The Meaning of the "Injury to Competition" Provision of the Robinson-Patman Act

Henry D. Ostberg
THE MEANING OF THE "INJURY TO COMPETITION" PROVISION OF THE ROBINSON-PATMAN ACT

HENRY D. OSTBEBG †

F ew statutes have been castigated more frequently or more vehemently than the Robinson-Patman Act.1 "One of the most tortuous legislative pronouncements ever to be put on the statute books" is the way Dirlam and Kahn describe the Act.2 "... [A] grotesque manifestation of the scissors and pastepot method of [legislative] drafting" is the characterization offered by Professor S. Chesterfield Oppenheim, chairman of the Attorney General's Committee to Study the Antitrust Laws.3 "Vague" and lacking in any "detailed set of guiding yardsticks" is what was said about the Act in a recent federal court decision.4 And even fervent supporters of the Robinson-Patman Act have been forced to admit that the Act is "scarcely a model of clarity."5

At the heart of most of this criticism lies dissatisfaction with the so-called "injury to competition" clause. All other doubts and confusion about the statute, and they are many, seem to shade into insignificance when compared with the turmoil caused by this clause.

It will be recalled that Section 2(a) of the Act does not prohibit all acts of price discrimination, but only those "where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce,

† Assistant Professor of Marketing, New York University School of Commerce. Member of the New York Bar.
2 DIRLAM & KAHN, FAIR COMPETITION 119 (1954).
4 Rubberoid Co. v. FTC, 189 F.2d 893, 894-95 (2d Cir.), aff'd, 343 U.S. 470 (1951).
5 ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS xi (1937).
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. . . .”  

The clause dealing with injury to “any line of competition” was taken almost verbatim from Section 2 of the Clayton Act. The sponsors of the Robinson-Patman Act were, however, aware of the difficulty that the government had experienced under the Clayton Act in its attempts to prove that discrimination in price caused a general injury to competition. They, therefore, shifted the emphasis of Section 2(a) of the Robinson-Patman Act from injury to a line of commerce to injury to individual competitors. This was accomplished by adding the competition with clause.

There can be little doubt that Section 2(a) of the Robinson-Patman Act is based on a philosophy quite different from that underlying the Sherman and Clayton Acts. Section 2(a) prohibits acts of price discrimination which may result in injury, destruction or prevention of competition with individual competitors. The Sherman and Clayton Acts, on the other hand, were concerned with the preservation of competition, and not with the protection of individual competitors. There is a vast difference between these two objectives. Obviously, practices which may injure competition generally may be beneficial to individual competitors. Thus, a retail chain store organization which lowers its prices in selected communities, with the intent of driving independent competitors out of business, and which raises its prices immediately upon achieving this goal, may hurt competition generally. However, while injuring competition generally, the firm may improve its own position as a competitor.

---


9. On their face, the words “to injure, destroy, or prevent competition with any person who . . .” might seem to require the same general showing of injury to competition as do the words “to . . . lessen competition or tend to create a monopoly in any line of commerce. . . .” However, the legislative history of the “competition with” clause shows that the addition of this clause was designed to change the law so that the main concern of Section 2(a) was “injury to the competitor victimized by the discrimination.” Adelman, *Effective Competition and the Antitrust Laws*, 61 Harv. L. Rev. 1289, 1334-35 (1948).
Similarly, practices which may hurt individual competitors may benefit competition in general. To cite just one example, it is clear that a businessman who is forced to lower his prices as a result of competitive pressures may not make as much profit as he would at a higher price and may therefore feel "injured." However, it would not be logical to assert that competition had been impaired by this price adjustment. In fact, it is such adjustments by competitors which serve as the fuel operating the competitive machinery.

Competition is, after all, a contest in which different individuals or organizations seek to gain the same thing or somehow to exceed each other. Business competition, reduced to its most fundamental concepts, involves rivalry among sellers to sell the same goods (or services) and rivalry among buyers to purchase these same goods (or services). The success of one competitor necessarily implies the exclusion of others, at least in regard to the transaction at hand. This means that competition requires competitors, but that persistently successful competition may eliminate them.

