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A NEW PRAGMATISM IN ROBINSON-PATMAN INTERPRETATIONS?

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For a long time the courts have sanctioned the Federal Trade Commission's interpretation of the Robinson-Patman Act rather uncritically. The Trade Commission has in turn worked diligently at pressing interpretations which would facilitate proof of violation and restrict the scope of necessary inquiry to as narrow a base as possible. The asymmetrical grammatical construction of the Act has allowed the isolation and strict interpretation of the various sub-sections. Above all, the Commission has insisted on literal reading of the statutory language when the result favored finding a violation; economic differences were less distinguishing than semantical ones.[1]

Success has its price, however, and the Commission found itself, on at least one occasion, thwarted in an interpretation primarily because of prior compartmentalization. In the *Grand Union* case,[2] the Commission (apparently believing that the provision prohibiting the receipt of discriminatory allowances could apply only to the receipt of cash payments and not on promotional allowances[3]) invoked its jurisdiction under Section 5 of the Federal Trade Commission Act[4] and declared the receipt an unfair method of competition. At that point, it seemed that the Commission was asserting its right to rely, at its option, on either the intricate and sometimes irrational construction applied by literal reading of the statute or something in the nature of a joker which it could use when strict interpretation was unavailing. When the Second Circuit, by a split decision, approved the Trade Commission's position,[5] one could fear that the traditional distribution channels which had long been protected by the Commission through its interpretation of Robinson-Patman had gained a new permanency and that distributive experimentation, however sound economically, was vulnerable. This paper will be a brief attempt at an evaluation of the period since *Grand Union* to see to what extent such pessimism has been justified.

Since *Grand Union*, the Trade Commission has invoked section 5 in a number of cases and has won two additional court tests of its ability to use its broad power to interdict conduct violative of the "spirit" but not the

1. The author's complaints, along this line, are to be found in 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).
2. Grand Union Co., No. 6973, FTC, Aug. 12, 1960.
3. The gist of my article, supra note 1, is that 2(f) properly interpreted, applies equally to both.
4. 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45 (1958).
5. Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

letter of the Robinson-Patman Act.[6] It should be noted, however, that in each of these court tests the issue was precisely the same as in *Grand Union*: a buyer was participating in conduct which for the seller violated the promotional allowance section. No court has yet passed on the Trade Commission's broader assertion that Section 5 of the Federal Trade Commission Act is applicable in any case in which acts are deemed by the Trade Commission to violate the "spirit" of Robinson-Patman.

It may well be that the receipt of a promotional discrimination is expressly covered by a more careful interpretation of section 2(f), a point reserved by the Second Circuit in *Grand Union*.[7] Indeed, the court suggested the possibility of the applicability of section 2(f) by expressly refuting the assertion that were it applicable, section 5 should not have been invoked. Despite the Report of the Attorney General's National Committee to Study the Antitrust Laws[8] recommending that the broad Trade Commission power not be applied to violation of the Clayton Act, Judge Clark stated that he saw no objection to such practice.[9]

In any event, *Grand Union* could hardly be classed as a case broadly supporting the Trade Commission's assertion of the scope of Section 5 of the Trade Commission Act. Judge Clark, after carefully noting the expressed concern over the revolutionary possibilities in this new use of section 5, stated his sympathy with the general objection, but found it "misplaced in the instant case."[10]

Obviously, *Grand Union* raised more questions than it answered. One of the most disturbing is the question whether by invoking section 5 power the Trade Commission can in other cases avoid resolving paradoxes contained in the Act through reliance on what it conceives to be the spirit of the Act. A recent case suggests perhaps not.

In *R. H. Macy & Co. v. FTC*[11] the Second Circuit had before it a slightly different application of the *Grand Union* problem. In the conduct of its one-hundredth anniversary celebration, Macy had solicited approximately 750 of its 20,000 vendors for contributions of $1,000 each to defray promotional advertising costs. A substantial number agreed, apparently without offering similar contributions on proportionally equal terms to Macy's competitors. By so doing they had apparently violated the Robinson-Patman Act. But which section? Despite the similarity between the concession received in this case and concession received in *Grand Union*, a distinguishing feature of the Macy contribution was that the money was to be

6. American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962). Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).
7. Grand Union Co. v. FTC, supra note 5, at 95.
8. March 31, 1955, 148-159 n.78.
9. Grand Union Co. v. FTC, supra note 5, at 95.
10. Id. at 96.
11. 326 F.2d 445 (2d Cir. 1964).

used entirely for Macy's benefit. Section 2(d) of the Robinson-Patman Act applied on its face only to "payment . . . for any services or facilities furnished . . . in connection with the processing, handling, sale or offering for sale of any products or commodities manufactured or offered for sale by such person. . . ."[12] Since there was no connection between the allowance granted and advertising for the supplier, Macy contended that 2(d) did not apply. If 2(d) did not apply, the argument continued, *Grand Union* was also not on point. Without resolving the applicability of 2(d), the Trade Commission found the payment violative of the spirit of Robinson-Patman and consequently of Section 5 of the Federal Trade Commission Act. The Second Circuit affirmed.[13] What is interesting about the affirmance, however, is that the Court of Appeals chose to affirm not on the basis of a violation of the spirit of the Robinson-Patman Act[14] but on the basis of a 2(d) violation. Reasoning that a distinction between allowances given for the benefit of the seller and those coerced solely for the benefit of the buyer should not be invoked on the buyer's behalf in light of legislative history identifying large buyers as the target of the Act, the court found no difficulty in bringing the grant of the allowance under 2(d). Having done that, the case was parallel with *Grand Union*; the remaining problems were disposed of with comparative ease.

