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COUNSELING SMALL BUSINESS UNDER THE ANTITRUST LAWS AND THE ROBINSON-PATMAN ACT.

Statement by Earl W. Kintner of Arent, Fox, Kintner, Plotkin & Kahn, Washington, D. C., before the Annual Convention of the Colorado Bar Association, Colorado Springs, October 11, 196?

While I was considering Charles E. Grover's invitation to speak at this session of your convention and what I might bring here to benefit your outstanding Bar, I recalled various conversations in recent years with Fred Kirgis, my fellow laborer in the vineyard of the American Bar Association's Section of Administrative Law. Fred was firmly of the opinion that antitrust and trade regulation law had come to the Rocky Mountain area to stay, and we shared the conclusion that this was probably so with respect to all other areas of America, metropolitan or rural. We agreed also that the general practitioner increasingly would be called upon to counsel his clients, large, medium-size, and small, on their rights and responsibilities under such laws.

I doubt whether the framers of the Sherman Antitrust Act in 1890 at the time of its enactment and those that were responsible for the early cases which resulted in the dismemberment of the large trusts could have been aware of the extent to which antitrust litigation would involve small businessmen.

That small businesses are vitally involved with the antitrust laws is a fact which should concern practically every member of the Colorado Bar.

Recently, the Federal Trade Commission issued an advisory opinion indicating that joint advertising by groups of small retail businessmen of uniform prices for the commodities which they sell would constitute a violation of the antitrust laws, although the Chairman and various Commissioners have made it clear that the Commission is unlikely to undertake an enforcement program in this instance, due to the Commission's desire to aid individual small businessmen to compete against their better organized chain store competitors. Recently also, a treble damage suit brought by a retail appliance dealer against large department stores and certain manufacturers of appliances was carried all the way to the Supreme Court of the United States. (Klor's v. Broadway-Hale Stores, 359 U.S. 207 (1959)). The Supreme Court's decision affirmed the small retailer's right to collect treble damages from the defendants for concertedly refusing to sell to him, that is, boycotting him because he did not adhere to the manufacturer's suggested prices. A small retailer in Delaware sued his competitor, also a small retailer, for treble damages because, as the court found, the competitor had agreed with the manufacturer to sell at the price established by the manufacturer, and the manufacturer would not sell to the plaintiff because he refused to sell at the prices established by the manufacturer. (Klein v. American Luggage Works,

206 F. Supp. 924 (D.C. Del. 1962). A New Jersey drug wholesaler brought suit against a drug manufacturer for a refusal to deal which arose out of the wholesaler's refusal to follow certain policies set by the manufacturer. These are merely a few recent examples which I happened to think of at the time I was composing these remarks. There are a host of past and current antitrust treble damage suits and many government suits involving small business. Thus small businessmen find themselves involved with the antitrust laws either as the object of a government investigation or prosecution or as the victim of practices engaged in by their large competitors or by manufacturers or other suppliers which may lead to filing of a treble damage suit, or complaint to the appropriate antitrust enforcement agency. Therefore, counseling small business on antitrust matters involves a knowledge of the substantive law and of the procedures followed by the prosecuting government agencies.

As I indicated, the Sherman Antitrust Law was passed in 1890. The basic statute is very simple. It forbids contracts, combinations and conspiracies in restraint of trade. It also forbids monopolization and attempts and conspiracies to monopolize. The courts have, however, developed the rule of reason, and over the years through their decisions they have held that certain restraints of trade are unreasonable and thus unlawful and also that some business activity necessarily involves restraints of trade which under the circumstances of the overall business transaction

are considered to be reasonable and thus lawful. The courts have clearly told us that price-fixing, boycotts and agreements among competitors to divide territories are _per se_ violations of the Sherman Act. (I might add at this point that as I understand it, a _per se_ violation is one which the courts have examined and found to be pernicious and to have no redeeming virtues, and therefore, not requiring a detailed examination of the business facts surrounding the use of the particular practice for a determination of its reasonableness). Many groups of retailers have been prosecuted for price-fixing, and in my example above I have shown how a small retailer filed a treble damage suit because of injuries he sustained by reason of price-fixing arrangements involving his small retailer competitor. Groups of small retailers have also been prosecuted by the government for boycotting particular suppliers or manufacturers because they had not adopted certain practices advocated by the retail group. And on the other hand, retailers have filed treble damage suits against manufacturers for boycott because of a refusal to follow a policy set by the manufacturers or large competitors.

The Sherman Antitrust law is the oldest of our antitrust laws, and it is enforced exclusively by the Department of Justice's Antitrust Division. However, it is not our only antitrust law. In 1914 Congress passed the Clayton Act, which outlaws certain practices not classified as _per se_ unreasonable under the Sherman Act if the effect of the use of the practice

tends to substantially lessen competition. Such practices covered by the Clayton Act include price discrimination, exclusive dealing arrangements, mergers and certain other practices. In the same year the Congress also passed the Federal Trade Commission Act, which was also designed to supplement the Sherman Act by striking at practices in their incipiency which would be unlawful under the Sherman Act if fully matured. The Federal Trade Commission has exclusive responsibility for enforcement of the Federal Trade Commission Act, and both the Commission and the Department of Justice have responsibility for enforcement of the Clayton Act, except that by arrangement between the two government agencies, the Federal Trade Commission virtually always enforces Section 2 of the Clayton Act which deals with price, advertising and service discriminations, and unlawful brokerage payments. I shall deal with Section 2 of the Clayton Act as amended in 1936 by the Robinson-Patman Act in greater detail in a few moments.

The enactment of the Clayton Act in 1914 also re-enacted a provision for private enforcement of the "antitrust laws" by allowing suits for treble damages by those injured "by reason of anything forbidden in the antitrust laws". (38 Stat. 731, 15 U.S.C. §15). The emphasis on the law permitting private treble damage suits to a great extent provided the framework which gradually led to the present day heavy involvement of small business in antitrust litigation. I have already given you some samples of small business

involvement in Sherman Act litigation. Similarly, Section 3 of the Clayton Act which prohibits a lease or sale requiring the lessee or purchaser not to deal in the goods of the competitors of the lessor or purchaser where the effect of such arrangement "may be to substantially lessen competition or tend to create a monopoly in any line of commerce", involves many small business distributors and franchise holders in antitrust problems. A small retail or wholesale dealer confronted with demands of his supplier that he deal exclusively may refuse to deal on an exclusive basis, and for that reason may be injured by his supplier's refusal to deal on a non-exclusive basis. The small businessman may in such circumstances find himself aiding the government authorities in establishing their antitrust case against the exclusive dealer, or may wish to institute a treble damage suit in an attempt to recover damages which he may have suffered. Osborne v. Sinclair Refining Co., 286 F.2d 832 (4th Cir. 1960), and Susser v. Carvel Corp., 206 F. Supp. 636 (S.D. N.Y. 1962), are cases arising from these circumstances which readily come to mind. Recently also I had occasion to advise a lawyer concerning a suit for eviction brought against his client, a retail gasoline dealer. The eviction suit was premised upon a breach of certain exclusive dealing provisions in a lease and contract which indicated that the lessor was engaging in a tie-in sales policy in violation of Section 3 of the Clayton Act.