It appears that the sponsors of the Robinson-Patman Act were not entirely aware of the paradox inherent in any attempt to protect individual competitors as well as competition. This conclusion emerges clearly from the debates recorded in the Congressional Record. That the legislature could have failed to understand the nature of competition is slightly puzzling, since economists have given this subject attention for nearly two centuries. Leading economists have long argued that the competitive process carries with it the seeds of its own destruction; that competition, by permitting only the survival of the fittest, thereby destroys the mechanism for the future selection of the fittest. Consequently, an important problem in an economy based upon free enterprise is how to preserve competition without curtailing its beneficial effects. The answer to this dilemma appears to

---

10 See Clark, *Competition and the Objectives of Governmental Policy, Competition and Monopoly and Their Regulation* 317, 326 (Chamberlin ed. 1954).


12 For the start of the debates, see 80 Cong. Rec. 8137 (1936).

lie in striking a satisfactory compromise between vigorous and continuous competition. Business competition cannot be considered a single battle from which one rival may emerge victorious. A free enterprise economy requires unceasing, unmitigated rivalry between competitors, not only for the present but for the interminable future.

Section 2(a) of the Robinson-Patman Act cannot, therefore, be interpreted to outlaw every discrimination in price which might injure some competitor. Section 2(a) applies only when there is a potential injury of a substantial and serious nature, which is reasonably unavoidable, and the results of which are traceable to the discrimination. Very few law review articles have clearly indicated the extent and nature of injury required by the so-called "competition with" clause of Section 2(a). A review of the pertinent principles, therefore, seems desirable.

Generally speaking, the "competition with" clause requires a showing of five elements in order to establish competitive injury within the meaning of Section 2(a):

a. Potential injury;
b. To competitors;
c. Which is substantial and serious;
d. Resulting in injury traceable to the discrimination in price;
e. Which injury was reasonably unavoidable.

**POTENTIAL INJURY**

Acts of price discrimination are within the scope of Section 2(a) "where the effect of such discrimination may be substantially to lessen competition...." 14 Consequently, the Federal Trade Commission need not find that competition has been injured, but merely that it may be injured, in order to find a violation of the Robinson-Patman Act. In this respect the Robinson-Patman Act does not differ from the Clayton Act; both statutes sought to deal with tendencies

---

toward monopoly in their incipiency or, as the Senate Committee on the Judiciary said so colorfully, to "catch the weed in the seed" and "keep it from coming to flower." The Robinson-Patman Act, however, carried the incipiency concept one step further than the Clayton Act, which was limited in application to discriminations in price which might substantially lessen competition or tend to create a monopoly. The Robinson-Patman Act undertook also to prohibit discriminations in price which might injure competition with the seller granting the discriminatory price, the buyer receiving it, or the customer of either of them.

The Federal Trade Commission inferred and the courts have held that the word *may*, as used both in the Clayton Act and in the Robinson-Patman Act, requires a showing of more than a "mere possibility" of competitive injury, but that proof of absolute certainty of injury is not necessary.

Section 2(a) may, therefore, be satisfied by proof that there is a "probability" that a particular discrimination in price will have an injurious effect on competition or competitors. However, a decision of the Supreme Court in 1948 threw some doubt, at least temporarily, upon the validity of this "probability" test. Writing for the majority in *FTC v. Morton Salt Co.*, Mr. Justice Black said:

After a careful consideration of this provision of the Robinson-Patman Act, we have said that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect."

Mr. Justice Jackson, dissenting, criticized the majority for adopting "reasonable possibility" as a standard of the potential injury required by Section 2(a). He called attention to the repeated use by the Court of the "probability" test in earlier cases. He said:

---

16 See note 14 *supra*.
18 334 U.S. 37 (1948).
It is true that . . . the [Corn Products] opinion uses the language as to possibility of injury now quoted in part by the Court as the holding of that case. But the phrase appears in such form and context . . . [that it] must appear to a fair reader as one of those inadvertencies into which the most careful judges sometimes fall.\(^{20}\)

The controversy aroused by the majority opinion in the Morton Salt Co. case is really quite fruitless. The practical difference between a standard of "mere possibility" and one of "probability" is, of course, readily apparent, but it is to be doubted whether any significant distinction can be made between a test of "reasonable possibility" and one of "probability." Any attempt to do so would constitute little more than a barren game of semantics.\(^{21}\) This conclusion seems to be confirmed by the Commission's attitude toward the Morton Salt Co. decision. The Commission has not relied upon the reduced standard of "reasonable possibility," if indeed this represents any reduction in the proof previously required under Section 2(a).\(^{22}\) In one recent decision, a Hearing Examiner of the Commission used the two standards interchangeably.\(^{23}\) In general, however, the Commission seems to prefer "probability" as the test of potential injury.\(^{24}\) It should be noted that the Supreme Court, which first announced the "reasonable possibility" standard in 1948, has not reaffirmed nor amplified its original remarks on this question.

