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IT ONCE AGAIN TAKES TWO TO TANGO: GREAT
ATLANTIC & PACIFIC TEA CO v F.T.C.

PAUL J. GALANTI*

In *Kroger Co. v. FTC*,¹ the Court of Appeals for the Sixth Circuit affirmed and enforced a Federal Trade Commission order holding that Kroger had violated section 2(f) of the Robinson-Patman Act² by inducing a supplier of dairy products to sell at prices lower than those charged other customers. When the Supreme Court denied certiorari, *Purchasing Week* magazine described Kroger as having danced a "solo tango."³ This was an appropriate observation. Although Kroger was convicted under section 2(f) of the Act, its sup-

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1. 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). Retired Supreme Court Justice Tom Clark wrote the opinion in *Kroger*. *Kroger* was analyzed in Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's*, 7 IND. L. REV. 962 (1974). The decision was discussed in Curtis, *Buyer Liability Under the Robinson-Patman Act*, 42 ANTITRUST L.J. 345 (1973); LaRue, *Workshop Discussion, Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 147, 162-64 (1971); Borowitz, *Beatrice Foods: Meeting Competition and Buyer Liability*, 22 CASE W. RES. L. REV. 54 (1970). The decision was noted in 40 U. CIN. L. REV. 632 (1971). See also E. Kintner, L. Henneberger & M. Fleischaker, "Power Buyers" and the Robinson-Patman Act (Feb. 8, 1974) (unpublished memorandum on file in Indiana University School of Law—Indianapolis library).

2. 15 U.S.C. § 13(f) (1976). Section 2(f) reads: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

For a discussion of buyer liability under the Robinson-Patman Act, see generally ABA, ANTITRUST LAW DEVELOPMENTS 159-62 (1975) [hereinafter cited as 1975 DEVELOPMENTS]; C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 157-66 (2d rev. ed. 1959); D. BAUM, ROBINSON-PATMAN ACT, SUMMARY AND COMMENT 66-73 (1964); E. KINTNER, A ROBINSON-PATMAN PRIMER 251-65 (1970); J. MCCORD, COMMENTARIES ON THE ROBINSON-PATMAN ACT 94-104 (1968); 3 S. OPPENHEIM & G. WESTON, THE LAWYER'S ROBINSON-PATMAN ACT SOURCEBOOK ch. 7 (1971); THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT, 193-97 (1955); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 421-55 (1962) [hereinafter cited as F. ROWE]; L. SULLIVAN, ANTITRUST §§ 230-231 (1977) [hereinafter cited as L. SULLIVAN]; 16D J. VON KALINOWSKI, BUSINESS ORGANIZATIONS—ANTITRUST LAWS AND TRADE REGULATION §§ 36.01-.05 (1979) [hereinafter cited as VON KALINOWSKI]; Applebaum, *Fundamentals of Buyer's Violation Under Robinson-Patman Act*, 39 ANTITRUST L.J. 869 (1970); Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ANTITRUST L.J. 884 (1970).

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

plier was absolved from liability under section 2(a) of the Act⁴ for selling at discriminatory prices. Kroger's supplier convinced the FTC that the prices quoted to Kroger had been offered in good faith to meet what it believed were equally low prices offered by a competitor.⁵ Kroger's supplier had successfully established the meeting competition defense provided by section 2(b) of the Act.⁶

Kroger was an atypical buyer liability case. The typical seller granting "discriminatory," that is better, prices to favored customers can be found guilty of violating the Act along with the buyer who induced the discrimination. Kroger, however, had induced the supplier to reduce prices for the dairy products by claiming falsely that it had received lower bids from the supplier's competitor.⁷ To both the FTC and the Sixth Circuit, Kroger's misrepresentation made it a "lying buyer," which justified condemning Kroger while exonerating the supplier who was unaware of the deception.

When *Kroger* was decided, this author believed that the Sixth Circuit's view of the liability of the lying buyer would prevail if the

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4. 15 U.S.C. § 13(a) (1976). Section 2(a) provides in pertinent part as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them

Id.

5. *Beatrice Foods Co.*, 76 F.T.C. 719 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372, 1373-74 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). See generally Applebaum, *supra* note 2; Borowitz, *supra* note 1; Scher, *supra* note 2.

6. 15 U.S.C. § 13(b) (1976). Section 2(b) provides in pertinent part as follows:

Upon proof being made that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section. *Provided, however*, that nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that 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.

Id.

7. 438 F.2d at 1378.

proper case ever reached the Supreme Court.⁸ The Supreme Court's recent decision in *Great Atlantic & Pacific Tea Co. v. FTC*,⁹ however, forces a reconsideration of this view despite the Court's disclaimer that it was not deciding whether a "lying buyer" could be liable under section 2(f) where the seller is absolved from liability under the meeting competition defense.¹⁰ The Court in *A&P* reversed a Second Circuit decision¹¹ that denied a petition for review of an FTC finding that A&P had violated section 2(f) of the Act and granted enforcement of the FTC order. Although A&P knew when it accepted a supplier's second bid that it substantially bettered the bid of the supplier's competitor, the bid was not clearly induced by any misrepresentations. A&P, therefore, was not a lying buyer, and the Court was facially correct in stating that the lying buyer issue had not been reached. The holding and the tone of *A&P* unfortunately make survival of *Kroger* unlikely.¹² The primary purpose of this Article is to assess the impact of the *A&P* decision and other recent developments upon the basic elements of buyer liability under section 2(f) of the Act.

Although this author agrees with Justice Marshall's observation that the buyer who induces a discriminatory price by means of lies and misrepresentations probably will escape liability if the majority of the Supreme Court is consistent in its interpretation of section 2(f),¹³ nothing assures that any court will be consistent in dealing with the Robinson-Patman Act. Consequently, if the Court

8. See Galanti, *supra* note 1, at 975-77.

9. 440 U.S. 69 (1979). Only eight members of the Court participated in the decision. Chief Justice Burger and Justices Brennan, Blackmun, Powell, and Rehnquist joined in the opinion of the Court delivered by Justice Stewart. Justice White filed an opinion concurring in part and dissenting in part, and Justice Marshall filed an opinion dissenting in part. Justice Stevens took no part in the consideration or decision of the case. See the discussion of *A&P* in *The Supreme Court, 1978 Term—Federal Statutes and Regulations*, 93 HARV. L. REV. 234 (1979).

10. 440 U.S. at 81 n.15.

11. *Great Atl. & Pac. Tea Co. v. FTC*, 557 F.2d 971 (2d Cir. 1977), *aff'g* 87 F.T.C. 962 (1976). Borden, the supplier in *A&P*, filed suit in the Federal District Court for the Northern District of Illinois, Cause No. 73-C-1187, seeking a determination that the FTC was without authority to proceed under its complaint. Counts I and II of the Borden complaint were dismissed on June 7, 1973 and October 19, 1973, respectively. The dismissal of the complaint was affirmed on appeal. *Borden, Inc. v. FTC*, 495 F.2d 785 (7th Cir. 1974).

12. Justice Marshall, dissenting in part in *A&P*, 440 U.S. at 88-92, strongly urged this point.

13. *Id.*

were to uphold section 2(f) liability of the *Kroger*-type lying buyer, it could claim that the *A&P* situation was factually distinguishable.

As the law presently stands, the Court in *A&P* in effect has repealed section 2(f) as against large chain stores and other giant "power buyers" except those neither sufficiently clever nor well enough advised to avoid overtly conspiring with a seller in obtaining discounts unavailable to small businesses.¹⁴ The Court, by interpreting section 2(f) as precluding buyer liability unless the seller also can be found liable for price discrimination under section 2(a) of the Act, conceivably struck a blow against inflation by reducing price uniformity, but only by doing violence to a statute that the Court itself has indicated was aimed at protecting both competitors and competition.¹⁵

This is not to say that violence to the Robinson-Patman Act is not justified, but *quaere* whether the Supreme Court, rather than Congress, is the appropriate forum.¹⁶ Many economists and scholars have urged drastic revision, if not repeal, of the Robinson-Patman Act. The gist of most of these attacks is that the Act is anticompetitive in spirit because it imposes restraints on price bargaining that are alien or supposedly alien to our competitive economy.¹⁷ Indeed, the Robinson-Patman Act is not only anticom-

14. Ms. Sylvia Porter in her column "Your Money's Worth" rhetorically asked small entrepreneurs if they were "aware that no longer does the Robinson-Patman Act of 1936—known as the 'Magna Charta' of small business—prevent deals between big manufacturers and their big customers—that can promote the equivalent of a monopoly against you and drive you, a 'mom and pop' retailer or other little business, to the wall?" *The Indianapolis Star*, June 9, 1979, at 32, col. 5.

15. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 695 (1967); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 119-20 (1954); *FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948). See also Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 *YALE L.J.* 70 (1967); *The Supreme Court, 1978 Term*, *supra* note 9, at 241-43. Admittedly, the courts have not always been consistent on this point. See generally 16C VON KALINOWSKI, *supra* note 2, § 28.03.

16. Ms. Porter, in her column cited *supra* note 14, opined that "the Supreme Court has accomplished what critics of the law couldn't get from Congress," that is, a gutting of the Robinson-Patman Act that Congress refused to do because of a violent reaction by small businesses against a suggested repeal of the Act.

17. The literature is encyclopedic. See, e.g., C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 617-35, 646-57 (1959); M. HANDLER, *CASES AND MATERIALS ON TRADE REGULATION* 1131-48 (4th ed. 1967); Austin, *Isn't Thirty Years Enough?*, 30 *ABA ANTITRUST SECTION* 18 (1966); Backman, *An Economist Looks at the Robinson-Patman Act*, 17 *ABA ANTITRUST SECTION* 343 (1960); Cooper, *Price Discrimination Law and Economic Efficiency*, 75 *MICH. L. REV.* 962

petitive but also confusing and turgid.

Fairness, however, demands that the historical milieu that produced the Act be recalled. Congress adopted the Robinson-Patman Act in 1936 as an amendment to section 2 of the Clayton Antitrust Act when, as a result of economic dislocations caused by the depression, excessively low prices were regarded as evil and "cut throat" competition was considered a threat to survival of the economy. This environment also produced fair trade laws permitting manufacturers to fix prices at which retailers could sell brand name products.¹⁸ In fact, during the depression, even the Supreme Court was deemphasizing, if not ignoring, the benefits of price competition in enforcing section 1 of the Sherman Antitrust Act¹⁹ in price-fixing cases.²⁰

BACKGROUND OF SECTION 2(f)

A brief review of section 2(f) of the Robinson-Patman Act, or, more properly designated, section 2 of the Clayton Antitrust Act as amended by the Robinson-Patman Act,²¹ is appropriate before discussing the impact of A&P on the enforcement of the Act against what some have characterized as "power buyer abuses."²² Section

(1977); Levi, *The Robinson-Patman Act—Is It In the Public Interest?*, 1 ABA ANTITRUST SECTION 60 (1952); Rowe, *The Robinson-Patman Act—Thirty Years Thereafter*, 30 ABA ANTITRUST SECTION 9 (1966); *The Supreme Court, 1978 Term, supra* note 9, at 241-43. As Rowe pointed out in his remarks at the 1966 Spring Meeting of the American Bar Association Antitrust Section, *supra* at 10-11, "Today criticism of the Act's enforcement is mounting. The sleek indignation of *Fortune Magazine* [Editorial, *Antitrust: The Sacred Cow Needs a Vet*, *FORTUNE*, Nov. 1962, at 104-06] is matched by the hairy outrage of the *New Republic*, no less, at the FTC's Robinson-Patman 'attack on small businessmen who form co-ops.' [Ridgeway, *Out of Business—By FTC Order*, *THE NEW REPUBLIC*, Feb. 12, 1966, at 13]."

The Act is not without its defenders, but even they recognize the need for administrative changes. See, e.g., Loughlen, *The Little Statute that Ran Away*, 56 A.B.A.J. 681 (1970); Van Cise, *No, Thirty Years Are Not Enough*, 30 ABA ANTITRUST SECTION 28 (1966). Even those critics who recognize that some economic losses can be accepted in pursuit of social or political goals posit that the Act as it now stands serves no legitimate goal. Cooper, *supra*.

18. These blatantly anticompetitive laws were in force until the Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801, withdrew the exemption given to such resale price maintenance statutes by the federal antitrust statutes. See generally L. SULLIVAN, *supra* note 2, § 131.

19. 15 U.S.C. § 1 (1976).

20. Compare *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) with *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). See generally L. SULLIVAN, *supra* note 2, at 175-86.

21. 15 U.S.C. § 13(f) (1976).

22. Address by Miles W. Kirkpatrick, Antitrust Law Section of the New York State Bar

2(f) is the primary, but not the exclusive, proscription against a buyer inducing or receiving discriminatory, and presumably more favorable, prices, terms, or conditions of sale or promotional allowances than are available to his competition. In addition to section 2(f), purchasers can incur liability under section 2(c) of the Act for receiving improper brokerage payments,²³ under section 5 of the Federal Trade Commission Act²⁴ for engaging in what can be characterized as "unfair methods of competition," and possibly, though unlikely, under section 3 of the Robinson-Patman Act.²⁵

Association (January 28, 1971). Mr. Kirkpatrick is a former Chairman of the FTC. *See also* Address by Basil J. Mezines, Executive Director, FTC, Automobile Warehouse Distributor Association (March 6, 1973); Address by Lawrence G. Meyer, Director, Office of Policy Planning and Evaluation, FTC, Annual Meeting of the State Bar of Texas (July 1, 1971).

23. 15 U.S.C. § 13(c) (1976). *See generally* F ROWE, *supra* note 2, at 337; L. SULLIVAN, *supra* note 2, at 697-99; 16D VON KALINOWSKI, *supra* note 2, §§ 33.01-.04.

24. 15 U.S.C. § 45(a) (1976). Sections 2(d) and 2(e) of the Robinson-Patman Act prohibit a seller from granting promotional allowances or services to customers unless such allowances or services are available or accorded to all competing customers on proportionally equal terms. *Id.* §§ 13(d), (e). Section 2(f) by its terms does not apply to buyers who induce favorable promotional allowances or services, so the FTC has utilized the general prohibitions of § 5 to stop such practices. *See, e.g.,* Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963). *See generally* F ROWE, *supra* note 2, § 14.5; 16D VON KALINOWSKI, *supra* note 2, § 36.02[1]; Galanti, *supra* note 1, at 996-99. This technique has not escaped criticism. *See, e.g.,* 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 67-68, 420-31, 665-77 (1973); 2 *id.* at 1030-43; Alexander, *Section 5 of the Federal Trade Commission Act, a Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act*, 12 SYRACUSE L. REV. 317 (1961); Openheim, *Guides to Harmonizing Section 5 of the Federal Trade Commission Act With the Sherman and Clayton Acts*, 59 MICH. L. REV. 821, 851 (1961).