The Federal Trade Commission Act has been interpreted to outlaw

those practices which are considered to be violations of the Sherman Act, and as indicated above, to outlaw also incipient Sherman Act practices, as well as false and misleading advertising. Of my own knowledge I know that many, many small businessmen are involved with the Federal Trade Commission concerning the propriety of certain portions of their advertising.

In 1936 Congress amended Section 2 of the Clayton Act to prohibit discriminations in price where the effect of the discrimination was to injure competition, and also provided a scheme for the prohibition of the discriminatory supply of promotional and advertising allowances, services and facilities which manufacturers provide to their customers. These amendments are known as the Robinson-Patman Act, or the Robinson-Patman amendments to the Clayton Act. (49 Stat. 1526, 15 U.S.C. §13). As is the case with other portions of the antitrust laws, small businessmen find that they are prosecuted by the government for practices considered to be in violation of the Act and that on the other hand they aid government in ferreting out violators who cause them injury and they may also institute private treble damage suits for redress of these injuries. Obviously, small business involvement with the antitrust laws covers many of the major provisions of these laws. I would like, therefore, to concentrate on the Robinson-Patman Act this morning and hereafter to share with you the larger portion of a chapter of a book on the antitrust laws, almost completed and designed for basic education of corporate executives and general legal practitioners.

A. HISTORY AND PURPOSE OF THE ROBINSON-PATMAN ACT.

Turning the clocks back in our mind, we recall that the Depression Era gave rise to an abundance of Congressional legislation affecting trade; security transactions, labor, and banking are but examples of areas in which Congress enacted extensive regulatory legislation. Legislation enacted during this period included the National Recovery Administration Act with its Codes of Fair Competition. When this Act was held unconstitutional in 1935, many interest groups thought a void was left. This void was coupled with a concern in Congress over the power wielded by large buying groups, specifically the chain grocery stores.

Extensive investigation had shown that chain grocery stores were able to secure favored pricing treatment from suppliers by virtue of their large-volume purchases. These price reductions to chain stores were reflected in a lower retail price to the consumer. The independent grocery stores were thus placed in an unfavorable competitive position. In the market place, the consumer naturally turned to the lower-priced goods -- sold by the chain stores.

The future of the "independents" was considered to be in grave danger in view of their inability to compete with the large chain stores. On this basis, there was a broad public support for legislation which would compel suppliers to treat all buyers on a fair and equal basis in order that the small

independents would not be prejudiced by their lack of purchasing power. This was the nature of the price discrimination which the Robinson-Patman Act sought to remedy. Paradoxically, the 1936 Act ended up by-and-large as a series of restrictions placed on the seller rather than the buyer, although it was the buyer's purchasing power which was of paramount concern to Congress. We shall see that the Act does have provisions for preventing a buyer from knowingly receiving an unlawful price discrimination; but generally the unlawful use of a buyer's purchasing power is curbed in a "back door" fashion by prohibiting the seller from giving unlawful price discriminations to buyers.

The Robinson-Patman Act is sometimes praised, sometimes abused, much interpreted, little understood, and capable of producing instant arguments of infinite variety. In many business quarters, the very name is an anathema. There can be little doubt that the Robinson-Patman Act is controversial and complex. Mr. Justice Jackson stated that it "is complicated and vague in itself and even more so in its context." (FTC v. Ruberoid Co., 343 U.S. 470 (1952)). Mr. Justice Frankfurter once said that " precision of expression is not an outstanding characteristic of this Act. (Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953)). Their judgment is probably correct. Interpretation of the Act is a daily necessity in view of the subtle problems arising from the many diverse fact situations present in the business world. However, if we did not have a Robinson-Patman Act it would be necessary to invent one. The

imperviousness of the Act to amendment during its history is a significant indication that it was and is a response to a felt need. Therefore, however much we may decry the law's defects, we must recognize that a broad consensus supports its two primary objects:

1. To prevent unscrupulous suppliers from attempting to gain an unfair advantage over their competitors by discriminating among buyers; and

2. To prevent unscrupulous buyers from using their economic power to exact discriminatory prices from suppliers to the disadvantage of other less powerful buyers.

B. SUMMARY OF THE ACT

The Robinson-Patman Act is an amendment to Section 2 of the Clayton Act, and is divided into six parts. Section 2 of the Robinson-Patman Act imposes civil prohibitions, while Section 3 contains criminal prohibitions.

Section 2(a) is the heart of the Act. It prohibits sellers from discriminating in price. The Section also provides a defense in situations where the otherwise unlawful price discrimination can be cost-justified by the seller and provides other limited defenses and exceptions.

Section 2(b) is related to 2(a), and sets forth burdens of proof in defending a violation. Section 2(b) also provides that a price discrimination is not unlawful if it is made in good faith to meet the equally low price of a competitor. That a lower price was made to meet competition is a complete defense to a Section 2(a) violation.

Section 2(c) is a self-contained section prohibiting the seller from paying any brokerage fee, commission, or equivalent to a buyer or the buyer's agent. Section 2(c) also prohibits a buyer from accepting any such brokerage fee or commission.

Section 2(d) and 2(e) are closely related sections which prohibit a seller from granting discriminatory allowances (§2(d)) and services and facilities (§2(e)) to a buyer, unless made available to other competing buyers on proportionally equal terms.

Section 2(f) is the section of the Act which deals with buyers who knowingly receive price discriminations declared unlawful in Section 2(a). Remembering again the Congressional concern over the purchasing power wielded by large buyers to exact price discriminations, Section 2(f) is designed to deal directly with such buyers.

Section 3 declares it unlawful for a seller to provide certain secret allowances to the buyer. It also forbids territorial price reductions or sales at unreasonably low prices where the seller's purpose is to destroy competition or to eliminate a competitor.

C. PRICE DISCRIMINATION PRACTICES BY THE SELLER: SECTION 2(a)

We will first consider what sellers are within the reach of Section 2(a). In lawyer-like language, we will first consider the "jurisdictional elements" -- those conditions which will invoke the power of the Federal Trade Commission

or the courts to consider the lawfulness of the pricing transactions. Next we will explore what is a discrimination in price; and, we will then consider the competitive effects necessary to give rise to a completed violation of Section 2(a) by a seller.