It is difficult to read into a case affirming a Trade Commission order a principle limiting the Commission. Nonetheless, it seems that the court went to unnecessary length to make two points. First, by refusing to settle the matter as a violation of the spirit of Robinson-Patman, the court re-emphasized the limited nature of its *Grand Union* holding. Indeed, the very reason that the court invoked to find section 2(d) applicable can be used even more persuasively to demonstrate that the payment in question violates the spirit of the Robinson-Patman Act. Secondly, the court demonstrated how obscurities in the Act can be reconciled along more regular lines of statutory interpretation to arrive at palatable results. The latter may well be regarded as an admonition to the Trade Commission to make some attempt along the same line. It is difficult to assert that Macy's defense *ought* be determinative of the issue of discriminatory allowance payments, except on the grounds favoring literal interpretation of the Act.[15] Bringing the Robinson-Patman Act to bear by interpretation suggests a viability in the Act that it has infrequently appeared to have previously.

The Federal Trade Commission has also recently been rebuffed in an

12. 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1958).
13. R. H. Macy & Co. v. FTC, supra note 11.
14. Indeed the court stated more broadly, "Nor do we find it necessary to determine whether Section 5 of the Federal Trade Commission Act authorizes the Commission to prohibit any trade practice which it deems to contravene the spirit of the Robinson-Patman Act . . . ." Id. at 447.
15. But see Rowe, Price Discrimination Under the Robinson-Patman Act, 386, 387 (1962).

attempt to do what Macy attempted in the aforementioned case: to base a distinction in result on a strict construction of the language of the Act. In *Exquisite Form Brassiere, Inc. v. FTC*[16] the Commission contended that it did not have to consider the company's argument that it had offered allowances for advertising and premium plans in a discriminatory fashion in order to meet competition. The meeting of competition defense, concededly applicable to furnishing services, was held not applicable to paying for them. The Commission's position was based in part on its interpretation of legislative history; the history involved is sufficiently ambiguous, however, to reduce its position almost to this: The meeting of competition proviso (discussed more fully below)[17] expressly allows justification only for "lower price or the furnishing of services or facilities. . . ."[18] The main distinction between subsections (d) and (e), both of which relate to arrangements for "services and facilities," is that under (d) they are provided by the buyer and paid by the seller while under (e) the seller provides them directly—"furnishes" in statutory language.[19] One is expressly mentioned, the other is not in the 2(b) formula. Consequently 2(b) applies to 2(e) but not to 2(d).

The court considered the Commission's opinion at some length, in part because it stated that it attached great weight to the view of the Commission, reviewed the legislative history proposed by both parties and came to the conclusion, on balance, that nothing in the legislative history supported such a narrow reading of the Act. It then concluded, "We think this is an unrealistic reading of the statute."[20] Analyzing the evil prohibited by the Robinson-Patman Act, the court said in language which might have been equally applicable in the Macy controversy, "Congress was here dealing with a fundamental economic concept; it was not shadowboxing or indulging in fine semantic shadings."[21]

One further illustration on the peripheral problems of Robinson-Patman enforcement will perhaps suffice to make the point. In *Nuarc Co. v. FTC*[22] the Trade Commission had found certain advertising payments to be a violation of section 2(d). A publisher who was also the controlling shareholder in a company manufacturing and distributing printing and lithograph equipment had solicited suppliers of the manufacturing company for advertising in his publication. Their placing of ads was held illegal by the FTC. Finding the evidence of a connection between the publishing business and the manufacturing business to be insubstantial, the Seventh Circuit set aside the Trade Commission order. The mere profit made

16. Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962).
17. See note 42 infra and accompanying text.
18. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).
19. 49 Stat. 1526 (1936), 15 U.S.C. § 13(d), (e) (1958).
20. Exquisite Form Brassiere, Inc. v. FTC, supra note 16, at 502.
21. Ibid.
22. 316 F.2d 576 (7th Cir. 1963).

by the controlling shareholder of the manufacturer in his role as controlling shareholder of the publisher was not the kind of discriminatory benefit that the Act was designed to prevent, held the court.

It should be noted that great care was taken by companies in this case to keep the two enterprises separate.[23] Indeed, the manufacturer was required to pay standard rates for advertising in the publisher's publication, although one may wonder whether this fact is significant with respect to the benefited controlling shareholder. The supplier's payments were made at standard advertising rates—the same rates paid by competitors of the supplier who were apparently also customers of the publisher. Lack of connection between the publisher and printer made it possible for the court to distinguish this case from the principle case suggesting the opposite result,[24] in which payments for advertising space in A & P's publication had been held a violation of 2(d). In both cases money was paid solely for advertising services rendered. A lack of proportionally equal payments had been found sufficient to interdict the A & P arrangement. As a result the Trade Commission reasoned that *payment* to a customer, even through an intermediary, was itself prohibited. Reading the legislative history to require something more, the court disagreed. "We believe that Section 2(d) requires a showing that some benefit accrued to, or was intended to accrue to, the customer. . . . The only benefit that could have possibly accrued to . . . [the manufacturer] was through the indirect route of profits from the printing business accruing to . . . the owner of both enterprises. This, without more, cannot be the basis of a Section 2(d) violation. A contrary decision would operate as a compulsory divestiture for any owner of an advertising medium that also engaged in a separate enterprise selling products advertised in his publication. The evidence contradicts any inference that other indirect benefits were intended. . . ."[25]

In annunciating the benefit requirement for 2(d) violations the court was not unmindful of *P. Lorillard Co. v. FTC*[26] which it quoted at some length. That case, of course, stood for the converse proposition that where the interdicted benefit accrued, the fact that it resulted from what appeared to be two separate transactions and did not flow directly from the supplier to the customer was not determinative. *Nuarc* also suggests that literal reading of the statute, which provides *disjunctively* against payments to a customer and payments for a customer's benefit, will not necessarily lead to

23. Both the reviewing court and the Federal Trade Commission agreed that in its inception the arrangement was a violation of 2(d). In initial letters, solicitations for advertising indicated a direct link between the promotion of the manufacturing business and the intended publication. No ads were placed during this period, however, and the court and Trade Commission disagreed as to whether the original infirmity in this scheme pervaded its later realization.