The Supreme Court in *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 73 n.14 (1953), expressly left unresolved the question of the applicability of § 2(f) to buyer-induced violations of § 2(d) and § 2(e) of the Act; A&P, however, makes anything but a negative answer unlikely.

25. 15 U.S.C. § 13(a) (1976). Section 3 of the Robinson-Patman Act, § 1 of the Robinson-Patman Act which amended § 2 of the Clayton Act and is codified at 15 U.S.C. §§ 13(a)-(f) (1976), and § 3 of the Clayton Act, 15 U.S.C. § 14 (1976), must be distinguished. The first is not an "antitrust law" within the meaning of § 1 of the Clayton Act, 15 U.S.C. § 12 (1976) and thus cannot be enforced by the private treble damage suits authorized under § 4 of the Clayton Act. 15 U.S.C. § 15 (1976). *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). The latter two provisions are "antitrust laws" enforceable by private actions.

Section 3 of the Robinson-Patman Act provides criminal sanctions that parallel and largely duplicate the civil sanctions of § 2 and appears to apply to buyers as well as to sellers. The actual application of section 3 to buyers, however, has not been tested thoroughly in the courts. Frederick M. Rowe, the foremost Robinson-Patman Act scholar, argues that § 3 is limited to sellers. F ROWE, *supra* note 2, at 459-60. The enforcement history of § 3 supports Rowe's hypothesis, at least tangentially. The Justice Department has been reluctant to invoke the sanction against buyers, perhaps because of some serious doubts as to the

The history of section 2(f) is ironical. Section 2 of the Clayton Act, as adopted in 1914, was directed against localized price-cutting by monopolistic sellers intending to force competitors out of business²⁶ and was not intended to combat price coercion on sellers by large volume buyers such as the food and chain stores.²⁷ Thus,

constitutionality of the provision. For example, in the proceedings reported in *United States v. Bowman Dairy Co.*, 1948-49 Trade Cas. ¶ 62,403 (N.D. Ill. 1949), only the dairy product sellers and not the chain store buyers were indicted under § 3. In *United States v. Maryland & Virginia Milk Producers Ass'n*, 151 F. Supp. 438 (D.D.C. 1957), both the purchasing dairy and the selling cooperative were indicted under § 3, but the indictment was dismissed voluntarily before trial. In *United States v. H.P. Hood & Sons*, 1963 Trade Cas. ¶ 70,728 (D. Mass. 1963), the buyer and the seller were charged with violating §§ 1 and 2 of the Sherman Antitrust Act, but only the seller was charged with violating § 3 of the Robinson-Patman Act. Both defendants were acquitted on March 19, 1965. ABA, ANTITRUST DEVELOPMENTS 1955-68, at 156 n.5 (1968).

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

Section 3 rarely has been invoked since 1958, when it was held in *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958), that it was not an "antitrust law." Treble damage actions will lie, however, when conduct proscribed by § 3 also violates § 2. *Englander Motors, Inc. v. Ford Motor Co.*, 186 F. Supp. 82, 84 (N.D. Ohio 1960), *aff'd*, 293 F.2d 802 (6th Cir. 1961). For a general discussion of § 3 of the Robinson-Patman Act, see D. BAUM, *supra* note 2, at 74-76; 1 M. HANDLER, *supra* note 24, at 304-08; E. KINTNER, *supra* note 2, at 266-80; 1975 DEVELOPMENTS, *supra* note 2, at 162-64; F. ROWE, *supra* note 2, at 452-75; *id.* at 112-17 (Supp. 1964); 16D VON KALINOWSKI, *supra* note 2, ch. 37.

Abuse of power by large and aggressive buyers also can result in civil liability under the Sherman Act. See, e.g., *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948). Buyers inducing or coercing secret price discriminations have been prosecuted successfully on criminal charges brought under the Sherman Act. See, e.g., *United States v. New York Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626, 676 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949). A buyer inducing or receiving price or related commercial discriminations also might violate the myriad of state laws applicable to price discriminations. For a general survey of state law in this area, see [1973] 1 TRADE REG. REP. (CCH) ¶¶ 3510-96; F. ROWE, *supra* note 2, § 3.6.

26. F. ROWE, *supra* note 2, § 1.2, at 6. For the background and legislative history of the Robinson-Patman Act, see D. BAUM, *supra* note 2, at 1-5; C. EDWARDS, *supra* note 17, at 1-28; F. ROWE, *supra* note 2, §§ 1.1-1.7, 14.1, & app., at 559-620; 16B VON KALINOWSKI, *supra* note 2, chs. 21-22.

27. The original language of § 2, Pub. L. No. 212, 38 Stat. 730 (1914), appeared to bar price discriminations prejudicial to competition on the customer level, but court decisions in the 1920's restricted it to seller or primary line competition. See, e.g., *National Biscuit Co. v. FTC*, 299 F. 733 (2d Cir. 1924); *Mennen Co. v. FTC*, 288 F. 774 (2d Cir. 1923). Even the

section 2 of the Clayton Act was inadequate to deal with the problem of the power buyer abuses that arose in the late 1920's and early 1930's. Although the problem was perceived as one of buyers forcing sellers to grant discounts unavailable to other purchasers, the key buyer liability provision, which was adapted from language in another bill being considered by Congress, was added only as an afterthought during Senate debates.²⁸ Congress's primary answer to the problem of power buyers was the enactment of legislation making it illegal for *sellers* to grant discriminatory prices or more favorable promotional allowances to selected customers. Although the anomalous approach of ending buyer abuse by regulating sellers seems inappropriate, the legislation can and has been explained by examining Congress's doubts about its constitutional power to prohibit buyers from inducing or receiving favorable price discriminations.²⁹

Basically, section 2(f) prohibits a buyer from knowingly inducing or receiving a price reduction or discount that would cause the seller to violate section 2(a) of the Act. Commentators long have argued that the Supreme Court's decision in *Automatic Canteen Co. of America v. FTC*³⁰ required the acquittal of a buyer whose seller was exculpated for whatever reason in a companion proceeding under section 2(a) of the Act.³¹ *A&P* vindicates this position by construing section 2(f) liability as exclusively derivative in nature and dependent upon a finding of section 2(a) liability. This rule usually produces an appropriate result. If section 2(a) has not been violated because no price discrimination or injury to competition

Supreme Court, in *George Van Camp & Sons v. American Can Co.*, 278 U.S. 245 (1929), repudiating the restrictive interpretation of § 2, did not revitalize its vis-a-vis chain stores because the provision unconditionally exempted price differentials made "on account of differences in the grade, quality or quantity of the commodity sold." This quantity discount exemption gave chain stores, in Rowe's words, "carte blanche for unlimited purchasing advantages which the FTC felt powerless to check with the legal safeguards of Section 2 of the original Clayton Act." F. ROWE, *supra* note 2, § 1.2, at 7. See *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir. 1939).

28. The provision originated in S. 4024, 74th Cong., 2d Sess. (1936). See C. EDWARDS, *supra* note 17, at 45-46; F. ROWE, *supra* note 2, § 14.1, at 423-25.

29. See *Fairmont Creamery Co. v. Minnesota*, 274 U.S. 1 (1927). See generally F. ROWE, *supra* note 2, § 14.1.

30. 346 U.S. 61 (1953).

31. See generally C. AUSTIN, *supra* note 2, at 161-62; D. BAUM, *supra* note 2, at 69; J. McCORD, *supra* note 2, at 96; Rowe, *Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 98, 103-04 (1971).

has occurred,³² the buyer has done nothing unlawful.

In some circumstances, however, a seller who has granted discriminatory prices that have injured competition may escape liability by showing that the lower prices were quoted in good faith to meet what the seller thought were the equally low prices of a competitor. A seller who makes such a showing has established the meeting competition defense under section 2(b) of the Act.³³ This defense is absolute, even though the FTC or any private plaintiff has established all the elements of a section 2(a) violation.³⁴ To give a seller the right to cut prices to keep or even gain new customers³⁵ without having to lower prices to all his existing customers is sensible. Unfortunately, a situation can occur in which the seller in good faith believes his discriminatory prices are being offered to meet competition while the buyer in fact knows the seller is beating rather than meeting competition.³⁶

The buyer in these situations might be "guilty" or "innocent", that is, he might have been a lying buyer who has misled the seller as in *Kroger*, or he might have been the recipient of a "better" bid who merely declines to disabuse the seller of the notion that a lower bid was met but not beaten. A&P may or may not have been

32. See text accompanying notes 124-44 *infra*.

33. Section 2(b) is set out in note 6 *supra*.

34. *Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951). With two insignificant exceptions, the competitor must be the seller's and not the buyer's. *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Hampton v. Graff Vending Co.*, 478 F.2d 527 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973). For the elements of and the problems surrounding the meeting competition defense, see C. AUSTIN, *supra* note 2, ch. IV; D. BAUM, *supra* note 2, at 29-37; 1 M. HANDLER, *supra* note 24, at 522-28, 560-64; 1975 DEVELOPMENTS, *supra* note 2, at 143-49; F. ROWE, *supra* note 2, ch. 9; L. SULLIVAN, *supra* note 2, § 229; 16C VON KALINOWSKI, *supra* note 2, § 32.02.

35. A split of authority exists as to whether the meeting competition defense can be used aggressively to capture new customers or is limited to self-defense against price attacks. The trend, however, is clearly toward accepting the aggressive use of § 2(b). Compare *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) with *Cadigan v. Texaco, Inc.*, 492 F.2d 383 (9th Cir. 1974) and *Hanson v. Pittsburgh Plate Glass Indus., Inc.*, 482 F.2d 220 (5th Cir. 1973) and *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48, 52 (7th Cir. 1962), *cert. denied*, 414 U.S. 1136 (1974).

36. The FTC has adopted a "meet but not beat" rule that denies the defense when sellers undercut the competitive price, e.g., *National Dairy Prods. Corp.*, 70 F.T.C. 79 (1966), *aff'd*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968), but courts have permitted incidental undercutting when the seller otherwise has acted in good faith. See, e.g., *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

in the latter category³⁷

IMPACT OF A&P ON THE CONSTRUCTION OF SECTION 2(f) IN KROGER

The respondent in *Kroger* was convicted of a section 2(f) violation by claiming falsely that it had received lower bids from the seller's competitor although the FTC absolved the seller of liability on the basis of the section 2(b) meeting competition defense.³⁸ The court in *Kroger* recognized that section 2(f) liability was "almost" exclusively derivative in nature. The court acknowledged that under *Automatic Canteen Co. of America v. FTC*,³⁹ a buyer is guilty of violating section 2(f) only if he knows that the price induced is illegal or not within one of the defenses available to the seller. It concluded, however, that a buyer who has "conned" a seller should not escape liability and interpreted the *Automatic Canteen* requirement that the buyer *know* the induced price was not within one of the seller's defenses to permit considering the buyer's knowledge from his own vantage point as well as that of the seller. In other words, the buyer who knows that the section 2(b) defense in fact is unjustified is guilty even if it would be available to a deceived purchaser. The court in *Kroger* stated the rule as follows:

In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act, and frustrate the intent of the Congress.⁴⁰

An opposite result would "put a premium on the buyer's artifice and cunning in inducing discriminatory prices."⁴¹

In effect, *Kroger* held that section 2(f) was not totally dependent on section 2(a) liability. Although the Court in *A&P* purportedly held only that a buyer such as *A&P* who had done no more than accept the lower of two competitively offered prices does not violate

37. Justice Marshall was not convinced of *A&P*'s innocence. 440 U.S. at 91-92.

38. *Beatrice Foods Co.*, 76 F.T.C. 719 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

39. 346 U.S. 61, 74 (1953).

40. 438 F.2d at 1377.

41. *Id.*

section 2(f) when the seller has a meeting competition defense, the totally derivative nature of section 2(f) liability is now clearly established. Consequently, the *Kroger* exception, which depended on a construction of section 2(f) that liability was not totally dependent on a section 2(a) violation, cannot logically or consistently exist.

The scuttling of *Kroger* is unfortunate even if a "solo tango" is a rare case. A seller cannot establish the good faith element of the meeting competition defense unless it is dealing with an adept lying buyer who simultaneously can disguise the facts completely and exert extreme pricing pressure. The good faith element of the section 2(b) defense requires the seller to act as a "prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity."⁴² It has long been thought that this element precluded a seller from taking a buyer's word at face value and that it must make some effort to substantiate that the alleged competitive bid in fact was made.⁴³ Unfortunately, the simple expedient of calling up a competitor to verify the offer now involves the substantial risk of liability for price-fixing under section 1 of the Sherman Act.⁴⁴ Other ways, however, exist by which the veracity of a buyer can be ascertained.⁴⁵ The question posed after the decision in *A&P* is whether these efforts are likely to be fruitful when the buyer knows the beneficial consequences of successful deception.

FACTUAL BACKGROUND OF THE A&P DECISION

The A&P litigation was extraordinarily lengthy, lasting well over seven years. The private label milk arrangement with the Borden Company that triggered the proceeding, however, was terminated

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

43. See *Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 259-60 (3d Cir. 1969), in which the court concluded that respondent had not shown the requisite good faith in failing to investigate the veracity of a buyer who reported a competitive offer in an oral communication and in failing to verify a competitive offer reported by an experienced salesman who had been with the company for 18 years. See generally 16C VON KALINOWSKI, *supra* note 2, § 32.02[2][a].

44. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978).

45. See generally 1975 DEVELOPMENTS, *supra* note 2, at 145; F. ROWE, *supra* note 2, at 220-34; 16C VON KALINOWSKI, *supra* note 2, § 32.02[2][a].

voluntarily by A&P in February of 1972, only four months after the FTC complaint was issued.⁴⁶ The litigation arose from A&P's attempt to secure savings in its dairy product business by switching from selling Borden brand label milk, milk sold under the brand name of the supplying dairy, in its Chicago unit of over 200 stores in northern Illinois, thirty-five stores in neighboring northwestern Indiana and a few stores in Iowa, to selling private label milk under its own A&P label.

