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Competitive Bidding Under the Robinson-Patman Act

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NOTES AND COMMENTS

COMPETITIVE BIDDING UNDER THE ROBINSON-PATMAN ACT

The Robinson-Patman Act[1] (the Act) was designed to eliminate illegal price discrimination and thereby to promote active price competition.[2] In practice, however, it has often yielded results which are disturbingly anticompetitive,[3] eliciting widespread criticism and the frequent charge that the Act is essentially a price-fixing statute masquerading in "anti-monopoly and pro-competition symbols."[4] Nowhere is this more evident than in the context of competitive bidding.

Consider the Robinson-Patman problems posed when a buyer seeks to purchase goods by inviting sellers to bid for his business. If a seller bids a price lower than that which he charges other buyers, a competitor of the seller may be able to establish a prima facie case under the Act. Moreover, the seller may find the "meet-competition" defense unavailable to him, since the object of bidding is to "beat" and not merely to "meet" the competition.[5] If the seller is aware of his competitor's bid and then bids a lower price, the requisite good faith needed for a meet-competition defense may be lacking. On the other hand, if the bidding is sealed, the seller is deprived of the argument that the price cut was in response to the competitor's low bid.

Permutations of these rather simple examples produce equally complex and uncertain results. Thus, utilization of the seemingly purest form of competition, *i.e.*, bidding, may place the unwitting seller in a quagmire of potential liability. This Note will outline these difficulties and suggest modes of avoiding Robinson-Patman liability in bidding.

THE ACT

Prior to its amendment by the Robinson-Patman Act, section 2 of the Clayton Act of 1914[6] sought to eliminate territorial price discrim-

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1 15 U.S.C. § 13 (1970).

2 W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 2 (1963) [hereinafter cited as PATMAN].

3 *See* Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

4 1 R. CALLMAN, THE LAW OF UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES § 28.1(a), at 951 (3d ed. 1967) [hereinafter cited as CALLMAN].

5 *See, e.g.*, National Dairy Prods. Corp. [1965-1967 Transfer Binder] TRADE REG. REP. ¶ 17,656 (FTC 1966), *aff'd*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968). *See* text accompanying notes 18-21 & 110-25 *infra*.

6 15 U.S.C. § 13 (1970).

inations practiced by large firms.[7] At the outset, strict judicial construction of the Clayton Act limited its protection to competitors of the discriminatory seller and not to injured buyers.[8] With the disruption of the traditional manufacturer-wholesaler-retailer marketing structure, caused by the advent of large chain stores, Congress recognized the need to protect small buyers who lacked the purchasing power to command price concessions, and who were left at a competitive disadvantage.[9] In response to this need, the Robinson-Patman Act was adopted.[10]

Simply stated, section 2(a)[11] now prohibits a seller from charging

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7 *See* C. EDWARDS, THE PRICE DISCRIMINATION LAW 5 (1959) [hereinafter cited as EDWARDS]. *See also* PATMAN, *supra* note 2, at 7.

When faced with troublesome local competition, a large firm frequently resorted to territorial price discrimination. Its prices in the particular area would be lowered to such a point that the local competitor's share of the market was significantly reduced, if not eliminated. The profit loss sustained during this price war would be subsidized by profits the large firm realized in its other markets, its so-called "war chest" or "treasury."

> [T]he treasury used to finance the warfare is drawn from interstate, as well as local, sources . . . and the prices on interstate sales . . . are kept high while the local prices are lowered. . . . The profits made in interstate activities would underwrite the losses of local price-cutting campaigns.

Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119 (1954).

8 Initially, the language of § 2 was strictly construed by the Second Circuit, which limited its application to competitive injury between sellers. Mennen Co. v. FTC, 288 F. 774 (2d Cir.), *cert. denied,* 262 U.S. 759 (1923); *accord,* National Biscuit Co. v. FTC, 299 F. 733 (2d Cir. 1924), *cert. denied,* 266 U.S. 613 (1925). In 1929, however, the Supreme Court rejected this interpretation and extended the Act's protection to buyers. George Van Camp & Sons v. American Can Co., 278 U.S. 245 (1929). In so holding, the Court was required to ignore the Act's legislative history and rely upon the "clear language" of the section.

Despite the extension of protection to buyers, enforcement of the Act was still crippled by the exception for quantity (volume) discounts which were not required to be cost justified. Although all buyers would theoretically realize similar savings under the mass purchasing plans which were then offered, very few could take advantage of the savings by taking delivery in large quantities. The discrimination was thus cloaked in an apparently equitable program which was beyond the reach of the Act. *See* E. KINTNER, A ROBINSON-PATMAN PRIMER 7-8 (1970) [hereinafter cited as KINTNER]. *See also* EDWARDS, *supra* note 7, at 6-7; PATMAN, *supra* note 2, at 9-10.

9 Section 2 of the Clayton Act could not meet new developments in distribution whereby the traditional middleman was eliminated. Large chain stores realized cost savings by buying directly from the manufacturer, demanding a price reduction equal to the regular brokerage fees avoided by the seller. These savings were then either passed on to the consumer in the form of lower retail prices or used to finance advertising. In either event, this placed the independent retailer at a marketing disadvantage, for he could only purchase through a wholesaler and thus could not enjoy similar savings. *See* C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 4-11 (2d rev. ed. 1959) [hereinafter cited as AUSTIN]. *See generally* EDWARDS, *supra* note 7, at 21; PATMAN, *supra* note 2, at 1.

10 The original Patman bill, as was anticipated at the time, met with strong opposition from lobbyists representing large chain stores. Thus, the resulting Robinson-Patman Act "represents extensive legislative compromise," and as a consequence is not a "hallmark of clarity." KINTNER, *supra* note 8, at 14. Indeed, much of the ensuing confusion over the years has resulted from occasional misinterpretations by the courts.

11 15 U.S.C. § 13(a) (1970) provides in part:

different prices to different purchasers, other than governmental and nonprofit institutions,[12] unless the differential reflects actual savings to the seller. Such savings may be related to the cost of manufacturing, selling, or delivering under the circumstances of a particular sale, or may result from a change in the marketability of the goods, *e.g.*, deterioration of perishable items, seasonal obsolescence, or discontinuance.[13]

As the Act is concerned solely with the sale of commodities, the realm of its protection is necessarily restricted. For example, a recent district court holding places the usual building and construction contract beyond the Act's scope since the dominant purpose of such an agreement is not the sale of goods.[14] Thus, one major industry which heavily relies on the practice of competitive bidding is, in most instances, immune from any charge of price discrimination.

To establish a prima facie case under the Act, the following elements must be shown:

(1) two or more sales transactions reasonably close in time;
(2) of commodities of like grade and quality;
(3) with different prices;
(4) to two or more purchasers;

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

[12] Sales to federal or state governments or their agencies are not subject to the provisions of the Act. Thus, there is no prohibition against sales to governmental purchasers at lower, discriminatory prices. *See* 1 TRADE REG. REP. ¶ 3275 (1971), *citing* General Shale Prods. Corp. v. Struck Constr. Co., 37 F. Supp. 598 (D. Ky. 1941), *aff'd on other grounds*, 132 F.2d 425 (6th Cir. 1942) (sales to a federal agency) and Sachs v. Brown Forman Distiller Corp., 134 F. Supp. 9 (S.D.N.Y. 1955), *aff'd*, 1956 TRADE CAS. ¶ 68,396 (2d Cir.) (sales to a state agency). Section 2c of the Act, 15 U.S.C. § 13c (1970), exempts purchases by nonprofit institutions of supplies for their own use.

[13] 15 U.S.C. § 13(a) (1970) provides in part:

[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . . *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to 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.

[14] Ideal Plumbing Co. v. Benco, Inc., 382 F. Supp. 1161 (W.D. Ark. 1974).

(5) satisfying the interstate commerce requirements;[15] and
(6) which result or may result in competitive injury.[16]

Once these elements have been successfully demonstrated, the burden shifts to the accused party to proceed with affirmative proof that the discrimination was either cost justified or due to changing conditions.[17] An additional affirmative defense is set forth in section 2(b),[18] the so-called "meet-competition" defense, which permits a seller to rebut a charge of illegal price discrimination "by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . . ."[19] As interpreted by the Supreme Court in *FTC v. A. E. Staley Manufacturing Co.*,[20] the good faith requirement necessitates a showing of existing facts that "would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[21]

A buyer may incur liability under section 2(f)[22] by inducing his seller to part with goods at a discriminatory price. Section 2(f) makes it unlawful for a buyer engaged in commerce "knowingly to induce or receive a discrimination in price which is prohibited by this section."[23] While this provision has been largely dormant in the past, in recent years there has been a marked change in the attitude of the Federal

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15 In a recent holding, the Supreme Court emphasized that the Act's coverage is less than the broad jurisdictional scope which Congress can authorize under the commerce clause, as exemplified by § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970). Essentially, the Robinson-Patman Act is applicable only to

> persons or activities within the flow of interstate commerce — the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer. . . . [T]he jurisdictional requirements of these provisions cannot be satisfied merely by showing that allegedly anti-competitive acquisitions and activities *affect* commerce.

Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 195 (1974). The Court stated that Congress purposely limited the reach of the Act, and, even if the legislative intent were ambiguous, four decades of judicial interpretations have rejected the "effects on commerce" approach. *Id.* at 401.

16 *See* KITNER, *supra* note 8, at 25. *See also* D. BAUM, THE ROBINSON-PATMAN ACT SUMMARY AND COMMENT 6-14 (1964).

