Understanding the Antitrust Laws: Advising the Client

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It is of course true, as previously emphasized, that the facts are all important in advising clients. This is because proposed transactions consistent with competition will survive even adverse per se rulings, whereas those conflicting with antitrust objectives can not be saved by the most persuasive of past precedents.

Nevertheless, it is likewise true that legal principles—as distinguished from specific cases—must be applied to these facts. For this reason guidelines marshalling the general principles must be constructed. An illustrative summary of the controlling principles in [five] major areas of antitrust law is therefore presented in this Chapter.

Customer Problems

Initially, the practitioner might group together the guidelines which should control the distribution by his client of its products and services. These principles of law involve what are often referred to as vertical relationships, which primarily concern the dealings of a seller with a buyer, although they have an impact also upon the competitors of each party.

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*B.S. 1932, Princeton University; LL.B. 1935, Yale University.

1 See, e.g., the cases cited in "Per Se Presumptions," in the preceding Chapter IV.

Customer Selection

The first step for a seller in dealing with purchasers is for him to decide with whom he wishes to do business. The statutes applicable to this selection by a seller of his customers are sections 1 and 2 of the Sherman Act and section 5 of the Federal Trade Commission Act. These statutory provisions permit the seller to sell what he pleases, where he wishes and to whom he desires, so long as he does not engage in any unfair act, enter into any contract in unreasonable restraint of trade, or seek to monopolize.

This means, according to the courts, that—in the absence of any unfair, unreasonable or monopolistic conduct—a businessman is privileged under the antitrust laws to deal with some and to refuse to deal with others, to assure those selected that they will be thus dealt with, and subsequently to drop those deemed to be unsatisfactory. Even the Automobile Dealer Franchise Act, which curtails the freedom of automobile manufacturers in dealing with their outlets, has been held not to destroy these rights of a seller.

This also means, however, under the uniform rulings of the courts, that a seller should not maliciously select as products or services to be marketed any which are merely temporary weapons specially designed to destroy competitors, such as “fighting ships” or machines. Neither should

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7 Thomsen v. Cayser, 243 U.S. 66 (1917); Patterson v. United States, 222 Fed. 599 (6th Cir. 1915), cert. denied, 238 U.S. 635.
he deliberately choose as sources of supply or channels of distribution the suppliers or customers of competitors in order to drive those competitors out of business. Finally, he should not make his selection of products and customers as part of an unlawful conspiracy, boycott or attempt to monopolize.

As recently explained, with respect to the refusal of a TV network to deal with a station and its simultaneous purchase of a competing station:

If such a cancellation and purchase were part and parcel of unlawful conduct or agreement with others or were conceived in a purpose to unreasonably restrain trade, control a market, or monopolize, then such conduct might well run afoul of the Sherman Law.

There is admittedly one substantive question as to seller selection which cannot clearly be answered. This relates to his right to deal or not to deal with customers as a means of controlling their competitive activities. The old cases broadly acknowledged his right to do so in the absence of monopolization. Subsequent cases have differed. Other recent cases of limited authority, in turn, are not in agreement. Our analysis of the cases and congressional objec-

8 United States v. Reading Co., 226 U.S. 324 (1912); Ballard Oil Terminal Corp. v. Mexican Petroleum Corp., 28 F.2d 91 (1st Cir. 1928).
9 Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Porto Rican Amer. Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929), cert. denied, 279 U.S. 888.
10 Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1 (9th Cir. 1963); United States v. Pacific & Arctic Co., 228 U.S. 87 (1913); William H. Rankin Co. v. Associated Bill Posters of U.S., 42 F.2d 152 (2d Cir. 1930), cert. denied, 282 U.S. 864.
tives suggests that a seller may advise his customers with respect to any competitive activity, but that he may not automatically cut them off for failure to conform to this advice. Certainly a large seller would be poorly advised to use his right of customer selection to regiment the prices, purchases and other competitive decisions of a nationwide network of outlets. The condemnation by the Supreme Court of the use by a seller of a lawful consignment arrangement to effect such elimination of competition would seem equally to ban his use of the equally lawful right to select customers if exercised for a similar unlawful purpose, for either:

[D]evice, if successful against challenge under the antitrust laws, furnishes a wooden formula for administering prices on a vast scale.

Such coercive refusal to deal would seem to be vulnerable not only as an unfair act, but as conduct pursuant to implied contracts in restraint of trade. For if a seller should threaten to cut off even one customer because the latter has not resold at prices and under competitive conditions set by the seller, the courts may find that there exist tacit agreements between that seller and his remaining customers pursuant to which the latter resold at such prices and terms. He has then passed from the issue of his right individually to restrain by unilateral selection of customers to the issue—subsequently discussed—of whether he and his customers have the right contractually to restrain through resale agreements.

The Parke Davis ruling warns that when a manufacturer refuses to deal with customers, in accordance with a

18 Bragon v. Hudson County News Co., 321 F.2d 864 (3d Cir. 1963); Girardi v. Gates Rubber Co. Sales Div., Inc., 325 F.2d 196 (9th Cir. 1963); Allsec Corp. v. Senco Prods., Inc., 329 F.2d 567 (6th Cir. 1964); LeBlanc v. Continental Oil Co., CCH 1965 Trade Cas. ¶71,494 (5th Cir. 1965).
21 Frey & Son v. Cudahy Packing Co., 256 U.S. 208 (1921); cf. Carter Carburetor Corp. v. FTC, 112 F.2d 722 (8th Cir. 1940).
policy of controlling the resales of these customers, a court needs little more to spell out an unlawful combination between the manufacturer and his acquiescing customers:

When the manufacturer's actions, as here, go beyond mere announcement of his policy and the simple refusal to deal, and he employs other means which effect adherence to his resale prices, he has put together a combination in violation of the Sherman Act. . . .

Customer Supply

Once customers are selected, the seller will proceed to supply them. The statutes relevant to this supply by a seller of his outlets include principally sections 1 of the Sherman Act, 3 of the Clayton Act and 5 of the Federal Trade Commission Act. These statutory provisions caution the supplier in his use of tying, exclusive dealing, and requirements contracts.

This legislation has been interpreted to permit a seller to enter into such forms of agreements, with the buyers he selects, as may be reasonably necessary to do business with and through them. Thus he may assure an outlet that it has been selected on an exclusive or other basis, and that it will be adequately supplied. In addition, if the outlet does business under the seller's franchised name, he may require it to purchase such distinctive supplies as may be essential to provide the public with the products associated with that franchise name, may stipulate the means by

which these supplies are delivered to the outlet, and may even impose objective standards by which his outlet—if it so elects—may patronize his competitors for such supplies. Contracts of lease as well as sale may contain such qualified controls, provided that:

[R]ules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet.