At the time, A&P was one of Borden's major customers in the Chicago area, and Borden was concerned that its newly constructed dairy processing facility near Chicago would be underutilized if it lost the A&P account. Borden's first bid to A&P for private label milk was premised on A&P's acceptance of limited delivery service. According to Borden, this would have reduced A&P's annual dairy costs by \$410,000. A&P also received a bid from a competing dairy that would have produced estimated annual savings of approximately \$737,000. Instead of merely accepting the lower bid, A&P's Chicago unit buyer telephoned Borden's Chicago chain store manager and informed him that Borden's initial offer was not "in the ballpark."⁴⁷ When pressed for details as to what would be in the ballpark, the A&P representative responded that a \$50,000 improvement in the bid "would not be a drop in the pocket [sic]."⁴⁸

Borden's Chicago agent apparently was told by his superiors to "save the [A&P] business."⁴⁹ Borden then doubled A&P's expected annual savings under the private label program to \$820,000. The Borden representative advised A&P when the second bid was made that it was offered only to meet the rival bid. In other words, Borden doubled its bid without knowing the amount of the rival bid or even its lawfulness under the Act and claimed it was meeting competition. This author is skeptical that Borden genuinely believed it was meeting, and not beating, competition when it doubled the

46. The FTC complaint was filed on October 8, 1971. After extensive discovery and Borden's ill-fated attempt to block the proceedings, the hearing itself took 110 days. The Commission entered the final order on April 29, 1976. The Second Circuit upheld the order on June 21, 1977, and the Supreme Court reversed on February 22, 1979.

47. 557 F.2d at 976.

48. *Id.* In its review of the facts, the Supreme Court recited that the representative had stated that the improvement in the bid " 'would not be a drop in the bucket.' " 440 U.S. 69, 73 (1979). Later in the opinion, however, the Court quoted that the improvement " 'would not be a drop in the pocket.' " *Id.* at 83.

49. 557 F.2d at 976.

proposed savings knowing only that a \$50,000 improvement would be insignificant. For all Borden knew, the rival bid might have been \$500,000 and not \$737,000. The fact that there could have been a much greater disparity between the rival bid and the ultimate Borden bid escaped the Supreme Court.⁵⁰

The FTC filed a three-count complaint against A&P for its efforts. Count one charged A&P with violating section 5 of the FTC Act⁵¹ in misleading Borden while negotiating the private label milk contract by failing to inform Borden that its second bid had not just met, but had beaten substantially, the competitive bid. Count two charged that the same conduct violated section 2(f) of the Robinson-Patman Act. Count three charged A&P and Borden with combining to stabilize and maintain the retail and wholesale price of milk and other dairy products in violation of section 5 of the FTC Act.⁵²

As to the first count, the FTC Administrative Law Judge found that A&P had acted unfairly and deceptively in accepting the Borden bid without informing Borden that it beat the rival bid, thus precluding the meeting competition defense.⁵³ A&P's conduct vio-

50. Before A&P accepted the second and final Borden bid, it requested a letter from Borden to the effect that the prices being offered A&P were proportionally available to other buyers. A&P clearly was seeking a Robinson-Patman Act clean bill of health letter but in fact received a letter stating only that Borden felt its prices were proper under the applicable law and it was prepared to defend them. A&P's legal department also reviewed the bid before it was accepted. *Id.*

51. 15 U.S.C. § 45 (1976). This section provides in relevant part: "(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful."

52. The FTC has used § 5 to "bolster" and "supplement" the Sherman Act, which is not specifically enforced by the Commission, and §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14 and 18 (1976), which are enforced. *See, e.g.,* FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); L.G. Balfour Co. v. FTC, 442 F.2d 1, 14 (7th Cir. 1971); Beatrice Foods Co., 67 F.T.C. 473 (1965).

In FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239 (1972), the Supreme Court answered affirmatively the twofold question whether § 5 empowers the FTC to "define and proscribe an unfair competitive practice, even though the practice does not infringe either the letter or the spirit of the antitrust laws," and also to "proscribe practices as unfair or deceptive in their effect upon consumers regardless of their nature or quality as competitive practices or their effect on competition." For consideration of § 5 as an "antitrust law," see 1975 DEVELOPMENTS, *supra* note 2, at 167-74, and authorities cited in M. HANDLER, TRADE REGULATION 1310-11 (4th ed. 1968); S. OPPENHEIM & G. WESTON, FEDERAL ANTITRUST LAWS 621-40 (3d ed. 1968). For a criticism of this practice, see authorities cited at note 24 *supra*.

53. 87 F.T.C. 962, 967-1046 (1976).

lated the policy of the Robinson-Patman Act and consequently violated section 5 of the FTC Act. As to the second count, the judge found that A&P had violated section 2(f) of the Robinson-Patman Act by knowingly inducing or receiving the discriminatory prices in the purchase of dairy products. As to the third count charging a combination to stabilize and maintain milk prices, the judge concluded that the FTC had not satisfied its burden of proof and dismissed the count.

On review, the FTC reversed the decision on count one. The Commission characterized that charge as being aimed at what must be legally disclosed during contract negotiations and believed that A&P's failure to disclose affirmatively the terms of the rival bid was not an unfair trade practice under section 5. So to construe section 5 would be "contrary to normal business practice and contrary to the public interest."⁵⁴ Notwithstanding its reversal of count one, the Commission affirmed the finding of liability under section 2(f) because the sales by Borden met the jurisdictional requirements of the Act in that at least one purchase was in "commerce," that the evidence demonstrated the presence of discriminatory prices that resulted in competitive injury, and that by virtue of its trade experience and common sense A&P knew, or should have known, that it was the beneficiary of a price discrimination having the requisite harmful competitive effects.⁵⁵

The FTC rejected A&P's two affirmative defenses to the charge of illegal price discrimination. The first was the *Automatic Canteen* defense ultimately accepted by the Supreme Court. A&P argued that Borden had submitted the final bid in a good faith effort to meet the rival dairy's bid and that because Borden had a meeting competition defense, A&P could not be liable despite its knowledge that Borden had undercut the other bid. The Commission,

54. *Id.* at 1050.

55. *Id.* at 1051-55. The FTC affirmed the dismissal of the third count because there was insufficient evidence to show that A&P and Borden had combined to stabilize dairy prices. *Id.* at 1066-68. A&P's claim that it was denied due process of law by the FTC's delay in initiating the proceedings was dismissed by the Commission because the delays were reasonably related to the complexity of the case and to A&P's own failure to evidence any concern for speedy resolution of the matter. *Id.* at 1068-69. The Commission also rejected A&P's challenge to the Administrative Law Judge's order that required A&P to distribute copies of the order to all of its milk and dairy product suppliers throughout the country as well as imposing the burden on A&P of going forward with the meeting competition defense in the future. *Id.* at 1069-72.

following *Kroger*, concluded that a buyer charged with violating section 2(f) must come within the meeting competition defense not only from the seller's point of view but also from his own in order to escape liability even without the misrepresentations or lies present in that case. Even if Borden could have defended a section 2(a) complaint by the FTC had one been brought, this was insufficient to absolve A&P of wrongdoing because A&P knew the terms of both bids before accepting the Borden bid. The FTC also rejected the contention that A&P could not violate section 2(f) unless Borden, as the seller, was found guilty of giving illegal price discrimination under section 2(a) prior to or at the same time.⁵⁶

The Commission also rejected A&P's second defense that the discriminatory prices offered were justified under the cost justification defense of section 2(a).⁵⁷ If the discriminatory prices induced or received by A&P in fact were cost justified or if A&P was unaware of the unavailability of that defense to Borden, A&P would be absolved.⁵⁸ The cost justification study presented by A&P, however, was found to be so defective and inadequate that it could not support A&P's belief that the second Borden bid was cost justified. The latter conclusion is not surprising because Borden simply doubled its initial bid. Furthermore, Borden's indication that its

56. *Id.* at 1056-57. The FTC noted that it alone established the enforcement policy that best will accomplish the ends contemplated by Congress, citing *FTC v. Universal-Rundle Corp.*, 387 U.S. 244, 251 (1967), and that it could proceed only against A&P because it, not Borden, was the principal malefactor. 87 F.T.C. at 1057.

57. The cost justification defense is established by the first proviso of § 2(a), 15 U.S.C. § 13(a) (1976), which provides "[t]hat 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." For a seller to sustain a cost justification defense is not easy. Good accountants are a necessity. The problem is that workable criteria for the defense do not exist, and the courts have required accurate and actual, not estimated, data on the savings involved. See THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTI-TRUST LAWS, REPORT, *supra* note 2, at 171-75; 16C VON KALINOWSKI, *supra* note 2, § 32.03[1], at 32-86 through 32-92. Some judicial broadening of the defense has occurred as the use of average cost data for similar and legitimate customer groups has been permitted, *United States v. Borden Co.*, 370 U.S. 460 (1962), but the use of reasonable approximations rather than actual cost data still is not allowed. See 1975 DEVELOPMENTS, *supra* note 2, at 138. For a discussion on the problems presented by the defense and the various techniques developed in its use, see C. AUSTIN, *supra* note 2, at 59-70; D. BAUM, *supra* note 2, at 22-25; C. EDWARDS, *supra* note 17, ch. 18; 1975 DEVELOPMENTS, *supra* note 2, at 136-40; F. ROWE, *supra* note 2, at 10; L. SULLIVAN, *supra* note 2, § 228; 16C VON KALINOWSKI, *supra* note 2, § 32.02.

58. The cost justification defense is an absolute one. *United States v. Borden Co.*, 370 U.S. 460 (1962); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 66-69 (1953).

final offer was made solely to meet competition did, or at least should have, put A&P on notice that Borden could not cost justify the second offer. Borden also informed A&P that it would either lose money or at best make a minimal profit on private label sales to A&P. All this, coupled with A&P's trade experience,⁵⁹ sufficed to support the conclusion that the second offer was not cost justified or was "not known" by A&P not to be within the cost justification defense.

THE JURISDICTIONAL CHALLENGE

On appeal, the first issue considered by the Second Circuit was A&P's jurisdictional challenge that the transactions with Borden were not in interstate commerce and hence were not subject to the Robinson-Patman Act, which prohibits an illegal price discrimination only "where either or any of the purchases involved in such discrimination are in commerce."⁶⁰ The Second Circuit's rejection of this argument is significant because the Supreme Court, although reversing the decision of the Second Circuit, did not discuss the jurisdictional element. Consequently, the Second Circuit's holding on this point presumably is good law. That A&P abandoned the contention in the Supreme Court, although possible, seems unlikely, particularly in light of the Court's recent decision in *Gulf Oil Corp. v. Copp Paving Co.*,⁶¹ which narrowly construed the jurisdictional scope of the Act.

In *Copp*, the Court held that jurisdiction under the Robinson-Patman Act requires more than the Sherman Act's showing that the allegedly anticompetitive activities affected commerce. The Court stated that to trigger the Act, the allegedly discriminatory sales must have occurred in the course of the seller's interstate activities and at least one of the sales giving rise to the price discrimination must have been made in interstate commerce.⁶² Even though the commodities involved were used in the construction of interstate highways and hence arguably had a "nexus" to commerce, the Court refused to apply the Sherman Act test to the dis-

59. For a discussion of "trade experience," see text accompanying notes 149-52 *infra*.

60. 15 U.S.C. § 13(a) (1976).

61. 419 U.S. 186 (1974). The Court in *A&P* simply noted that the Commission had found that the commerce requirement of § 2(f) had been satisfied. 440 U.S. at 74 n.4.

62. 419 U.S. at 195.

tinct "in commerce" language of the Robinson-Patman Act. The Court rejected the nexus approach as an irrational method of expanding the scope of the restrictive language of the Robinson-Patman Act.⁶³ The Court also rejected as unsupported by the legislative history of the Act the alternative position of the Department of Justice in an amicus brief that Congress intended the "in commerce" language to be construed to encompass the full scope of Congress's constitutional power to regulate commerce. It therefore affirmed the long standing interpretation that section 2(a) applies only when " 'at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line.' " ⁶⁴

In *A&P*, substantially all of the private label milk purchased from Borden was processed in Borden's Illinois processing plant. That plant, in turn, acquired approximately sixty percent of its milk from Wisconsin dairy farmers. That the milk purchases for stores in Indiana, and presumably in Iowa, were in interstate commerce was undisputed. A question, however, did exist whether the

63. *Id.* at 198.

64. *Id.* at 200 (quoting *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4, 9 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969)). The Court pointed out that *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), was not contradictory. Although the opinion contains language that Congress was concerned with an interstate corporation financing local level predatory practices by means of a "war chest" built up from multistate operations, one of the discriminatory sales involved in *Moore* was in commerce. *See also* *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963); *Roorda v. American Oil Co.*, 446 F. Supp. 939 (W.D.N.Y. 1978).

Professor Sullivan posits that the restrictive commerce requirements of §§ 3 and 7 of the Clayton Act, 15 U.S.C. §§ 4 and 8 (1976), might be anomalous because the Clayton and Sherman Acts are parts of a "coherent antitrust policy." L. SULLIVAN, *supra* note 2, at 714. In *United States v. American Bldg. Maintenance Indus., Inc.*, 422 U.S. 271 (1975), for example, the Court rejected the contention that the Clayton Act should be construed as broadly as the Sherman Act because it was enacted to supplement the Sherman Act and arrest incipient Sherman Act violations. The Court held that § 7 of the Clayton Act, 15 U.S.C. § 8 (1976), did not apply to a national building maintenance service firm engaged in commerce acquiring a local firm that was not in commerce. Confining the range of the Robinson-Patman Act as narrowly as its jurisdictional terms permits, however, best serves the goal of balancing the tension between the policies of the Robinson-Patman Act and the Sherman Act. *See* L. SULLIVAN, *supra* note 2, at 714.

Furthermore, the jurisdictional scope of § 5 of the FTC Act, which was phrased initially in terms of "in commerce," was amended by the Magnuson-Moss Act, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183 (codified at 15 U.S.C. § 45(a)(1) (1976)), to broaden the scope of that act to encompass conduct that is in or affects commerce. Congress, of course, can broaden the reach of a statute to the outer boundaries of the commerce clause when it so desires, and its failure to do so with the Robinson-Patman Act indicates congressional acceptance of the limited jurisdiction of the Act.

private label milk sold in Illinois stores was in interstate commerce. The Second Circuit upheld the FTC's determination that the milk was still in interstate commerce because it was not substantially altered, chemically or otherwise, by processing in the Illinois plant after it was purchased from Wisconsin farmers. In other words, the milk was in a continuous "flow or stream of commerce" from the Wisconsin farms to the Illinois processing plant to the shelves of retail grocery establishments.⁶⁵

Apparently, the "flow of commerce" jurisdictional test articulated in *Standard Oil Co. v. FTC*⁶⁶ survived *Copp*. Under this test, the Act applies when goods produced in one state are shipped into another state for storage or minor processing. Those goods, or to use the terminology of section 2(a), commodities, retain their interstate nature and satisfy the jurisdictional requirements of the Act. As stated by the Court in *Standard Oil*, "Any other conclusion would fall short of the recognized purpose of the Robinson-Patman Act to reach the operations of large interstate businesses in competition with small local concerns. Such temporary storage of the [commodity] as occurs within the Detroit area does not deprive the [commodity] of its interstate character."⁶⁷

Although one court recently has expressed doubt as to the continued viability of the flow of commerce doctrine,⁶⁸ other courts continue to view the *Standard Oil* test as a viable doctrine. A motion to dismiss a section 2(a) complaint was denied in *Roorda v. American Oil Co.*⁶⁹ over the defendant's assertion that the sales had not crossed a state line and hence were not in commerce. Upholding the complaint, the district court noted that the asphaltic concrete in *Copp* never was in interstate commerce. It was pro-

65. 557 F.2d at 979. See also *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 677 (5th Cir.), cert. denied, 382 U.S. 959 (1965). The court recognized limits to the flow of commerce doctrine when it sustained A&P's argument that such products as the cottage cheese, fortified skim milk, buttermilk, and egg nog supplied by Borden were outside the scope of the Act because they were chemically changed from their origin as raw milk by a variety of processes and additions at Borden's Illinois plant. 557 F.2d at 979 n.7.