17 *See* FTC v. Morton Salt Co., 334 U.S. 37, 44-45 (1948); CALLMAN, *supra* note 4, § 28.1(c), at 997.

18 15 U.S.C. § 13(b) (1970).

19 *Id. See* AUSTIN, *supra* note 9, at 82; D. BAUM, THE ROBINSON-PATMAN ACT SUMMARY AND COMMENT 29 (1964); EDWARDS, *supra* note 7, at 546; 4 J. VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 32.02 *et seq.* (1971) [hereinafter cited as VON KALINOWSKI].

20 324 U.S. 746 (1945).

21 *Id.* at 760.

22 15 U.S.C. § 13(f) (1970).

23 *Id.*

Trade Commission (FTC) toward buyer liability, and stricter enforcement can be anticipated.[24]

BIDDING AND PRICE HAGGLING

The term "competitive bidding," as herein employed, encompasses the entire spectrum of price negotiations present whenever a number of sellers are competing for the business of a single buyer. The style of bidding to be analyzed will typically arise in a buyer's market, one in which the seller's pricing will be sensitive to buyer pressure. Generally, the market will be highly competitive, with the competition centering primarily on price. Excluded from this discussion are bids based on established list prices, or justified by cost savings, volume or other considerations.

The few instances in which a court has been called upon to define competitive bidding usually have involved the construction of a municipal ordinance which has mandated its use. In this context, the term has been held to require due advertising, an opportunity to bid on the same undertaking, and equal treatment of all bidders.[25] The procedures used in commercial practice are generally less structured. In fact, the phrase has been used in a Robinson-Patman context to refer to situations where the buyer has merely requested informal price quotations from a number of sellers.[26]

Other preliminary definitions are in order. For the purposes of this discussion, "sealed" or "blind bidding" may be described as the submission of a price offer at the invitation of the buyer without any specific information regarding the offers of competing sellers. At the other extreme, there is the practice which may be described as "haggling," "secret concessions,"[27] or "catch-as-catch-can"[28] pricing. As used herein, haggling denotes a process whereby the buyer attempts to obtain the lowest selling price from one of a number of sellers by utilizing the price quote of one seller as leverage against another. On occasion,

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24 *See Hearings on Small Business and the Robinson-Patman Act Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the Select Comm. on Small Business*, 91st Cong., 2d Sess., vol. 3, at 831 (1970).

25 *See* Sterrett v. Bell, 240 S.W.2d 516, 520 (Tex. Civ. App. 1951).

26 *See, e.g.*, Beatrice Foods Co. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969).

27 As opposed to utilizing standard discounting procedures, secret concessions represent a practice whereby a seller offers "haphazard" individual prices in a particular market in order to attract certain business accounts. 5 VON KALINOWSKI, *supra* note 19, § 29.04 n.2.

28 The practice of offering secret concessions has also been referred to as "catch-as-catch-can" pricing. EDWARDS, *supra* note 7, at 468-85.

the FTC has referred to this type of hard bargaining as "competitive bidding."[29]

Independent of the form in which the bargaining is conducted is the eligibility of a seller to enter the competition for the buyer's business. A buyer may invite only certain sellers to submit bids, a procedure normally referred to as "closed bidding."[30] In an "open bidding" situation, on the other hand, any supplier may submit an offer.

The argument has been raised that because of the beneficial and procompetitive effects of bidding, price discriminations in that context should be excluded from the prohibitions of the Act. The trial examiner in *Quaker Oats Co.*,[31] an FTC proceeding, was faced with that very question. The respondent, Quaker Oats, was charged with discriminating in price between different purchasers of its oat flour. The complaint charged that Quaker Oats sold to some processors at prices substantially lower than those charged others for a product of like grade and quality. No formal price lists were ever employed by Quaker Oats. Instead, purchasers of oat flour would contact two or more suppliers and request bids for specific quantities. Quaker Oats generally submitted prices in response to such bid requests, and the contracts usually would be awarded to the lowest bidder.[32]

The examiner found that the flour was of like grade and quality and that none of the price differentials could be cost justified.[33] However, despite a few sales below cost, which were held to be the result of miscalculations, the examiner found no evidence of predatory intent.[34] Next, questioning whether the industry-wide practice of competitive bidding for sales contracts removed the case from Robinson-Patman applicability, he noted:

> The evidence is uncontradicted that competitive bidding to the manufacturer customers of Quaker is entrenched as a custom in the industry despite the few exceptions. It is also clear that there

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[29] Beatrice Foods Co. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969).

[30] There are a variety of reasons why a buyer may decide to restrict the bidding to certain suppliers. At the most basic level, the buyer may have preferences for several firms with which he has previously dealt or of which he has received favorable reports. In other instances, the buyer's needs may require adherence to a strict list of specifications regarding, among other factors, quality and quantity of the desired goods. This invariably tends to limit the bidding to certain suppliers.

[31] 66 F.T.C. 1131 (1964).

[32] *Id.* at 1141-42.

[33] *Id.* at 1159-61.

[34] *Id.* at 1162-65. For a discussion of predatory intent, see text accompanying notes 52-57 *infra*.

> is a shifting floor under the bidding, i.e. the market price of oats. Under such circumstances we are inclined to agree with the counsel for respondent that we must reconcile the Robinson-Patman Act and the Federal Trade Act "with the broader antitrust policies that have been laid down by Congress" by dismissing the complaint, unless it be shown that the competitive bidding carried on by Quaker was a mere cloak for discrimination between customers. Reading the Clayton Act to be sure that it is administered in a manner consistent with the Sherman Act would tend toward the approval of any plan so apparently productive of competition. For, the Sherman Act was specifically designed to protect competition against unreasonable restraints.
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> . . . .
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> No one objects to the consumer insisting that his suppliers bid against one another. Bids to meet competition are expressly authorized under the Robinson-Patman Act. That does not mean, however, that suppliers under the guise of offering competitive bids may favor one customer over another. If this is such a favoring of one customer over another it makes no difference that in form there was competitive bidding.[35]

The examiner found that Quaker Oats regularly favored one customer, Gerber Products Company, by providing it with lower prices for its oat flour, and by so doing, undercut Quaker Oats' main rival for the business, National Oats Company. Consequently, Quaker Oats was held to have conducted a discriminatory pricing campaign designed to injure competition. Moreover, the respondent was deemed to have failed to establish the requisite good faith necessary for the meet-competition defense.

> Quaker so underpriced National in its competition for Gerber that National just was unable to remain in the running. . . . Such conduct, therefore, both colors Quaker's bidding practices withdrawing them from their character of good faith competitive bidding and itself constitutes an unfair competitive practice, which, if continued by a company so disproportionately well financed in comparison with smaller competitors that it will eventually, in the normal course, drive the latter out of business.[36]

Accordingly, a cease and desist order was entered to prevent Quaker Oats from further price discrimination.

In reaching his decision, the trial examiner expressly provided that nothing would prevent Quaker from engaging in good faith competitive bidding "in any industry in which the practice of buying oat flour under that system has been established . . . ."[37] Furthermore, the opinion

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35 66 F.T.C. at 1174-75.
36 *Id.* at 1177.
37 *Id.* at 1183.

outlined the definition of bad faith bidding to include (1) prices to particular customers which are consistently lower than those to others who are in competition with the favored buyers, unless they can be justified, and (2) prices which fail to reflect either actual cost of sale or the estimated costs, whichever is higher.[38]

Despite the hearing examiner's well-reasoned opinion, the Commission set aside the findings and dismissed the complaint for failure to establish the necessary causative link, *i.e.*, that the price differentials produced, or were likely to produce, an adverse effect on competition.[39] While not rejecting the trial examiner's views on bidding, the Commission's reversal on other grounds has no doubt weakened their impact. Nevertheless, *Quaker Oats* represents the most significant attempt to reconcile the salutary features of competitive bidding with the Act's ban upon discriminatory pricing. Its basic conclusion is that bidding will not be given categorical treatment under the Act. Rather, the statutory and judicial elements of both the prima facie case and the defenses thereunder must be applied to the specific fact situation in which the discriminatory bid was made. The balance of this Note will examine the relationship between these elements and the fact patterns that frequently arise in the context of bidding.

PRICE DISCRIMINATION AND COMPETITIVE INJURY: ESTABLISHING A NEXUS

Injury to Competition

In order to establish a prima facie case under the Act, the FTC or a private party plaintiff[40] must prove an adverse effect on competition. Unlike price discrimination, which may be established simply by showing a difference in price charged to two purchasers,[41] proof of injury to competition is not as easily demonstrated. A generally adverse effect on competition must be shown, not merely an isolated instance of price discrimination.[42] More specifically, the discrimination must tend to "injure, destroy, or prevent competition."[43]

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[38] *Id.*

[39] *Id.* at 1191-93.

[40] *See* note 84 *infra.*

[41] *See* FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960).

[42] *See* Yale & Towne Mfg. Co., 52 F.T.C. 1580, 1604 (1960). The Act does not seek to protect individual competitors as such, but rather "competition." Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63 (1953). It attempts to prevent the "substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses." Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961). However, while the elimination of a competitor is not by itself significant, it is relevant as a "necessary incident" of competitive injury. CALLMAN, *supra* note 4, § 28.1(b)(7), at 970.

[43] 15 U.S.C. § 13(a) (1970).