1. What Sellers Can Be Reached Under 2(a)?

Turning first to the commerce requirement, Section 2(a) begins "That it shall be unlawful for any person engaged in commerce, in the course of such commerce . . . ." If a seller, such as a corporation, is engaged in purely local commerce within one state, the prohibitions of the Act do not apply. It should be mentioned, however, that many states have comparable Acts which can regulate local pricing activities. Also, by contrast, the scope of control is more limited here than in the Sherman Act area, where intrastate activities "affecting" interstate commerce can be reached. If a local seller in Illinois unlawfully discriminates between his two Chicago buyers, for example, the Act does not apply. But if this seller discriminates between a Chicago buyer and a competing St. Louis buyer, the commerce requirement of the Act is satisfied: a state line has been crossed in the transaction.

In another landmark case, Standard Oil Co. v. FTC, 340 U.S. 231 (1951), the Supreme Court was faced with interpreting this "commerce" requirement. Gasoline was shipped from Whiting, Indiana to bulk storage tanks in the Detroit, Michigan area. The government charged certain unlawful

discriminatory practices which took place in distribution of the gasoline from these bulk storage tanks to local Detroit buyers. The defendant sellers in this suit said, in effect: "You cannot charge any Section 2(a) violation because these Detroit practices are not in commerce -- every act charged as unlawful took place entirely in Michigan." The Supreme Court rejected this argument and concluded that the practices all took place in "the flow of commerce" from Whiting, Indiana to the Detroit area buyers. The interstate character of the acts was not lost by storing the gasoline in Detroit.

Price discrimination in foreign commerce is not covered by the Act. Thus, if a seller in the United States discriminates unlawfully between foreign buyers, the transaction cannot be reached; and, if a foreign seller discriminates between competing U. S. purchasers, the foreign seller cannot be reached.

Next, there is <u>the requirement that the same seller make at least two sales to different purchasers, reasonably close in point of time</u>. A sale to one buyer and an outright refusal to sell to another cannot come under Section 2(a). Similarly, a sale to one buyer and a consignment to another cannot be reached.

The requirement for reasonably contemporaneous sales affords protection to the seller and prevents any "freezing" of pricing practices over long periods of time. (See <u>Atalanta Trading Co.</u> v. <u>FTC</u>, 258 F.2d 365 (2d Cir. 1958)). Of course, individual fact situations in particular industries will

determine what are contemporaneous sales under the law. A two-month difference between two sales might not be reached under §2(a) in one industry, while a longer period between sales might be reached in another industry. Inventory turnover, fluctuation of prices in the market place, and other factors would be considered in determining if this time requirement were satisfied -- no rule of thumb exists.

The requirement that the same seller make these sales raises interesting questions where a parent corporation makes one of the sales while a wholly-owned subsidiary makes the other sale. Under these circumstances the courts appraise the degree of control exercised by the parent corporation over its subsidiary to determine if the latter is but a "tool" of the former. If the subsidiary acts independently and without direction by its parent, it may be considered a separate seller. Differing prices for the same commodity between parent and subsidiary would then not be illegal price discriminations.

Another "legal invention " -- the doctrine of the "indirect purchaser" -- has been developed over the years to determine who are the actual purchasers to which the sales are made. Suppose Manufacturer M sells to Wholesaler W who in turn sells to Retailer R1 and R2. Suppose further that Manufacturer M, not Wholesaler W, really controls sales to R1 and R2. Such control might occur by having M's salesman call on R1 and R2, take the order, and then refer it to W. While it would appear that M has made only one sale, that

being to W, a court might hold that R1 and R2 were "indirect purchasers" from M because of M's activity in obtaining these retailers as purchasers. If differing prices were charged R1 and R2, an illegal price discrimination may have taken place.

Now we turn to the requirement that the sales be of commodities. This means goods, not services. For example, the Act would not reach a consulting engineering firm which charged different rates for engineering services to different companies. Such a contract would be for the sale of services, not for the sale of goods. Radio or TV broadcasting time is another example of a service. Thus, only tangible goods in the conventional sense are embraced by the term "commodities".

And these commodities must be of like grade and quality. When identical goods are sold, this requisite of course is satisfied. But how much difference between similar commodities will allow an "escape hatch" from a §2(a) charge of price discrimination? It has been held that a price discrimination in the sale of identical goods between those sold under a private brand label and those sold under a prominent trademark was embraced by Section 2(a). On the other hand, minute physical differences, strangely enough, have caused some courts to hold the transaction to be beyond the reach of Section 2(a). The better view seems to be, however, that such small differences will not prevent goods from being of "like grade and quality." For instance, sales

of "X" hydrometer and "Y" hydrometer (of identical physical construction) were reached under Section 2(a), as were sales of cans 3-14/16 inches and 3-12/16 inches high. The Attorney General's Committee to Study the Antitrust Laws aptly summarized the current rule in these terms: "Actual or genuine physical differentiations between two different products adapted to the several buyers' uses, and not merely a decorative or fanciful feature, probably remov differential pricing of the two from the reach of the Robinson-Patman Act."

As to the wisdom of refusing to recognize brand names and trademark differences in considering "like grade and quality," the law probably rests on a sandy foundation. Marketing executives well appreciate that two identical products standing side-by-side on a shelf will not sell alike where only one is a widely advertised national brand. Hypothetically, "Coca-Cola" would sell better than "Sparkle Cola" in the market place, even if they were of identical composition. Following this hypothesis a little further, if "Coca-Cola" and "Sparkle Cola" were sold <u>in different bottle designs</u> by the same bottling distributor to different competing purchasers at different prices, it would be understandably difficult to convince a sophisticated businessman that this could be an unlawful price discrimination under §2(a). But the law has leaned in that direction.

2. <u>What is Price Discrimination?</u>

The Supreme Court has said that a discrimination in price is just a

difference in price; it is the other parts of the Act that determine whether a given price difference is lawful or not. (FTC v. Anheuser-Fusch, Inc., 363 U.S. 536 (1960)). It follows that no violation of Section 2(a) is present if there is no difference in price to competing buyers. If the seller has one single sales price, as f.o.b. factory to all customers, he is shielded from problems under Section 2(a).

A direct price discrimination is obvious on its face: a seller charges different prices to different buyers. An indirect price discrimination, on the other hand, occurs when differing terms or conditions of sale result in a lower price to certain buyers. We shall see that some indirect price discriminations have also been held illegal under Sections 2(d) and 2(e) of the Act, the sections requiring allowances and services to be made available to all competing buyers on proportionally equal terms. The better view is that those discriminations in the furnishing of services or allowances incident to an original sale to a buyer, as opposed to services and allowances incident to resale of the goods by the buyer, are cognizable only as indirect price discriminations in violation of Section 2(a).