66. 340 U.S. 231 (1951). For a discussion of the test, see generally F. ROWE, *supra* note 2, § 4.9; 16C VON KALINOWSKI, *supra* note 2, § 26.02[3][a]; Note, *The Interstate Commerce Requirement of Section 2(a) of the Robinson-Patman Act*, 44 U. COLO. L. REV. 607 (1973).

67. 340 U.S. at 237-38.

68. *Red Apple Supermarkets, Inc. v. Deltown Foods, Inc.*, 419 F. Supp. 1256 (S.D.N.Y. 1976). See text accompanying notes 98-106 *infra*.

69. 446 F. Supp. 939 (W.D.N.Y. 1978).

duced and used exclusively in California; therefore, the purely intrastate character of the transactions precluded application of the flow of commerce theory. *Roorda* acknowledged that *Copp* refused to expand the relatively restrictive flow of commerce doctrine to include items with a nexus to interstate commerce, but pointed out that the Court in *Copp* in fact was applying the flow of commerce test.⁷⁰

The application of the flow of commerce theory depends on whether the goods retain their interstate nature considering the facts, circumstances, and economics of the particular industry. The standard is whether the "goods sent across state lines at a prior time remain within the 'practical, economic continuity' of the interstate transaction at the time of the subsequent intrastate sale."⁷¹ The test is not satisfied when ingredients or raw materials are shipped into a state for subsequent processing, which takes the goods out of the flow of commerce.⁷² The test is satisfied and the commodities are in commerce if they are shipped into a state from elsewhere and resold substantially unchanged within that state immediately or after temporary storage.⁷³

In *Roorda*, the court held that gasoline refined in New York and sold to plaintiff and its competitors in that state, but not across the state lines, was without the jurisdiction of the Act. The court, however, concluded that to dismiss the complaint until plaintiff had the opportunity to show that some of the gasoline was refined in Texas and shipped by pipeline to New York was premature.⁷⁴

70. *Id.* at 942. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195, 198 (1974).

71. See *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186, 195 (1974); *Walker Oil Co. v. Hudson Oil Co. of Missouri*, 414 F.2d 588, 590 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970).

72. See *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *Scranton Constr. Co. v. Litton Indus. Leasing Corp.*, 493 F.2d 778, 781 (5th Cir. 1974); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); *Dean Milk Co. v. FTC*, 395 F.2d 696, 715 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Red Apple Supermarket, Inc. v. Deltown Foods, Inc.*, 419 F. Supp. 1256 (S.D.N.Y. 1976).

73. See *Perry v. Amerada Hess Corp.*, 427 F. Supp. 667 (N.D. Ga. 1977).

74. The court in *Roorda* considered that such cases as *McGoffin v. Sun Oil Co.*, 539 F.2d 1245 (10th Cir. 1976), *Bacon v. Texaco, Inc.*, 503 F.2d 946 (5th Cir. 1974), and *Borden Co. v. FTC*, 339 F.2d 953 (7th Cir. 1964), merely stood for the proposition that goods or commodities made and sold in one state at discriminatory prices are not subject to the proscriptions of § 2(a) of the Robinson-Patman Act. 446 F. Supp. at 944-45. The Fifth, Seventh and Tenth Circuits, even before *Copp*, required at least one leg of the alleged discriminatory sales to

A recent decision on the jurisdictional scope of the Act that is of special interest because it is a post-*A&P* decision is *Paceco, Inc. v. Ishikawajima-Harima Heavy Industries Co.*⁷⁵ In *Paceco*, the district court denied defendants' motion to dismiss a section 2(f) complaint alleging that they were able to purchase steel directly from Japanese steel companies at a price lower than that charged plaintiff by domestic wholesalers who purchased steel from the same companies. The complaint alleged that defendants, as favored customers, could outbid plaintiff on domestic contracts for large steel cranes used to unload ship containers. It further alleged that the steel was shipped to the United States in a relatively unchanged condition where the cranes were assembled without any substantial altering or processing.⁷⁶ In other words, the *Paceco* complaint was premised on the continued viability of the flow of commerce theory.

Of importance is that the court in *Paceco* recognized that different jurisdictional requirements govern sections 2(a) and 2(f) of the Act. For section 2(a) to apply, the seller must be engaged in commerce, the discrimination must be made in the course of commerce, and one of the purchases involved must be in commerce.⁷⁷ Section 2(f), however, provides that the buyer who is charged with knowingly inducing or receiving a discriminatory price must be engaged in commerce. Consequently, to prosecute a buyer theoretically is more difficult than to prosecute a seller under the Robinson-Patman Act. The section 2(f) requirement is satisfied when the buyer purchases from a seller located in another state although the buyer resells the commodity locally, because the purchase transaction clearly would be in the "course of such commerce." But the

cross a state line. *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); *Mayer Paving & Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972).

75. 468 F. Supp. 256 (N.D. Cal. 1979).

76. This allegation had to be accepted for purposes of passing on the motion to dismiss. *Id.* at 258. See *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Baldwin Hills Bldg. Material Co. v. Fiberboard Paper Prods. Corp.*, 283 F. Supp. 202 (C.D. Cal. 1968).

77. Although the jurisdictional requirement of § 2(a) is tripartite, the critical element is that one of the challenged sales must be in commerce. It automatically follows that if one of those sales is made in commerce, the first two requirements are satisfied. See *Liquilux Gas Serv. v. Tropical Gas Co.*, 303 F. Supp. 414, 416 n.2 (D.P.R. 1969). It long has been settled that whether the higher or lower priced sale is the interstate transaction is irrelevant. See *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

same buyer might not be culpable under section 2(f) if the seller is located in the buyer's state because the buyer is not engaged "in commerce" even if the seller violates section 2(a) by selling at higher prices to the favored buyer's out-of-state competitors.⁷⁸ Of course, the courts could harmonize seller and buyer liability in the same transaction notwithstanding the literal language of section 2(f);⁷⁹ but, given the approach of the Supreme Court reflected in *A&P*, this is less likely than it formerly was.

The court in *Paceco* was more sanguine on this point. It recognized the anomaly between the commerce requirements of sections 2(a) and 2(f) and that the "plain reading" of the language of section 2(f) would require that the wrongdoing buyer receive the discrimination in the course of commerce.⁸⁰ It posited, however, that the emphasis on the derivative nature of section 2(f) and the absence of any logical reason for intentionally creating favorable treatment for buyers⁸¹ would require a liberal reading of section 2(f) to impose no other requirements than those in section 2(a). What the court in *Paceco* seems to have ignored is that, although *A&P* does make the section 2(f) violation totally derivative, the Court constantly emphasized the "plain meaning" and clear language of section 2(f).⁸² A Court so concerned with the plain meaning of the liability elements of the provision seemingly would be equally concerned with the "plain meaning" of the jurisdictional element. Of course, consistency is neither the hallmark of the Robinson-Patman Act itself nor of the courts that have construed it.

The court in *Paceco* rejected the argument that section 2(f) required a defendant to purchase commodities from an American supplier,⁸³ and hence refused to construe the jurisdictional scope of

78. See, e.g., *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 319 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961). For a discussion of the commerce requirement of § 2(f), see generally F. ROWE, *supra* note 2, § 14.6; 16D VON KALINOWSKI, *supra* note 2, § 36.04.

79. Rowe suggests that courts might harmonize the jurisdictional requirements of §§ 2(a) and 2(f) and notes that such a construction would obviate recourse to § 5 of the FTC Act. Section 5 could be applied against the local buyer who induced the discriminatory price because the discrimination would prejudice buyers in other states, even before the jurisdictional scope of that provision was broadened to the outer boundary of the commerce clause by the Magnuson-Moss Act. F. ROWE, *supra* note 2, at 437-38.

80. 468 F. Supp. at 259 n.7.

81. See generally 16D VON KALINOWSKI, *supra* note 2, § 36.04.

82. See text accompanying notes 200-02 *infra*.

83. 468 F. Supp. at 259 n.5.

the provision so narrowly that it could not cover sales made in Japan. The court applied the flow of commerce test and concluded that "a sale across state lines can carry the flow back to the initial shipment of the goods after manufacture and carry the flow forward to transformation or storage in the state of resale, embracing every transaction in between."⁸⁴ Thus, a subsequent transaction in commerce could bring into the "flow" an earlier transaction such as a sale of steel in Japan even though on its own the earlier transaction would not be viewed as being within commerce for purposes of the Robinson-Patman Act.

The court also accepted, at least for purposes of a motion to dismiss, that the allegation the steel purchased by defendants was used in the United States satisfied the requirement of section 2(a) that the commodities must be sold for "use, consumption, or resale, within the United States."⁸⁵ Unless the steel purchased at lower prices ended up in the United States in some form, the Act would not apply.⁸⁶

The defendants also failed in contending the complaint should be dismissed because Paceco did not allege that it was a direct purchaser of steel from the Japanese steel manufacturers. The court recognized that *Klein v. Lionel Corp.*⁸⁷ and *Wales Home Remodeling Co. v. Alside Aluminum Corp.*⁸⁸ established that only actual purchasers can maintain a section 2(a) suit, but concluded that those cases did not preclude an indirect purchaser from maintaining a section 2(a) action alleging that his wholesale supplier was a victim of discriminatory prices, vis-à-vis the plaintiff's competitors. The court distinguished *Klein* and *Wales* on the ground that the complaints alleged that plaintiffs' wholesalers received the same prices as plaintiffs' direct buying retailer competitors, and not that they, the wholesalers, were victims of price discrimination. In other words, the plaintiffs in *Klein* and *Wales* were complaining

84. 468 F Supp. at 259 (quoting 1 P AREEDA & D. TURNER, ANTITRUST LAW ¶ 233 (1978)).

85. 468 F Supp. at 260.

86. See *Fimex Corp. v. Barmatic Prods. Co.*, 429 F Supp. 978, 980 (E.D.N.Y. 1977) (§ 2(a) does not apply where one purchaser, presumably the favored purchaser, exported all products bought for resale); *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 402 F Supp. 244, 248 (E.D. Pa. 1975) (§ 2(a) does not apply to defendant's sales of consumer goods in Japan at higher prices than the goods were sold in the United States).

87. 138 F Supp. 560 (D. Del.), *aff'd*, 237 F.2d 13 (3d Cir. 1956).

88. 443 F Supp. 908, 911-12 (E.D. Wis. 1978).

that they were not being treated the same as their competitors because the manufacturers refused to sell to them directly, whereas in *Paceco*, the plaintiff was complaining of injuries suffered because of the discrimination against the steel wholesalers. In effect, the court considered *Klein* and *Wales* as overstating the rule and construed the language in section 2(a) prohibiting discriminations in price "between different purchasers" as referring only to the parties who paid the discriminatory prices and not to the standing of the "victim" of the discrimination.⁸⁹

The view of the court in *Paceco* that an "indirect" purchaser such as the plaintiff would have standing to bring a Robinson-Patman action appears somewhat tenuous.⁹⁰ To be sure, some cases reject a strict actual purchaser rule,⁹¹ and the Supreme Court in *Perkins v. Standard Oil Co.*,⁹² a section 2(a) case, and *FTC v. Fred Meyer, Inc.*,⁹³ a section 2(d) promotional allowance case, indicated that any statutory construction of the Robinson-Patman Act requires a broad look at the purpose of the Act to end injury resulting from the proscribed discriminatory conduct. Though the court may be correct in its reading of *Perkins* and *Fred Meyer*, the question is whether those cases would reach the same result if brought today before a Supreme Court seemingly determined to restrict the scope of the Robinson-Patman Act. Of course, the Court might accept the logical position taken in *Paceco* that the issue of standing under the Robinson-Patman Act should focus on substantive questions of causation and injury.

Heeding the Supreme Court's observation that summary procedures should be used sparingly in complex antitrust cases,⁹⁴ the court in *Paceco* rejected the defendants' argument that an indirect purchaser could not show as a matter of law injury to competition, an element of a section 2(f) case,⁹⁵ because of plaintiff's allegation

89. 468 F Supp. at 261.

90. See generally 1975 DEVELOPMENTS, *supra* note 2, at 127-29; F ROWE, *supra* note 2, § 4.5.

91. See, e.g., *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); *Southern Concrete Co. v. United States Steel Corp.*, 394 F. Supp. 362, 377-78 (N.D. Ga. 1975), *aff'd*, 535 F.2d 313 (5th Cir. 1976), *cert. denied*, 429 U.S. 1096 (1977).

92. 395 U.S. 642 (1969).

93. 390 U.S. 341 (1968). Cf. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 175 (1960) (proscribing "indirect" brokerage payments by independent broker).

94. See *Poller v. Columbia Broadcasting Sys., Inc.*, 368 U.S. 464, 473 (1962).

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

that the price discrimination in favor of the defendant crane manufacturers permitted them to outbid it on contracts. It recognized that cases such as *Secatore's Inc. v. Esso Standard Oil Co.*⁹⁶ have permitted suppliers to discriminate in favor of consumer customers when the disfavored retailer could not compete for the consumer's business even if he paid the same price.⁹⁷ The court may have entertained doubts whether the particular discrimination injured competition but believed that Paceco should have an opportunity to show that it could compete with the defendants even after absorbing the wholesalers' surcharge if the American steel wholesalers had not been "victimized" by discrimination.⁹⁸

*Red Apple Supermarkets, Inc. v. Deltown Foods, Inc.*⁹⁹ is one recent decision taking a narrow view of the jurisdictional scope of section 2(a). In *Red Apple*, the District Court for the Southern District of New York held that the New York producer of a type of lowfat milk that was made by blending dry nonfat milk solids with raw whole milk and liquid skim milk could not be charged with an illegal price discrimination under the Act simply because some of the raw whole milk came from Pennsylvania. Red Apple had alleged merely that Deltown's discriminatory sales were made in interstate commerce and did not demonstrate or even assert that any actual purchases crossed a state line in satisfaction of the third jurisdictional element of section 2(a). Red Apple contended that the lowfat milk was still in the flow or stream of commerce. This contention, however, was rejected because the early cases relied on as requiring the term "purchases in commerce" to include the entire stream of commerce¹⁰⁰ were restricted by the narrow jurisdictional interpretation of *Copp*. The court noted that no Second Circuit decision approving the stream of commerce analysis in Robinson-Patman Act cases was cited¹⁰¹ and that even the Fifth Circuit had re-

96. 171 F. Supp. 665 (D. Mass. 1959).