24. State Wholesale Grocers v. Great Atlantic & Pacific Tea Co., 258 F.2d 831 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1959).

25. Nuarc Co. v. FTC, supra note 22, at 582.

26. 267 F.2d 439 (3d Cir. 1959).

appropriate results. The realities of a discriminatory benefit may be a more reliable criterion for distinction.

Anticompetitive Effect. Having examined a few peripheral problems of price discrimination, it is interesting to compare some recent developments in sections which go more to the heart of Robinson-Patman discriminations. Two recent cases have given interesting insights into the meaning of the anticompetitive effect required in the basic price discrimination provision itself.[27]

Even unjustified discriminations do not violate the Robinson-Patman Act unless their effect is anticompetitive if they take the form of 2(a) price reductions. It is thus possible for a seller to have different prices for different customers of the same product in some circumstances. For example, a seller appears to have the right to make a territorial reduction as a legitimate competitive response to local conditions (even though it may not meet the 2(b) defense) where the discrimination does not affect competition among his customers but rather runs against one of his own competitors ("primary-line competition"). *Anheuser-Busch, Inc. v. FTC*[28] suggested broadly that, under such circumstances, an absence of a broadly defined anticompetitive effect barred interdiction of localized price reductions.[29] However liberating that opinion may have been on the ability of the seller to compete with other sellers of similar products, it did not go very far in suggesting how a seller might pragmatically determine in advance of his price reduction whether the Robinson-Patman Act would allow it or not. In light of the fact that the court in *Anheuser-Busch* found no quarrel with the decision of the previous cases which had interdicted what it characterized as "predatory misconduct" in cases in which the localized price reduction was too effective, the line to be drawn appeared still to be nebulous.

Shore Gas & Oil Co. v. Humble Oil & Refining Co.[30] provided a considerably less involved approach. In a highly competitive local market the defendant oil distributor was able to obtain a substantial customer (a cab company consuming about 50,000 gallons of gasoline a year) which had previously dealt with the plaintiff, on the basis of a price concession which brought its price below that otherwise charged. Plaintiff, having lost a customer, brought suit under the Robinson-Patman Act charging a primary-line section 2(a) violation. Requiring proof of "causation" the district court set a pragmatic test for compliance in primary-line price discrimination cases and, on that basis, granted summary judgment to the defendant. Plaintiff must show, said the court, not only the lowered price which caused the

27. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1958).
28. 289 F.2d 835 (7th Cir. 1961).
29. It was significant in that case that the court read the record as precluding a predatory territorial price reduction aimed at eliminating a competitor. Also significant was the fact that it found the petitioning company to have exercised "restraint" in invoking its local pricing in the area in question. Id. at 842.
30. 224 F. Supp. 922 (D.N.J. 1963).

injury but that the price was subsidized by higher prices elsewhere. Otherwise, the injury caused would have been caused only by the low price not by the "discrimination."[31] Having said that, the rule was comparatively easy to state,

> [I]t is the general rule in territorial primary line injury cases that to establish the necessary causative link between the price difference and the injury to competitors and competition, it must be shown that high prices aided the injurious low prices and enabled defendant to charge them. Conversely, if no relationship is shown between prices in the low price area and prices in other areas, the injured party's case fails for lack of causation . . . . When a seller underbids a competitor, thereby injuring him, the injury is an "effect" of discrimination only if the low price is supported by other prices and their profits, wherever charged. Otherwise, the low price alone has caused the injury and the price discrimination is but incidental. Thus, if it is shown that the low bid is below cost, it is fairly inferrable that profits made on other prices financed the complained-of low price. If the price is completely self-sufficient, it may be inferred that no relationship between high and low prices exists, and therefore that the discrimination had not the proscribed "effect."[32]

According to the court, the seller need merely satisfy himself that his local price is self-sufficient to determine the legality of the price under 2(a). Indeed, it is the comparative simplicity of this test that the court finds most appealing. Striking at the "compete-at-your-own-risk-policy" which it finds an alternative to some reasonably predictable means of establishing the propriety of territorial price competition, the court states that reconciliation of Robinson-Patman with broader aims on antitrust laws requires no less and concludes "competition, while it may take many forms, is most meaningful and vigorous when it consists of or includes price rivalry. We must read the Act to encourage price competition wherever possible. Price uniformity is the anti-thesis of competition."[33] The rationale is rather broad. The case is a private treble damage action to begin with. The competition involved does not partake of the kinds of activity condemned in *Anheuser-Busch*. Yet following the court's reasoning, one would come to the same conclusion for any injury which was caused by a self-sustaining price in a primary-line case.

When price discrimination effects competition between customers of the seller, a much stricter standard applies.[34] Mere granting of a price discrimination in these cases is usually sufficient to establish a 2(a) violation, since the probability of injury to the high-price buyer is in the normal case "self evident." Even this easy characterization, however, must yield to

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31. Causation, which is equally essential to a cause of action, is more subtle and difficult to discern. Injury is not an "effect" of discrimination directly. Rather it is the result of a low price which a discrimination in price allowed the defendant to charge. High prices provide for the predatory defendant the profit margins with which to lower other prices and undercut competitors. The existence of a difference is essential to the injury. The injury is an effect of the discrimination.

Id. at 925.