3. What are the Competitive Effects Necessary to Show a Completed Section 2(a) Violation?

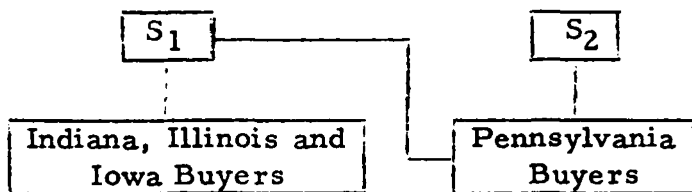
Section 2(a)'s concluding proviso reads:

> "That it shall be unlawful . . . to discriminate in price . . . where the effect of such discrimination [1] may be substantially to lessen competition or [2] tend to create a monopoly in any line of commerce, [3] or to injure, destroy, or prevent competition with any person who either [a] grants [b] or knowingly receives the benefit of such discrimination, [c] or to customers of either of them . . . "

Basically, Congress, by this language, was seeking to distinguish price discrimination practices having no real competitive effect on commerce from pricing situations which are of legitimate public concern. Only those discriminations having one of the listed effects on competition are illegal. The nature of the competitive effect necessary to finding a violation of Section 2(a) varies with the type of competition affected. Let us now consider the contexts in which competitive injury can be found.

a. <u>Primary Line Injury at the Seller Level</u>

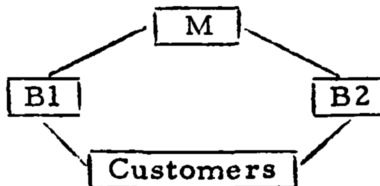
Consider the following hypothetical marketing situation:



The first seller, S_1, and the second seller, S_2, are competing in the market place for the sale of goods. As the diagram illustrates, S_1 and S_2 are competing in Pennsylvania, and S_1 is also selling in other states, but not in competition with S_2. Suppose S_1 ruthlessly sets out to drive S_2 out of business. Suppose further, that in order to accomplish this purpose, S_1 slashes his long-established prices by 25% in Pennsylvania. S_1 sells below cost in Pennsylvania but is able to do this because he has raised his prices in the area where S_2 does not compete. Here is a clear case of "primary line" or "seller's level" injury. The purpose and effect of S_1's price reduction is to destroy S_2's competition in Pennsylvania. This practice may also amount to an attempt to monopolize prohibited by Section 2 of the Sherman Act or to a violation of Section 3 of the Robinson-Patman Act. Of course, if S_1 did not have the economic power to work competitive injury on S_2, no violation would have occurred.

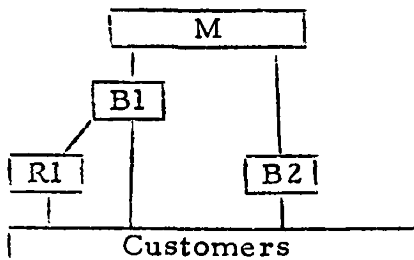
b. Secondary Line Injury at the Buyer's Level

Consider the situation where a hypothetical manufacturer-supplier, M, sells to two buyers, B1 and B2 who are in direct competition with each other.



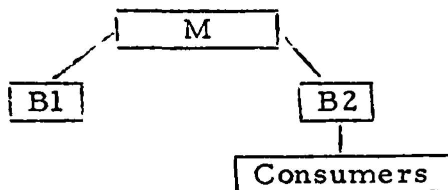
Now, suppose that M lowers his price to B1 but not to B2. The requisite

effect on competition will be present if B2 is significantly less able to compete with B1 because of the price discrimination. Let us now vary the situation and consider buyer level injury again.



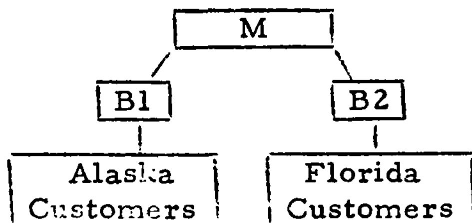
Here B1 is a "split distributor" selling to the same customers as B2 and also selling to a retailer R1 who sells to these customers. The fact that B1 is not in competition with B2 on sales to R1 does not prevent any price differential granted in favor of B1 from wreaking the necessary competitive injury with respect to that competition that does exist between B1 and B2.

An entirely different situation arises where B1 and B2 do not compete for the same customers. Suppose that M is a refiner-supplier of gasoline, that B1 runs a fleet of taxi cabs, and that B2 is a retail gasoline dealer.



Since B1 purchases gasoline for use in his taxicabs and not for resale, he is not in competition with B2. M can, therefore, quote B1 a lower gasoline price without fear of working any injury to competition.

Another common situation where no buyer level injury is present is where B1 and B2 do not actually compete in a geographical market. Suppose M, our gasoline supplier, sells to B1 in Alaska and to B2 in Florida.

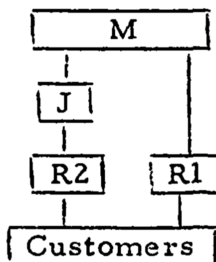


B1 and B2 obviously do not compete for the same business so as to give rise to a buyer level competitive injury if B2 receives a lower price than B1. There is a more difficult situation when these geographic areas are close to one another. If B1 sold to customers in downtown Chicago and B2 sold to customers in the suburbs of Chicago, it may well be that B1 and B2 would be considered as competing for the same customers and any price discrimination between B1 and B2 could have the requisite buyer level injury.

Even in those situations where there is a discrimination in price between two buyers who compete for business, there must be an adverse effect on competition due to this price discrimination. If the "injured" buyer does not lose business in the market place as a direct result of a price-cut to his competitor, but due to sloppy management, a poor location, the "injured" buyer's own pricing policies, or a stubborn refusal to buy at lower price from another source, it cannot be said that there is an injury to competition due to the price differentials.

c. Third Line Injury

This type of competitive injury is suffered by the customers of the supplier's buyer, three steps down the distribution chain. This is a more controversial, and less commonly used, means for measuring competitive effect, as compared to injury occurring at the buyer or seller level. Suppose our gasoline supplier M, who may be a refiner, sells his gasoline directly both to retail gasoline station, R1, and to independent jobber, J, who in turn sells to another retail gasoline station, R2. R1 and R2 both compete for the same retail business. M sells to J at a lower price than the price charged R1.