97. In effect, if equality in price cannot help the disfavored purchaser, and equality is all that is required by the Act, then the price discrimination cannot be said to injure competition.

98. See *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 355 (E.D.N.Y. 1960). See also *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942 (D. Conn. 1966).

99. 419 F. Supp. 1256 (S.D.N.Y. 1976).

100. *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), cert. denied, 382 U.S. 959 (1965); *Olympia Food Market, Inc. v. Sheffield Farms Co.*, 1955 Trade Cas. ¶ 68,064 (S.D.N.Y. 1955).

101. 419 F. Supp. at 1258. *Red Apple*, of course, was decided before *A&P* wherein the

stricted the broad sweep of the *Foremost Dairies* decision in *Hampton v. Graff Vending Co.*¹⁰²

The court's analysis of *Hampton* in *Red Apple* seems questionable. *Hampton* did not restrict *Foremost Dairies* because, as the opinion pointed out, the earlier decision recognized the limits of the flow of commerce theory.¹⁰³ This does not mean the court in *Hampton* did not acknowledge the impact of *Copp* upon the interpretation of the Act. The court recognized that between the time of an earlier decision in *Hampton*¹⁰⁴ and the instant case, *Copp* substantially had overruled *Littlejohn v. Shell Oil Co.*,¹⁰⁵ wherein the use of profits from interstate activities to finance local price-cutting was considered sufficient to satisfy the "in commerce" requirement of the Act. The *Littlejohn* position was based on the dictum in *Moore v. Mead's Fine Bread Co.*,¹⁰⁶ which the Court in *Copp* clearly rejected.

Furthermore, as was noted in *A&P*,¹⁰⁷ any discussion of the continued vitality of the flow of commerce theory in *Red Apple* was irrelevant because the product sold in New York differed substantially from the Pennsylvania raw milk that was but one of its ingredients; the flow of commerce theory is premised on no more than a negligible change in the commodity once it enters a state.¹⁰⁸ The possibility does exist, of course, that the court in *Red Apple* was

Second Circuit accepted a flow of commerce analysis.

102. 516 F.2d 100 (5th Cir. 1975).

103. *Id.* at 102-03. See *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 677-78 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965).

104. *Hampton v. Graff Vending Co.*, 478 F.2d 527 (5th Cir. 1973).

105. 456 F.2d 225 (5th Cir. 1972).

106. 348 U.S. 115 (1954).

107. 557 F.2d at 979-80. But see *Rohrer v. Sears, Roebuck & Co.*, 1975-1 Trade Cas. ¶ 60,352 (E.D. Mich. 1975) (applying the *Copp* requirement in a § 2(c) brokerage case).

108. *Red Apple*, which involved the production of lowfat milk, was closer to cases such as *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961), in which the product, ice cream, was substantially different and richer in butterfat than the milk that had previously moved in interstate commerce, and *Belliston v. Texaco, Inc.*, 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), in which crude oil had been shipped from Colorado to Utah where it was refined and sold as gasoline.

Of course, when a manufacturer sells to autonomous distributors who resell only within the state, the flow of commerce clearly has ceased. *Hiram Walker, Inc. v. A&S Tropical, Inc.*, 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); *Abramson v. Colonial Oil Co.*, 390 F.2d 873 (5th Cir. 1968) (per curiam); *Roorda v. American Oil Co.*, 446 F. Supp. 939 (W.D.N.Y. 1978) (denying summary judgment because the fact question of the relationship of the distributor defendant and American Oil Co. could be resolved only by trial).

more attuned to the current philosophy of the Supreme Court than, for example, the courts in *Paceco* and *Roorda*.

THE PRICE DISCRIMINATION ISSUE

After rejecting A&P's jurisdictional challenge, the Second Circuit considered whether the FTC had established a *prima facie* violation of section 2(f) by showing the knowing inducement or receipt by A&P of an illegal discriminatory price. The court noted that, under the holding of *Automatic Canteen*, the emphasis in a section 2(f) case is on the culpability of the buyer and not merely the receipt of a favorable price.¹⁰⁹ To paraphrase the Court, a buyer violates section 2(f) when he knows the price induced or received was illegal or knows that it was not within one of the defenses available to the seller.¹¹⁰

Under *Kroger* most buyers, but under *A&P* all buyers, are liable under section 2(f) only when the price knowingly induced or received is prohibited by the "section." That is, the ultimate liability of the buyer depends on the presence of a section 2(a) violation by the seller.¹¹¹ In addition to satisfying the jurisdictional commerce requirements, including the requirement that the items involved

109. The initial FTC enforcement of § 2(f), which was not extensive, emphasized the receipt of the favorable price. See discussion of the early § 2(f) cases in C. EDWARDS, *supra* note 17, at 486-501.

110. *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 74 (1953). The rule is of solace to buyers in that the Court did not feel it was an undue burden on a plaintiff, whether a private party or the FTC, to show that the defendant buyer was "not an unsuspecting recipient of prohibited discriminations." *Id.* at 81. The FTC disagreed and dismissed a number of § 2(f) cases after *Automatic Canteen* was decided. See 16D VON KALINOWSKI, *supra* note 2, § 36.05[1], at 36-65 n.7. Upon reflection, however, the FTC realized that *Automatic Canteen* involved only the issue of the burden of introducing evidence and this burden could be satisfied by showing that a buyer had reasonable knowledge as to the illegality of the seller's price.

Consequently, when the Commission realized the burden was not as onerous as originally thought, it began to file new § 2(f) proceedings. Unfortunately, these actions often were brought against small buyers who had banded together to get favorable price treatment in order to compete against large buyers. In the opinion of this author, such actions constituted a perversion of the basic purposes of an Act intended to respond to the conduct of the so-called "power buyer." See, e.g., *D.&N. Auto Parts Co.*, 55 F.T.C. 1279 (1959), *aff'd sub nom.* *Mid-South Distrib. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961).

For a general discussion of the burden of proof requirements under § 2(f), see C. AUSTIN, *supra* note 2, at 158-64; D. BAUM, *supra* note 2, at 70-73; C. EDWARDS, *supra* note 17, at 501-11; 1975 DEVELOPMENTS, *supra* note 2, at 159-62; F. ROWE, *supra* note 2, § 14.7; 16D VON KALINOWSKI, *supra* note 2, § 36.05.

111. See note 4 *supra*.

must be sold for use, consumption, or resale within the United States or any territory thereof,¹¹² the threshold elements of a section 2(a) violation are as follows: there must be two or more consummated sales;¹¹³ of commodities;¹¹⁴ of like grade and quality;¹¹⁵ made at discriminatory. that is, different prices;¹¹⁶ by the same

112. Section 1 of the Clayton Act, 15 U.S.C. § 12 (1976), defines "commerce" as including trade with foreign nations. Thus, the specific language of § 2(a) exempts export sales discriminations, but such sales may be subject to other provisions of the Act. *See, e.g.,* Baysoy v. Jessop Steel Co., 90 F Supp. 303 (W.D. Pa. 1950) (holding that an export sales agreement violated the brokerage provision of § 2(c)). Import sales are covered by the Act. *See, e.g.,* *In re Siemens & Halske A.G.*, Berlin, Germany, 155 F Supp. 897 (S.D.N.Y. 1957). *See also* cases cited at note 86 *supra*. *See generally* 16C VON KALINOWSKI, *supra* note 2, §§ 26.01[1], 26.03.

113. *See* *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 372-73 (2d Cir. 1958). Individual refusals to deal by a seller are not actionable as discriminations under a specific proviso of § 2(a), *Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939), but concerted refusals to deal are actionable under the Sherman Act. *See* *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

114. "Commodities" include tangible goods or products, but not services. *See, e.g.,* *Baum v. Investors Diversified Serv., Inc.*, 409 F.2d 872, 875 (7th Cir. 1969); *Rea v. Ford Motor Co.*, 355 F Supp. 842 (W.D. Pa. 1973), *rev'd on other grounds*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc.*, 219 F Supp. 400 (W.D. Pa. 1963). For an extensive list of cases classifying various items as commodities or noncommodities, see 16B VON KALINOWSKI, *supra* note 2, § 24.05.

115. Conflicting views on the proper criteria for determining like grade and quality were resolved in favor of the objective "physical characteristics" test in *FTC v. Borden Co.*, 383 U.S. 637 (1966). The courts and the FTC recognize that physically dissimilar products are not of like grade and quality. *See, e.g.,* *Lubbock Glass & Mirror Co. v. Pittsburgh Plate Glass Co.*, 313 F. Supp. 1184 (N.D. Tex. 1970); *Universal-Rundle Corp.*, 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967).

Although consumer preferences are irrelevant if the products are physically identical, they are appropriate in evaluating whether a minor physical difference is "merely decorative or fanciful" or in fact affects the marketability of the product. *See, e.g.,* *Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp.*, 1974-1 Trade Cas. ¶ 75,054 (D. Utah 1974); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F Supp. 312 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); *Universal-Rundle Corp.*, 65 F.T.C. 924, 954-55 (1964), *order set aside and remanded on other grounds*, 352 F.2d 831 (7th Cir. 1965), *rev'd and remanded on other grounds*, 387 U.S. 244 (1967). *See generally* Galanti, *supra* note 1, at 984-86.

116. There were divergent views as to the exact scope and meaning of "discrimination" under the Robinson-Patman Act until the Supreme Court's decision in *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), which held that "a price discrimination within the meaning of [§ 2(a)] is merely a price difference." *Id.* at 549. Thus, the Court rejected the authorities and commentators who contended that predatory intent or competitive injury were prerequisites to a statutory "price discrimination." The Court also decided against those economists who urged that economic discrimination exists "when the profit contribution is not the same

seller;¹¹⁷ to two or more different purchasers;¹¹⁸ and in reasonably close temporal proximity¹¹⁹ The Robinson-Patman Act does not

for all sales of a product; some sales are more profitable than others." Backman, *An Economist Looks at the Robinson-Patman Act*, 17 ABA ANTITRUST SECTION 343, 344 (1960). Thus, to an economist, economic price discrimination does not necessarily follow from differing prices; such discrimination, however, may exist even though prices are the same. See generally 16B VON KALINOWSKI, *supra* note 2, §§ 27.01-.02.

117. See, e.g., *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588, 590 (5th Cir. 1969); *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955); *Massachusetts Brewers Ass'n v. P Ballantine & Sons*, 129 F Supp. 736 (D. Mass. 1955). The requirement that the sales be made by the "same seller" seems to provide an easy opportunity to avoid the proscriptions of the Act by the simple expedient of a manufacturer reserving to itself favorite customers who will receive preferential price treatment while dealing with disfavored customers through a selling subsidiary. This stratagem, in fact, has worked. It is not without risk, however, because in order to avoid liability, the subsidiary must have substantial independence in setting prices in terms of sales—probably more independence than exists in the real world of parent-subsidiary relationships.

Neither share ownership, *Warren Petroleum Corp.*, 53 F.T.C. 268 (1956), nor common directors or officers, *National Lead Co. v. FTC*, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); *Baim & Blank, Inc. v. Philco Corp.*, 148 F Supp. 541 (E.D.N.Y. 1957), standing alone are sufficient to make the parent accountable for discriminatory sales. If, however, the parent corporation actively controls or contributes to the subsidiary's pricing or distribution policy, disregarding the corporate fiction will be justified. The parent-seller assumes another risk. If it successfully shows that it did not control its subsidiary, it might be liable for direct discrimination between different purchasers or customers if the subsidiary receives price or allowance benefits not available to others. Cf. *Baim & Blank, Inc. v. Philco Corp.*, 148 F Supp. 541, 542 (E.D.N.Y. 1957) (holding manufacturer not liable for price discrimination under Robinson-Patman Act when prices established by distributor). For an analysis of the cases involving the "single seller" issue, see 16B VON KALINOWSKI, *supra* note 2, § 24.04[2][a], particularly the guidelines, *id.* § 24.04, at 24-45, 24-46.

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

119. *Atalanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958); *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F Supp. 608, 610 (S.D. Cal. 1963). Essentially, the requirement is satisfied if both the sale agreements and the delivery of the commodities occur approximately simultaneously. "Closeness" rather than precise simultaneity is required. Hart-

apply to transactions such as leases or consignments, provided the transactions are not disguised sales.¹²⁰

One of the essential threshold inquiries in a Robinson-Patman Act proceeding, therefore, is whether the commodities are of like grade and quality. The need for this element as a means of confining the price discrimination law to reasonably comparable business transactions is self-evident. Although the wisdom of ignoring brand names and trademark differences in considering whether commodities are of like grade and quality has been questioned,¹²¹ the Supreme Court has held that the test of like grade and quality is the physical identity or characteristics of the commodities involved and that economic factors and consumer preferences are not to be considered in passing on this element.¹²² In *A&P*, no like grade and quality issue was presented because the private label milk sold to A&P was physically and chemically identical to the Borden brand milk.¹²³

The elements listed above are threshold elements; even if all are satisfied, a price discrimination¹²⁴ will not violate section 2(a) un-

ley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 921 (5th Cir. 1962). Otherwise, the Robinson-Patman Act would be effectively emasculated.

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

121. The commentators were so prolific on this point that in *FTC v. Borden Co.*, 383 U.S. 637 (1966), the Supreme Court engaged in a battle of footnotes—the majority emphasizing the numbers, *id.* at 640 n.3, and the dissenters urging that most of the supportive writings were not relevant. *Id.* at 652 n.8. See also 16C VON KALINOWSKI, *supra* note 2, § 25.01, at 25-3 n.2.

122. *FTC v. Borden Co.*, 383 U.S. 637 (1966). Economic factors and consumer preferences, however, may be considered in the context of the more flexible injury to competition issue; in fact, Borden ultimately prevailed in the case because the discrimination in price between the brand name and the private label condensed milk did not cause the requisite injury to competition. *Borden Co. v. FTC*, 381 F.2d 175 (5th Cir. 1967). See also *Continental Baking Co. v. Old Homestead Bread Co.*, 476 F.2d 97 (10th Cir. 1973).