This legislation has been viewed to provide far less freedom to a seller, however, when he seeks to prohibit his customers from purchasing from the seller's competitors. At the outset, he is informed that a tying arrangement, whereby the sale of one item is conditioned upon the purchase of another, is viewed coldly. True, all tying agreements are not per se unlawful, for otherwise a clothing manufacturer could not refuse to sell a coat without accompanying trousers. Again, in special situations, business necessity may justify some forms of tying. But for the most part unreasonable tying of unrelated commodities is dangerous where either the seller has a monopoly of a unique tying article or the volume of business in the tied commodity is substantial. In addition to this caution on tying arrangements, he is warned that a network of total requirements contracts will be troublesome. On the one hand, a small seller may be able to prove that requirements

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contracts are necessary for him to engage in business,31 a large seller may demonstrate that they are advisable in dealing with large buyers,32 and both may be able to prove that they are essential in launching a new product or service.33 On the other hand, however, a large seller at least who is a leader in a market and is contracting with a network of subservient retailers34 should proceed cautiously, in order to ensure that he is not tending thereby to foreclose35 an unduly large segment of the market for too long a period of time.36 Even substantial franchisors should not assume that they may foreclose franchised outlets for all products.37 Also, no seller should seek to foreclose competition by requirements contracts pursuant to unlawful coercion,38 conspiracy with other sellers39 or attempted monopoly.40

Nevertheless, it should be emphasized that both the latest Supreme Court discussion of requirements contracts

34 Anchor Serum Co. v. FTC, 217 F.2d 867 (7th Cir. 1954); Dictograph Prods., Inc. v. FTC, 217 F.2d 821 (2d Cir. 1954), cert. denied, 349 U.S. 940 (1955); Harley-Davidson Motor Co., 50 F.T.C. 1047 (1954).
and the competitive objectives of our antitrust laws do permit a requirements contract involving substantial purchases over a substantial period of time:

[I]f only a small share of the market is involved, if the purpose of the agreement is to insure to the customer a sufficient supply of a commodity vital to the customer's trade or to insure to the supplier a market for his output and if there is no trend toward concentration in the industry.41

**Customer Resales**

On occasion, a seller may also attempt to control the resales of his customers. In this case, the statutes concerned with such attempts by a seller to control the sales and services of his outlets are limited to the Sherman and Federal Trade Commission Acts. But their prohibitions of unfair acts, unreasonable restraints and monopolizing apply far more severely to the seller when he goes beyond selecting and supplying his outlets and also seeks to dictate resales.

Interpretations of these statutory provisions permit a supplier to impose obligations upon his dealers which will safeguard the good will associated with his products in his dealers' hands, and to require aggressive efforts to sell these products. For example, a seller may designate a territory as the primary responsibility of a particular dealer and obligate him to use his best efforts to exploit this market.42 A seller may also establish standards with respect to cleanliness, attractiveness and investments,43 and prohibit fraud and deception in the sales and services of his franchised outlets.44 In particular, as recently emphasized by the

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43 See cases cited in note 6 supra. See also Boro Hall v. General Motors Corp., 124 F.2d 822 (2d Cir. 1942), cert. denied, 317 U.S. 695 (1943).
44 Woodard v. General Motors Corp., 298 F.2d 121 (5th Cir. 1962), cert. denied, 369 U.S. 887, rehearing denied, 370 U.S. 965; Chicago Sugar Co. v. American Sugar Ref. Co., 176 F.2d 1 (7th Cir. 1949), cert. denied, 338 U.S. 948 (1950); Pick Mig. Co. v. General Motors Corp., 80 F.2d 641 (7th Cir. 1935), aff'd, 299 U.S. 3 (1936); Fosburgh v. California & Hawaiian Sugar Ref. Co., 291 Fed. 29 (9th Cir. 1923).
Federal Trade Commission, a supplier who licenses outlets to use his trade name is not guilty of any antitrust violation in requiring these outlets to conform to his specifications and quality controls, including the use of his unique ingredients in any further manufacturing on the premises:

In our view... [the franchise agreement] is neither a typical tie-in arrangement such as would render it vulnerable under the Sherman Act, nor does it have any of the characteristics of such an arrangement nor any other elements of unfairness such as would subject it to Section 5 of the Federal Trade Commission Act.\textsuperscript{45}

Further than this a supplier must proceed cautiously. Thus, in the absence of lawful agreements entered into pursuant to fair trade laws,\textsuperscript{46} a seller may not contractually fix the resale prices of his buyers.\textsuperscript{47} For if buyers may not agree upon their resale prices,\textsuperscript{48} they may not do so through the conduit of the seller.\textsuperscript{49} Again, a seller in the absence of unusual circumstances should abstain from requiring his buyers to resell only within a defined territory. Since buyers may not agree upon their respective territories,\textsuperscript{50} they normally may not so contract through the seller.\textsuperscript{51} The seller may, of course, offer suggestions on price and territory.\textsuperscript{52} But he will be well advised to distinguish carefully between "mine" and "thine," controlling at will that which is his, but limiting himself to non-coercive suggestions only

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\textsuperscript{45} Carvel Corp., 3 CCH 1965 Trade Reg. Rep. ¶17,298 at p. 22,425.
\textsuperscript{47} United States v. Univis Lens Co., 316 U.S. 241 (1942); Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940).
with respect to commodities which by sale have become another's property.

It is true that some lower courts have sustained the right of small sellers to control the resales of their franchisees; but the recent Supreme Court condemnation of franchisor-franchisee conspiracies indicates the limited application of these rulings. In any event, the increasing opposition of our highest Court to any substantial power at the manufacturing level to regiment competition at the dealer level and the underlying objection of our antitrust laws to a cartelized economy, at least, makes any coercive restriction by a large company of dealer prices, territories and other competitive decisions extremely hazardous. As previously pointed out, our highest Court has no sympathy with any device, whether of agency, consignment or sale, involving "the utilization of economic power in one market to curtail competition in another."

**DISCRIMINATION PROBLEMS**

Next, the practitioner might collect the guiding rules which should apply to the pricing by his client of its products and services. These guidelines similarly relate to the vertical relationships of a seller with a buyer. Subsequently we will consider the price relationships of a seller with his competitors.

**Price Discrimination**

The Robinson-Patman Act is the principal statute applicable to the prices charged by a seller to his buyer. The provisions of the Sherman and Federal Trade Commission

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53 Snap-On Tools Corp. v. FTC, 321 F.2d 825 (7th Cir. 1963); Sandura Co. v. FTC, 339 F.2d 847 (6th Cir. 1964); Baker v. Simmons Co., 307 F.2d 458 (1st Cir. 1962), rev'd on other grounds, 325 F.2d 580 (1st Cir. 1965); Denison Mattress Co. v. Spring-Air Co., 308 F.2d 403 (5th Cir. 1962); United States v. Sealy Inc., CCH 1964 Trade Cas. ¶71,258 (N.D. Ill. 1964), *probable jurisdiction noted*, 382 U.S. 806 (1965).


Acts, however, are also relevant. This collective legislation imposes substantial limitations upon the freedom of a seller to discriminate in prices between his customers.

In general, the seller is required to adopt non-discriminatory policies in dealing with his customers in interstate commerce. The Sherman and Federal Trade Commission Acts as well as the Robinson-Patman Act make this advisable. Congress and the courts have emphasized that although a seller is normally free to select or reject customers, he is usually obliged to deal in a non-discriminatory manner with those chosen by him:

Congress intended to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned.

The seller's pricing policies, however, need not be rigidly uniform in his interstate transactions. Thus, as previously explained, a seller may initially decide in good faith to sell a product to one customer and decline to sell it to another, or continue to sell to one while terminating relationships with the other. In addition, under these statutes, he may vary his prices from one grade and quality of a product to another grade and quality of the same product if they differ more than merely in form and brand name.