Under these circumstances, assume no seller level (primary line) injury is present. When considering the buyer level (secondary line) injury, we see that R1 and J, the jobber, are not competing for the same business. R1 sells to customers in his gasoline stations while J sells only to R2, a retailer. If we stopped here, we would have to conclude that no Robinson-Patman violation would have arisen under this distribution scheme. But not so. If the lower price to J results in a lower price to R2 enabling R2 to underprice R1, the necessary competitive injury may have occurred at the retail level.

This type of fact situation came before the Supreme Court in the Standard Oil case. (340 U.S. 231 (1951)). The refiner defended on the ground that resale price fixing (a violation of the Sherman Act) would be necessary if his pricing policy was condemned as a violation of the Robinson-Patman Act. The only way that the refiner could be certain that his jobber customer did not pass the lower price on to the jobber's retailer customers would be to control the jobber's resale prices. The refiner would be in the strange position of having to violate the Sherman Act by engaging in resale price maintenance in order to avoid violating the Robinson-Patman Act by causing competitive injury among customers of his buyer. It is for this reason that the courts are reluctant to give force to this third-line injury concept. Of course, as with second-line injury, there must be a direct relationship between the pricing practices and injury to competition.

Let us now assume that a §2(a) charge has been proven, that is,

(1) the commerce requirement has been satisfied, and

(2) there have been two sales,

(3) by the same seller,

(4) to two different purchasers,

(5) of commodities,

(6) of like grade and quality,

(7) with a price difference, and

(8) there had been the necessary competitive injury.

We will now consider the defenses available to the seller to avoid liability under Section 2(a).

D. THE SELLER'S POSSIBLE DEFENSES TO A SECTION 2(a) VIOLATION

Even if a violation of Section 2(a) is alleged, in the two following situations a seller may have a complete defense to that charge:

(1) The price differentials "make only due allowance for differences in the cost, other than brokerage, of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered"; or

(2) The price differentials were "made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."

(1) Cost Justification

The cost justification defense stems from the economic premise that a seller should not be compelled by law to charge an artifically high price to a particular buyer if the seller can show by facts and figures that it costs less to sell to this particular buyer than to other buyers. If the seller were to actually make more money selling to buyer A than to buyer B when the price is the same to both, the Act allows the seller to reduce the price to A to the

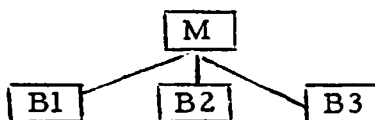
extent this reduction in price is based on the actual lower cost of selling to A. Such cost savings might result from A's purchasing practices, savings in shipping costs, reduced sales expense, or a host of other factors.

Knowledgeable executives, however, will appreciate that distributive cost accounting is far from an exact science; indeed, in many cases, a seller has no precise idea at all of the exact cost of selling a certain quantity of goods to a certain customer. Various accounting distribution techniques are customarily used to determine the approximate cost of different parts of the manufacturing and distribution process. But the very inexact nature of these cost figures, together with the traditionally strict requirements of the Federal Trade Commission in proving cost justification, has made this defense a difficult and expensive one to prove. (See United States v. Borden Co., 370 U.S. 460 (1962)). Guidelines for making use of the cost justification defense are few, and the hazards are many.

There are recent indications that a more reasonable approach will be taken toward this defense. For example, in the Sylvania Electric Products, Inc. case, (51 FTC 282 (1955)), Sylvania was charged with a violation of Section 2(a) in granting unlawful price differences in sales of about 600 variously priced types of replacement vacuum tubes. These tubes were sold both through Philco Corp. and through Sylvania's own distributors. Sylvania accounting executives and lawyers doubtlessly appreciated the practical impossibility of

cost justifying exactly each and every price difference in the sale of each of these 600 items. Time and expense would simply militate against such a formidable task, and even if successful on paper, the results would not have the mathematical certainty of the engineer's calculations that went into the design of these vacuum tubes. Nevertheless, Sylvania was successful in cost justifying the price difference to the satisfaction of the Federal Trade Commission. Sylvania employed a "weighted average" method to demonstrate that aggregate price differences in distributing the vacuum tubes through the two outlets justified charging a higher price to Sylvania's own distributors than to Philco. The Federal Trade Commission thus accepted the distribution pricing policy of Sylvania for its entire product line of 600 vacuum tubes, and, on this basis, the price difference between individual vacuum tubes was not considered to be of competitive significance. One tube was not designed to be competitive against another tube, and the study reflected the realities of electronic tube distribution.

A few generalizations are appropriate in evaluating cost justification. Suppose manufacturer M sells to three buyers, B1, B2 and B3, and discriminates in favor of B1:



In seeking to cost justify his price to B1, M contends that the total purchases by

Bl make M's total volume great enough so that certain cost economics are possible in M's overall production process. This is impermissible. M cannot say that the goods sold to Bl reflect the entire savings in the unit cost of manufacturing. Since if B2 or B3 withdrew their business the extra volume necessary to the cost economies would vanish, they have just as much right to a price reduction as Bl on this basis. On the other hand, if M maintained warehouse facilities for goods sold as a service to his buyers, and Bl agreed to take over the warehousing of his goods, or if Bl accepted less expensive crating, M could pass these cost savings on to Bl in the form of a price concession.

It is difficult, if not impossible, to cost justify special treatment to new customers or discounts based on the cumulative volume of business per year which have no relationship to the size of individual shipments. A new customer normally is as expensive to serve as an old customer. And, annual volume bears no necessary relationship to shipping costs. Similarly, quantity discount schedules must be developed with care if they are to be protected by the cost justification defense. Only if these schedules accurately reflect cost differences will the defense be available. In this connection, it is important to note that cost justification must be substantially complete. If a seller could only justify part of the price difference, the defense would not prevail.

The seller whose first efforts to cost justify an otherwise unlawful

price discrimination occur after a charge under Section 2(a) is made labors under a psychological disadvantage in the ensuing legal proceedings. The prudent businessman should make some realistic cost justification appraisals to support the price concession before the concession is given to a particular buyer. "Good faith" efforts to comply with Section 2(a) before the pricing practices are challenged puts a seller in a much better initial position.

(2) The Meeting Competition Defense

Let us now turn to the defense of meeting competition. It is well established that if the seller lowered his price to meet competition, he would have a complete defense to a proven violation of Section 2(a). However, this defense has always been strictly limited by the Federal Trade Commission, and Congressional legislation has even been proposed to abolish it entirely. Thus, while the defense is generally available, strict rules have developed for separating out certain situations in which it is not.