123. 87 F.T.C. at 981-82.

124. Although a price discrimination is the same as a price difference, the Robinson-Patman Act does not apply to every situation in which a seller nets less from one customer than from another. For example, in *Kapiolani Motors, Ltd. v. General Motors Corp.*, 337 F. Supp. 102 (D. Hawaii 1972), the court held that false and fraudulent warranty claims that reduced General Motor's net receipts from sales to a dealer might have stated a *prima facie* case of obtaining money by false pretenses, fraud, conversion, and the like, but not a price discrimi-

less it has the prescribed adverse effect on competition. That is, it is unlawful only when its effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce"¹²⁵ or to injure, destroy, or prevent competition with any person who "grants" the discrimination,¹²⁶ with any person who "knowingly receives the benefit of such discrimination,"¹²⁷ or with "customers of either of them."¹²⁸ The Act does not preclude selling at different prices to customers who clearly occupy different places in the distribution chain.¹²⁹ It does preclude indirect price discriminations that have the requisite competitive impact.¹³⁰ The key word in the statutory standard by which the impact of price discriminations is to be judged is "may." The term does not mean a "mere" or "remote possibility" of substantially lessening competition;¹³¹

nation because "[n]owhere in the legislative history of the Act does it indicate that Congress was worried about purchasers who would engage in fraud, misrepresentation, or actual stealing from suppliers to procure economic advantages only secondarily relevant to 'net price.'" *Id.* at 103.

125. 15 U.S.C. § 13(a) (1976).

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

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

128. *Id.* This is the so-called tertiary line or customer's buyer level injury. *See Perkins v. Standard Oil Co.*, 399 U.S. 222 (1970).

129. *See, e.g., Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 950 (D. Conn. 1966); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956); *Doubleday & Co.*, 52 F.T.C. 169 (1955). *See generally* F. ROWE, *supra* note 2, at 174-75; 16C VON KALINOWSKI, *supra* note 2, § 30.02[2]. Discounts granted to dual function distributors, that is, wholesalers who also retail, may be challenged successfully under § 2(a) if not cost justified. *See, e.g., Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963), *cert. denied*, 377 U.S. 923 (1964); *E. Edlmann & Co.*, 51 F.T.C. 978 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958). Also, arrangements in which direct buying customers farther down the chain obtain greater discounts than those available to customers higher up may be challenged under § 2(a). *See, e.g., Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956).

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

131. *See, e.g., Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945); *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir.

rather, the interpretation of "may" has ranged from "reasonable possibility"¹³² to "reasonably probable"¹³³ depending on the forum and the circumstances.

As is frequently the case in determining whether certain conduct is proscribed by a statute, both easy and difficult cases arise. In the context of price discrimination the easy cases are the primary line cases in which predatory pricing is shown and the secondary line cases in which the price concessions are great. In the primary line cases, to conclude that competition has been injured when the seller has engaged in predatory pricing aimed at destroying his competitors is not difficult.¹³⁴ Similarly, it is easy to conclude that competition has been injured when a favored buyer continuously has received a thirty percent price reduction that would benefit him vis-à-vis his competitors regardless whether he passed on his savings or simply increased his profits.¹³⁵

In the difficult primary line cases in which no predatory pricing has occurred, an examination of the vitality of the competitive system is necessary to determine if the discrimination had the requisite effect. Although they do not establish a per se violation,¹³⁶ a diversion of trade or a loss of customers are factors considered by

1963), *cert. denied*, 377 U.S. 954 (1964). See generally 1975 DEVELOPMENTS, *supra* note 2, at 116-25; 16C VON KALINOWSKI, *supra* note 2, § 28.05.

132. The leading case authority favoring this construction is *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948). The test was reaffirmed impliedly in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). See also *American Motors Corp. v. FTC*, 384 F.2d 247, 251 (6th Cir. 1967), *cert. denied*, 390 U.S. 1012 (1968); *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

133. *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The FTC itself now seems generally inclined toward the "reasonably probable" test. See, e.g., *Fred Bronner Corp.*, 57 F.T.C. 771 (1960); *General Foods Corp.*, 50 F.T.C. 885, 887 (1954). See generally cases cited in 1975 DEVELOPMENTS, *supra* note 2, at 117 n.79.

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

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

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

the courts and the FTC.¹³⁷ Another important factor used to measure the impact of price discrimination on seller-level competition is the loss of profits by competitors.¹³⁸ The structure of the particular market, including the number and strength of the competitors, the availability of lower prices from others, and even the relationship between the seller's two prices when the higher price subsidizes operations in the affected market also have been examined.¹³⁹

The difficult secondary line cases are those involving the propriety of utilizing the "inference technique" established in *FTC v. Morton Salt Co.*¹⁴⁰ Under *Morton Salt*, competitive injury may be inferred when profit margins are small and the industry is highly competitive, notwithstanding that the discounts involved are relatively insignificant and that no actual evidence exists that disfavored retailers lost business or suffered financial loss.¹⁴¹ The technique is difficult to defend against; even direct testimony by unfavored customers that they were not injured by unfavorable prices has been found legally insufficient to protect the seller in a section 2(a) proceeding.¹⁴²

If the inference technique is inappropriate, the courts and the

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

138. See, e.g., *Utah Pie Co., Continental Baking Co.*, 386 U.S. 685 (1967); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965); *H.J. Heinz Co. v. Beech-nut Life Savers, Inc.*, 181 F. Supp. 452 (S.D.N.Y. 1960). See generally 16C VON KALINOWSKI, *supra* note 2, § 29.03[2].

139. The so-called "war chest" theory is more likely to be an issue in the predatory primary line cases. See, e.g., *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). It continues to be a factor, however, in other cases to support a conclusion that § 2(a) has not been violated. See, e.g., *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 842 (7th Cir. 1961); *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). See generally 16C VON KALINOWSKI, *supra* note 2, §§ 29.03[3]-[4].

140. 334 U.S. 37 (1948).

141. For a general discussion of *Morton Salt* and its progeny, see 16C VON KALINOWSKI, *supra* note 2, §§ 31.01[2][a]-[b], 31.04[4]. See also 1975 DEVELOPMENTS, *supra* note 2, at 117; F ROWE, *supra* note 2, at 180-86.

142. See *United Biscuit Co. of America v. FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966). Of course, testimony that the disfavored customers were not injured might mean that they were injured but, for whatever reasons, were not complaining. For other cases rejecting such rebuttal evidence, see *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Moog Indus. Inc. v. FTC*, 238 F.2d 43 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958); *Beatrice Foods Co.*, 76 F.T.C. 719 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). See also 16C VON KALINOWSKI, *supra* note 2, § 31.01[2][c].

FTC will attempt to determine whether the price discrimination has impaired the competitive abilities of unfavored customers.¹⁴³ The health of the competitive process at the customer level is ascertained by examining the temporary or permanent nature of the discrimination, the causal nexus between the discrimination and alleged injury, and even the general availability of the challenged lower prices.¹⁴⁴

The Second Circuit had no difficulty affirming the FTC's conclusion that the higher prices paid by A&P's competitors for milk substantially identical to that purchased by A&P were injurious to competition. The price discriminations ranged up to twenty-two and one-half percent in the retail grocery business, which has notoriously low profit margins. Moreover, A&P admitted that fluid milk was one of the most important commodities carried in retail grocery stores and sometimes was used as a price leader to draw customers to a store.¹⁴⁵ Thus, substantial evidence supported the findings of the FTC that a reasonable possibility and even a reasonable probability of the adverse effect on competition existed.¹⁴⁶ The Supreme Court did not discuss the issue of injury to competition; in fact, its emphasis on A&P's right to rely on Borden's meeting competition defense was a tacit acknowledgment that the prices did injure competition.

Section 2(f) does not specifically provide that the buyer must have actual or constructive knowledge that section 2(a) prohibits the price differential given by the seller. The provision could be construed to impose liability on a buyer who knowingly induces or receives prices lower than those charged other buyers that in fact are illegal even if the buyer is unaware of the illegality. The requirement that the plaintiff has the burden of coming forward with evidence of the buyer's knowledge of the illegality of the price was

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

144. See cases cited at note 143 *supra*. See generally F. ROWE, *supra* note 2, §§ 8.3-5; 16C VON KALINOWSKI, *supra* note 2, §§ 31.03[3] - [4].

145. 557 F.2d at 980-81.

146. The findings of the Commission as to the facts are deemed conclusive if supported by substantial evidence. 15 U.S.C. § 21(c) (1976). See *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 760 (1945); *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Callaghan & Co. v. FTC*, 163 F.2d 359, 372 (2d Cir. 1947).

a gloss imparted by the Supreme Court's decision in *Automatic Canteen Co. of America v. FTC*.¹⁴⁷ Thus, the plaintiff must make two showings: that the defendant was paying a price that differed from that paid by other buyers that was neither cost justified nor otherwise defensible; and that the defendant knew or should have known that the differential would have the effect of substantially lessening competition.¹⁴⁸

On its face, to require a showing that the buyer had knowledge of the illegality of the price would seem to be an insurmountable burden. *Automatic Canteen*, however, supplied the means of overcoming this obstacle by noting that the buyer's "trade experience"¹⁴⁹ could be used to show his knowledge of the illegality. Trade experience is a somewhat amorphous concept. Simply stated, it is the expertise of a skilled purchasing manager who knows a great deal about the going price for the commodities being purchased. The FTC and the courts have developed some standards in this respect.¹⁵⁰ For example, the burden has been met in a proceeding against a large volume buyer when the FTC showed the following: none of the suppliers granted quantity discounts as a matter of course; the favored customer received the discounts only during the month it conducted a special coupon promotional sale; and the price concessions amounted to a full one-third off the regular price whereas cost savings to the sellers were, at best, negligible.¹⁵¹ It also has been satisfied in cases in which buyers have formed buying

147. 346 U.S. 61 (1953).

148. *Id.* at 74-75. The substantiality of the discount alone does not satisfy the lessening competition requirement, but a showing of a significant discrimination in a highly competitive industry with low profit margins often can satisfy the burden. See generally 1975 DEVELOPMENTS, *supra* note 2, at 121. With a few exceptions, this is the generally accepted rule even if the *Morton Salt* "inference technique" is applicable. *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). See authorities listed in 16C VON KALINOWSKI, *supra* note 2, § 31.01[1], at 31-8 n.23. The Second and possibly the Ninth Circuits take the position that any discrimination among competing buyers is sufficient to establish a *prima facie* case under § 2(a) and that the seller has the burden of disproving competitive injury to the seller. See *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970); *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

149. 346 U.S. at 79-80.

150. See C. EDWARDS, *supra* note 17, at 515-17; 1975 DEVELOPMENTS, *supra* note 2, at 160; 16C VON KALINOWSKI, *supra* note 2, § 36.05[3][c].

151. *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 363-67 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

groups and paid lower prices for their purchases although the mode, quantity, or quality of their individual purchases remained unchanged.¹⁵²

The Second Circuit in *A&P* easily concluded that A&P's trade experience sufficed to establish that it knew Borden's prices on the private label milk products violated section 2(a).¹⁵³ The Supreme Court also accepted that Borden's prima facie violation of section 2(a) had been established and that a prima facie violation of section 2(a) necessarily implied a prima facie violation of section 2(f)

AVAILABILITY OF DEFENSES TO A&P

The two courts, however, disagreed on the issue of the availability to A&P of the statutory defenses that would have been available to Borden had it been charged with a section 2(a) violation. In other words, the courts disagreed in their interpretations of the statement in *Automatic Canteen* that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or *not known by him not to be within one of those defenses.*"¹⁵⁴

The cost justification defense¹⁵⁵ is absolute¹⁵⁶ in a section 2(a) case when the differential makes only due allowance for actual cost savings from the manufacture, sale, or delivery of the commodities, even if the price discrimination results in an injury to competition. A seller also can escape liability when the lower price offered to any

152. See *American Motors Specialties Co. v. FTC*, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960). See generally *Galanti*, *supra* note 1, at 992-93. See also *Mid-South Distrib. v. FTC*, 287 F.2d 512, 518-19 (5th Cir.), cert. denied, 368 U.S. 838 (1961).

153. 557 F.2d at 981.

154. 346 U.S. at 74 (emphasis supplied). The admonition also would apply to the final proviso of § 2(a), which justifies otherwise unlawful price discriminations made in response to changing conditions affecting the market for the goods concerned or the marketability of those goods. The proviso specifically refers to several possibilities, such as a deterioration of perishable goods and obsolescence of seasonal goods. See generally 16C VON KALINOWSKI, *supra* note 2, § 32.04. Also, the FTC and the courts have recognized, albeit somewhat vaguely, a de minimis exception. See *E. Edelman & Co. v. FTC*, 239 F.2d 152, 155 (7th Cir. 1956); *Alterman Foods, Inc.*, 82 F.T.C. 298 (1973); *American Metal Prods. Co.*, 60 F.T.C. 1667 (1962).

155. See note 57 *supra*. A cynical observation about the problems of the cost justification defense is that in many cases cost justification is considered only after an FTC complaint has been filed.

156. *United States v. Borden Co.*, 370 U.S. 460 (1962); *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61, 66-69 (1953).

purchaser "was made in good faith to meet an equally low price of a competitor."¹⁵⁷ The meeting competition defense likewise is absolute.¹⁵⁸

In order to decide whether Borden's defenses were available to A&P, the courts had to construe the provision in section 2(f) referring to discrimination in prices that are "prohibited by this section." One interpretation is that the provision makes section 2(f) totally derivative so the buyer is liable only if the seller is liable and escapes liability whenever the seller can establish one of his affirmative defenses, even though the buyer in fact knows the defense is unavailable. The alternative interpretation, based on *Kroger*, is that the availability of the defenses must be viewed from the perspective of both buyer and seller so the buyer who knows of the unavailability of the defense and does not inform the seller is liable even if the seller is absolved. The Second Circuit adopted the latter position whereas the Supreme Court held that section 2(f) is derivative.

A&P invoked both the cost justification and the meeting competition defenses. As to cost justification, the Second Circuit acknowledged that a cost study will not be invalid merely because one method of computation was used over another,¹⁵⁹ as long as the method selected is as fair and accurate as the next, and that a cost study made in good faith and in accordance with sound accounting principles is entitled to great weight.¹⁶⁰ Nonetheless, the court rejected the defense because the three cost studies purporting to show that Borden's final offer was cost justified were flawed and unreliable.¹⁶¹

The court also rejected A&P's argument that the FTC could find no section 2(f) liability under the standards of *Automatic Canteen* without submitting a cost study showing that the prices were not cost justified; otherwise there would be no "square holding as to the factual absence of cost justification."¹⁶² The Second Circuit

157. 15 U.S.C. § 13(b) (1976). See note 6 *supra*.