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61 Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961), cert. denied, 368 U.S. 829; Package Closure Corp. v. Sealright Co., 141 F.2d 972 (2d Cir. 1944); Boss Mfg. Co. v. Payne Glove Co., 71 F.2d 768 (8th Cir. 1934), cert. denied, 293 U.S. 590.
63 FTC v. Borden Co., 383 U.S. 637 (1966); Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916 (5th Cir. 1962); United States Rubber
The Commission has ruled that where a commodity is inferior both in physical content and in buyer appeal, it is sufficiently differentiated to justify sales at a lower price than that charged for the better grade of the commodity. The seller, moreover, may cautiously discriminate in prices in the sale of the same grade of commodity in the absence of any showing of an appreciable threat of competitive injury. For example, he may change his prices from market to market, where the lower prices are equally available to all competing buyers and are neither intended to nor do in fact appreciably endanger competition with other sellers. Likewise, he may sell at lower functional prices to distributors than to customers competing with the customers of the distributors, and at even lower prices to manufacturers of original equipment than to those distributors. In such circumstances competition should not be adversely affected at any level.

The seller, however, in the absence of an affirmative showing that he can justify his conduct under one of the provisos of the Act, may not safely sell the same grade of commodity at substantially different prices for any substan-
tial period of time where competition may be injured thereby. This injury may occur at the buyer level when competition is severe, profit margins are small and the lower prices are made available only to favored buyers. Any such discrimination may not be disguised, moreover, by granting the preferential treatment to a captive buying intermediary owned by the favored customers, or to an independent buying intermediary who functions only nominally in the transaction of sale, or as a payment for services made available only to the preferred purchasers. This injury may also occur at the seller level when lower prices are charged in one market than in another for the purpose or with the probable effect of driving out of business competing local sellers. Territorial price differences, like any other discrimination, are not per se unlawful; but substantial, continuous and discriminatory undercutting of small local competitors—even when those competitors thereupon reduce their prices below the price cuts—may be unlawful.

70 American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 924 (1964); Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964); Sperry Rand, CCH 1964 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16,791.

71 United Biscuit Co. of America v. FTC, 350 F.2d 615 (7th Cir. 1965).

72 Kaplan & Sons v. FTC, 347 F.2d 785 (D.C. Cir. 1965); Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir. 1965), cert. denied, 382 U.S. 1009 (1966); Dayco Corp., CCH 1964 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 17,029; Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962); American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir. 1960), cert. denied, 364 U.S. 884; Mid-South Distsib. v. FTC, 287 F.2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838.


74 Mueller Co. v. FTC, 323 F.2d 44 (7th Cir. 1963), cert. denied, 377 U.S. 923; General Foods, 52 F.T.C. 798 (1956).

75 Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Porto Rican Amer. Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir. 1929), cert. denied, 279 U.S. 858.


77 Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965), cert. denied, 382 U.S. 959.
in the absence of other defenses if the purpose or probable effect is predatory. 78

The buyer, on its part, has substantial freedom to bargain competitively for price reductions, and may not be charged with unlawfully receiving a discriminatory price unless it receives the price differential knowing it to be illegal. 79 But a buyer may be assumed to have knowingly induced an unlawful price differential when it negotiates for a reduction in a manner indicating either awareness of or an indifference to its illegality. Thus a purchaser may not join with others in setting up corporate buying offices controlled by the organizers and obtain, by this subterfuge, functional discounts resulting in lower net prices to these vendees than to their competitors. 80 Again, a buyer who deliberately seeks preferential treatment, 81 or misleads a seller into giving the buyer a lower price in order to meet nonexistent competition, 82 evidences by such action that it is knowingly inducing an unlawful discrimination. Indeed, the Commission has recently warned that a buyer may knowingly induce an unlawful discrimination where it is not:

[C]ontent with merely getting from his regular supplier a price that merely 'equals' the competitive price offered by the newcomer, but might, by remaining mute and letting that supplier 'guess' at the amount of the competitive bid, hope to get a still lower price. . . . A buyer's silence here, if motivated by a desire to secure a discriminatory price that 'beats' competitive offers, might very well place the buyer himself in violation of another provision of the statute, Section 2(f). 83

80 General Auto Supplier Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965), cert. dismissed, 382 U.S. 923; Mid-South Distrubs. v. FTC, 287 F.2d 512 (5th Cir. 1961), cert. denied, 368 U.S. 838.
There are only a few rulings indicating whether discrimination in price as part of a transaction not subject to the Robinson-Patman Act—because not involving the sale of a commodity—may be reached by other antitrust statutes. To date, however, the licensing of film and patents at preferential terms to monopolistic licensees has been held to violate the Sherman Act; the charging of rentals at varying rates injurious to competition with favored lessees has been condemned under both the Sherman and Federal Trade Commission Acts; and even the discriminatory sale and promotion of commodities has been reached under the first and second of these statutes as well as under the Robinson-Patman Act. These few pioneering decisions and the competitive objectives of the antitrust laws suggest, therefore, that any pattern of substantial discriminatory practices in licensing, leasing and servicing should be scrutinized carefully for their possible anticompetitive effect, because:

[D]iscriminatory practices are included among the restraints of trade which the Sherman Act condemns.

Non-Price Discrimination

The Robinson-Patman Act, in subsections (c), (d) and (e), is the principal statute to be consulted in connection with the non-price terms of a transaction of purchase and sale. These subsections seek to prevent indirect, concealed discrimination by a seller through arrangements for related payments, services and facilities with favored customers. They apply, moreover, to transactions in interstate and for-
eign commerce—whereas subsection (a) dealing with price discrimination is limited to sales for use, consumption or resale within the United States.

A seller would be well advised, when he formulates the terms which are to supplement his pricing structure, not only to adopt non-discriminatory policies in his arrangements for services and facilities, but also to announce publicly the terms of these arrangements. Special payments or kickbacks to induce purchases by large buyers—unrelated to bona fide cost savings, functional discounts or services—should be avoided, even in export trade. Rather, he should ensure that all customers have access on proportionately equal terms—either directly or through intermediaries—to offers of payments for advertising and display, the furnishing of display racks, and provision for markdown allowances and returns. If he makes available these benefits to customers of his customers, moreover, he may be required to provide proportionate treatment through

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92 Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480 (2d Cir. 1962); Chestnut Farms-Chevy Chase Dairy Co., 53 F.T.C. 1050 (1957); cf. Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954); Atlanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1955).


94 Thomasville Chair Co. v. FTC, 306 F.2d 541 (5th Cir. 1962).


1 American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962), cert. denied, 371 U.S. 824.


3 Kaplan & Sons v. FTC, 347 F.2d 785 (D.C. Cir. 1965).
the outlets he contacts to all such customers competing in
the resale of his merchandise. Where one form of benefit
is not capable of being used by some customers, he should
offer equivalent benefits which are capable of being used by
them.

Buyers knowingly receiving special payments, discrimi-
natory allowances or preferential facilities, it might be add-
ed, are equally liable with the seller—either under the
Robinson-Patman or under the Federal Trade Commission
Acts.