Since the Act was created to prevent illegal conduct in its incipience,[44] a showing of potential competitive injury will suffice. In this regard, two tests have been employed by the courts. In *Corn Products Refining Co. v. FTC*,[45] the Supreme Court held that the Act merely required a showing of a reasonable *possibility* of injury — that an adverse effect on competition could occur.[46] However, this overly inclusive test has been modified and replaced by a requirement of a reasonable *probability* of injury, *i.e.*, that an adverse effect is likely to occur.[47]

Once price discrimination and actual or probable competitive injury are established, the final task is to prove that a causal nexus exists between the two. The illegal price discrimination must be responsible for the injury. Occasionally a seller may successfully defend against a Robinson-Patman charge by demonstrating that the injury to competition was due to such extraneous factors as internal problems, changes of competitors,[48] an intensely competitive market,[49] advertising and selling campaigns, and the like. Analysis of these possible defenses requires the familiar division of injury to competition into two categories: primary-line — injury to a competitor of the seller, and secondary-line — injury to a competitor of the buyer.[50]

Primary-Line Considerations

Traditionally, it has been more difficult to establish injury on the seller's own line of competition.[51] The plaintiff, whether the Govern-

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44 *See* PATMAN, *supra* note 2, at 47-48.

45 324 U.S. 726 (1945).

46 *Id.* at 742.

47 *See* National Dairy Prods. Corp. v. FTC, 412 F.2d 605, 616 (7th Cir. 1969); United Biscuit Co. of America v. FTC, 350 F.2d 615, 622 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 678 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 843 (7th Cir. 1961); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 368 (9th Cir. 1955); Quaker Oats Co., 66 F.T.C. 1131, 1191 (1964).

48 Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 839 (7th Cir. 1961).

49 Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 368 (9th Cir. 1955).

50 In addition, there is "tertiary-line injury" which is suffered by customers of the unfavored buyer. *See generally* KINTNER, *supra* note 8, at 22. It is not, however, relevant to the purposes of this discussion.

51 At the primary level, inferences of competitive injury will not be permitted merely upon a showing of a significant price differential. *See* Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840-41 (7th Cir. 1961); Shore Gas & Oil Co. v. Humble Oil & Ref. Co., 224 F. Supp. 922, 925 (D.N.J. 1963); Keck, *Lawful Price Discrimination: "Where There Is No Unlawful Effect on Competition,"* 8 ANTITRUST BULL. 381, 396-402 (1963) [hereinafter cited as Keck]. This difficulty in proving injury is not found at the buyer's level, since secondary-line analysis "permits wide inferences of adverse competitive effects based on the existence of substantial price differentials." Kroger Co. v. FTC, 438 F.2d 1372, 1379 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

ment or a private party, must prove that the adverse effects on competition resulted from price discriminations and not from a multitude of other factors affecting competition among sellers. Since direct evidence of causation will often be difficult to establish, courts have occasionally settled upon evidence of predatory intent as a substitute.[52] The intent, and in turn the causation, are inferred from the seller's conduct designed to undermine the competitive power of another seller. Sales below cost,[53] drastic undercutting of a competitor's price over a prolonged period,[54] and nonpricing anticompetitive practices[55] are among the judicially accepted indicia of predatory intent.

Where bidding is the general mode of purchasing in a given market, a pattern of illegal price discrimination will be easily discernible since each transaction is essentially unique. In such instances, the seller may abandon his usual list price — if he has one — and work on a cost-plus profit approach. If his bids are consistently lower when a particular competing seller is involved in the contest, this may constitute evidence of predatory intent when considered in light of other factors.[56] The offending seller may be unwilling to submit unprofitable bids when bidding against sellers who do not pose realistic competitive threats. However, when the targeted competitor is bidding for the business, the predatory seller may make an unprofitable and discriminatory bid which is primarily designed to prevent the other seller from obtaining the contract. Clearly, evidence of this type of conduct should suffice to establish the needed causative link.[57]

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[52] *See* FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955). *Cf.* National Dairy Prods. Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969).

[53] *See* National Dairy Prods. Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969); CALLMAN, *supra* note 4, § 28.1(b)(7), at 971. A bid below cost permits an inference that it was supported by extra-territorial profits. Such a finding supplies the needed causation in a primary-line case. *See* Shore Gas & Oil Co. v. Humble Oil & Ref. Co., 224 F. Supp. 922, 926 (D.N.J. 1963).

[54] *See, e.g.*, Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277 (7th Cir. 1966); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957). *See* Keck, *supra* note 51, at 402 n.57.

[55] *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) (engaging in industrial espionage); E.B. Muller & Co. v. FTC, 142 F.2d 511, 517 (6th Cir. 1944) (continually disparaging competitor's products while falsely representing one's own); Bergjans Farm Dairy Co. v. Sanitary Milk Producers, 241 F. Supp. 476 (E.D. Mo. 1965), *aff'd*, 368 F.2d 679 (8th Cir. 1966) (attempting to monopolize a market by conspiring to fix prices and by following a plan which ultimately resulted in the acquisition of a second processing plant).

[56] Other factors to consider in determining whether predatory intent exists are (1) relative size and strength of the competitors; (2) whether elimination of the competitor would lead to a monopoly for the discriminatory seller; and (3) whether the low prices were subsidized by profits earned elsewhere. *See* Keck, *supra* note 51, at 402 n.57.

[57] As will later be examined, the discriminating seller may, nevertheless, be able to establish a meet-competition defense. *See* text accompanying notes 94-140 *infra*.

In markets where bidding for the business of the buyer is the exception and not the rule, an injured seller will not have a record of past experiences from which to demonstrate this pattern of discrimination. Yet, whether bidding is generally or infrequently utilized, the loss of a single contract, if large enough, may have a considerable impact upon competition. In such instances, a Robinson-Patman violation could conceivably be charged.

One court has employed a pragmatic test to determine the anticompetitive effects of the loss of a single customer through price discrimination practiced by the seller's competitor. Borrowing from the standard used in territorial discrimination cases,[58] the district court in *Shore Gas & Oil Co. v. Humble Oil & Refining Co.*,[59] held that, in a bidding contest, the test for causation is whether higher bids to other customers subsidized the discriminatory low bid. In *Shore Gas*, gasoline suppliers engaged in bidding for the business of governmental and commercial accounts by offering discounts from posted consumer prices. The Asbury Park Radio Cab Company, which had been a commercial customer of Shore, the plaintiff, entered into a contract with Humble, the defendant, after the latter offered a price reduction greater than that given other purchasers. Subsequently, Shore charged Humble with violating the Act and brought an action for treble damages.

Despite the defendant's concession that its price to the cab company was discriminatory, Humble was nonetheless absolved from liability since its lower price was self-sufficient and nonsubsidized.

> When a seller underbids a competitor, thereby injuring him, the injury is an "effect" of the 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. . . . 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."[60]

As enunciated by the court, for a violation of the Act to exist, there must be a correlation between the low bid which is the basis of the

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[58] *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119 (1954); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 839, 842 (7th Cir. 1961). For a discussion of the "war chest" theory, see note 7 *supra*.

[59] 224 F. Supp. 922 (D.N.J. 1963).

[60] *Id.* at 926.

suit and higher bids to other purchasers.[61] High prices provide the profit margins necessary to undercut the competition.[62]

In applying this "deep pocket" or "war chest" theory to competitive bidding, the court made available a significant body of case law developed with respect to territorial price discrimination disputes.[63] Furthermore, by focusing on the predatory practice of subsidization, the otherwise positive aspects of competitive bidding are not unduly restricted. The court emphasized the pro-competitive features of the bidding system and felt that sustaining the plaintiff's case would "render impractical the only meaningful price competition in which Shore, Humble, and other rivals are presently engaged."[64] The existence of "secret concessions"[65] in the bidding procedure, *i.e.*, downward adjustments of bids based on knowledge of a competitor's offer, in no way troubled the court. Indeed, the court emphasized pragmatic market considerations by conceding that, where there are a limited number of suppliers offering a standardized product, "secret concession" pricing is perhaps the only effective type of price competition available.[66]

Further borrowing from territorial cases, the *Shore Gas* court noted that the presence of any injury to competition may have resulted from the nature of the market.[67] A highly competitive market often forces a seller to reduce his bid. Therefore, any injury sustained is not the result of the seller's price reduction but rather is the product of that fierce competition.[68] Still, if the plaintiff was to establish that defendant's low bids were responsible for the downward pressure on the price structure in the market, thus eroding competition, a finding of a sufficient nexus would seem appropriate.[69]

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61 *Id.* at 925.

62 *Id.*

63 *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); H.J. Heinz v. Beech-Nut Life Savers, Inc., 181 F. Supp. 452 (S.D.N.Y. 1960). *See* note 7 *supra*.

64 224 F. Supp. at 928.

65 *See* note 27 *supra*.

66 224 F. Supp. at 927.

67 *Id.* at 926-27.

68 The court in *Shore Gas* relied heavily upon Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), a territorial price discrimination case. In *Balian*, the plaintiff's revenue loss was held to be attributable solely to the presence of a highly competitive market. The fact that several ice cream suppliers charged higher prices outside the Los Angeles area was alone insufficient to prove primary-line injury to the ice cream market in that city. No evidence existed that these extraterritorial prices were subsidizing the lower Los Angeles prices. The price differences "did not substantially lessen competition or tend to create a monopoly in ice cream products." *Id.* at 368.