32. Id. at 926.
33. Id. at 927.
34. FTC v. Morton Salt Co., 334 U.S. 37 (1948).

economic reality. In local gas price wars, discrimination may be temporary. Can one infer from a short period of discriminatory pricing that the requisite anticompetitive effect has been established? Ruling on precisely this question in *American Oil Co. v. FTC*, the Seventh Circuit held no.[35] Instead the court held that the Trade Commission would have to demonstrate competitive injury. At least with respect to discriminations for so short a period, *Anheuser-Busch, Inc. v. FTC*[36] applied. A long-term discrimination between competitive customers, as in *Morton Salt*[37] presents, according to the court, a probability of injury considerably different than the one in *American Oil*. During the shorter period, a price differential may or may not have caused significant injury to competition among gas stations. The Commission is put to its proof.

Finally, the Supreme Court suggested by way of dictum in *FTC v. Sun Oil Co.*,[38] a case that is discussed more fully in another context below,[39] that there remains yet another entirely different area of flexibility. Sun Oil had argued before the Supreme Court that to interdict its action in the face of price wars and to require of it area price uniformity would have the result of substantial price stultification. According to Sun, its dealers were so situated that if it retained its present distributive scheme any geographic line which was drawn for a price zone would find a dealer close enough to his nearest competitor who was charged a different price to make out a case of discrimination. To this assertion the Court had several replies. One of them suggested feathered discounting "under which the amount of the price allowance diminishes as it reaches stations further away from the center of the price war . . . ."[40] Indeed, even without feathering, the Court suggested "in appraising the effects of any price cut or the corresponding response to it, both the Federal Trade Commission and the courts must make realistic appraisals of relative competitive facts. Invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis. In cases in which the economic facts so indicate, carefully drawn area submarkets may be the proper measure of competitive impact among purchasers."[41] Without certainty as to a definition of "submarket" which will fit a price discrimination context one can, nevertheless, assert two charac-

35. American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963).
36. 289 F.2d 835 (7th Cir. 1961).
37. FTC v. Morton Salt Co., supra note 34.
38. FTC v. Sun Oil Co., 371 U.S. 505 (1963).
39. See note 57 infra and accompanying text.
40. FTC v. Sun Oil Co., supra note 38 at 527 n.17:
[I]t may be noted that a properly designed and limited price reduction system fashioned in such a manner might, under appropriate circumstances, be found to have obviated substantial competitive harm to the other Sun dealers and thereby negated a violation of § 2(a) such as is here charged. Of course, improperly designed or too sharply drawn "feathering" gradations may produce precisely the same effect as no gradation at all, and consequently fall within the same ban as an outright legal discrimination.
41. Id. at 527.

teristics of such a "submarket." It is likely to be smaller than a "market" and it is likely to be somewhat more pragmatically structured.

The determination of the three cases seems to be that the anticompetitive effect of a price discrimination is not to be judged any longer by semantic formulas. Especially in primary-line cases, but apparently in secondary-line cases as well, pragmatic approaches based on economic realities seem to have found new currency.

The Meeting of Competition Defense. A justification for price discrimination under the Act is provided by the 2(b) meeting of competition defense.[42] Since the defense successfully invoked allows the seller to justify a discrimination in price under 2(a) (as well as a 2(d) or (e) violation)[43] on the ground of self interest without taking into account the anticompetitive effect that may be occasioned on others, the section has a controversial history. It has never been a favorite of the Commission which has attempted to limit the section by a strict reading and extreme interpretation.[44] The courts have been more agreeable. The Trade Commission held that the meeting of competition defense was applicable to the furnishing of services but not to their payment; the courts disagreed.[45] And the Trade Commission ultimately capitulated.[46]

The Trade Commission has taken a very narrow position with respect to the facts required to invoke a 2(b) defense.

> We think the emphasized words place two requirements on the seller who would avail himself of this defense. First, the seller in making the defended sale must have acted for the purpose of meeting a competitor's equally low price. The phrase "made . . . to meet" can mean no less. . . .
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> Secondly, a discriminator seeking to avail himself of a section 2(b) defense must not only have satisfied the meeting of equally low price, but that purpose must have been conceived "in good faith." In this connection it must be noted that section 2(b) deals not only with tangible, objective facts, but with a state of mind as well. Thus, the mere fact that the competitor *has* sold to a buyer at a particular price does not standing alone preclude a discrimination made to "meet" it.[47]

In other words, in order to invoke the defense, the respondent must successfully ascertain the identity of the competitor and the quantum of the discount. Blundering into an appropriate discount is not enough. Furthermore, the Commission held it is imperative that the discount be given only to customers actually solicited by a competitor. With respect to any customer who had not received a competitor's offer (whether or not such offer was generally available in the area), the defense did not apply. The Fifth Circuit has strongly suggested that it would not require such

42. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1958).
43. Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962); Exquisite Form Brassiere, Inc. v. FTC, supra note 16.
44. See, e.g., Exquisite Form Brassiere, Inc. v. FTC, supra note 16 and accompanying text.
45. Ibid.
46. J. A. Folger & Co., No. 8094, FTC, Nov. 14, 1962.
47. Forster Mfg. Co., No. 7207, FTC, March 18, 1963.

custom tailoring of discounts and might be prone to accept discounts made generally available in the area although it had not specifically reached this point.[48] Professor Handler argues convincingly that the Trade Commission's assertion that an offer must have been received from the discriminator's competitor was impliedly rejected in *Sun Oil*.[49]

The Commission has taken the position that price cuts made to meet competitor pricing as a means of obtaining new customers is not covered by the 2(b) justification. Reasoning that such an interpretation would stifle competition for new customers and force a monopoly, the Seventh Circuit reversed.[50] The Commission has declined to follow that case.[51]

An even greater division of opinion can be found on whether the price to be met must be known to be lawful, supposed to be lawful, or just not known to be unlawful. Until very recently the Trade Commission had apparently taken the position through *Tri-Valley Packing Ass'n*[52] that the respondent had the burden of proving facts which would lead a reasonable person to believe that the competitor's price being met was a lawful price. The second point of view comes from Commissioner Elman's dissent in the same case. He would then have required nothing more than that the seller would have had no reason to believe the prices he met to be unlawful. The case is on appeal in the Ninth Circuit Court of Appeals.