The law is not settled concerning what general terms of
a transaction—e.g., those involving credit—must also be
non-discriminatory. Apparently, however, the granting of
better credit terms to one purchaser than to an equally
solvent competing purchaser may raise problems. In addi-
tion, the grant of consignment privileges or returns for
credit to some but not all competing customers may be vul-
nerable. At least it is best to avoid exposing either seller
or buyer to the charge that the terms of their relationships
represent:

[D]iscrimination in the terms of the sale [which] operated to
permit the favored customers to purchase at a lower price than
other customers, so that their only practical effect was to establish
discrimination in price, precisely the evil at which the statute was
aimed.

5 Sunbeam Corp., CCH 1965 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 17,178; Lever Bros., 50 F.T.C. 494 (1953); see, e.g., Statement of FTC Accompanying Trade Practice Conference Rules for the Cosmetic and Toilet Preparations Industry, effective February 1, 1952, 3 CCH TRADE REG. REP. ¶ 20,221, and FTC Guides for Allowances and Services; Compliance with § 2(d) and (e) (1960).
6 R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964); Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); Swance Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961), cert. denied, 368 U.S. 987 (1962).
7 U.S. Rubber Co., 28 F.T.C. 1489 (1939); yeast cases, i.e., Yeast Corp., 33 F.T.C. 701 (1941); National Grain Yeast Corp., 33 F.T.C. 684 (1941); and Federal Yeast Corp., 33 F.T.C. 1372 (1941); cf. Vandalia R.R. v. United States, 226 Fed. 713 (7th Cir. 1915), cert. denied, 239 U.S. 642.
Justified Discrimination

The forms of discrimination prohibited in the manner described in the above discussion, nevertheless, may be justified if they conform to certain limited affirmative defenses recognized by the Robinson-Patman Act.

First, discrimination in price by a seller is permissible if it represents merely the sale of distress or obsolete merchandise to a few of the seller's customers.

Second, both discrimination in price, and discrimination in payments for or furnishing of services and facilities are proper if these preferences are extended in good faith to meet the equally low price, payments or services and facilities of a competitor. The Federal Trade Commission as well as the courts is currently recognizing this defense, provided that the seller limits himself to defensive rather than to aggressive action in individual competitive situations. The essential prerequisites in raising this test are that the seller must be acting (1) in good faith and (2) to meet equivalent conduct of his—rather than his customer's—competitor. Roughly speaking, this means that he may act without fear, provided that there are not additional facts which indicate that he is thereby seeking to implement an indefensible trade practice, an unlawful conspiracy or a plan of monopoly. Thus a seller would not be acting

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12 Standard Oil Co. v. FTC, 340 U.S. 231 (1951); Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 586 (1962); Shulton, Inc. v. FTC, 305 F.2d 36 (7th Cir. 1962); Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).
14 Compare Forster Mfg. Co., 3 CCH 1965 TRADE REG. REP. ¶ 17,304, with Sunshine Biscuits Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962).
in good faith if with knowledge of its illegality he copied verbatim an unlawful basing point or quantity discount structure of an individual competitor or joined a conspiratorial industry-wide price structure of numerous competitors. Nor would he be acting in good faith if he cut prices to meet the low price levels of inferior merchandise in order maliciously to exclude it from, and thereby monopolize, the market. Above all, the seller must be seeking to meet, not to undercut and destroy, his competition:

the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

Finally, discrimination in price—but not with respect to services and facilities—is lawful if the price differentials make only due allowance for differences in cost resulting from differing methods or quantities of sale or delivery. This defense requires a seller initially to segregate those of his costs which vary with differences in methods or quantities of sale and delivery. Any such segregation must be achieved by recognized accounting techniques, such as sampling, because estimates and past company procedures are rejected unless supported by a factual basis justifying their use. This defense next requires the seller to allocate

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17 Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, 360 U.S. 334 (1959); Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).
22 Advisory Committee on Cost Justification, Report to the FTC (1956).
his costs, thus segregated, among reasonable customer classifications. Recently, certain cost studies have been rejected because of failure by sellers to place purchasers into groups whose members were of such selfsameness as to make the averaging of the cost of dealing with a group a valid indicium of the cost of dealing with individual group members. Finally, the seller must compare the differences in the prices charged those groups with the differences in the costs allocated to those groups, in order to determine whether the former make only due allowance for the latter. On occasion, the prices and costs of selling a complete line of products may be so compared. In this evaluation, a rule of reason must be employed, and where a price difference seems in good faith to be justified by a cost differential, any de minimis failure of minor steps or of minor percentages to be cost justified may be disregarded. This rule of reason, incidentally, is more favorably invoked by cost studies made in advance of litigation than by ex post facto accounting rationalization.

It has been said that this third affirmative defense of cost justification is of little value because the courts and the Commission, in their rejection of accounting studies allocating costs among customer groups, in effect require cost comparisons to be made customer by customer. This statement, however, is incorrect. The Supreme Court, while rejecting arbitrary customer groupings, has expressly approved the practice of comparing average costs with average prices on the basis of reasonable customer classifications:

We ourselves have noted the 'elusiveness of cost data' in a Robinson-Patman Act proceeding. *Automatic Canteen Co. v. Federal

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28 Id. at 291, n.15.
29 American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951); Minneapolis-Honeywell Regulator Co. v. FTC, 44 F.T.C. 351, 394 (1948), rev'd on other grounds, 191 F.2d 786 (7th Cir. 1951), cert. denied, 344 U.S. 206 (1952).
To completely renounce class pricing as justified by class accounting would be to eliminate in practical effect the cost justification proviso as to sellers having a large number of purchasers, thereby preventing such sellers from passing on economies to their customers. It seems hardly necessary to say that such a result is at war with Congress' language and purpose.\footnote{United States v. Borden Co., 370 U.S. 460, 468 (1962).}

**COMPETITIVE PROBLEMS**

The problems of a client include, of course, not only its vertical seller-buyer relationships, but also its horizontal dealings with its competitors. Both relationships affect competition between the client and the other members of the industry involved. The latter, however, raises separate issues which merit separate treatment. We might commence our analysis of these further horizontal problems, therefore, by considering individual competitive practices.

**Competitive Conduct**

The unilateral acts and practices of a businessman in competing with other members of the industry may raise issues under several of the antitrust statutes, even where he does not enter into any direct dealings with his competitors. Thus, for example, price discrimination and exclusive dealing contracts will involve the Robinson-Patman and Clayton Acts, with which we have just dealt. The most all-embracing legislation applicable to the single actions of a company, however, is section 5 of the Federal Trade Commission Act.

A seller or a buyer is normally free to engage in any business conduct under this Act so long as he avoids unfair methods injurious to his competitors and unfair or deceptive acts which are harmful to his suppliers and purchasers. Indeed, he is encouraged by the antitrust laws to use his ingenuity in taking any reasonable commercial action in the course of developing new products\footnote{United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956).} and expanding his busi-
ness. The mere fact that he is successful in his business conduct will not expose him to attack, even though it may cause difficulties to his rivals.

A business organization is not free, however, to engage in practices characterized by bad faith, fraud or oppression. Thus he should not engage in predatory price cuts, unreasonable forms of tying and total requirement devices or coercion to foreclose his competitors' sales; nor use fictitious price tickets, misleading names, or gambling devices to promote his own sales. Again, he should keep in mind, in his advertising, "the Commission's insistence that the public be not misinformed."