Related to the issue of the standard to be used in determining the existence of potential injury to competition is the question of which party must shoulder the burden of proving this potential injury. Until relatively recently, it was universally agreed that the Federal Trade Commission had the responsibility of adducing affirmative proof to show

\(^{20}\) Id. at 57-58 (dissenting opinion).

\(^{21}\) Austin, Price Discrimination, Committee on Continuing Legal Education 12 (1954).

\(^{22}\) See FTC Notice to Staff, Oct. 12, 1948, p. 8; Hearings Before the Subcommittee on Inter-state and Foreign Commerce of the Senate Committee on Inter-state and Foreign Commerce, 80th Cong., 2d Sess. 127, 729-30 (1948).


competitive harm in order to sustain a complaint under Section 2(a). Evidence proving significant adverse market consequences resulting from the discrimination was deemed part of the Commission's prima facie case. The established precedent to this effect was overturned in 1945 by a per curiam decision of the Court of Appeals of the Second Circuit. In Samuel H. Moss, Inc. v. FTC, the court held that once the fact that a seller charged two prices to different buyers is shown by the Commission, the seller has the burden of showing that competitive injury did not result. The court said:

... Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result.

The Moss principle of assigning the burden of disproving injury on any seller who grants different prices to competing purchasers was reaffirmed by the Court of Appeals of the Second Circuit in FTC v. Standard Brands, Inc. The Supreme Court cited the Moss decision, with approval, in FTC v. Morton Salt Co. There has, however, been much unfavorable reaction to the Moss decision, which made lack of competitive injury a defense to be pleaded and proven by the seller.

The Commission's attitude toward the Moss decision has been puzzling. The Commission actually disavowed the burden-of-proof principle of the Moss decision in its brief opposing certiorari of the Court of Appeals' opinion in the case. The Commission said:

The court below apparently interpreted the Act as meaning that upon mere proof by the Federal Trade Commission that a respon-

---

28 Id. at 379.
29 189 F.2d 510, 515 (2d Cir. 1951).
30 334 U.S. 37 (1948).
dent before the Commission had sold to two customers at different prices, he has the burden of affirmatively proving that the discrimination did not lessen competition or tend to injure or prevent it. . . . [T]he Commission has always construed the Act to require it as part of its affirmative case to present evidence that a discrimination may lessen or tend to injure competition. The petition for certiorari correctly states that the Commission's argument in the court below was not that respondent had failed to prove affirmatively that the discriminations did not lessen competition but that it, the Commission, had proved that the discriminations "injured competition." In seemingly attributing a different position to the Commission, the court below apparently misunderstood the Commission's argument.\textsuperscript{32}

Once the application for certiorari in the Moss case had been denied, the Federal Trade Commission did not hesitate to reverse its earlier stand. In Matter of Standard Oil Co.,\textsuperscript{33} the Commission said:

A prima facie case of violation of Section 2(a) may be established by proving (1) jurisdiction, (2) goods of like grade and quality, and (3) discrimination in price. Discrimination in price here was shown by proving a difference in the prices charged competing customers. Based upon the prima facie case thus shown the Commission may draw from such prima facie case a rebuttable presumption that the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly or to injure, destroy or prevent competition. The burden then shifts to the respondent.\textsuperscript{34}

The Report of the Attorney General's Committee to Study the Antitrust Laws concludes that recent decisions "have receded" from the "presumption" doctrine developed by the Court of Appeals of the Second Circuit in Moss and reiterated in Standard Brands, Inc.\textsuperscript{35} It cites five cases to support this conclusion.\textsuperscript{36} However, only one of these cases