69 *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). In this non-

Secondary-Line Injury

At the customer level there is a greater risk of liability for price discrimination, for here, broad inferences of buyer injury will be made from a permanent and substantial price difference.[70] In *Shore Gas*, for example, the court noted the trend toward a per se approach in secondary-line cases:

> In the common "secondary" or buyer's line injury case, the causal relationship between discrimination and injury to competition is obvious: defendant's difference in price to buyers places the one discriminated against at a competitive disadvantage, consequently prejudicing fair, vigorous competition in the affected market.[71]

Despite the inferences of injury which are permitted in the secondary-line cases, certain market analysis is nevertheless necessary.[72] First, there must be a competitive relationship between those customers receiving the different prices.[73] Second, the competitive injury and

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bidding case, the Court held that the practice of offering discriminatory prices was responsible for the downward pressure on the price structure in the Salt Lake City market and, in so eroding competition, was in violation of § 2(a). Yet, for all intents and purposes, the competition in the market appeared to have improved. Plaintiff's market share decreased from a quasi-monopolistic 66.5% to a still commanding 45.3%, but its sales volume actually increased.

Justice Stewart, in his dissent, criticized the majority for misreading the Act in such manner as to provide protection to individual competitors and refute the generally held notion that "lower prices are the hallmark of intensified competition." *Id.* at 706. Fourteen years earlier, the Court had held that to construe the Act as protecting individual competitors at the expense of public injury would give rise to price uniformity "in open conflict with other purposes of the antitrust legislation." Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 63 (1953). Apparently, in *Utah Pie*, the Court refused to view higher retail prices as evidencing public injury. For a detailed critique of this decision see Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

[70] *See* FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948); Kroger Co. v. FTC, 438 F.2d 1372, 1379 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

[71] Shore Gas & Oil Co. v. Humble Oil & Ref. Co., 224 F. Supp. 922, 925 (D.N.J. 1963). The ready inference of injury on the secondary-line is also made by the FTC.

> [I]t is clear that the mere existence of substantial differentials between competing purchasers in a price sensitive atmosphere is sufficient to give rise to an inference of reasonable probability of injury to competition.

Beatrice Foods Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,303.

[72] *See* Keck, *supra* note 51, at 407.

[73] *See* Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 367 (9th Cir. 1955); Webster v. Sinclair Ref. Co., 338 F. Supp. 248, 252 (S.D. Ala. 1971) ("There is no price discrimination in violation of the Robinson-Patman Act if a different price is charged to retailers who are not in competition with one another as is the case here.").

In this regard, it is essential to remain aware of functional discounts, which are solely related to the buyer's market stratum or function. The special functions provided by these buyers can be cost justified as savings to the seller under § 2(a). Needless to say, the price differential must reflect an actual savings or liability will be incurred. Furthermore, it is the actual marketing function which is singularly dispositive and not the buyer's title. *See* FTC v. Ruberoid Co., 343 U.S. 470 (1952). *See generally* VON KALINOWSKI, *supra* note 19, § 30.02[1].

the price discrimination must be at the buyer level.[74] Finally, the causal connection between the competitive injury and the price discrimination must be established, a task made measurably easier by the permitted inferences.[75] As is true with primary-line injury, care must be taken to determine if the price differentials were the cause rather than the result of a specific market situation.[76]

With regard to secondary-line injury, a possible "no causation" defense was suggested in *Quaker Oats Co.*[77] There, the FTC upheld the respondent's pricing methods on the ground that reductions in price of a component commodity — oat flour — had little effect on the price of the finished product. Due to the lack of correlation between the price of the component and the buyer's final product, the effect on buyer level competition caused by the respondent's discriminatory bids was too tenuous to establish the requisite causation.[78]

Somewhat akin to the approach taken in primary-line decisions[79] is the Seventh Circuit's view in *American Oil Co. v. FTC.*[80] The FTC's charge of price discrimination was predicated upon a local price war between major gasoline distributors. American had instituted a dealer assistance program whereby it would lower its prices in order to facilitate effective competition between its dealers and other retailers who were enjoying lower prices from their suppliers. The court correctly noted that, absent a reasonable connection between the two, the mere fact that there were adverse competitive effects and discriminatory prices does not in and of itself establish a section 2(a) violation.[81] It concluded by holding that American Oil's dealer assistance program

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74 Keck, *supra* note 51, at 404.

75 Inferences of injury can more easily be made in a secondary-line situation in which there is keen competition and narrow profit margins. Kroger Co. v. FTC, 438 F.2d 1372, 1378-79 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971); Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *cert. denied,* 386 U.S. 908 (1967). Nevertheless, the Commission has been warned by the Supreme Court to take "realistic appraisals of relevant competitive facts" and avoid the "[i]nvocation of mechanical word formulas." FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963).

76 *See* American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954 (1964).

77 66 F.T.C. 1131 (1964).

78 *Id.* at 1191.

79 *See* Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), discussed in note 68 *supra.*

80 325 F.2d 101 (7th Cir. 1963), *cert. denied,* 377 U.S. 954 (1964).

81 The court noted:

> [I]n addition to competitors, price discrimination, and the fact of a shift of some business from or other adverse economic effect upon the unfavored customers, it is essential to the establishment of the violation here charged that there be a causal relation between the price discrimination to the favored customers and the factor relied upon as evidencing an actual or reasonably probable substantial lessening of ability to compete on the part of the unfavored customers.

325 F.2d at 104.

was a result of the price war and not a cause of it.[82] Once the court found the causal connection wanting, there was no need for it to be concerned with any meet-competition problems of not having undercut the competitors' prices.

It is perforce the very nature of the competitive bidding process which encourages discriminatory price reductions. Sellers are virtually forced to offer the lowest price feasible. This situation is arguably a breeding ground for discriminatory prices, and may conceivably bring many bidding cases within the ambit of the protection afforded in *American Oil*. Furthermore, this downward pressure distinguishes competitive bidding, in all its forms, from a mere request for a price quote. In the latter instance, apart from the ever-present need to fall within a competitive range, the pressure to shave prices is considerably less.[83] Notwithstanding *American Oil*, and in light of the inferences of causation available in secondary-line cases, sellers should exercise caution in formulating their competitive bidding practices.

Injury to Private Party Plaintiffs

Unlike actions instituted by the FTC, the private party plaintiff must demonstrate a causal relationship between the discriminatory price and the injury he suffered. Furthermore, outside the Second Circuit, he will usually have the additional burden of establishing injury to competition in general.[84] Not surprisingly, various instances exist where a supplier can demonstrate that causation was wanting on the secondary level. This is evidenced by several territorial price discrimination cases where the seller has been able to prove the favored buyer

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[82] *Id.* at 106. This decision may be contrasted to the holding in *Utah Pie* that downward pressure on the price level may constitute substantial injury to competition. *See* note 69 *supra*.

[83] In a bidding situation, a seller is more alert to the need for shaving prices since it is readily assumed that his price will be matched against others. He consequently arrives at a price with his competitor's price very much in mind. Far less pressure exists when making a formal price quote. Here, the seller is much less likely to lower his price and more often than not will remain fairly close to list price.

[84] *See* VON KALINOWSKI, *supra* note 19, § 28.08. Until 1945, it was generally believed that a prima facie case could not be established by a private plaintiff without a showing of general injury to competition. A.E. Staley Mfg. Co. v. FTC, 135 F.2d 453 (7th Cir. 1943). The Second Circuit, however, in 1945, liberally construed § 2(b) to hold that any price differential would constitute sufficient prima facie evidence of competitive injury. Samuel H. Moss, Inc. v. FTC, 148 F.2d 378, 379 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945). Based upon this case and Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 660 (1961), one of the authors of the Act has stated that a private litigant need only show injury to himself resulting from the discriminatory price without the necessity of proving injury to competition. PATMAN, *supra* note 2, at 52. However, a careful reading of *Radiant Burners* seems to support the conclusion that its holding was limited to § 1 of the Sherman Antitrust Act, 15 U.S.C. § 1 (1970).

was not in competition with the unfavored one.[85] Furthermore, in *Balian Ice Cream Co. v. Arden Farms Co.*,[86] the court refused to find a violation, emphasizing that the plaintiff was injured not by the extraterritorial price differentials, but by the highly competitive nature of the market, for which the plaintiff was in some part responsible.

In a bidding situation, a private plaintiff may also be denied recovery if a defendant's discriminatory bid is equal to bids of sellers who could lawfully underbid the plaintiff.[87] In such a case, a court may well find that the defendant did not cause injury to the plaintiff. Regardless of the submission of defendant's unlawful bid, the plaintiff would not have received the desired business. Such was the holding in *General Shale Products Corp. v. Struck Construction Co.*,[88] wherein a building materials subcontractor brought suit against a fellow subcontracting material supplier and a contractor who had been awarded a municipal housing contract. Prior to bidding on the contract, the defendant-contractor had received quotes on bricks from several firms, among them the defendant Southern Company and the plaintiff. The contractor persuaded Southern to lower its bid to equal those submitted by two other suppliers and then awarded Southern the subcontract. Plaintiff contended, *inter alia,* that Southern's price reduction destroyed the competitive price advantage that plaintiff's product en-

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The Second Circuit's position has been rejected by the FTC and several circuits. *See, e.g.*, Dean Milk Co. v. FTC, 395 F.2d 696, 700 (7th Cir. 1968); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 843 (7th Cir. 1961); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 956 (10th Cir. 1959); Sun Oil Co., 55 F.T.C. 955, 976 (1959); Yale & Towne Mfg. Co., 52 F.T.C. 1580, 1604 (1956). This has led one respected commentator to conclude:

> The rule outside the Second Circuit is that the plaintiff has the affirmative burden to prove not only a price differential, but also the other elements of a Section 2(a) violation, including that of competitive injury; only after such elements are established is a prima facie case of illegal price discrimination made out under the statute. Although the Supreme Court has not ruled on the question directly, it has by implication rejected the *Moss* approach.