It might be noted that there are two practices, widely employed in some industries, which today are particularly under attack as unfair. The first practice involves the coercive use of reciprocity, whereby a company will utilize substantial purchasing power in withholding the purchase of commodities from a supplier in order to force the latter to buy in turn from the former. The oppressive employment of this device has long been vulnerable under the Federal Trade Commission Act, and recently has been condemned in Sherman and Clayton Act proceedings. The second practice concerns selling below cost for the purpose

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40 Helbros Watch Co. v. FTC, 310 F.2d 868 (D.C. Cir. 1962), cert. denied, 372 U.S. 976 (1963); Heavenly Creation Inc. v. FTC, 339 F.2d 7 (2d Cir. 1964), cert. denied, 380 U.S. 955; Baltimore Luggage Co. v. FTC, 296 F.2d 608 (4th Cir. 1961), cert. denied, 369 U.S. 860 (1962); Clinton Watch Co. v. FTC, 291 F.2d 838 (7th Cir. 1961), cert. denied, 368 U.S. 952 (1962).
of destroying competition or eliminating a competitor. Conduct of this nature has resulted in a $380,000 fine for a corporate defendant and a three-month (suspended) jail sentence plus a $52,500 fine for an individual defendant. Reciprocity and below cost sales are not, however, per se unlawful. The Supreme Court itself has reassured industry that the use of reciprocity in de minimis situations is unobjectionable, even in section 7 proceedings, and that selling below cost is not banned:

[W]here made in furtherance of a legitimate commercial objective, such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor.

**Competitive Contacts**

The acts and practices of a businessman raise further issues under the antitrust laws, nevertheless, when they are accompanied by direct dealings on his part with competitors. An inference at times is drawn under these circumstances that such conduct, when accompanied by conscious parallel action, represents evidence of an unlawful conspiracy in violation of section 1 of the Sherman Act as well as section 5 of the Federal Trade Commission Act.

Fortunately, the more recent decisions hold that a businessman in selecting his customers, quoting his prices and engaging in normal business practices is no longer assumed, in the absence of proof of direct dealings with his competitors, to be prima facie guilty of conspiracy merely because of similar conduct by his competitors. Earlier cases to the contrary are now to be discounted.

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51 FTC v. Cement Inst., 333 U.S. 683 (1948); Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), aff'd sub nom. Clayton Mark & Co. v. FTC, 336 U.S. 956 (1949).
Accordingly, if a seller will take a few elementary precautions to make clear his independence of his competitors, he should have no fear of any such conspiracy charges. To illustrate, from the teachings of old and new cases, every important decision of a seller as to price which follows or may be followed by his competitors should be taken only after internal deliberations, carefully recorded, which are not preceded by discussions with competitors.\(^5\) Other important decisions of a seller which may accompany industry-wide changes in established practices might well conform to a similar procedure.\(^6\) Outward indications of less than rugged competition, e.g., in friendly discussions with competitors of internal policies and in unusual disclosures to them of competitive secrets, should particularly be avoided\(^7\) because they provide opportunities for inferences of unlawful agreements when competitors happen to follow similar policies:

A friendly relationship within . . . a long established industry is, in itself, not only natural but commendable and beneficial, as long as it does not breed illegal activities. Such a community of interest in any industry, however, provides a natural foundation for working policies and understandings favorable to the insiders and unfavorable to outsiders.\(^8\)

In addition, uniform solutions by competitors of common industry problems should be rechecked from time to time to ensure that practices originally adopted by independent action of individual competitors have not degenerated into implied understandings between them. Thus industry-wide favoring of customers who no longer represent the most desirable outlets,\(^9\) or parallel quotation by

\(^{5}\) See, e.g., the Gary dinners in United States v. United States Steel Corp., 251 U.S. 417 (1920), and the competitive contacts in Morton Salt Co. v. United States, 235 F.2d 573 (10th Cir. 1955).


\(^{8}\) American Tobacco Co. v. United States, 328 U.S. 781; 793 (1946).

\(^{9}\) United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); see also the subsequent treble-damage actions against the Paramount defendants, e.g., Theatre Enterprises, Inc. v. Paramount Film Distrib., 346 U.S. 537 (1954).
numerous sellers of prices f.o.b. plants which have been abandoned, or uniform acquiescence by licensees in restraints after the significant patents have expired, may suggest continuation, by some secret intercompany concert of action, of individual practices once lawfully conceived. Where there is danger that a course of action by a businessman will be inferred to be part of an unlawful industry conspiracy, it would be well to break cleanly with the past through:

[A]n overt and visible reversal of policy, carried out by extensive operations which have every appearance of being permanent.

The most controversial question raised by recent rulings involves the effect of any systematic exchange of current price lists among competitors. Needless to say, such an exchange after prices have previously been independently established does not, without more, spell out a conspiracy, nor does an independent decision to follow a listed price make the price follower a conspirator. The exchange of prices, plus uniformity in prices, plus systematic discussion of those prices before and after their publication, however, add up to a totality which has been viewed by some courts as vulnerable to attack. Under these circumstances, a company which believes itself forced to follow the prices of a competitor might consider dispensing with the luxury of exchanging and/or discussing those prices with his competitor.

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Competitive Contracts

The agreements of a businessman with his competitors, as distinguished from his unilateral acts, are similarly subject to scrutiny under both the Sherman and Federal Trade Commission Acts. The application of these statutes to his agreements, however, has been more clearly spelled out in recent years.

A composite analysis of recent and prior decisions—in the light of current views with respect to the competitive objectives of our antitrust laws—indicates that competitors should be safe so long as they enter into contractual relationships with each other (through trade associations or otherwise) solely in order to improve the opportunities of each to compete. Thus the collection, averaging and distribution without editorial comment of industry statistics with respect to past transactions contributes greatly to the effectiveness of competition by small and large competitors alike and should be upheld—that is to say, provided that there is no commitment on the part of industry members to take agreed action thereon and if undue disclosure of the facts relating to individual members or customers is avoided.

Again, the creation by competitors of industry service organizations available to all should be permissible. These horizontal contractual relationships between competitors should, of course, be accompanied by convincing evidence that competition is nevertheless continuing unabated.

Competitors would be well advised, however, to abstain in the future, except insofar as authorized by Congress, from horizontal contractual relationships with each other of a formal or informal nature directed toward restricting the

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68 Tag Mfrs. Inst. v. FTC, 174 F.2d 452 (1st Cir. 1949); United States v. Chicago Mortgage Bankers Ass'n, 123 F. Supp. 251 (N.D. Ill. 1954).
freedom of each to compete. Businessmen should be informed that in the absence of clear affirmative justification they should avoid agreeing with competitors upon the prices, terms and conditions upon which they will purchase or sell, the markets in which they will do business, or the persons with whom they will deal. They should also abstain from horizontal agreements with respect to procedures for forecasting the future prices and production of members, the elimination of competitive products, joint action to enter into fair-trade and compulsory arbitration agreements, and any similar activity which indicates an arrangement to create:

[A]n extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce.
Competitors should realize, moreover, that evasion of these rulings by concealment is becoming increasingly difficult. For example, an unnatural uniformity of action between competitors, such as raising prices simultaneously in a depression, may invite an investigation to determine the reasons for this phenomenon. As previously indicated, parallel action between competitors by itself is meaningless; but, when it produces a result which is inconsistent with competition, it stimulates the interest of government prosecutors to determine how it came about. Justification from implied exemptions from the antitrust laws, furthermore, is becoming increasingly difficult. For where concerted action is not expressly exempt from the antitrust laws:

[\text{Any repealer of the antitrust laws must be discerned as a matter of principle, and "[i]t is a cardinal principle of construction that repeals by implication are not favored."}]

The most difficult area in which to anticipate future antitrust rulings on horizontal competitive relationships between competitors is that with respect to joint ventures. Increasing criticism of such joint arrangements is being heard today in government circles. There is reason to believe, however, on the basis of our legislative approach, that reasonably limited cooperative business ventures between competitors will still be upheld. The following may be the rules of the future: On the one extreme, a long-term elimination of competition in the United States between substantial companies which are actual or potential competitors in an industry, through jointly-backed ventures, may not be justified by the phrase "joint venture." On the other extreme, short-term ventures by large segments of an industry and

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even long-term enterprises formed by groups of small businessmen, where the purpose and effect is to provide new products, improve old products, promote additional sales and supply new facilities—where consistent with competition—should be permissible. In between these two extremes, large and small companies should equally be entitled to participate as investors and owners at least in the creation of new self-contained business organizations for the development and/or production of new products or to provide new competition in markets which the parent companies could not separately invade. The participants in these latter, self-contained joint ventures should of course avoid any undue exchange of competitive secrets through the conduit of the new venture, and refrain from any agreement eliminating all interparent competition. But as the Supreme Court has emphasized, such a new, self-contained venture should be condemned only if:

[E]ither one of the corporations would have entered the market . . . [of the venture] while the other would have remained a significant potential competitor.

**Patent Problems**

The horizontal problems of a client also include, of course, those involving his patents, since patents grant to

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a patentee the right to exclude or to permit competition between members of an industry, and thus affect primarily their horizontal relationships. To complete our consideration of the horizontal aspects of a company, therefore, we turn to patents.

**Patent Practices**

At the outset, we find that the very acquisition and enforcement of patent rights may raise antitrust issues, even if no license is ever granted under these rights. Any such activity must run the gauntlet of sections 1 and 2 of the Sherman Act, section 7 of the Clayton Act, and section 5 of the Federal Trade Commission Act.

A businessman has a right guaranteed both by statute and by the Constitution to apply for and obtain a patent covering the claims of an invention conceived by him. The antitrust statutes listed above, however, caution him to avoid fraud or conspiracy in the procurement of this patent if he wishes to be able to enjoy and enforce against others the patent monopoly thereby secured. He similarly has the right to acquire patents covering the inventions of others, unless this acquisition is part of a larger plan to control competition, e.g., by suppressing competing patents or through undertaking by agreement with second parties to exclude third parties from the market. In either such event the acquisition may also raise problems.

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under section 7 of the Clayton Act. Finally, he may engage in the practice of accumulating patents covering his own or others' inventions, but here again the antitrust laws caution him not to do so as part of an aggressive plan of securing exclusive right to all available patents.

Once he has obtained patents, moreover, the owner ordinarily is entitled to use them or not as he pleases, and to license them exclusively or nonexclusively. These rights, however, are conditioned by antitrust rulings warning him not to give a veto power over such licensing to nonexclusive licensees. Furthermore, he may enforce those patents against infringers, but only so long as he does not threaten infringement suits which he never intends to bring or win, or does not press such suits merely because of failure on the part of the defendant to purchase from him noninfringing supplies.

footnotes:
5 Lynch v. Magnavox Co., 94 F.2d 883 (9th Cir. 1938); cf. Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416 (10th Cir. 1952), cert. denied, 344 U.S. 837.
6 Mercoid Corp. v. Mid-Continent Inv. Co., 320 U.S. 661 (1944); Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488 (1942); Switzer Bros., Inc. v.
In his acquisition and enforcement of his patent rights, the patentee should keep in mind that his practices are not only subject to judicial scrutiny, but also to the recently assumed jurisdiction of the Federal Trade Commission. It is the position of the Commission that it may strike down even:

[F]raud, unclean hands, inequitableness or bad faith, or any borderline behavior before the Patent Office.7

Patent Licenses

Once the patentee decides to grant licenses, of course, he will become a party to contractual arrangements which are traditionally subject to antitrust review, and he must therefore take care to avoid unreasonable or unfair restrictions in those licenses in violation of the Sherman and/or Federal Trade Commission Acts.

A safe rule of thumb for the patentee to follow in issuing his licenses is to assume that he will have no problem under the antitrust laws so long as he merely grants such limited or unlimited rights as he desires to extend to his licensees. Thus he should be free to license one or more patents8 for one or more fields, markets or products.9 He would be well advised, however, not to go further and impose contractual covenants which control the competitive decisions of his licensees, e.g., by requiring them to agree to take more patents than they desire,10 to refrain from

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competing in specified markets\textsuperscript{11} or with alternative products\textsuperscript{12} to resell at the prices\textsuperscript{13} and to the persons\textsuperscript{14} dictated by the licensor, and to buy certain products from the licensor.\textsuperscript{15} In addition, covenants relating to quotas,\textsuperscript{16} grant-backs,\textsuperscript{17} contesting validity\textsuperscript{18} and conduct arising after the expiration of patents\textsuperscript{19} have been challenged. There is no per se prohibition of all of such covenants, of course, because even tying clauses\textsuperscript{20} and compulsory grant-


\textsuperscript{12} McCullough v. Kamerer Corp., 166 F.2d 759 (9th Cir. 1948); Berlenbach v. Anderson Thompson Ski Co., 329 F.2d 782 (9th Cir. 1964), \textit{cert. denied}, 379 U.S. 830; Waco-Porter Corp. v. Tubular Structures Corp., 222 F. Supp. 332 (S.D. Cal. 1963).


\textsuperscript{14} Ethyl Gasoline Corp. v. United States, 309 U.S. 436 (1940); United States v. Univis Lens Co., 316 U.S. 241 (1942); F. C. Russell Co. v. Consumers Insulation Co., 225 F.2d 373 (3d Cir. 1955).


\textsuperscript{20} Electric Pipe Line, Inc. v. Fluid Sys., Inc., 231 F.2d 370 (2d Cir. 1956); Dehydrating Processing Co. v. A. O. Smith Corp., 292 F.2d 653 (1st Cir.}
backs\(^2\) have been upheld; and there may be some life left in earlier rulings approving provisions reasonably necessary to secure to the licensor the fruits of his inventions.\(^2\) Nevertheless, such contractual covenants, whether or not they are lawful considered by themselves, may be viewed as vulnerable when inserted in a pattern of licenses alleged to control competition in an industry. In such a case, a court may hold that illegality:

[F]ollows despite the assumed legality of each separate patent license, for it is familiar doctrine that lawful acts may become unlawful in concert.\(^2\)

A patentee, moreover, will have to proceed with particular care in his contractual arrangements where the patent rights flow to as well as from the licensor. Apparently it is more blessed for a patentee to give, than to receive, a license. When two patentees cross-license each other, practices which might be innocent of restraint in a unilateral license may represent actual restraints in a bilateral license, and the courts will scrutinize such two-way licenses to determine whether that is or is not the case.\(^2\) Thus a downstream exclusive license in effect merely conveys the patent rights of one to another, whereas an exchange of exclusive licenses may in some cases debar each from competing in the market of the other.\(^2\) Like-


wise, a patentee who designates a licensee to sublicense for
him merely substitutes one licensor for another; whereas
two patentees who contract to make one of them exclusive
licensor have decreased the number of licensors from two
to one, and this may in some instances raise antitrust
problems. The necessity for reasonable precautions in
entering into cooperative research with attendant cross-
licenses, however, should not deter their bona fide use
throughout an industry, for:

The development of patents by separate corporations or by cooperat-
ing units of an industry through an organized research group is a
well known phenomenon. However far advanced over the lone
inventor's experimentation this method of seeking improvement in
the practices of the arts and sciences may be, there can be no
objection, on the score of illegality, either to the mere size of such
a group or the thoroughness of its research.