Since that time we have at least one other point of view. Dissenting in *Continental Baking Co.*,[53] Commissioner MacIntyre suggested the following:

> Perhaps, in the years ahead, the Supreme Court again will be provided with an opportunity to review this sort of problem. If it should, I feel confident it will reconsider its use of the term "*lawful price*" in the *Standard Oil* case and modify its ruling so as to preclude justification of unlawful destructive price discrimination on the basis of self defense against *lawful conduct*. If that should be done, undoubtedly the Court will make it clear that the "good faith defense," while not applicable to such situations of unlawful pricing as were involved in the *Staley* case, is, nevertheless, available as a matter of self defense and complete justification for the use of price discrimination to combat unlawful and wrongful pricing practices of competing sellers.[54]

Apparently Commissioner MacIntyre, preoccupied with the law of self defense, would change the requirement to proof of the *unlawfulness* of the pricing. One can see from the mere listing of the above-mentioned problems that the position of the Trade Commission has been to favor a restrictive point of view.

The last-quoted case suggests that the Trade Commission's position

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48. General Gas Corp. v. National Utilities of Gainesville, Inc., 271 F.2d 820 (5th Cir. 1959). Cf. Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956).
49. Handler, Recent Antitrust Developments, 112 U. Pa. L. Rev. 159, 185 (1963).
50. Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).
51. Trade Reg. Rep. ¶ 50166 (Nov. 23, 1962).
52. Trade Reg. Rep. ¶ 15893 at 2074 (May 10, 1962).
53. Trade Reg. Rep. ¶ 16720 (Dec. 31, 1963).
54. Id. at 21650.

may be changing somewhat. Writing for the majority, Commissioner Elman, in *Continental Baking Co.*, had these words to say about section 2(b):

> At the heart of Section 2(b) is the concept of "good faith." This is a flexible and pragmatic, not technical nor doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity. [Citations omitted.] Such a standard, whether it be considered "subjective" or "objective," is inherently *ad hoc*. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories nor remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such inference in others.[55]

Unfortunately the broad and reassuring language of Commissioner Elman occurred in a model case of meeting of competition. The respondent abstained from discriminatory pricing at considerable loss for a substantial period. Thereafter it adopted a highly selective discount system—on an individual basis to meet actual competitive offers. The recipients of the allowances were questioned as to the terms of their offers, and their stories were verified. Even under the Trade Commission's most stringent recent decisions this was a good faith meeting of competition.[56]

The 2(b) defense has now also been before the United States Supreme Court. The resulting decision, *FTC v. Sun Oil Co.*,[57] however, leaves more questions unanswered than answered. Sun Oil had lowered its price to a small retailer who was engaged in a price war with a neighboring station. The Trade Commission held good faith meeting of competition inapplicable. The Fifth Circuit reversed[58] only to be reversed in turn by the United States Supreme Court. Unfortunately for the clarity of the resulting decision, it may well turn on differences in the facts perceived by the Fifth Circuit and those perceived by the Supreme Court. The Court of Appeals had treated the neighboring "independent" as an integrated supplier-retailer while the Supreme Court, finding nothing in the records to support that conclusion, treated it as an independent retailer. The Fifth Circuit assumed that the price war was subsidized by a competitive oil company through the independent station while the Supreme Court could find no evidence indicating anything but price competition based on the greater efficiency of the independent retailer. These factual differences are, of course, more than enough to account for the different conclusions of the courts.

The rationale of the Supreme Court in the initial portion of its opinion does not seem to depend on this factual distinction. The Court explains, at some length, that a rather curious reading of the statute is required in order to interpret it as applying to a buyer's customers rather than the

55. Id. at 21647.
56. See note 47 supra and accompanying text.
57. FTC v. Sun Oil Co., 371 U.S. 505 (1963).
58. Sun Oil Co. v. FTC, 294 F.2d 465 (5th Cir. 1961).

seller's. The argument is convincingly made.[59] One is led to wonder, however, if the matter is settled by the statute, why the Court should have felt compelled to point out that should the independent station turn out to be an integrated supplier-retailer a different case would be presented.[60] If the case turns on interpreting the statute to allow the seller only to match other seller's prices, the integration or lack of integration of the competitor would not seem relevant. Nor could one explain the Court's lengthy economic justification of the conclusion. Indeed, if the retailer were not the efficient solo retailer which the Court assumes, the economic explanation would have considerably less force.

In any event it is impossible to read the probing opinion of the Court and believe that meeting of competition can any longer be interpreted without recourse to an economic evaluation of the circumstances. It should be remembered that whatever was said in the opinion about statutory interpretation must be read in conjunction with the Court's suggestion that "invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis."[61]

As in the area of definition of anticompetitive effect, some evidence is to be found of a greater pragmatism in approach. While it is still far from clear what information must be available to the supplier to justify his pricing differential, the courts have suggested, and the Trade Commission has now said, that reasonable business judgment may suffice as a standard of evaluation both of the existence and the lawfulness of the price. Furthermore, the scope of the competitive exception may be broadened to include aggressive price cutting and, perhaps, to allow an area response to an individual competitive offer. Most speculative, and most interesting, is what kind of competition is included in the defense. If something other than the seller's competition is included in the "other case" which the Supreme Court did not reach, the section is sure to have a substantially increased effect.

Buyer Cooperatives. In an industry in which distribution is complex and distributive integration is extant in varying degrees several special problems with functional pricing must be faced.