VON KALINOWSKI, *supra* note 19, § 28.08.

85 *See, e.g.*, FTC v. Sun Oil Co., 371 U.S. 505, 526-27 (1963); England v. Chrysler Corp., 493 F.2d 269, 271-72 (9th Cir. 1974); Webster v. Sinclair Ref. Co., 338 F. Supp. 248, 252 (S.D. Ala. 1971).

86 231 F.2d 356, 368 (9th Cir. 1955).

87 Frequently, a competitor, operating under lower overhead and promotional expenses, can lawfully charge a buyer less for identical goods. This situation is found in a number of Robinson-Patman cases in which a large nationwide firm sought to compete with a small, local company, which, due to either efficiency or proximity to the market, could offer its product at a lower price. *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961). In extreme situations, the small firm's products may never enter the "flow of interstate commerce." Thus the jurisdictional threshold of the Act will not be met, and the small firm is free to offer discriminatory prices. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974).

88 132 F.2d 425 (6th Cir. 1942).

joyed. Since the plaintiff, however, would not have been injured within the intendment of the Act by the acceptance of a bid from either of Southern's two competitors, the court held that it could not have been injured by the acceptance of Southern's bid of an equally low amount.[89]

Additional circumstances may exist which further restrict the right of a private plaintiff to recover. For example, in inviting bids, a buyer may stipulate that he makes no assurances that the lowest bidder will receive the contract.[90] This is especially true when price is not the principal consideration. Thus, an allegation of injury by a disappointed seller may fail as being too speculative.[91] Likewise, where a plaintiff-seller has failed to submit a bid and there is no evidence that the defendant was responsible for that failure, no liability will be imposed.[92] The plaintiff must show that it was an illegal discriminatory price that was responsible for his loss of business and not his own failure to act or a buyer's cautious policies. Finally, in a closed bidding situation, a seller who was not invited to bid cannot successfully impose Robinson-Patman liability upon his victorious competitor.[93] The plaintiff was not injured by the defendant's otherwise unlawful conduct, since the excluded seller would not have received the lost business in any event. A possible exception, however, might be the situation in which invitations to bid are based on preliminary price quotes.

THE MEET-COMPETITION DEFENSE

Once there is evidence of a price differential, competitive injury, and a nexus linking the two, the defendant seller has the burden of asserting a justification for his lower bid. Rarely will the cost justifica-

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89 *Id.* at 429.

90 *See* A.J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp., 81 F. Supp. 890 (D. Mass. 1949).

91 *Id.* at 893. In preparing to submit a bid for a state contract, the plaintiff in *Goodman* entered into a contract with the defendant whereby the latter would furnish it with paint for $1.85 per gallon. After plaintiff submitted its bid, the defendant forwarded its own bid to the state, quoting a price of $1.75 per gallon. The district court refused to sustain a Robinson-Patman charge for lack of evidence of a primary-line injury.

The court first pointed out that there were no assurances that had plaintiff been the lowest bidder it would have been awarded the contract. Even if there were such assurances and even if the defendant had offered the paint to the state for the same price that it did to the plaintiff, the defendant's bid would still in all likelihood have been lower than any price the plaintiff could have bid without foregoing a profit. *Id.* "The contract would already be lost to plaintiff, and the fact that defendant lowered his price still further so that it was either discriminatory or unreasonably low in itself, could add nothing to the injury." *Id.*

92 Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872, 890 (E.D. Pa. 1973); *see* text accompanying notes 121-25 *infra*.

93 *See* White, *Workshop, Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 147, 163 (1971). *See also* note 30 *supra*.

tion defense be employed because of the difficulty in proving that a reduction in costs was realized in dealing with the particular purchaser, thereby warranting the price reduction.[94] Thus, a good number of reported Robinson-Patman cases turn on the section 2(b)[95] "meet-competition" defense. To utilize this defense, the defendant must prove that his discriminatory price was a good faith response to an equally low price of a competitor.

Since the goal of a seller in a bidding contest is to submit an offer which underprices his competitor by as little as possible, the meet-competition defense would appear to be a logical starting point for a seller who seeks to justify his conduct. It is a fundamental principle of the defense, however, that since a price reduction justified under section 2(b) still discriminates in favor of one purchaser, it may only be made defensively,[96] *i.e.*, as a response to a lower price of a competitor. Because of the particular nature of bidding, a number of problems arise under this broad rule. First, some authority exists for the proposition that a defensive price cut may only be made to retain present customers and not to obtain new business.[97] Three circuits, however, have expressly rejected this distinction.[98] Second, the price reduction may only "meet but not beat" the competition.[99] Finally, before offering the

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94 CALLMAN, *supra* note 4, § 28.1(c)(1), at 978-79; EDWARDS, *supra* note 7, at 591-601. *But see* PATMAN, *supra* note 2, at 75.

Section 2(a) expressly allows price differentials which mirror actual savings to the seller in his cost of manufacturing, selling, or distributing. Unfortunately, due to the variety of cost accounting problems involved, the defense has proved illusory, having been described as "a bonanza for the accountants, but fool's gold for the affluent respondent." Rowe, *The Robinson-Patman Act — Thirty Years Thereafter*, 30 ABA ANTITRUST SEC. 9, 12 (1966). Nonetheless, quantity discounts are permissible, provided the price reductions correspond to the seller's cost avoidance.

If quantity discounts are effectively available to all purchasers, little attention will be paid to their relation to cost savings. If a particular discount, however, requires the purchase of such large quantities that it is in essence placed beyond the reach of smaller buyers, the FTC and the courts will deem such a quantity discount to be discriminatory within the meaning of the Act. If the proper causal connection is established, the seller is then forced to justify the price. FTC v. Morton Salt Co., 334 U.S. 37, 42-43 (1948); AUSTIN, *supra* note 9, at 21.

95 15 U.S.C. § 13(b) (1970).

96 *See* EDWARDS, *supra* note 7, at 550-51.

97 The strict interpretation of the "meet but not beat" rule has led the Second Circuit and the FTC to hold that a lower price which goes beyond retaining old customers and attracts new ones is too aggressive to be within the § 2(b) defense. *See* Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); Steele, *Section 2(b) of the Robinson-Patman Act — Rules for Meeting Competition in the Past and the Present*, 13 ANTITRUST BULL. 1223, 1247-50 (1968) [hereinafter cited as Steele]. This distinction between old and new customers was rejected in Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962). *See* text accompanying notes 101-09 *infra*.

98 *See* notes 105-08 & accompanying text *infra*.

99 *See* Steele, *supra* note 97, at 1239-44.

discriminatory price, a seller must make a good faith verification of the competitor's price which he is allegedly meeting.[100]

Old Customers, but Not New Ones

It has been held that a seller may rely upon the 2(b) defense only when he is competing for the business of a purchaser with whom he has previously dealt.[101] Since meeting competition has been interpreted as a defensive measure,[102] a price reduction which is given to attract new customers has been deemed too aggressive to fall within the purview of the section.[103] This is the view expressed by the Commission and the Second Circuit.[104] The Seventh Circuit, however, rejected this distinction as economically unsound in *Sunshine Biscuits, Inc. v. FTC*,[105] finding that such an interpretation would be responsible for a forced price discrimination between a seller's current and prospective customers.[106] While this significant holding has been expressly followed by the Ninth[107] and Fifth[108] Circuits, the FTC has not acquiesced.[109]

Meet but Not Beat

The "meet but not beat" rule prohibits a seller from undercutting a competitor's price when seeking to comply with the meet-competi-

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[100] *Id.* at 1254; La Rue, *Meeting Competition or Price Fixing? Appearances Are Often Deceiving*, 54 CHI. B. REC. 335, 340-41 (1973).

[101] *See* Standard Oil Co. v. FTC, 340 U.S. 231, 242 (1950) ("[W]herever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to *retain* that customer, may in good faith meet that lower price") (emphasis added); Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959) ("[I]t is well settled that a lowered price is within § 2(b) . . . only if it is used defensively to hold customers rather than to gain new ones"). *See generally* Steele, *supra* note 97, at 1247.

[102] EDWARDS, *supra* note 7, at 550-51.

[103] CALLMAN, *supra* note 4, § 28.1(c)(2), at 993.

[104] *See* note 97 *supra*.

[105] 306 F.2d 48 (7th Cir. 1962).

[106] That the distinction between old and new customers is economically unsound and would defeat the purpose of the Robinson-Patman Act seems obvious. If, in situations where the Section 2(b) proviso is applicable, sellers could grant good faith competitive price reductions only to old customers in order to retain them, competition for new customers would be stifled and monopoly would be fostered. . . . Moreover, the distinction would create a forced price discrimination between a seller's existing customers to whom he had lawfully lowered his prices under Section 2(b) and a prospective new customer. These results, we believe, are incompatible with the purpose for which the Robinson-Patman Act was enacted.

Id. at 52.

[107] Cadigan v. Texaco, Inc., 492 F.2d 383 (9th Cir. 1974).