158. *Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951). See also authorities cited in note 34 *supra*.

159. See *FTC v. Standard Motor Prods., Inc.*, 371 F.2d 613, 622 (2d Cir. 1967).

160. See *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 394 (1948).

161. 557 F.2d at 984-85.

162. *Id.* at 985. But see *Rutledge v. Electric Hose & Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd*, 511 F.2d 668 (9th Cir. 1975).

read *Automatic Canteen* as adopting a middle ground approach that required the FTC to go forward with some evidence of the buyer's knowledge that the discriminatory prices could not be cost justified, rather than a rule that the Commission always must prove the absence of cost justification.¹⁶³

A&P also failed to persuade the Second Circuit that even though it could not show an actual cost justification, it neither knew nor had any reason to know, that Borden's prices were not cost justified.¹⁶⁴ The court concluded that the FTC reasonably could infer that Borden's letter to A&P, which stated that its prices were "proper under applicable law" and that it was prepared to defend them, did not justify A&P's conclusion that the prices generally were available to other customers of Borden or were cost justified. The FTC's findings therefore could not be disturbed on appeal.¹⁶⁵ Similarly, the court deemed A&P's argument that the price difference between the private label and the Borden brand milk might have made A&P suspicious that the brand label prices were too high, not that the private label prices were too low, to be only an invitation to retry the facts and draw new inferences.¹⁶⁶

The Second Circuit and the Supreme Court disagreed as to whether Borden's potential meeting competition defense was available to A&P as a defense in a section 2(f) proceeding. The court of appeals did not decide whether Borden in fact would have been able to defend a section 2(a) action had one been brought; rather, it decided that even were the defense available to Borden, A&P could not use it because it knew that Borden's final bid, which substantially exceeded the rival bid, in fact was not sheltered by the

163. 557 F.2d at 985. See also *Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

164. 557 F.2d at 986.

165. *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 760 (1945). Furthermore, A&P did not criticize Borden's cost study prepared during the negotiations indicating losses or minimal profits on the private label service. This supported the conclusion that both A&P and Borden knew of the illegality of the bargain. 557 F.2d at 986-87. The court also noted that a formula used by A&P reflecting the general proposition that a dairy can sell milk profitably for approximately six cents more per quart than the cost for raw milk was relevant but did not rebut the FTC's *prima facie* showing of knowledge. *Id.*

166. Because the Supreme Court accepted A&P's meeting competition defense, it did not reach the question whether Borden and consequently A&P had a cost justification defense under § 2(a). 440 U.S. at 85 n.18. Justice White was satisfied that Borden would not have had a cost justification defense. *Id.* Justice Marshall did not address the cost justification issue. *Id.* at 90 n.4.

meeting competition defense.¹⁶⁷ The Supreme Court not only reversed the Second Circuit's determination that the meeting competition defense was unavailable to A&P, but also took the unusual step of determining *sua sponte* that Borden would have sustained the defense. Justice White dissented on this issue because neither the FTC nor the Second Circuit had decided whether Borden itself had a valid meeting competition defense. He urged that the matter be remanded to the Commission "whose job it is initially to consider such matters."¹⁶⁸ Justice Marshall, dissenting in part, noted that neither the Administrative Law Judge, the FTC, nor the Second Circuit had determined that Borden was entitled to the meeting competition defense and that both the Administrative Law Judge and the FTC had suggested the opposite.¹⁶⁹

In order to establish that a lower price to a purchaser was "made in good faith to meet an equally low price of a competitor," a seller must "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."¹⁷⁰ The key to the defense is not an absolute certainty that a price concession is being offered to meet an equally low price offered by a competitor, but rather a good faith belief.¹⁷¹ Although a seller only can

167. The rival bid would have produced estimated annual savings for A&P of approximately \$737,000 as compared with the first Borden bid which would have produced estimated annual savings of \$410,000 and the final Borden bid which doubled the predicted annual savings to \$820,000. 440 U.S. at 73 & n.2.

168. 440 U.S. at 85 (White, J., concurring in part and dissenting in part).

169. *Id.* at 90 (Marshall, J., dissenting in part). The FTC noted that "[a]lthough the Commission decided not to issue a complaint against Borden for violation of Section 2(a), the Commission has not concluded that Borden would have a valid meeting competition defense to such a charge." Great Atl. & Pac. Tea Co., 87 F.T.C. 962, 1057 (1976). It further observed that "[w]e believe that it is very probable that Borden did *not* have such a defense." *Id.* at 1057 n.19 (emphasis original). The Commission noted that Borden had serious doubts regarding the legality of the rival bid because it believed the other dairy considered only direct costs. Contrary to Justice Stewart's indication as to what Borden had done, the Commission noted that Borden "should have asked A&P for more information about the competing bid. By not making the request, it was acting imprudently. As the record clearly indicates, A&P had knowledge of Borden's belief that other dairies might submit bids that did not include all costs." *Id.* (citations omitted). Justice Marshall noted that the majority's action was particularly inappropriate in light of the admonition in *United States v. United States Gypsum Co.*, 438 U.S. 422, 456 n.31 (1978), that "[t]he case by case interpretation and elaboration of the § 2(b) defense is properly left to the other federal courts and the FTC in the context of concrete fact situations." 440 U.S. at 90 n.5.

170. *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945).

171. *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978).

meet and not beat his competitor's price,¹⁷² the requirement was never draconian.¹⁷³ Indeed, the Supreme Court, in *United States v. United States Gypsum Co.*,¹⁷⁴ clearly established that a seller can assert the defense even if it unknowingly has made a bid that beats rather than meets the competition.

In *A&P*, the Supreme Court apparently has so broadened the concept of "good faith" that the only sellers who might be unable to establish the defense are those foolish enough to make some effort to substantiate that a lower bid from a competitor was made. The conventional wisdom was that to be a "prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity,"¹⁷⁵ a seller had to make such an effort and that merely taking the buyer's word at face value would not suffice.¹⁷⁶ In *A&P*, however, the majority held that on the basis of certain statements by A&P's Chicago unit buyer,¹⁷⁷ and Borden's fear of losing its established A&P business, Borden justifiably could conclude it had to make another bid offering substantial concessions to avoid losing the A&P account. The Court noted Borden's request for more information had been denied, and that under *Gypsum* it could not attempt to verify from its rival the existence

172. See, e.g., *FTC v. Standard Brands, Inc.*, 189 F.2d 510 (2d Cir. 1951); *National Dairy Prods. Corp.*, 70 F.T.C. 79 (1966), *aff'd*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968).

173. The defense has been interpreted liberally in light of competitive realities and has been permitted when the seller technically has "beaten" his competitor's price. See, e.g., *Callaway Mills Co. v. FTC*, 362 F.2d 435 (5th Cir. 1966); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956). In fact, in *Kroger*, the FTC recognized that the seller "at least technically 'beat' the competitors" but still allowed the defense. 76 F.T.C. at 811. The key was the seller's showing of "good faith."

174. 438 U.S. 422, 454 (1978).

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

176. See *Viviano Macaroni Co. v. FTC*, 411 F.2d 255, 259-60 (3d Cir. 1969), wherein the court concluded that the seller had not shown the requisite good faith in failing to investigate or verify the veracity of a buyer who reported a competitive offer in an oral communication and in failing to verify a competitive offer reported by an experienced salesman who had been with the company for 18 years. In *Gypsum*, the Court discussed various verification efforts. 438 U.S. at 453-56.

177. A&P's representative 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." Pressed for details, the representative responded only that a \$50,000 improvement in Borden's bid "would not be a drop in the bucket." 440 U.S. at 84.

and terms of the competing offer.¹⁷⁸

Unless the majority intended to undercut the standards of "good faith," its conclusion that it 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"¹⁷⁹ is hard to explain. This is not to say that Borden, in doubling the estimated annual savings from \$410,000 to \$820,000, was not acting in good faith.¹⁸⁰ It is merely to observe that the Court, in making such a determination on its own without remand to the FTC, appears to be giving little more than lip service to the requirement that verification efforts are necessary for a section 2(b) defense.

There is considerable irony in the majority's reliance upon *Gypsum* wherein the Court held that the exchange of price information among competitors, even when ostensibly done for Robinson-Patman Act compliance purposes, must remain subject to close Sherman Act scrutiny because such verification efforts easily can be a cover for hard-core price-fixing.¹⁸¹ Several commentators on *Gypsum*, however, have noted that vigorous enforcement of section 2(f) against buyers is a viable substitute for the interseller corroboration without inhibiting market competition.¹⁸² In fact, the Court in *Gypsum* recognized that utilizing section 2(f) against buyers would "serve to bolster the credibility of buyers' representations and render reliance thereon by sellers a more reasonable and secure

178. *Id.* The majority distinguished *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746 (1945), because the "source of the information was a person whose reliability was not questioned and who had personal knowledge of the competing bid." 440 U.S. at 84 n.17.

179. *Id.* at 84.

180. The difference between the second Borden bid and the rival bid was \$75,000. This figure is not so substantial that a reasonable person could not conclude that Borden only incidentally beat its competitor. The only dollar information Borden had when it doubled its bid, however, was the statement that \$50,000 would not be a "drop in the bucket." Considering that \$50,000 conceivably might not be "a drop in the bucket" if the rival's estimated annual savings was, for example, \$500,000 and not \$735,000, the Supreme Court is giving an extraordinary amount of leeway to the seller.

181. See Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476 (1977).

182. See generally *id.* at 1495. See also Note, *Price Verification Under Robinson-Patman: The Creation of an Unnecessary "Controlling Circumstance,"* 58 B.U.L. REV. 127 (1978) (observing that postcontract verification coupled with the enforcement of § 2(f) might be acceptable).

predicate for a finding of good faith under § 2(b) ”¹⁸³ When the two decisions are viewed together, however, it appears the Court has engaged in classic circular reasoning: under *Gypsum*, the seller need not verify the alleged bid with his competition because section 2(f) will keep the buyer honest; but under *A&P*, the buyer can escape liability under section 2(f) as long as he does nothing to give the seller cause to doubt his word.

The Court could achieve this result only by holding that the meeting competition defense, at least theoretically available to Borden, was available to A&P even though at the time of the negotiations A&P knew Borden's second bid substantially bettered the rival bid such that Borden did not satisfy the meet but not beat requirement. Denying the defense to A&P, the Second Circuit observed that the FTC decision was premised on *Kroger*, which held that the seller's absolution from section 2(a) liability did not *ipso facto* exonerate the buyer. According to Justice Clark writing in *Kroger*, *Automatic Canteen* did not warrant or require an interpretation of the Robinson-Patman Act that section 2(f) was totally derivative in nature and to so construe the Act “would put a premium on the buyer's artifice and cunning in inducing discriminatory prices.”¹⁸⁴ For both the Sixth Circuit in *Kroger* and the Second Circuit in *A&P*, “[i]n order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer.”¹⁸⁵

The Second Circuit considered this position to be fully consistent with *Automatic Canteen* wherein Justice Frankfurter commented that “the buyer whom Congress in the main sought to reach was the one who, knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for

183. 438 U.S. at 455 n.30.

184. 438 F.2d at 1377. As one commentator observed, “The teaching of the *Kroger* case is that under Section 2(f) the buyer is acting at his peril if he doesn't deal candidly and honestly with his supplier, and if he misrepresents facts in order to get a better price, he probably will be held in violation of Section 2(f) if caught.” LaRue, *Workshop Discussion: Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 147, 162-63 (1971).

185. 438 F.2d at 1377. In *A&P*, the Second Circuit stated, “While Borden may well have been under the impression that the terms of its final offer merely met the Bowman bid, A&P knew for a fact that the final Borden bid was substantially below ‘meeting competition’ and beat the Bowman bid by a good margin.” 557 F.2d at 982 (emphasis original).

lower prices.”¹⁸⁶ To rule otherwise would, according to the Second Circuit, “emasculate *Automatic Canteen* and the purpose of § 2(f) in that large buyers could consistently play one seller off against another to the point where all bids are below sellers’ costs and then in reliance upon the sellers’ potential good faith and its ‘meeting competition’ defenses, thus vindicate the final price.”¹⁸⁷

Furthermore, the Second Circuit considered A&P’s position as conflicting with the legislative origins of the meeting competition defense in section 2 of the Clayton Act, which was intended to permit a seller to defend against local competition without having to cut prices in all areas where it did business and simultaneously to permit a seller trying to enter a new territory to cut prices only locally.¹⁸⁸ That Congress intended to expand the scope of the meeting competition defense vis-à-vis buyers when it was amending section 2 in order to end power buyer abuses is difficult to believe.

A&P also unsuccessfully argued before the Second Circuit that *Kroger* was not controlling because Kroger was a “lying buyer” who had made actual misrepresentations to the seller whereas A&P had been exonerated under section 5 of the FTC Act for its behavior during the negotiations with Borden. A&P asserted it was inconsistent for the FTC to dismiss the charges of unfair trade practices under section 5 on the rationale that imposition of liability under that provision would require a buyer affirmatively to disclose to a seller that its bid had beaten a competitor’s bid and thus would run counter to the public interest in rigorous competitive price bargaining,¹⁸⁹ while the FTC imposed liability for the same conduct under section 2(f). The Second Circuit deemed the apparent inconsistency between a finding of section 2(f) liability and exoneration under section 5 “more apparent than real.”¹⁹⁰ The court approved scholarly comment that section 5 should not reach instances of price discrimination that are either explicitly included or excluded from the coverage of the Robinson-Patman Act.¹⁹¹ In other

186. 346 U.S. at 79. See generally Curtis, *Buyer Liability Under the Robinson-Patman Act*, 42 ANTITRUST L.J. 345, 351-52 (1973).

187. 557 F.2d at 982-83.

188. *Id.* at 983. See H.R. REP. No. 627, 63d Cong., 2d Sess. pt. 2, at 2-3 (1914); F. ROWE, *supra* note 2, § 9.1, at 208-09.

189. 87 F.T.C. at 1050.

190. 557 F.2d at 983.