In the more traditionally organized industry, one would expect a seller normally to have several prices, functionally distinguished from each

59. 371 U.S. at 514:
Reading the words to have "their normal and customary meaning," . . . the § 2(b) phrase "equally low price of a competitor" would seem to refer to the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut. . . . Were something more intended by Congress, we would have expected a more explicit recitation as, for example, is the case in § 2(a) in which the intent to give broader scope was expressly effected by the prohibition of price discriminations which, *inter alia*, adversely affected competition not only with the seller . . . who grants the favored price, but with the knowing recipient thereof . . . and "with customers of either of them."

60. Id. at 512.

61. Id. at 527.

other. Thus one would expect that a wholesaler would receive a lower price than a retailer and indeed, were this not so, wholesalers would have greater difficulty. The same thing is true for most middlemen and it is normally not objectionable for the seller to distinguish pricing among the various levels of distribution on a functional scheme. In the complex industry, however, an additional problem arises. How does one identify the person entitled to a functionally separate price? Will the label of the customer or the function he performs govern? There once was unanimity on the correctness of the latter alternative.

The Attorney General's National Committee to Study the Antitrust Laws[62] stated:

> To relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions thwarts competition and efficiency in marketing. It compels affirmative discrimination against a substantial class of distributors and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his supplier of risk, transportation, administration, etc., his performance, his capital investment and the saving to his suppliers, are unaffected by whether he also performs a retailing function, or any number of other functions. A legal rule disqualifying him from discount recognizing wholesale functions actually performed compels him to render these functions free of charge. The value of the services is pocketed by the seller who did not earn it. Such a rule proclaims as a matter of law that the integrated wholesaler-retailer cannot possibly perform the wholesaling function; it forbids the matter to be put to proof.

The Federal Trade Commission once agreed. In *Doubleday and Co.*[63] the Commission held:

> In our view, to relate functional discounts solely to the purchaser's method of resale without recognition of his buying function thwarts competition and efficiency in marketing, and inevitably leads to higher consumer prices. It is possible, for example, for a seller to shift to customers a number of distributional functions which the seller himself ordinarily performs. Such functions should, in our opinion, be recognized and reimbursed. Where a businessman performs various wholesale functions, such as providing storage, traveling salesmen and distribution of catalogues, the law should not forbid his supplier from compensating him for such services. . . . On the other hand, the Commission should tolerate no subterfuge. Only to the extent that a buyer actually performs certain functions, assuming all the risks and costs involved, should he qualify for a compensating discount. The amount of the discount should be reasonably related to the expenses assumed by the buyer. It should not exceed the cost of that part of the function he actually performs on that part of the goods for which he performs it.

The Commission's statement was a good one. While in the last paragraph the standard of functional discounts was held necessarily limited to a payment reasonably related to the services rendered, it should be noted that there was no requirement that functional discounts be cost justified; cost justification, or at worst cost justification coupled with proportional equality,[64] would suffice to justify a price discrimination without the need for a theory of functional discounts.

62. 1955, p. 207.
63. 52 FTC 169, 209 (1955).
64. Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962).

The harmony was ended, however, by the Trade Commission's abandonment of its earlier position. The result left some aspects of functional discounting to be hammered out by the court.

In a number of industries buyers have formed cooperative purchasing groups of one sort or another. Some of these have been found paper thin. For example, in *Mid-South Distributors v. FTC*[65] the group, which had been able to get substantially reduced prices for its members, existed in the form of two cooperatives. The cooperatives had obtained aggregate volume discounts by lumping the purchases of all members as though they came from one customer. The cooperative seemed to the court to perform no substantial service other than placing the orders. It would be difficult under such circumstances to find a function (other than brokerage) for which a discriminatory price might be allowed. Neither the Trade Commission nor the court did. As a matter of fact an independent reason for striking price discrimination to these buyers existed in the form of the 2(c) anti-brokerage discrimination provision.

What of more sophisticated arrangements? If the buyers' organization, in addition to mere placing of orders, utilizes warehousing facilities in the distributive process would that change the *Mid-South* result? In the *Alhambra Motor Parts*[66] case the Trade Commission was inclined to believe that it did not, or, at least, not much. The court disagreed,[67] finding that the Commission was required to consider cost justification of the price differential. If cost justification was available, since the justification here would be based on warehousing facilities, the additional question of the availability of similar discounts on proportionally equal terms to independent jobbers might be raised, said the court, although it appeared to be uncertain as to whether this would be required.[68] Even more intriguingly, the court suggested that a sufficiently sophisticated arrangement might convert the jointly-owned buying group from the status of an intermediary whose discounts are to be judged by the effect on the jobber-owner's competitors to an independent buyer entitled to a functional discount to be judged by the effect on others on its functional line (in this case warehouse distributors). Since the trial examiner in *Alhambra* has held that the jobber members were the buyers rather than their jointly-owned buying group, the court did not expand on this point.

On the other hand, in a case dealing not with a joint-buying group but merely with functional discounts, the Trade Commission made it clear that its view on that subject was now a harsh one indeed. In *Mueller Co.*[69]

65. 287 F.2d 512 (5th Cir. 1961).
66. No. 6889 FTC, 1960.
67. Alhambra Motor Parts v. FTC, supra note 64, at 215.
68. See Rowe, Price Discrimination Under the Robinson-Patman Act, 377-381 (1962) (finding 2(d) inapplicable to such cases).
69. No. 7514, FTC, Jan. 22, 1962.

it held discriminatory a ten per cent additional discount given to "stocking" jobbers over regular jobbers on the basis of warehousing provided by the "stocking" jobber. While there was a finding that the extra ten per cent was sometimes received on items for which warehousing was not required, the brunt of the opinion rested on the fact that the discount was not cost justified and also that it was not entirely available on a proportionally equal basis. As previously mentioned, the dual requirements imposed, negate giving the buyer the benefit of functional status. He is treated as all other purchasers who do not perform the function save only for an amount which can be "cost justified" and made available proportionally to his competitors, grounds which would justify non-functional discriminations of all sorts save brokerage discounts.