[108] Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220 (5th Cir. 1973).

[109] *See* 1 TRADE REG. REP. ¶ 3345.52 (1971). In a release dated November 23, 1962, the Commission stated that because of the particular facts in *Sunshine Biscuits* it would not seek review of the court's decision. However, the FTC noted that it had not changed its position on the question of law involved therein. *Id.*

tion defense; the seller's otherwise unlawful price may be as low as his competitor but not lower.[110] Since the admitted goal of a seller engaged in competitive bidding is to beat and not merely to meet his competitor's price, an immediate hurdle is encountered in reliance upon the meet-competition defense. The "meet but not beat" rule contemplates a situation where a seller may have been dealing with a particular customer for some time. A new seller arriving upon the scene might be able lawfully to offer a lower price. Absent the meet-competition defense, the Robinson-Patman Act would tie the regular seller's hands and prevent him from meeting the more attractive price. Courts have held that while section 2(b) authorizes a seller to reduce his price to equal that of his newly arrived competitor, it is not a carte blanche for a price war between the two.[111]

In the context of bidding, this requirement loses a great deal of its meaning. Bidding is a "winner-take-all" proposition in which the purchaser will generally select the seller with the lowest bid.[112] Permitting a seller to meet the last bid of his competitor, but go no lower, effectively deprives him of the opportunity to be awarded the contract. Fortunately, the FTC has shown considerable understanding of the dilemma faced by a seller caught in this situation. In *Beatrice Foods Co.*,[113] the relentless "meet but not beat" requirement was relaxed in a market which employed competitive bidding. Strict compliance with the rule in a situation in which the seller had otherwise exhibited every element of good faith was held to be unreasonable.[114]

In *Beatrice*, respondent, a large dairy company, was engaged in an informal bidding contest for the private label business of the Kroger retail stores. Based on misrepresentation of other seller's bids by the Kroger representative, Beatrice ultimately lowered its original bid to the point where Kroger received the more than 20 percent discount it had sought.[115] Although the Commission found secondary-line injury

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[110] *See generally* AUSTIN, *supra* note 9, at 99-100; Steele, *supra* note 97, at 1239-44. Since the meet-competition provision is designed as strictly a defensive measure, it is axiomatic that the response be limited to restoring an equal position vis-à-vis the competing seller by meeting his lower price. Any further reduction would be deemed too aggressive and not within the sanction of § 2(b). *See* CALLMAN, *supra* note 4, § 28.1(c)(2), at 992.

[111] *See* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[112] *But see* Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973) (under certain circumstances a higher bid will be accepted). For a discussion of this case, see text accompanying notes 121-24 *infra*.

[113] [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969).

[114] *Id.* at 21,308.

[115] In 1961, Kroger decided to investigate private label sales of milk and other dairy products in the hope of increasing both its profits and competitive strength. It invited bids from several companies with respect to prices of milk to be bottled under

stemming from the discriminatory prices contained in the final bid,[116] it held that Beatrice established a good meet-competition defense despite the fact that its prices actually "beat" the competition.[117] The Commission found that

> [p]recisely meeting the exact prices of competitive bids can have no realistic meaning in the context of this case. . . . This was a winner-take-all bidding situation. . . . Furthermore, exact comparability of price would have been impossible to achieve given the circumstances of the bidding procedure used here . . . .[118]

It was the Commission's belief that to require strict compliance with the rule

> would be effectively to outlaw such bidding situations by insisting upon an artificial and rigid test. . . . [P]rotection of competition under the Robinson-Patman Act can be accomplished in such cases by focusing on other questions (such as the responsibility of the buyers not to exceed the permissible bounds of bargaining) . . . .[119]

As a result of this alternative focus, Kroger, the buyer that misrepresented other competitive bids, was held to be in violation of section 2(f) for knowingly inducing illegal prices.[120]

The liberality of the *Beatrice* holding would appear to have been contradicted by a more recent district court opinion. In *Power Replacements Corp. v. Air Preheater Co.*,[121] the plaintiff challenged the virtual

Kroger's own label. The first bid received amounted to just under an 11% discount from prevailing prices. In January 1962, Beatrice, hearing rumors of Kroger's bid procurements, arranged a meeting with the representatives of the large food chain. At that meeting, Beatrice officials, after being asked if they were prepared to make an offer, replied that they were considering a 15% discount. Mr. Casserly, Kroger's representative, told them that their discount was not enough, as he already had in his possession a bid representing a 20% reduction.

On January 18, 1962, Casserly informed the dairy companies that the bidding could involve gross sales in excess of two million dollars and that his company was considering receiving reduced services which would eliminate certain distribution costs. Three weeks thereafter, Beatrice submitted its first proposal, which amounted to a sliding discount of between 16% and 18%. Although Kroger had not received a better offer, the bid was rejected. Between February and March, the other companies submitted various bids which were at times below Beatrice's first bid. In mid-March, during the course of another meeting, Beatrice quoted a 22.3% discount, conditioned upon approval by the Chicago office. Approval was forthcoming in April, Kroger accepted the bid, and the companies began operating under the contract in June. *Id.* at 21,289-96.

116 *Id.* at 21,303, *citing* United Biscuit Co. of America v. FTC, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966).

117 [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,308.

118 *Id.*; *see* note 115 *supra*.

119 [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,308.

120 *Id.* at 21,312. The Commission's finding of a § 2(f) violation was affirmed in Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971). *See* text accompanying notes 141-56 *infra* for a discussion of potential buyer liability.

121 356 F. Supp. 872 (E.D. Pa. 1973).

monopoly of the replacement units market enjoyed by the defendant, the original equipment manufacturer. In a series of informal bidding contests, the plaintiff offered a price it knew to be substantially below the defendant's list price. Pursuant to its attorneys' instructions,[122] the defendant countered by modifying its bids to offer the replacement units at a price nominally higher than the plaintiff's. Based on purchaser preference for the more established brand, the contracts were repeatedly awarded to the defendant. Notwithstanding the defendant's higher bids, the district court rejected the defendant's meet-competition defense on the ground that its bids in effect beat the competitor's price. The court's paradoxical holding was based primarily on consumer preference for the defendant's product:

> [I]n judging whether the seller has met rather than beaten his competition, we must do more than make a superficial dollar and cents comparison between the discriminatory price and the assumed competitive price. Since Air Preheater's product commands a premium in the replacement element market, it can illegally beat the price levels of Power Replacements even if it studiously obeyed the instructions of its attorneys.[123]

While the district court did not cite *Beatrice*, the decision implicitly rejects the FTC's view that competitive bidding requires unique treatment in regard to the "meet but not beat" rule. Worse yet, the court provided an additional qualification to the criticized rule: a *higher* price may at times "beat" a lower one because of customer preference for an established brand. Nevertheless, *Power Replacements* involved an unusual situation and it is easily distinguishable on its facts. For years, the defendant had a virtual monopoly in the particular market. The entrance of the plaintiff was the only effective competition the defendant had faced. Through its strategy of bidding slightly above its new competitor, Power Replacements could assure itself of contract awards because of strong customer preference. Furthermore, there were repeated instances of commercially unfair acts.[124] Perhaps the case

122 After a 1965 settlement of a Robinson-Patman and Sherman Antitrust Act suit in California, brought by the same plaintiff, defendant's attorneys advised that the following guidelines should be used in any situation where there existed the possibility of competing against plaintiff: (1) defendant should never sell below cost; (2) defendant should not attempt, prior to submitting its own bid, to learn what price plaintiff was quoting; (3) if it believed that it was bidding against plaintiff, defendant could quote off its list price but should try to quote *higher* than the bid it anticipated plaintiff would make; and (4) defendant must not malign plaintiff's products. *Id.* at 881.

123 *Id.* at 898.

124 For example, Power Replacements warned customers that boiler manufacturers would blame failures on the use of nonoriginal replacement parts sold by plaintiff, threatened to discontinue other services unless its products were used, implied that plain-

would have been more appropriately limited to considering violations of section 2 of the Sherman Act.[125] Absent strong evidence of predatory intent, the view expressed in *Beatrice* seems preferable.

Good Faith Verification

In order to establish a meet-competition defense, the seller must make a good faith verification of the allegedly lower price before responding by offering a discriminatory price.[126] Recent trends, however, indicate an easing of the verification requirements. The standard of good faith is becoming increasingly more subjective in nature.[127] Accompanying this trend has been an increased emphasis upon buyer liability under section 2(f).[128] A balance is thus being struck which

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tiff's product could not perform as well, and falsely represented that its higher price was due to continual research and development costs. *Id.* at 890-93.

125 15 U.S.C. § 2 (1970). Section two applies to situations in which a firm is found to possess monopolistic power as a result of willful acquisition or maintenance of exclusive power, as opposed to growth caused by accident, possession of a superior product, or a high degree of business skill. *See generally* 1 von Kalinowski, *supra* note 19, § 7.01 *et seq*. The forbidden practices were found to exist in *Power Replacements*, and consequently, a charge based on § 2 was sustained. Power Replacements Corp. v. Air Preheater Co., 356 F. Supp. 872 (E.D. Pa. 1973).

126 Before a competitor's price can be met, a seller is required to verify in good faith that the lower price existed or that he had sufficient reason to believe that it did. How far this verification must go has been the center of considerable debate. A seller who simply relied upon the information provided by his customer was held not to have satisfied the good faith requirement in Viviano Macaroni Co. v. FTC, 411 F.2d 255 (3d Cir. 1969). The court explained that respondent was under a duty to verify the buyer's price information and to weigh the credibility of the source in light of the "tendency of buyers to secure the most advantageous terms of sales possible." *Id.* at 259.