191. *Id.* at 983-84. See Reeves, *Toward a Coherent Antitrust Policy: The Role of Section 5*

words, A&P's liability under section 2(f) had to be assessed independently without regard to any other statute. Consequently, section 5 absolution did not *ipso facto* absolve A&P under section 2(f) ¹⁹²

That the position of the FTC and the Second Circuit produces an anomalous result is beyond dispute. The apparent explanation for this result is that the Robinson-Patman Act is directed specifically at the type of conduct engaged in by A&P, whereas the FTC Act is not. The Supreme Court emphasized the dismissal of the section 5 count against A&P in reversing the Second Circuit. This raises the interesting but unanswerable inquiry as to what the Court would have done if A&P never had been charged with violating section 5 or had been found guilty by the FTC. Writing for the Court and commenting on the point, Justice Stewart made the rather extraordinary statement that "[n]either the Commission nor the Court of Appeals offered any explanation for this apparent anomaly" ¹⁹³ The Second Circuit could well be wrong, but it did attempt to explain why exoneration under the FTC Act did not automatically absolve A&P under the Robinson-Patman Act. The majority almost appears not to have read the Second Circuit opinion.

The court of appeals concluded that the *Kroger* construction of section 2(f) was "salutary and correct" ¹⁹⁴ and to be applied even when the buyer had not affirmatively lied to the seller. If the rationale of section 2(f) is to keep buyers from inducing lower prices that are indefensible, the rationale applies equally when buyers remain silent about the nature of the competitive bid as when they lie. ¹⁹⁵ The court also observed that the line between the affirmative misrepresentation in *Kroger* and statements such as A&P's to Borden that it was not "in the ball park" and that a \$50,000 improvement in the bid would not be a "drop in the bucket" was a fine one indeed. ¹⁹⁶

of the Federal Trade Commission Act in *Price Discrimination Regulation*, 16 B.C. INDUS. & COM. L. REV. 151, 198 (1975).

192. 557 F.2d at 984.

193. 440 U.S. at 81.

194. 557 F.2d at 983.

195. *Id.*

196. *Id.* Justice Stewart contended that A&P's only "misrepresentation" was made after Borden had made its second bid, so it could not have induced the bid, 440 U.S. at 81 n.15.

Although the Second Circuit's position may be logically sound, it appears to go too far by placing a buyer in the almost untenable position of having to ask for a higher price. This is basically the position of Justice Marshall, who dissented not from the majority's conclusion that the "innocent" recipient of a lower bid could not utilize the seller's meeting competition defense, but from its construction of section 2(f) that permits the "lying buyer" to escape liability and from its "fact finding" that Borden could establish its meeting competition defense.

According to the majority of the Supreme Court, A&P could not be guilty of violating section 2(f) if Borden had a valid meeting competition defense; a price discrimination "prohibited by this section" as used in the provision cannot exist if the seller has a valid meeting competition defense.¹⁹⁷ Although the Court claimed it was not deciding the "lying buyer" case,¹⁹⁸ this appears inaccurate. If the liability under section 2(f) is derivative in nature, a lying buyer cannot be liable if the seller can establish the section 2(b) defense "[u]nder the plain meaning of § 2(f)"¹⁹⁹ The phrase "plain meaning" is used advisedly because notwithstanding countless judicial and scholarly comments on the opaqueness of the Robinson-Patman Act,²⁰⁰ the majority thrice referred to the "plain meaning" of section 2(f)²⁰¹ in its holding and further stated the following: "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

As Justice Marshall tellingly noted, however, no finding was made on the issue of misrepresentation because evidence of misrepresentation was irrelevant under the standard applied by the FTC. *Id.* at 91-92.

197. *Id.* at 78.

198. *Id.* at 81 n.15. Of course, as Justice Marshall pointed out, if the Court truly intended not to decide the "lying buyer" issue, it was improper not to remand the case for an actual determination whether the exception applied. *Id.* at 91.

199. *Id.* at 76.

200. Even Justice Frankfurter, who wrote the opinion in *Automatic Canteen*, observed that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act . . ." 346 U.S. at 65, and referred to the "infelicitous language of § 2(b)." *Id.* at 78.

The majority in A&P clearly ignored the admonition of Justice Frankfurter "to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings," *id.* at 65, if it was not deciding the "lying buyer" case.

201. 440 U.S. at 76, 78, 81.

prohibited price discrimination.”²⁰² How the Court condemns the lying buyer with this language is difficult to see. Just as there is no price discrimination if the ignorant seller improves his bid without being told he is beating competition, there is no “prohibited price discrimination” if a misled seller does the same.

To the majority, construing section 2(f) so that a buyer can be liable even if the seller has a valid defense was an attempt to amend judicially the Robinson-Patman Act. Justice Stewart compared this effort with *FTC v. Simplicity Pattern Co.*²⁰³ wherein the Court stated that “this Court is not in a position to review the economic wisdom of Congress” and that “[w]e cannot supply what Congress has studiously omitted.”²⁰⁴ Of course, repealing a statute is also an act of judicial legislation. By construing section 2(f) as creating derivative liability and ignoring the congressional purpose of section 2(f) of curtailing coercive practices by power buyers, the majority arguably has committed such an act.

As Justice Marshall noted in his dissent, neither the language nor the sparse legislative history of the provision justified the majority’s interpretation precluding buyer liability unless the seller also can be found liable for price discrimination.²⁰⁵ According to Justice Marshall, the language in section 2(f) referring to a discrimination in price “which is prohibited by this section” does not make the liability of the buyer derivative but rather incorporates by reference the elements of the section 2(a) offense and the cost justification and meeting competition defenses. Consequently, section 2(f) requires the establishment of the same basic elements and makes available the same basic affirmative defenses regardless whether the seller or buyer is being charged. Under this interpretation of section 2(f), which does not require a seller to be guilty of a section 2(a) offense, buyer and seller liability may be determined

202. *Id.* at 78.

203. 360 U.S. 55, 67 (1959).

204. *Id.* at 67. Justice Stewart failed to acknowledge, however, that courts have read words out of certain provisions of the Act and have read words into other provisions from which Congress, whether studiously or not, omitted them. Compare the interpretation of the § 2(c) brokerage provision in *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), *cert. denied*, 310 U.S. 638 (1940) with the interpretations of the § 2(b) meeting competition defense in *Exquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962) and the § 2(d) promotional allowance provision in *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968).

205. 440 U.S. at 86.

independently Justice Marshall considered this construction as placing less strain on the "plain meaning" of section 2(f) than did the absolutely derivative standard of the majority.²⁰⁶ The legislative history of section 2(f) buttresses his position. Although it was an "afterthought," it was prompted by the late realization that halting buyers' abusive practices could not be accomplished solely by imposing liability on sellers and that a proscription applicable to buyers was needed.²⁰⁷ Buyer and seller liability logically should be independently determinable.

Justice Marshall did not perceive *Automatic Canteen* as a barrier because the Court in that case was not purporting to define the precise contours of the elements and defenses of section 2(f) liability; rather, it was concerned with the allocation of "the burden of coming forward with evidence under § 2(f) of the Act."²⁰⁸ Regarding judicial legislation, he noted²⁰⁹ that Justice Frankfurter had observed that section 2(f) was "roughly the counterpart, as to buyers, of sections of the Act dealing with discrimination by sellers."²¹⁰ In effect, he was observing that the majority had deleted "roughly" in making section 2(f) the exact counterpart of section 2(a).

Under Justice Marshall's view, A&P would not be guilty of violating section 2(f) if it simply invited Borden to meet a lower bid and fortuitously received a still lower bid. A buyer acting in good faith in such a situation could sustain the section 2(b) defense. The "good faith" of the buyer would be the key, so that the lying buyer would be liable whereas the silent buyer would not.

The argument of the FTC and the Second Circuit that section 2(f) applies to the innocent as well as the lying buyer is tenable. Admittedly, however, such a construction of the Robinson-Patman Act could impose undue restrictions on the competitive process. Nevertheless, to construe section 2(f) in the guise of its "plain meaning" and supposed "clear language" to permit the lying buyer to escape liability under the Act is unfortunate. It is to be hoped that if the lying buyer case ever reaches the Supreme Court, it will adopt Justice Marshall's position. This would retain section 2(f),

206. *Id.*

207. *Id.* at 87. See S. REP. No. 1502, 74th Cong., 2d Sess. (1936); H.R. REP. No. 2287, 74th Cong., 2d Sess. 3-7, 17 (1936).

208. 346 U.S. at 65.

209. 440 U.S. at 89.

210. 346 U.S. at 63.

the provision that was to supplant interseller verification condemned in *Gypsum*, as a viable part of the Act. Although the result would be inconsistent with A&P, consistency is not the most distinguished feature of the Robinson-Patman Act.²¹¹

Perhaps the FTC should have dropped the A&P proceeding. A&P clearly had not engaged in the same type of conduct as had Kroger, and certainly was a more sympathetic respondent. The Supreme Court conceivably could have taken a more "liberal" approach to section 2(f) and not adopted the "derivative" standard had it been presented with a different case.²¹²

Two lower courts anticipated the result reached in A&P in *Harbor Banana Distributors, Inc. v. FTC*,²¹³ the Court of Appeals for the Fifth Circuit set aside an FTC cease and desist order that a banana importer and a distributor had violated sections 2(a) and 2(f) of the Act. The court viewed the actions of the importer as those of a reasonable and prudent person, thus satisfying the sec-

211. Because it reversed, the Supreme Court did not reach A&P's challenge to the scope and breadth of the FTC's order. The order provided that in the future A&P would have the burden of going forward with the meeting competition defense and required A&P to distribute the order nationwide to its operating divisions and to its dairy products suppliers. The Second Circuit limited its review of the order because the primary responsibility in developing relief is the Commission's, *FTC v. Colgate-Palmolive Co.*, 380 U.S. 374 (1965); *FTC v. National Lead Co.*, 352 U.S. 419, 429 (1957). Additionally, the Commission has been granted wide discretion in choosing the remedies necessary to cope with unlawful practices. *FTC v. Mandel Bros.*, 359 U.S. 385 (1959); *Jacob Siegal Co. v. FTC*, 327 U.S. 608 (1946). The FTC's authority to formulate remedial orders under the Robinson-Patman Act is quite extensive and is not limited to entering orders directed only to specific violations found to exist. *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 681-82 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965). The reason for the rule is simple. A restricted or limited order could be circumvented easily. *See generally* F. Rowe, *supra* note 2, at 504-14; Kinter, *Scope of Federal Trade Commission Orders in Price Discrimination Cases*, 14 BUS. LAW. 1053 (1959).

The order was upheld notwithstanding that A&P's private label arrangement with Borden had ended five years before the Second Circuit's decision. The mere fact that practices have been terminated and that there are written assurances against their resumption does not bar cease and desist orders. *See, e.g.*, *Diener's Inc. v. FTC*, 494 F.2d 1132, 1133 (D.C. Cir. 1974) (*per curiam*); *Cotherman v. FTC*, 417 F.2d 587, 595 (5th Cir. 1969); *Libbey-Owens-Ford Glass Co. v. FTC*, 352 F.2d 415, 418 (6th Cir. 1965). The nationwide scope of the order was upheld because the private label program involved A&P's national director of purchases and was initiated by its national headquarters in New York even though only the Chicago unit was involved. 557 F.2d at 987-88.

212. The Court would have remanded the case had it not wanted to let A&P off the hook. Alternatively, the Court could have decided that the FTC had abused its discretion and overstepped its bounds. *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 366 (1962).

213. 499 F.2d 395 (5th Cir. 1974).

tion 2(b) defense. It also set aside the order against the distributor because the section 2(b) defense precluded a finding of a section 2(a) violation. The court in *Harbor Banana* apparently took the derivative nature approach of the majority in *A&P*. It must be emphasized, however, that the case involved neither the lying buyer of *Kroger* nor the possibly "overly hard" bargainer of *A&P*. Although the result is consistent with *A&P*, it is not inconsistent with Justice Marshall's dissenting opinion.

In *Big Value Stamp Co. v. Sperry & Hutchinson Co.*,²¹⁴ a treble damage action, the District Court for the Southern District of Ohio held that a party barred from maintaining a section 2(a) action against the seller also was barred from maintaining a section 2(f) action against the buyer.²¹⁵ According to the court in *Big Value*, the two sections are closely related, and the purpose of section 2(f) is merely to place the legal responsibility for the prohibited price discrimination on the buyer as well as the seller. That a party would have standing to sue either the seller or the buyer but not the other was inconceivable.²¹⁶ Like *Harbor Banana*, however, *Big Value* is not inconsistent with the Marshall view

CONCLUSION

The decision in *A&P* might be justified despite its effect on section 2(f) if it fosters sporadic price cutting that results in downward price pressures in oligopolistic price systems.²¹⁷ If it does not have this ameliorative impact, then it is unfortunate. The derivative

214. 1967 Trade Cas. ¶ 71,978 (S.D. Ohio 1967).

215. In fact, private plaintiffs bringing § 2(f) actions generally have been unsuccessful or at best partially successful. See, e.g., *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793 (9th Cir. 1969); *Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831 (7th Cir. 1958), *rev'd* 154 F. Supp. 471 (N.D. Ill. 1957); *Kapiolani Motors, Ltd. v. General Motors Corp.*, 337 F. Supp. 102 (D. Hawaii 1972); *Metropolitan Dry Cleaning Mach. Co. v. Washex Mach. Corp.*, 1969 Trade Cas. ¶ 72,686 (E.D.N.Y. 1968); *Rosenfeld Co. v. Lion Mfg. Corp.*, 1961 Trade Cas. ¶ 69,937 (N.D. Ill. 1961); *Robinson v. Stanley Home Prods., Inc.*, 178 F. Supp. 230 (D. Mass.), *aff'd on other grounds*, 272 F.2d 601 (1st Cir. 1959); *Robinson v. Stanley Home Prods., Inc.*, 174 F. Supp. 414 (D.N.J. 1959); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956). The "partially successful" reference is to cases such as *Krug*, in which the adequacy of the § 2(f) complaint was tested by a motion to dismiss rather than by consideration of plaintiff's evidence in support of the allegations.

216. 1967 Trade Cas. at ¶ 83,461.

217. See generally *The Supreme Court, 1978 Term*, *supra* note 9, at 242.

standard of *A&P* has restricted severely the application of section 2(f) and has opened the door to the power buyer abuses that concerned Congress when it passed the Act and concerned the FTC in the early 1970's.²¹⁸ Borden's second bid doubtless was the result of the quantity of Borden products purchased by *A&P*. A small grocery store or even a small grocery chain seeking to establish a private label program probably could not have its estimated annual savings doubled merely by stating that an initial bid was "not in the ball park." In any event, notwithstanding potential benefits from *A&P* on oligopolistic prices, the "solo tango" clearly is a thing of the past. Or it will be if the Supreme Court acts consistently. Thus it still, or perhaps once again, takes two to tango.

218. See generally Galanti, *supra* note 1, at 966-67.