The Seventh Circuit affirmed in *Mueller Co. v. FTC.*[70] Judge Swygert in a vigorous dissent succinctly characterized the holding:

> According to the Commission's present view, legal recognition cannot be given to the fact that a customer integrates a warehousing function with his selling function and is compensated for so doing by lower purchase price. The Commission maintains that only the selling characteristics of the customer, i.e., whether wholesaler or retailer, should be considered when setting prices.

He disagrees, adding "labels should yield to realities."[71]

As for the other half of the suggestion in *Alhambra,* namely that an independent buying group, wholly owned by buyers on a lower level of distribution, might successfully obtain a functional discount commensurate with the discount of those competing on the higher distributive level, the Commission recently made it clear that it did not consider it possible. In *National Parts Warehouse*[72] the Commission held illegal the receipt of a price reduction by a limited partnership created by individual automotive part jobbers. It was apparently not disputed that, with respect to the bulk of purchases made, the partnership performed a substantial warehousing function. Claiming to have breathed life into their creation, the jobbers insisted on its independent right to obtain a functional discount. The Commission's answer was comparatively terse. A controlled purchaser may not get a functional discount which could not be justified for the controlling group. Control was a simple matter of income flow. Since the income of the partnership went to the jobber, control, according to Chairman Dixon, was established. Commissioner Elman filed a vigorous dissent pointing out that the Commission's decision essentially prevented independent jobbers from achieving a measure of functional integration even in a case such as the instant one where such integration would be possible without anticompetitive results.

Another line of cases had a close relationship to these functional dis-

70. 323 F.2d 44 (7th Cir. 1963).
71. Id. at 48-49.
72. No. 8039, FTC, June 12, 1962.

count cases: the cases dealing with the payments made in lieu of brokerage under Section 2(c) of the Robinson-Patman Act.[73] Since 2(c) prohibits discriminatory payment for or in lieu of brokerage almost absolutely,[74] to the extent that a joint buying group attempts to obtain from suppliers a price discrimination for the performance of brokerage services such an attempt must fail.[75] In any case in which suppliers use brokers for sales to some customers but not to others and a discount is given to some direct-buying customers, two questions arise. First, was there any allowance "in lieu of brokerage" in the sales in which brokers were not used? And secondly, if so, how much? The Supreme Court spoke to the second problem in *FTC v. Henry Broch & Co.*[76] In that case an independent broker lowered his "usual" commission of five per cent to three per cent in order to affect a transaction. The two per cent saving was passed along as part of the reduction to the purchaser. The Supreme Court using the five per cent usually charged as the measure of the value of the brokerage service found a violation of 2(c) with respect to the reduced two per cent. It specifically rejected an argument that the two per cent was merely a 2(a) discrimination which was passed on to the buyer as part of the seller's cost saving since, after all, the seller had had its brokerage fee reduced by two per cent. In this respect the Supreme Court was quite clear that 2(a) and 2(c) were to be isolated in application.

To the Trade Commission the meaning of the case was clear. The price of brokerage was the high price paid for it. A reduction from that scale was a reduction in lieu of brokerage. The implication of that interpretation for a group having a measure of functional integration is equally clear. Their brokerage costs and the brokerage costs to non-integrated buyers should be identical. Not so, said the court in *Thomasville Chair Co. v. FTC.*[77]

> We recognize that the Supreme Court has clearly and definitely held that even though the language of Section 2(a) may be broad enough to warrant the precise reduction in price that was put into effect by Broch and Company in the case then before the Supreme Court, the prohibitions of Section 2(c) are to be read independently and thus to that extent modify the broad proviso of Section 2(a). However, as we read it, the Court's opinion says that a reduction in price, giving effect to reduced commissions paid by the seller, are a violation of Section 2(c) only if such reduction in price is "discriminatory." We read that to mean "without justification based on actual bona fide difference in the costs of sales resulting from the differing methods or quantities in which such commodities are sold or delivered."[78]

On this basis the Court concluded that the Trade Commission could not prohibit a dual sales commission scheme in which some customers

73. 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1958).
74. See generally FTC v. Henry Broch & Co., 363 U.S. 166 (1960).
75. American Motors Specialties Co. v. FTC, 278 F.2d 225 (2d Cir. 1960).
76. Supra note 74.
77. 306 F.2d 541 (5th Cir. 1962).
78. Id. at 545.

were serviced on a three per cent sales commission and charged accordingly while others paid a price based on the seller's payment of a six per cent sales commission on sales to them. Before the discount to the former group could be declared illegal, the Court held, the Commission would have to permit a full scale inquiry into the extent of cost savings inherent in salesmen's handling of the favored customers and the consequent propriety of the lower sales commissions.

The other problem may be more difficult. The fact of a price reduction is not determinative of the passing on of brokerage favors. The Supreme Court in the *Broch* case specifically approved the Trade Commission's holding in *Main Fish Co., Inc.*[79] in which the Commission explained at length how difficult it was to extrapolate from the differing prices for fish whether a given price included a payment in lieu of brokerage. Obviously something more than a reduction in price need be shown. Indeed, even a reduction called a reduction in brokerage may turn out to be another type of functional discount on closer analysis.[80] Once a reasonable inference of brokerage is established, the Commission may shift the burden of proving that a discount was given for some reason other than brokerage to the grantor.[81] At what point may such inference be drawn?