In Surprise Brassiere Co. v. FTC, 406 F.2d 711 (5th Cir. 1969), the court rejected a contention that the FTC's hearing examiner erred as a matter of law by requiring specific foreknowledge as to every detail of the competitor's price allowances before the seller could use his § 2(b) defense. Verification of reports of competitive price reductions was not an "undue burden" in providing what the court felt was a necessary showing of diligence in ascertaining facts which would lead a reasonable and prudent person to believe that he was in fact meeting his competition. *Id.* at 715-16.

127 *See, e.g.*, Jones v. Borden Co., 430 F.2d 568, 573 (5th Cir. 1970) (rigid test abandoned in favor of a "standard of a 'reasonable and prudent person' attempting to meet his competitor's prices"); Beatrice Foods Co. [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,045, at 21,307 (FTC 1969).

128 *See* Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *cert. denied*, 386 U.S. 908 (1967); Beatrice Foods Co. [1967-1970 Transfer Binder] Trade Reg. Rep. ¶ 19,045 (FTC 1969). In *Beatrice*, the Commission held that a point is reached at which the buyer is bargaining "too hard," thereby shifting Robinson-Patman liability onto himself.

> Kroger [the buyer] bargained "too hard" in total disregard of its Robinson-Patman obligations, and not because it took advantage of a weak seller. It is usually the seller's obligation to observe compliance with Robinson-Patman, but there is a point which is reached by continuing pressure by the buyer when the latter begins to bear some liability if Robinson-Patman limits are exceeded. In this case, Kroger exceeded these limits by giving a false impression that a competitor had offered a 20% discount and when it failed to convey any correct information about quoted prices.

Id. at 21,312.

prevents any possible dilution of the Act. The seller may now establish his defense more easily, while the buyer's potential liability to the injured party is increasing. Where a buyer unlawfully induces the discrimination, he, and not the seller should bear the burden.[129] Nonetheless, the good faith requirement is still viable, and a seller who slashes his prices without diligent fact finding will surely fail in establishing his defense.

The *Beatrice* decision provides a model for the type of verification appropriate in an informal open bidding situation. The Commission noted that representatives of the company "made specific investigations, tested rumors and tried by legitimate means to find out what competitors were doing . . . ."[130] Furthermore, they sought information from the buyer inducing the reduction and had no reason to believe that the data supplied was untrue.[131] Accordingly, no finding of liability was justified.

The greatest difficulty with verification lies in the area of completely sealed bidding which, unlike the *Beatrice* procedure, leaves no room for reasonable reliance on buyer representations. It is questionable whether the courts will be willing to reduce the seller's affirmative burden when no other potentially liable party is available. Moreover, the seller is left in the unenviable position of trying to establish his good faith amid circumstances which foreclose any real possibility of his having verified knowledge of the competitive bids. While the courts may recognize the difficulties of precisely evaluating other prices, a bidder should nevertheless attempt to accurately gauge the range of offers of other contestants. One commentator has suggested that the best approach for a seller faced with the dilemma of having to verify competitors' prices in a sealed bidding contest is to "make a detailed analysis of what is going on in the market where his customer is located."[132]

Prior to the current relaxation of the verification requirements, it had been suggested that a seller who is unable to confirm a reported

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129 [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,308.

> If businessmen are not to be prohibited entirely from bargaining in such a situation, the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried every proper means to feel out the opposition.

Id.

130 *Id.* at 21,307.

131 *Id.*

132 White, *Workshop, Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 147, 161-62 (1971).

price quote should contact his competitor directly.[133] While such contact would expeditiously enable the seller to comply with the good faith requirement, it may well raise the specter of Sherman Act liability for conspiring to fix prices.[134] Not surprisingly, in *United States v. Container Corp. of America*,[135] the Supreme Court held that an exchange of price information between competitors may in some instances amount to a Sherman Act violation.[136]

It has been said that while several Robinson-Patman principles "coexist restlessly alongside the Sherman Act," the strict duty to verify demanded by the FTC and several courts "threaten[s] complete irreconcilability."[137] As a result of *Container Corp.*, the consensus was that no seller should ever make a direct inquiry of his competitor. Two circuits, however, have subsequently resolved some of the uncertainty by holding that direct verification is not violative of the Sherman Act when necessarily required for the purpose of complying with section 2(b).[138] Nonetheless, caution should still be exercised outside the Ninth

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[133] *See* La Rue, *Meeting Competition or Price-Fixing? Appearances Are Often Deceiving*, 54 CHI. B. REC. 335, 340 (1973), *as amended*, Pub. L. No. 93-528 (Dec. 21, 1974).

[134] *See* 15 U.S.C. §§ 1-7 (1970).

[135] 393 U.S. 333 (1969).

[136] Whenever one seller was unable to certify a report of a competitor's price offer, a designated employee would contact the alleged offeror for the sole purpose of verification. Conversation would be strictly limited to mentioning the suspect price, eliciting in turn either an affirmative or negative answer. Never were the merits of the particular price discussed, nor was there any formal agreement between the manufacturers to provide this information. Prices were nonetheless exchanged reciprocally. One would provide the desired information in expectation of the solicitor's mutual cooperation whenever it was required. *Id.* at 335.

The Court held that any "intereference with the setting of price by free market forces is unlawful *per se*." *Id.* at 337. It called attention to the fact that information was exchanged concerning specific offers to individual customers and was not merely a statiscal survey of average prices. *Id.* at 334.

The Court noted that price exchanges would be permitted only in the presence of a "controlling circumstance," such as fraudulent buyer representations against which sellers attempt to protect themselves. *See* Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925). In *Container Corp.*, no fraudulent inducement was alleged, and therefore, the manufacturers could not take advantage of the exception.

[137] *See* Eaton, *The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act*, 18 ANTITRUST BULL. 411, 424 (1973) [hereinafter cited as Eaton].

[138] In Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972), the court permitted direct verification in the absence of any "controlling circumstance." *See* note 136 *supra*. The case was distinguishable from *Container Corp.* by the fact that the seller's prices were publicly available, having been set forth in trade journals, whereas in the corrugated container industry, they were available from no other source but the manufacturers themselves. Furthermore, Texaco made its prices available to everyone, regardless of reciprocity. 455 F.2d at 181. The court held that Texaco's actions were motivated by compliance with the meet-competition defense and were without antitrust implications.

By seeking verification Texaco was simply complying with the requirements laid and Tenth Circuits by any seller who contacts his competition in the absence of any evidence of buyer misrepresentation. In view of *Container Corp.*, he could find himself walking a "tightrope."[139] Indeed, in the future, courts may find that a conflict exists between further relaxation of the verification requirement and permitting a seller to verify prices directly. As the verification requirement is eased, any seller who resorts to direct contact may well be regarded as overzealously fulfilling his Robinson-Patman obligations, thus leaving himself open to possible Sherman Act liability.[140] On the other hand, in light of recent decisions finding no Sherman Act liability, the courts and the FTC may begin to tighten the verification requirements again and expect a seller, when all else fails, to resort to direct communication.

> down in Federal Trade Commission v. A.E. Staley Manufacturing Co. That is, Texaco was attempting to confirm the reports of its retail outlets that their competitors had lowered their prices. This much would be necessary before Texaco could lower its prices and still be within the "meeting competition" defense.

Id. at 182.

The Ninth Circuit, in Gray v. Shell Oil Co., 469 F.2d 742 (1972), *cert. denied,* 412 U.S. 943 (1973), seemed unconcerned with distinguishing the price exchange involved therein from the situation in *Container Corp.* The court simply held that the latter case did not forbid every exchange of price information, whether performed "pursuant to an agreement or a reciprocal understanding." 469 F.2d at 746. According to the court, the jury had been properly instructed to consider the defendant's purpose in exchanging price information. *Id.* at 747. It also pointed out that only after exhausting every other means did the defendant resort to direct communication to verify the reportedly lower prices. *Id.*

In Di-Wal, Inc. v. Fibreboard Corp., 1970 Trade Cas. ¶ 73-155 (N.D. Cal. 1970), a wallboard manufacturer, who participated in an almost identical price exchange as that involved in *Container Corp.*, was charged with conspiring to fix or stabilize prices. In dismissing the purchasers' complaint, the district court found that the requests for price information and subsequent disclosures had been conducted in order to enable the defendant and its competitors to meet the good faith requirement of the Robinson-Patman Act. *Id.* at 88,557. The exchanges were not made as part of a conspiracy to restrain trade. *Id.* at 88,558. The court ignored the fact that there was no "controlling circumstance" and took no pains to distinguish the case from *Container Corp.* In Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971), the same court placed the wallboard industry practice of direct verification of prices within an exception established by the Supreme Court in Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925). The *Wall Products* court finding that the sellers were confronted with customer misrepresentation, held that "[n]o court is required by the Sherman Act to foster 'competition' procured by fraud and misrepresentation, and the Sherman Act does not prohibit a defendant from protecting itself therefrom." 326 F. Supp. at 315. The court was not at all troubled by the fact that the verification calls had a tendency to check the decline of prices that had already begun. According to the court, the inference to be drawn was that verification calls "were made for the purpose of complying with the Robinson-Patman Act and as a means of protection against false representations by customers." *Id.* at 311. As a consequence, no violation of the Sherman Act was found to have resulted from the practice of directly verifying prices.