One of the very recent issues before the courts is whether the defense of meeting competition is available to a seller who uses a Section 2(a) price discrimination aggressively to gain new customers by offering such potential customers a price as low as that of a competitor. The Federal Trade Commission ruled that the defense was available only when a lower price was granted in order to retain an old customer and not when actuated by a desire to obtain new customers. But a Court of Appeals reversed this ruling and held

that price discriminations otherwise prohibited by Section 2(a) can be defended by showing that in striving for new business the price discrimination was made in good faith to meet the equally low price of a competitor. (Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962)).

There are a number of restrictions on the use of the meeting competition defense. First, the seller does not come within this defense if he knows or should have known the competitor's price he met was itself unlawful under the Robinson-Patman Act. Second, the seller's price discrimination must be a temporary measure to meet competition and not part of a permanent price schedule whereby some customers are systematically charged higher prices than others. Third, an equally low price of a competitor "means an equally low price for a given quantity." Thus where the competitor sells to a customer in large quantities at a certain price, the seller is not properly "meeting competition" if he meets that price in sales of smaller quantities -- where the competitor has a higher price for such smaller quantities. Fourth, it is the view of the Federal Trade Commission that the seller's price discrimination must be limited to meeting a specific individual competitor's price to specific individual customers. Fifth, and last, the seller must meet, not beat, his competitor's price to the particular customer.

We can now see that the meeting competition defense is not an easy "out for a seller who has violated Section 2(a). This defense is severely limited but still absolute when proven.

(3) Other Exemptions

Certain transactions are exempted from the provisions of Section 2 (a). For example, price changes made in response to changing conditions affecting the market for or the marketability of the goods concerned may not be illegal. This category embraces actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. Supplementary legislation was passed in 1938 which declares the Act not to be applicable: "to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit." Sales to the Federal Government are exempt, and state and municipal bodies probably enjoy this exemption as well. However, the nature and extent of these exemptions is largely unexplored.

E. PROHIBITIONS AGAINST THE BUYER: SECTION 2(f)

Section 2(f) declares it unlawful for a buyer knowingly to induce or receive a price discrimination which is in violation of Section 2(a). To be reached by the Act, the buyer must be engaged in interstate commerce and must induce or receive the discrimination in the course

of such commerce. Although the language of the section appears to create a double "commerce" requirement, it is probable that courts will impose liability in any situation in which the seller could violate Section 2(a). Such a reading of Section 2(f) would harmonize that section with Section 2(a) and would more truly comport with the recognized antitrust objective of halting discriminations in price.

Like Section 2(a), Section 2(f) relates solely to price discrimination. As interpreted to date, a buyer cannot be reached for knowing receipt of discriminatory grants of allowances or services and facilities. However, this apparent legislative omission has been remedied in part by attacking the practice as an "unfair method of competition" in violation of Section 5 of the Federal Trade Commission Act.

It is a difficult task to prove that a buyer has violated Section 2(f). The Supreme Court has taken the position that there must be some showing that the buyer knew of the illegality of the price discrimination. And, there must also be some showing that the concession was known by the buyer not to be saved from illegality by the cost justification or meeting competition defense. It follows that a buyer can avoid a Section 2(f) violation by showing that the seller did not violate Section 2(a) in the first place, that the prices were justified by available defenses, or that the buyer had no knowledge of the seller's violation of Section 2(a).

F. UNLAWFUL BROKERAGE PAYMENTS: SECTION 2(c)

Section 2(c) is a self-contained legislative enactment having no relationship to the other Sections of the Robinson-Patman Act. This Section is in the nature of a *per se* wrong, such as price fixing under the Sherman Act. By the terms of Section 2(c), it is unlawful:

"[1] to pay or grant,

[2] or to receive or accept,

[3] anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered

[4] in connection with the sale or purchase of goods, wares, or merchandise.

[5] either to the other party to such transaction or to an agent, representative, or other intermediary therein

[6] where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid."

If a seller pays a buyer's broker a sales brokerage commission, Section 2(c) is violated. In effect, it is only the *seller's* broker who can receive a brokerage fee. And it makes no difference that the buyer's broker is performing some valuable function, such as warehousing or breaking bulk.

The "except for services rendered" clause has been emasculated by cases whi say that a buyer's broker does not render services to the seller.

This Section is aimed at reaching dummy brokerage payments which are in reality "under the table" price concessions eventually falling into the hands of the buyer. Section 2(c), being self contained, does not permit of a meeting competition or cost justification defense. Also, unlike Section 2(a), only one transaction, one seller payment to a buyer's broker, will give rise to a Section 2(c) violation, and a specific effect on competition need not be shown. For these reasons it is a far simpler task to prove a Section 2(c) violation than a Section 2(a) violation.

In one famous case, FTC v. Henry Broch & Co., (363 U.S. 166 (1960)), a seller's broker accepted a lower commission to clinch a sale (the seller passing on the reduction in the broker's commission to the buyer). The Supreme Court held that Section 2(c) had been violated by this transaction. The Court perceived no economic difference between such a transaction and one where the seller's broker split his brokerage commission with the buyer. The direct relationship between the brokerage fee and the lower price to the buyer was an important consideration in determining that Section 2(c) had been violated. Broch would appear to dictate that any adjustment of a broker's fees should be made with reference to all future sales so as to avoid the fee-splitting hazard on specific sales condemned by the Supreme Court.

G. MERCHANDISING ALLOWANCES AND SERVICES: SECTIONS 2(d) AND 2(e)

If the Robinson-Patman Act prohibited price discriminations alone, many opportunities for evasion and contravention of the basic purpose of the law would be available. Experienced marketing executives know there are many ways in which a supplier can favor one customer over other customers beyond the grant of a concession in price. Think for a moment of all the various types of merchandising assistance that suppliers customarily offer to retailers: advertising and promotional allowances, handbills and signs, window and floor displays and other point-of-purchase display materials, demonstrators and demonstrations, display and storage cabinets, "push money for sales clerks, special packaging or package sizes, warehouse facilities, return privileges -- the list is virtually endless.

When the Robinson-Patman Act was passed, Congress was well aware of the economic importance of advertising and promotional allowances and merchandising services and facilities furnished by suppliers to customers. The Act contains provisions to deal with discriminations by suppliers in these critical areas. Section 2(d) of the Act relates to payments or allowances by the seller to the buyer for promotional services and requires such payments to be made available on proportionally equal terms to all competing customers. Section 2(e) deals with the furnishing by the seller of services to the buyer, requiring such services also to be made available to all competing

customers on proportionally equal terms. Note that these prohibitions are directed only against sellers. The Robinson-Patman Act contains no prohibition against the inducement and receipt of discriminatory advertising and promotional allowances or services and facilities by powerful buyers. However, as noted, the Federal Trade Commission has moved to remedy this omission. The Commission has held that the knowing inducement and receipt of discriminatory advertising and promotional allowances by large buyers is an unfair method of competition prohibited by the Federal Trade Commission Act. The Commission's position has been upheld by two United States Courts of Appeal. (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)).