Central Retailer-Owned Grocers, Inc. was another wholly-owned buying cooperative. It "bought" food products on which it applied its private label, the food being shipped directly from supplier to retailer but being billed to and paid by C.R.O.G. On purchases of its private brand merchandise no brokerage commission was paid although suppliers usually paid brokerage on their packer label products. Finding a rough mathematical correlation between discounts received by Central and the brokerage usually charged by the supplier, the Trade Commission held that it had established a 2(c) violation. Denying that the inference could be so readily established, the Seventh Circuit said,

> The inference upon which the Commission's finding and order are based has no substantial evidence in the record to support it. Instead, the record convincingly shows that the payments made by Central to its suppliers were for merchandise which it bought upon its own credit and not on orders of its members transmitted by it to the suppliers. The fact that Central, because of its strong purchasing power, was able to buy at favorable prices, or on discounts and allowances by its suppliers, is not proof that Central was rendering a brokerage service. It bought on its own order and on its own credit. It was billed by the suppliers and it paid the bills. A broker does not purchase for his own account, is not billed by the seller, and does not make payments to the seller. Central was able to secure favorable prices from its suppliers, because of (1) their assured volume of business, (2) their lack of any credit risk, (3) a reduction in their billing work, and (4) Central's advance commitments for later requirements.[82]

Lest the court be misinterpreted, the breadth of its holding was

79. 53 FTC 88 (1956).
80. Edward J. Hruby, No. 8068, FTC, Dec. 26, 1962.
81. FTC v. Washington Fish & Oyster Co., 282 F.2d 595 (9th Cir. 1960).
82. Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410, 414 (7th Cir. 1963).

quickly explained. "Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chain stores."[83] The opinion went on to quote a speech reputedly made by FTC Chairman Paul Rand Dixon in which he pointed to retailer-owned cooperative food wholesalers as the only answer to the extermination of small independent grocery stores. Since these independents were the prime intended beneficiaries of the Robinson-Patman Act, it is not surprising to find the court solicitous.

One thing is clear. *Central Retailer-Owned Grocers, Inc.* underlined the requirement that the Trade Commission establish the passage of the allowances in lieu of brokerage by something other than a bare reduction in retailer price. What is not so clear is how much more the case holds. By its strong emphasis on purchases made by C.R.O.G. for its own account, rather than as broker for its members, the court seems to be according jointly-owned buying groups a new functional status. Which of the activities of the cooperative are sufficiently unrelated to the "commission, brokerage, or other compensation," which the act prohibits being compensated by discriminatory reductions in price, is not clear. Even less clear is the apparent assertion that *none* of the discount given for the services rendered by the cooperative were discounts in lieu of brokerage.[84] If the brokerage allowance problem can be avoided by groups functioning as the one in the instant case, buyer's cooperatives have great potential for competition with integrated firms. The benefits of such a rule, however, also seem to run to the larger firms with whom the cooperative's members compete. They ought also on such analysis to be able to create wholly-owned buying companies capable of avoiding at least the per se interdiction of allowances in lieu of brokerage.

A wide gulf separates recent court suggestions of buyer group autonomy from the Trade Commission's present position equating such groups and their owners. Between the two, the possibility of distinguishing on the basis of the competitive effect of functional integration seems to be frequently overlooked. To be sure, little would be added by viewing anticompetitive effect solely in terms of the impact on non-integrated buyers; on the *Morton Salt* analysis, they might well be injured.[85] Since the identical language has been interpreted, in primary-line discrimination cases, to require a more rigorous examination of the effect on competition than a mere effect on one competitor would disclose,[86] a broad inquiry into competitive injury might help decide cases.

83. Id. at 415.
84. "There were no savings in brokerage expenses involved in this case. . . ." Ibid.
85. See supra note 34 and accompanying text.
86. See supra note 28 and accompanying text.

For the buying cooperative, then, the prediction of greater flexibility in the future must be hedged more than the comparable prediction with respect to seller flexibility in general pricing. It will depend in part on the persuasiveness of the *Thomasville Chair* and *Central Retailer-Owned Grocer* cases in other courts. At least, the cases do represent a wedge in the Trade Commission decision to ignore the existence of the groups entirely for purposes of analysing pricing differences.

Conclusion. It is difficult to say what recent cases, such as the ones reviewed, have done to the Robinson-Patman Act. It is easier to say what they have not done. They have clearly not erased the main thrust of previous decisions which have been accused by so many as having created a state of soft competition. One does find more reference in the opinions, however, to such things as economic realities concerning the litigants involved and less reliance placed on conclusions reached solely by strict interpretation of the unfelicitous language of the statue. In a statute that is as complex in structure and awkward in form as the Robinson-Patman Act, that alone accomplishes a good deal. Even the Trade Commission is now on record in one decision suggesting that the meeting of competition defense is to be viewed essentially pragmatically. To think that this process, even if it continues, will ultimately lead to a statute wholly consistent with the interpretation of the Sherman Act is to hope too much. Professor Handler may be right when he says "The time is long overdue for a comprehensive legislative revision of the Robinson-Patman Act."[87]

Neither does it seem likely that the Federal Trade Commission will in the future be able to use its Section 5 Federal Trade Commission Act power broadly to strike down whatever practices it conceives ill-founded in the light of the spirit of Robinson-Patman nor that defense lawyers relying on the rule of reason will carry the day. As the Supreme Court said in *FTC v. Sun Oil Co.*, in which it warned against "invocation of mechanical word formulas"[88] to solve Robinson-Patman problems, "We are not interpreting a broadly phrased constitutional provision, but rather a narrowly worded statutory enactment with specific prohibitions and specific exceptions."[89] The two thoughts taken together may well describe the present approach to Robinson-Patman interpretation.

87. Handler, Recent Antitrust Developments, 112 U. Pa. L. Rev. 159, 187 (1963).
88. FTC v. Sun Oil Co., 371 U.S. 505, 528 (1963).
89. Ibid.

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