139 *See* Eaton, *supra* note 137, at 430.

140 *Id.*

BUYER LIABILITY

During the first 35 years of the Act, FTC enforcement of the buyer liability provisions[141] was infrequent.[142] In order to be liable under section 2(f), the buyer must have *knowingly* induced or received an illegal price. Knowledge as a prerequisite to liability was strongly emphasized by the Supreme Court in *Automatic Canteen Co. of America v. FTC*.[143] Moreover, the burden of proving this culpable knowledge was placed on the Commission or private party plaintiff.[144] This reflected the Court's fear that vigorous prosecution of section 2(f) could go beyond the Act, lead to price uniformity,[145] and place a buyer at his peril whenever he engaged in price bargaining.[146]

Because of *Automatic Canteen*, section 2(f) for a time "was relegated to the limbo of nonuse."[147] The situation has now changed. Buyers, who through aggressive bargaining realize material price concessions from suppliers quick to improve disappointing sales, may now face section 2(f) problems.[148] As a result of *Kroger Co. v. FTC*,[149] an appeal from the Commission's findings of a section 2(f) violation by Kroger in the *Beatrice* case, buyers apparently will be held to a higher standard of honesty in their negotiations.[150] Furthermore, *Kroger* specifically rejects the contention that there must first be a section 2(a) violation before a section 2(f) charge can be made.[151] Thus, regardless

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141 15 U.S.C. § 13(f) (1970).

142 *See* Klein, *Hard Bargaining Under § 2(f) of the Robinson-Patman Act*, 32 OHIO ST. L.J. 734 (1971) [hereinafter cited as Klein]. In the first 35 years of the Act's existence, there was less than 50 § 2(f) complaints filed. *Id.* at 734 n.2.

143 346 U.S. 61 (1953).

144 *Id.* at 81. Since trade experience can indirectly provide such knowledge, the Court held that an inference of the required *scienter* would be permissible under the following circumstances:

> [A] buyer who knows that he buys in the same quantities as his competitor and is served by the seller in the same manner or with the same amount of exertion as the other buyer can fairly be charged with notice that a substantial price differential cannot be justified.

Id. at 80.

145 *Id.* at 63.

146 *Id.* at 73.

147 KINTNER, *supra* note 8, at 256.

148 *See* Klein, *supra* note 142, at 734.

149 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

150 Eaton, *supra* note 137, at 427.

> Buyers may be held to a new standard after *Kroger Co. v. FTC* . . . one termed "truth in bargaining" by former Commissioner Elman. Negotiating deception could be curtailed by this specter of Robinson-Patman liability.

Id.

151 438 F.2d at 1377.

> The Commission found that Beatrice made a bona fide attempt to meet the Broughton bid which it was told by Kroger was the lower one. In so doing Beatrice was in good faith acting within a defense offered by section 2(b). On the other hand, Kroger knew that the Broughton bid was not lower and that the one of Beatrice was, therefore, not in fact responsive to an actual lower bid.

of the culpability of the seller, a buyer can be charged with knowledge that the discriminatory prices he received could not possibly be cost justified by the seller and were therefore illegal.[152]

The recent emphasis upon buyer liability has alleviated some of the problems encountered in price haggling and secret concessions. A supplier can now place greater reliance upon the representations of the buyer.[153] Nevertheless, it would be a reckless seller who would attempt no further verification and thereby risk section 2(a) liability. Still, in these cases the possibilities of buyer liability are increased, thereby reducing the probability of buyer misrepresentation.[154]

In a sealed bidding situation, where the buyer has merely invited suppliers to submit bids, the possibilities of section 2(f) liability are minimal. Perhaps, should the buyer receive an unusually low bid from a seller with whom he has had previous dealings, he could be charged with having "knowingly . . . receive[d] a discrimination in price . . . ."[155] Even if the buyer had no actual knowledge of the illegality of the bid, he could be charged with having had sufficient trade experience to place him on notice of the illegality.[156]

CONCLUSION

Bidding and price haggling are often viewed as an ideal manifestation of the competitive process. When properly employed, they encourage sellers to offer their goods at the lowest possible profit margin to the ultimate gain of the American consumer. Nevertheless, the un-

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> In such a factual situation the seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices.

Id.

152 *See* Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *cert. denied,* 386 U.S. 908 (1967). A retail food chain was found guilty of inducing illegal price discriminations by initiating a promotional campaign. In order to participate, the suppliers had to grant substantial price concessions. In affirming the decision of the Commission, the court agreed that the defendant had knowledge of certain facts of the market which at the very least could create a reasonable suspicion that the concessions were probably illegal. It held that under such circumstances a "duty to inquire" whether the suppliers' price reductions could be cost justified arose. *Id.* at 365-66. The defendant was charged with possessing sufficient trade experience to have reason to know the prevailing prices paid by its specific competitors — a far more stringent standard than that set forth by the Supreme Court in *Automatic Canteen. Id.* at 367.

153 *See* Beatrice Foods Co. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969).

154 *See id.*

155 15 U.S.C. § 13(f) (1970).

156 *See, e.g.,* Kroger Co. v. FTC, 438 F.2d 1372, 1378 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971); Fred Meyer, Inc. v. FTC, 359 F.2d 351, 365-67 (9th Cir. 1966), *cert. denied,* 386 U.S. 908 (1967).

certainties which the Robinson-Patman Act present may discourage the use of these pro-competitive devices and lead to stagnation within pricing structures.

The evil at which the Act is aimed is not price reduction, but rather, reductions to one buyer and not to another. A seller may not rob Peter to pay Paul. But bidding by its nature demands price discrimination. The seller is asked to give his lowest possible price, not his usual list price. The pressure for a reduction is great, since only one seller will prevail.

In an effort to aid the seller caught in the inevitable conflict between the commercial necessities of competitive bidding and the Robinson-Patman Act, the following guidelines are proposed. They must be read in light of the differences among the circuits, the possibilities of change in FTC enforcement policies, and the potential for somewhat groundless suits by disgruntled competitors.

1. A seller may always enter into a bidding contest when he intends to bid a list, or otherwise nondiscriminatory price.

2. A seller may not submit bids to *particular customers* which "are consistently lower than its prices to others who are competitors of such favored customers unless it can justify such differences by differences in cost . . . ."[157]

3. A seller may not submit bids which are consistently lower when bidding against a *particular competitor*, unless cost justified.

4. In bidding for the business of a *new* customer, any discriminatory price offered to meet the price of a competitor should only be submitted with full awareness of the attendant risks outside the Fifth, Seventh, and Ninth Circuits.[158]

5. Sales personnel should be required to maintain accurate records of the following information: (a) competitors' price lists or other published pricing policies; (b) written or oral statements by a purchaser describing competitive offers including name, time, and amount where possible; and (c) general knowledge of competitors' pricing policies obtained through field personnel. This information should be carefully reviewed before deciding on a bid price and a record of the information relied upon should be entered into the file.

6. When downward revisions of an already submitted bid are contemplated, the buyer should be requested to sup-

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[157] Quaker Oats Co., 66 F.T.C. 1131, 1183 (1964) (hearing examiner).

[158] *See* text accompanying notes 101-09 *supra*.

ply the following information in writing: (a) a copy of the competitor's price quote or most recent invoice; (b) in the alternative, a written statement describing the competitor's offer; or (c) failing that, a record should be made of specific oral statements made by the buyer fully describing the competitor's offer. Only when the prior course of dealing indicates that the buyer's representations are reliable should a discriminatory reduction be made based on the mere assertion by the buyer that the seller's bid is higher than that of its competitor's.

7. If the seller can clearly establish either of the following facts, it is then free to charge whatever the circumstances justify: (a) the presence of a condition designated in section 2(a) which affects the marketability of the goods, *e.g.*, pending obsolescence; or (b) the fact that the reductions were fully justified by attendant cost savings in dealing with a particular customer.

As precarious as a bidding seller's position may now be, there have been indications that it may worsen. In *Great Atlantic & Pacific Tea Co.*,[159] a case now pending before the Commission, the FTC has indicated that, in order to protect both the interest of the consumer and the competitive environment, an order may be forthcoming containing "restrictions on the use of the competitive bidding process."[160] While this Note expresses no opinion concerning the final outcome of the case, the Commission, in fashioning any remedy, should consider the competitive benefits of bidding as expressed in its earlier decisions.[161] Further, the courts and the FTC must show understanding for the plight of a seller asked to sell his goods by means of bidding. The meet-competition defense should be construed to give protection

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159 [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639 (FTC 1971).

160 *Id.*

In addition to halting the alleged practices, the proposed order stated that if record facts show that the proposed provisions "might be inadequate fully to protect the consuming public, or the competitive conditions of the retail grocery or dairy industries, the Commission may order such other relief as it finds necessary or appropriate, including restrictions on specific abuses of buying power in bi-lateral negotiations, restrictions on the use of the competitive bidding process, requirements that special price reductions be passed on to the consumer and to competing retail-purchasers, the posting or publication of net wholesale prices to A&P, and restriction of vertical integration by A&P into the dairy industry if it appears that any such provision is necessary or desirable for effective relief herein."

Id.

161 *See* Beatrice Foods Co. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969); Quaker Oats Co., 66 F.T.C. 1131 (1964).

to the bidding seller where his actions are not predatory, and his discriminations neither consistently favor one buyer nor disadvantage one competitor.

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