\textsuperscript{33}41 F.T.C. 263 (1945), rev'd on other grounds, 340 U.S. 231 (1951).
\textsuperscript{35}ATTORNEY GENERAL'S COMMITTEE, REPORT ON THE STUDY OF THE ANTITRUST LAWS 161 (1955).
\textsuperscript{36}Among the cases cited are: Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953); Mead's Fine Bread Co. v. Moore, 208 F.2d 777 (10th Cir. 1953), rev'd on other grounds, 348 U.S. 115 (1954); Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), cert. denied for late filing, 344 U.S.
actually supports the view that there has been a withdrawal from the Moss principle. This is Matter of General Foods Co.,\textsuperscript{37} where the Federal Trade Commission stated that in a proceeding to enjoin a discrimination in price “the burden of proof to establish injury to competition is on counsel supporting the complaint.” The other cases cited in the Report on this issue are not directly in point.\textsuperscript{38}

While the General Foods Co. opinion indicates that the Commission is not satisfied with the Moss principle, only a short while ago Hearing Examiner Earl Kolb concluded that “where purchasers, buying and competing in the resale of the same merchandise, are charged different prices therefor, the conclusion is inescapable that injury to competitive efforts of the unfavorable purchasers is present.”\textsuperscript{39} In Englander Motors, Inc. v. Ford Motor Co.,\textsuperscript{40} Judge Freed of the Northern District of Ohio, said:

It is obvious that the competitive opportunities of plaintiff were injured when it had to pay Ford substantially more for the commodities than its competitors had to pay and that the effect of such price discrimination may be substantially to lessen competition and to injure, destroy, or prevent competition.\textsuperscript{41}

If injury to competition is “obvious” as soon as the existence of a discrimination in price is shown to exist, it is, of course, unnecessary for the Federal Trade Commission to prove such injury. Judge Freed cited Morton Salt Co. as authority for this proposition.

If the Moss doctrine is dead, as the Report of the Attorney General’s Committee insists, the body is still very warm, indeed. It is true that many arguments can be mustered to support the view that the Moss doctrine should be reversed; but this is not the same as saying that the doctrine

\textsuperscript{37} Docket No. 5675 (FTC April 13, 1954). See also FTC Newsletter, Aug. 9, 1956.


\textsuperscript{40} 1955 Trade Cases 68.

\textsuperscript{41} Id. at 143 (emphasis added).
has already been overturned. Since the Moss case is a decision of the Federal Court of Appeals, it can be overruled only by a federal court of appellate jurisdiction of the Second Circuit or the Supreme Court. Such a reversal is perhaps imminent. Many lawyers practicing in the antitrust field hope so. It is certainly premature, however, to intimate that a reversal of the Moss decision has already occurred.

**INJURY TO COMPETITORS**

The injury required by Section 2(a) to make a discrimination in price unlawful must be to competition "with" the seller, the buyer, or the customers of either of these. It would not violate the Act for a manufacturer of nails to charge one price to consumers, another to building contractors, and still another to cabinet makers, provided that no competing sellers were substantially harmed by this practice. Similarly, a food wholesaler would be free to establish one set of prices to hospitals, another to restaurants, and still a third to supermarkets, again assuming that there were no injury to competitive sellers. In brief, transactions with non-competing buyers will normally be exempt from the operation of Section 2(a).42

It is not an easy matter, however, to classify purchasers into non-competitive categories in our complex and dynamic market structure.43 Many retail stores sell some goods at wholesale; most wholesalers undertake an occasional retail transaction; more supermarkets than not carry drug products; some drug stores handle food items. This constant expansion of the area of inter-competition of different units in the economy has tended to make classification of buyers into non-competitive groups, for purposes of pricing, rather hazardous.

Neither the Federal Trade Commission nor the courts have clearly indicated how many competitors must be injured before Section 2(a) applies. In *E. B. Muller & Co.*,44 a

---

42 ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 106 (1937).
44 142 F.2d 511 (6th Cir. 1944).
processor of chicory was found guilty of violating Section 2(a), although his discriminatory practices injured only one competitor; this was an unusual case, however, since there were only two major firms in the domestic chicory industry at the time. In general, it seems reasonable to conclude that Section 2(a) contemplates injury to competitors—that is, two or more—but that exceptions will be made when the nature of the competition in the industry or other factors so warrant.45

SUBSTANTIAL INJURY

The Robinson-Patman Act requires "substantial" injury to competition before Section 2(a) applies.46 This means that loss of one sale is normally insufficient to bring the Act into application, but it does not necessarily mean that the Act is not violated until all competitors have been forced into bankruptcy.47 The line, delineating the implications of the "substantial" injury requirement, must be drawn somewhere between these two extremes.