Essentially, Sections 2(d) and 2(e) provide that if a seller offers advertising allowances or merchandising payments or services to one customer he must make his offer (1) available (2) to all competing customers (3) on proportionally equal terms. Let us examine each of these three requirements.

The requirement of availability imposes an affirmative duty upon a supplier who offers promotional assistance to any of his customers. Suppose that a supplier goes to his largest customer with an offer of an advertising allowance of $1.00 per case on all goods purchased. In order to comply with the law the seller must then take action to inform all of his customers who

Suppose that a manufacturer sells to ten retail stores in Manhattan, ten retail stores in Brooklyn and ten retail stores in the Bronx. A promotional assistance program limited to the Manhattan customers would be illegal if the Brooklyn and Bronx retail stores compete for the same business as the Manhattan retail stores. The second test of coverage of all competing customers is related to the needs of particular customers. The law prohibits a supplier from so tailoring his promotional assistance plan as to render it impossible as a practical matter for some competing customers to participate. It may be that in a particular instance a supplier must even develop alternative promotional assistance plans to insure that each competing customer can participate in some manner. If a seller develops alternative merchandising assistance plans, his customers must be given the opportunity to choose among the plans. In other words, the supplier must offer something that each of his customers, no matter how small, can use effectively.

The law's requirement that promotional allowances or services must be made available to competing customers on "proportionally equal terms" is of cardinal importance. Proportional equality means basically to each according to his worth as a retailer. The Robinson-Patman Act does not spell out any single way in which to achieve proportional equality. One method is to compute the amount of payments made or services furnished as a specified percentage of the dollar volume of goods sold or the quantity of goods purchased

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during a specified time. Thus, a seller who offers his customers an advertising allowance of $1.00 per case on all purchases has made a proportionally equal offer. Offers based upon a sliding scale are suspect. For example, an offer of an advertising allowance of 2% on annual purchases up to $1,000, 3% on purchases up to $5,000 and 5% on purchases over $5,000 is not a proportionally equal offer if only a few large customers are able to purchase in sufficient quantities to receive the maximum allowance.

The supplier has the additional duty of checking to insure that every customer participating in a promotional allowance or service program is using the benefits he receives for the intended purpose. If, for instance, a customer is allowed to pocket an advertising allowance, without supplying any advertising, both the supplier and the customer may be in difficulty. The Federal Trade Commission might construe such a payment to be a price concession and proceed against the supplier under Section 2(a) of the Robinson-Patman Act and against the customer under Section 2(f).

A few examples will illustrate the application of the principles just described. Suppose that the National Soap Company markets its toilet soap through supermarket chains, drug chains and independent drug stores. An executive of National Soap Company proposes a television spot advertising allowance program. Under the program National would reimburse its customers for one-half the cost of any television spot announcements featuring

National Soap up to a maximum of 7-1/2% of the customer's annual purchases. The offer would be announced to all customers by means of a form letter. Superficially this proposed program appears to meet the requirements of Section 2(d) of the Robinson-Patman Act. The offer would be made available to all competing customers on a proportionally equal formula. However, as a practical matter this proposed program would fail the test of availability to all competing customers. If National Soap knows that only the large supermarket chains and drug chains can afford television advertising then the offer would not be available in any meaningful sense to its independent drug store customers. In order to meet the test of practical availability National would have to expand its allowance program to include alternative advertising media. Suppose that the program is enlarged to include radio and newspaper advertising on the same basis. The program still may not be available to all competing customers. If some small stores cannot afford television, radio, or newspaper advertising, National Soap should allow its customers to use the advertising allowance for handbills or in-store displays as well. Its customers would then have a meaningful choice and every customer would be able to use at least one advertising medium.

Suppose that the Association Cosmetics Company distributes its line through the Colossal Department Store and ten independent drug stores in Middletown. The Colossal Department Store is the largest customer by a

wide margin. Association Cosmetics employs a traveling demonstrator and the Colossal Department Store has asked for an all day demonstration in its store. If Association Cosmetics accedes to the request of the Colossal Department Store it must make a proportionally equal offer to the independent drug stores in Middletown who distribute its line in competition with the Colossal Department Store. However, the offer to the drug stores need not be the same as the offer to the Colossal Department Store. Association Cosmetics complies with the Robinson-Patman Act if its offer is proportionally equal. Suppose that Colossal Department Store has an annual volume of $10,000 in Association Cosmetics products and that the value of the all day demonstration is $100. The Tom Thumb Drug Store across the street has an annual volume of $1,000 in Association Cosmetics products. Association Cosmetics satisfies the requirements of the Robinson-Patman Act if it offers the Tom Thumb Drug Store promotional services worth $10. Here the offer to the independent drug store might take the form of a short personnel training program or the furnishing of a demonstration kit.

Retail Greeting Cards, Inc., desperately wants the Colossal Departme Store to take on its line. The salesman calling upon the store buyer states that if Colossal will take on the line, Retail Greeting Cards will ship to Colossal a complete set of display fixtures and storage cabinets free. Retail Greeting Cards also sells to a number of small stores who compete with

Colossal for greeting card business. No offer is made to these smaller stores. On these facts, Retail Greeting Cards clearly is guilty of violating Section 2(e) of the Robinson-Patman Act.

The Triple A Cigar Company plans to offer its customers the use of a humidified self-service display cabinet. The cabinet to be offered will occupy 12 linear feet of store space. Triple A Cigar Company plans to make its offer known to all customers. However, as a practical matter only very large stores will be able to accommodate a cabinet of this size. On these facts, Triple A Cigar Company is vulnerable to attack under the Robinson-Patman Act unless it develops alternative offers that can be utilized by smaller stores.

Unlike a Section 2(a) charge, there need be no proof of a competitive injury to make out a Section 2(d) or 2(e) violation. Moreover the seller has no defense of cost justification. The meeting competition defense, however, is available.

Buyers have duties with respect to supplier promotional plans as well as rights. We recall that although the Robinson-Patman Act does not make it illegal for customers to knowingly induce and receive discriminatory promotional payments or services from suppliers, the Federal Trade Commission has held that the knowing inducement and receipt of discriminatory promotional payments by retailers is a violation of the Federal Trade Commission Act. There is every reason to believe that the Commission would take the same

position with respect to the inducement or receipt of discriminatory services or facilities from suppliers.