*Patent Royalties*

In recent years, additional problems have also arisen
in connection with the royalties charged in patent licenses.
These questions have involved both the Sherman and the

It is clear that under these statutes a patentee may
charge whatever royalty he desires, measured by whatever
patented or unpatented royalty base he wishes, and for
as long a period of time as he elects, so long as his royalty
provisions are agreeable to his licensees who are making
the royalty payments. Thus, it is entirely lawful under
these circumstances for him to engage in package licensing,
whereby he collects a uniform royalty for the use by his
licensees of a changing number of present and future
patents.

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(1950); Ohio Citizens Trust Co. v. Air-Way Elec. Appliance Corp., 56 F.
1961).
(1950); Sbicca-Del Mac Inc. v. Milius Shoe Co., 145 F.2d 389 (8th Cir.
1944); McCullough Tool Co. v. Well Surveys, Inc., 343 F.2d 381 (10th Cir.
It is not clear, however, how far a patentee may go when his royalty procedures are not acceptable to his licensees. In certain situations he may have to yield to licensee objections to his rates. For example, he may be required by the antitrust laws to differentiate in his royalty rates when a licensee wishes to pay a lower royalty than he is charging other licensees, for the use of substantially less valuable patent rights than are used by other licensees. In contrast, he may be denied by these statutes the right to discriminate in his rates should he desire to charge a lower royalty to a favored licensee in order to give it an unreasonable competitive advantage over other licensees. Other royalty problems also may arise, as, e.g., in the event that he seeks to coerce licensees into accepting royalty provisions requiring payments to be measured by a royalty base of unpatented parts or of patented products after all relevant patents have expired.

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31 Hartford-Empire Co. v. United States, 323 U.S. 386, 324 U.S. 570 (1945); United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Grand Caillou Packing Co., CCH 1964 TRADE REG. REP. (1963-1965 Transfer Binder) ¶ 16,927; cf. the proviso to paragraph 13(A) (2) of the final judgment in United States v. Hartford-Empire Co., 65 F. Supp. 271 (N.D. Ohio 1945) final judgment, providing for denial of an application for a license of individual—as distinguished from a package of—patents "upon a showing that the granting of such application probably will result in inequitable discrimination as between licensees or unduly burden the Court."

32 Barber Asphalt Corp. v. La Fera Crecco Contr. Co., 116 F.2d 211 (3d Cir. 1940); Dehydrators, Ltd. v. Petrolite Corp., 117 F.2d 183 (9th Cir. 1941); National Foam Sys., Inc. v. Urquhart, 202 F.2d 659 (3d Cir. 1953).


Two principles may be helpful, however, in resolving most royalty disputes of a patentee with his licensees:

First, the objective of the patentee should be to obtain a reasonable reward for the licensed use of his patented invention. Neither the royalty nor any other provisions of his license agreement, when they are considered as a whole, should seek merely to profit from the suppression of competition in the industry involved, for:

The rewards which flow to the patentee and his licensees from the suppression of competition through the regulation of an industry are not reasonably and normally adapted to secure pecuniary reward for the patentee's monopoly.\(^{35}\)

Second, a patentee who is merely seeking a reasonable reward for the use of his patented invention should be able to utilize any reasonable royalty yardstick to measure the value of that use. Thus a licensor who grants a package license should not be required to justify on any arithmetical basis a royalty rate for less than the complete package \(^{36}\) so long as he is not seeking to force a licensee to pay for rights that he does not want: "A patent empowers the owner to exact royalties as high as he can negotiate with the leverage of that monopoly."\(^{37}\)

**Corporate Problems**

A client need not leave his corporate grounds, however, to have trade regulation problems. Size, conspiracy and other antitrust issues, like charity, may begin at home. These problems, unless otherwise noted, relate primarily to the Sherman and Federal Trade Commission Acts. It is

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now in order to turn from external to these intracorporate questions, commencing with the issue of size.

**Corporate Size**

For years—to be candid about it—we have been passing through an open season on big business. Nostalgic Lil-liputians have longed for the good old days of the small carriage-maker instead of General Motors, the housewife's knitted stockings in preference to du Pont's nylons, and the fish pond's ice instead of General Electric's refrigerators. Divestiture proponents, like the Queen in *Alice in Wonderland*, have ordered "off with their heads" at the mere sight of large corporations. We suggest, however, that it has come to be recognized, at last that bigness throughout the world—in government, in unions and in business—is here to stay, whether we like it or not. For the courts have hesitated to play the role of Madame Defarge, except where size is based upon unlawful acquisitions, with the result that corporate heads do not normally roll into the antitrust basket.\(^3\) In spite of statements that size may be presumed to be unlawful,\(^3\) and other inflammatory judicial dicta,\(^4\) large as well as small companies are normally deemed to be acceptable members of our business community.

It follows that both big business and little business are currently being upheld in their bona fide selection of customers,\(^4\) negotiation of prices,\(^4\) allocation of supplies,\(^4\)

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\(^9\) American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. Aluminum Co. of America, 148 F.2d 416, 431 (2d Cir. 1945).


and nonpredatory internal growth.\textsuperscript{44} The law seems to be that there is no limit to the permissible internal growth of a company, provided that the large organization:

\[O\]wes its monopoly solely to superior skill, superior products, natural advantages, (including accessibility to raw materials or markets), economic or technological efficiency, (including scientific research), low margins of profit maintained permanently and without discrimination, or licenses conferred by, and used within, the limits of law, (including patents on one's own inventions, or franchises granted directly to the enterprise by a public authority).\textsuperscript{45}

Current cases, when viewed in the light of past decisions and contemporaneous views on the competitive objectives of our antitrust laws, nevertheless, indicate that the relationships of a corporation which is large, when compared with its buyers and competitors, should continue to be subjected to greater scrutiny in the future than those of a smaller company. While absolute size is not in and of itself an offense,\textsuperscript{46} relative size does provide an opportunity for abuse\textsuperscript{47} and necessarily affords a more readily identifiable target.\textsuperscript{48} For example, long-term leasing which in and of itself is laudable may be found in future decisions to be a deadly device to exclude competitors if practiced by a lessor controlling seventy-five per cent and more of an industry.\textsuperscript{49} Again, corporate integration is entirely lawful, but where the leverage of a monopoly position of one corporate division is utilized to give a controlling competitive

\textsuperscript{46} United States v. International Harvester Co., 274 U.S. 693 (1927); United States v. United States Steel Corp., 251 U.S. 417 (1920).  
advantage to another division, it may be held to be unlaw-
ful. Other practices such as the threat of a parent to com-
pete with its customers through a subsidiary, unless these
customers purchase exclusively from the parent; the coer-
cessive use of reciprocity, by which the purchasing power of
one corporate unit is used to require its suppliers to pur-
chase from another unit of the corporation; and the use
of the profits of a parent or division to subsidize preda-
tory pricing by another solvent branch of the corporate
family, all represent conduct whose legality becomes ques-
tionable in direct proportion to the size of the corporation
involved. In short, size which is large when compared
with others in an industry—when accompanied by exclu-
sionary practices that are merely irritating in the hands
of the weak but lethal in the hands of the strong—may
add up to attempted monopolization:

[W]e reject the idea that success and resultant bigness in a com-
pany makes it a threat to our free competitive system. But in a
field where large and small companies compete, the larger ones
must be especially careful to stay within the rules. Size brings
with it increased responsibilities, commensurate with its increased
power.