The Federal Trade Commission has issued guides relating to Sections 2(d) and 2(e) of the Robinson-Patman Act, a copy of which I have appended to these remarks since problems under these Sections are becoming increasingly numerous for the lawyer who counsels both large or small business. These and other valuable guides relating to problem areas in the field of deceptive practices are available by writing the Federal Trade Commission, Washington 25, D. C.

Time does not permit further discussion of the attached guides. There are, however, two additions to them due to a recent Commission decision and a recent court decision which I should like to call to your attention.

In paragraph 12, page 6 of the guide, an additional example should be added tentatively in accordance with the Commission's recent decision in Fred Meyer, Inc., F.T.C. Docket No. 7492, which holds that a wholesaler is a customer of a manufacturer in competition with direct buying chain retailer customers of the manufacturer. Sections 2(d) and 2(e) refer generally to "competing customers" and do not detail the various levels of competition to which the section would apply, as is the case with Section 2(a), and therefore the Commission had previously held that under Section 2(d) customers at different functional levels do not compete. This was reversed in the Fred

Meyer decision, which probably will have to face the tests of court review.

Also, the first sentence of paragraph 14, on page 6, should be changed to reflect recent court decisions (Exquisite Form Brassiere, Inc. v. Federal Trade Commission, 301 F.2d 499 (D.C. Cir. 1961), and Shulton, Inc. v. Federal Trade Commission, 305 F.2d 36 (7th Cir. 1962)), holding that the meeting competition defense applies to merchandising payments under Section 2(d) as well as to such services and facilities under Section 2(e). The Commission has also adopted this holding.

H. CRIMINAL PROHIBITIONS: SECTION 3

Section 3 of the Robinson-Patman Act is a criminal statute aimed at three specific practices. First, Section 3 declares it a crime for any person who meets the "commerce" test: "to be a party to, or assist in any transaction of sale, or contract to sell, which discriminates against competitors of the purchaser, in that any discount, rebate, allowance or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity." This part of Section 3 is designed to reach secret price concessions of a fraudulent nature. It has been little used both because of the difficulty of proving fraud and because courts have strictly construed its provisions. Thus, where a concession is given on a purchase of 1,000 cases

and not on a purchase of 999 cases, some courts have found no violation because a sale of a "like quantity" of goods was not involved.

Second, it is a crime for any person "to sell or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States." Within the reach of this part of Section 3 is a seller who makes a geographical price cut with the predatory purpose of destroying competition or eliminating a competitor. In one case a bakery company with multi-state operations cut its bread price substantially in one city in which it operated, thereby destroying the competition afforded by a local baker. This practice was held to be a violation of Section 3.

Finally, it is a crime for any person: "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." This provision is also aimed at predatory pricing. What is forbidden would appear to be a sudden drop in prices, without economic justification, and with the intent to eliminate a competitor.

Section 3 of the Robinson-Patman Act is not a popular enactment. Its language has been criticized as being too vague to give any ascertainable standard of prohibited conduct. This argument was used in the recent National Dairy Products case in the hope that the Supreme Court would hold

the last part of Section 3 unconstitutionally vague. (372 U.S. 29 (1963)). The argument failed. Moreover, the Supreme Court has held that Section 3 is not an "antitrust statute" so as to give a private treble damage civil action.

In conclusion, I hope that my remarks today have shown that small business is very heavily involved with many important provisions of the antitrust laws, and that effective counseling requires an understanding of the substantive provisions of those laws and a familiarity with the responsibility and procedures of the antitrust enforcement agencies. I predict that a client will bring each of you at least one such problem during the next twelve months, or that each of you will need to be advising at least one regular client on these problems during that period.

THE ROBINSON-PATMAN ACT: THE FEDERAL PRICE DISCRIMINATION LAW

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Alhambra Motor Parts v. FTC,
309 F.2d 213 (9th Cir. 1962) (buying group discounts)

Amana Refrigeration, Inc. v. Columbia Broadcasting System,
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104 F.Supp. 796 (S.D.Cal. 1952), affirmed, 231 F.2d 356 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956) (business considerations)

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Carpel Frosted Foods, Inc.,
48 FTC 581 (1951) (Sections 2(c) and 2(d)

Central Ice Cream Co. v. Golden Rod Ice Cream Co.,
287 F.2d 265 (7th Cir.), cert. denied, 368 U.S. 829 (1961) (interstate commerce)

Champion Spark Plug Co.,
50 FTC 30 (1953)(competitive injury; indirect purchasers)

Chicago Seating Co. v. S. Karpen& Bros.,
177 F.2d 863 (7th Cir. 1949) (refusal to sell)

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44 FTC 237 (1947) (Section 2(f)); secondary line injury; Sections 2(d) and 2(e)).

Dantzler v. Dictograph Products, Inc.,
272 F.2d 172 (4th Cir. 1959) (Section 2(e)).

Day's Tailor-D Clothing, Inc.,
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Elizabeth Arden, Inc. v. FTC,
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Elizabeth Arden Sales Corp. v. Gus Blass Co.,
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Enterprise Industries, Inc. v. Texas Co.,
240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957) (proof of damages)

Exquisite Form Brassiere, Inc. v. FTC,
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334 U.S. 37 (1948)(quantity discounts; broadness of order)

FTC v. Simplicity Pattern Co.,
360 U.S. 55 (1959)(Section 2(e)).

FTC v. Standard Oil Co.,
355 U.S. 396 (1958)(meeting competition defense0

FTC v. Sun Oil Co.,
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Giant Food, Inc. v. FTC,
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Kay Windsor Frocks, Inc.,
51 FTC 89 (1954)(Section 2(d)).

Kraft-Phenix Cheese Corp.,
25 FTC 537 (1937)(indirect purchaser)

Krug v. International Tel. & Tel. Corp.,
142 F.Supp. 230 (N.J. 1956)(tertiary line injury)

Lever Bros. Co.,
50 FTC 494 (1953)(indirect price discrimination; Section 2(d))

Liggett & Myers Tobacco Co.,
56 FTC 221 (1959) (Section 2(d))

Ludwig v. American Greetings Corp.,
264 F.2d 286 (6th Cir. 1959 (indirect price discrimination)

Moog Industries, Inc. v. FTC,
355 U.S. 411 (1955) (order can take effect though other competitor violators untouched)

Moore v. Mead's Fine Bread Co.,
348 U.S. 115 (1954) (predatory conduct)

Mid-South Distributors, Inc. v. FTC,
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51 FTC 282 (1955) (cost justification)

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306 F. 2d 541 (5th Cir. 1962)(cost justification; Section 2(c))

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55 FTC 1252 (1959)(secondary line injury)

Tri-Valley Packing Ass'n.,
FTC Dkt. 7225 (May 10, 1962)(meeting competition defense)