Under the law as now developing, a large company
must be highly conscious of its strength, cautious in add-
ing to its power and careful to refrain from controlling the
market place. Such a company may find it necessary to
assume certain aspects of public-utility obligations, depend-

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50 United States v. Paramount Pictures, Inc., 334 U.S. 131 (1948); Schine
Chain Theatres, Inc. v. United States, 334 U.S. 110 (1948); United States v.
Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).
Ingersoll-Rand Co., 218 F. Supp. 530 (1963), aff'd, 320 F.2d 509 (3d Cir.
1963); United States v. General Dynamics Corp., CCH 1965 Trade Cas.
**171,516** (S.D.N.Y. 1965); Waugh Equip. Co., 15 F.T.C. 232 (1931); Mechanical
(1937).
ing upon its industry. But the large companies will not, and should not, disappear, since:

[C]onsiderable size is often essential for efficient operation in research, manufacture and distribution.56

Corporate Agreements

While direct attacks upon the size of a company seem currently to be blunted, there remains an indirect form of challenge frequently utilized in the past. This device for attacking corporations of large size has been the so-called "bathtub" conspiracy theory, which views the corporation as sitting in the corporate bathtub, shut off from customers and competitors, and conspiring with its subsidiary limbs to restrain trade through concerted selection of customers or suppliers, allocation of markets, and other devices to control the market.57

The present more reasonable approach of the courts would seem to suggest future rulings dealing less kindly with this disguised form of attack upon corporate size. It is believed that a company—whether big or small—will be permitted to choose customers, quote prices and determine sales markets through whatever internal arrangements it may elect to utilize.58 The officers and subsidiaries may

be "conspiring" on these occasions, but—if so—they are "conspiring" solely to enable their corporation to take reasonable, lawful action:

[T]o hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect. . . . 61

Recent rulings further suggest, however, that a company's officers, agents and subsidiaries may not reach out beyond those normal and proper intracorporate matters to engage in traditionally unlawful antitrust conspiracies. Thus they may not elect to represent to the public that a subsidiary is an independent competitor and thereafter agree with it to boycott third persons. 62 Likewise they may not buy control of the major competitor of the corporation and thereupon claim immunity—by reason of the captive status of their acquisition—for a pre-existing combination to restrain competition between them. 63 Again they may not seek by internal concert of action to monopolize either the commerce of customers 64 or that of competitors. 65 The form of their internal corporate relationships, in short, should neither condemn nor commend their actions under the antitrust laws. As explained in the General Motors case, where it was argued that the defendants were all individual or corporate units of one organization:

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64 United States v. Yellow Cab Co., 332 U.S. 218 (1947); United States v. General Motors Corp., 121 F.2d 376 (7th Cir. 1941), cert. denied, 314 U.S. 618, rehearing denied, 314 U.S. 710.
The appellants [cannot] enjoy the benefits of separate corporate identity and escape the consequences of an illegal combination in restraint of trade by insisting that they are in effect a single trader. The test of illegality under the Sherman Act is not so much the particular form of business organization effected, as it is the presence or absence of restraint of trade and commerce.66

Corporate Acquisitions

The most troublesome problem of many large corporations today is not size or internal agreements, however, but that of growth through acquisitions. Section 7 of the Clayton Act—and to a certain extent section 1 of the Sherman and section 5 of the Federal Trade Commission Acts—stand in the way of rapid growth in a line of commerce through the corporate purchases of stock or assets.

The antitrust laws generally oppose the expansion of a substantial corporation through its acquisition of the stock or assets of a competing unit or division of another substantial company. The political objective of preserving the market structure of vigorously competing buyers and sellers would be frustrated if the horizontal merger of such competitors were freely sanctioned. Accordingly, the merger of a company representing a large share of the market with a solvent substantial competitor has been condemned out of hand.67 A series of such acquisitions of competitors by a substantial corporation has also been held to be unlawful.68 Even large companies competing in the sale of alternative forms of a product,69 or representing mere poten-

66 United States v. General Motors Corp., 121 F.2d 376, 404 (7th Cir. 1941), cert. denied, 314 U.S. 618, rehearing denied, 314 U.S. 710.
tial sources of the same product, have been barred from merging their businesses.

The Supreme Court has ruled, with respect to the legality of horizontal mergers under section 7 of the Clayton Act, that:

[I]t is the basic premise of that law that competition will be most vital when there are many sellers, none of which has any significant market share. 72

All mergers of competitors, of course, are not prohibited. Thus, small competitors are permitted to bind themselves together in order to provide a sufficiently large economic raft on which to ride out a competitive storm. 72 Also, both large and small may acquire competitive businesses which are unable to operate profitably. 72 Nevertheless, it seems clear that the eye of the antitrust needle is steadily narrowing for acquisitions or mergers involving healthy dynamic competitors. 72

The antitrust laws, moreover, would appear increasingly to raise doubts with respect to the legality of the expansion of a corporation through its acquisition of the stock or assets of certain other substantial companies, whether or not they are competitors. Thus, judicial decisions and enforcement actions during the past few years reflect a growing tendency to question substantial mergers and acquisitions involving large companies where a major supplier or customer of the acquiring company is involved. For example, the acquisition by a large supplier of over twenty per cent of the stock of a customer representing a substantial share of its consumer market has been prohibited; and other major mergers which have integrated a

seller with its customers have been proscribed.\(^75\) In addition, a dominant corporation must even debate whether or not to acquire other corporations which are neither competitors, suppliers, nor customers, where the probable effect of such a conglomerate acquisition—by reason of such factors as reciprocity or combination of resources—may be substantially to increase its competitive strength.\(^76\)

Here also the courts have stressed that:

We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned businesses. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization.\(^77\)

Mergers and acquisitions as yet are not, and should not be, condemned merely because they involve large companies. The merger-minded executive dreaming today of expanding his corporate borders through acquisitions, nevertheless, should keep in mind that there are those occupying the seats of judgment who would oppose almost any significant corporate acquisition. It is the view of these judicial Canutes that the current wave of mergers must be stopped, regardless of the business reasons which may be advanced for an individual acquisition.

Congress determined to preserve our traditionally competitive economy. It therefore proscribed anti-competitive mergers, the benign and the malignant alike, fully aware, we assume, that some price had to be paid.\(^78\)