Various verbal standards have been employed by the courts and the Commission to express the injury to competition required by Section 2(a). In several cases the courts stated that Section 2(a) requires a showing that the actual or potential result of the discrimination was the gaining or maintaining by the discriminating seller or by the favored buyer of business which he would not have had in the absence of the discrimination.48 In several other cases, a discrimina-

45 See ATTORNEY GENERAL’S COMMITTEE, REPORT ON THE STUDY OF THE ANTITRUST LAWS 161 (1955). "In some circumstances, to be sure, injury to even a single competitor should bring the Act into play." Id. at 165.

46 The term "substantially" was carried over from Section 2 of the old Clayton Act into the Robinson-Patman Act.

47 "... [W]e construe the [Robinson-Patman] Act to require substantial, not trivial or sporadic, interference with competition to establish the violation of its mandate." Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 790 (7th Cir. 1951), cert. denied for late filing, 344 U.S. 206 (1952).

48 "It is true that §2(a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition with the merchant who engages in the practice; and that no doubt means that the lower price must prevent, or tend to prevent, competitors from taking business away from the merchant which they might have got, had the merchant not lowered his price below what he was charging elsewhere." Samuel H. Moss, Inc. v. FTC, 148 P.2d 378, 379 (2d Cir. 1945).
tion which forced the injured competitor either to lower his price, and thereby reduce his profits or competitive ability, or else forced him to maintain his price, but lose business, has been held to involve "substantial" injury to competition. The essential concept behind both of these standards is that some trade or patronage is diverted to the discriminating seller or away from the non-favored purchasers.

De minimis non curat lex. The law does not care for, nor take notice of, trifling matters. This principle was applied in Matter of Kraft-Phenix Cheese Corp., where it was found that the maximum difference in annual profits resulting from the discrimination was $6.50. This was held too insignificant to justify Federal Trade Commission intervention. However, in the application of the de minimis principle, strict reliance on figures and percentages is not warranted. The amount involved in the discrimination must be considered in relation to the nature of the product, the intensity of competition found in the resale of the product, the normal margin of profit on the product, and even the

49 The Federal Trade Commission and the courts have recognized that a seller who receives a smaller gross margin than his competitors may be injured in his competitive ability. See Corn Products Refining Co. v. FTC, 324 U.S. 726, 742 (1945). In Matter of Moog Industries, Inc., Docket No. 5723 (FTC April 18, 1955), the Commission, quoting its Hearing Examiner, said: "Any saving or advantage in price obtained by one competitor as against another increases his margin of profit, permits additional services to be extended to customers, the use of additional salesmen, the carrying of larger and more varied stocks, and the establishment of branch houses for expansion of the business." Id. at 7.


51 25 F.T.C. 537 (1937). In Matter of the Curtiss Candy Co., 44 F.T.C. 237, 275-76 (1947), the Commission indicated that a price difference of less than one-half-of-one-cent on a box of twenty-four candy bars would fall within the de minimis rule. In Matter of the United States Rubber Co., 46 F.T.C. 998, 1103 (1950), the Commission hinted that a price difference of two per cent or less on rubber footwear would also be within the de minimis rule.

52 See ZORN & FELDMAN, BUSINESS UNDER THE NEW PRICE LAWS 109-10 (1937).

53 See Matter of Standard Brands Inc., 30 F.T.C. 1117 (1940), aff'd, 189 F.2d 510 (2d Cir. 1951).

nature of the industry. Thus, the Federal Trade Commission was quick to recognize that food chain organizations might employ the collective benefits received from a number of resources to gain competitive advantage over their independent rivals, even though the concessions received from any one supplier might appear insignificant. In *Matter of H. C. Brill Co.*, it was held that a two and one-quarter per cent discount on an ice cream mix was illegal, even though this was a minor product in the typical grocery store. The Federal Trade Commission stated that only by prohibiting each individual discount was it possible to avoid the substantial cumulative advantage a chain store organization would be able to acquire if it were to receive a large number of such small concessions. A similar view was expressed by the Supreme Court in the *Morton Salt Co.* case:

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock. Congress intended to protect a merchant from competitive injury attributable to discriminatory prices on any or all goods sold in interstate commerce, whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.

A finding by the Federal Trade Commission that competitive injury resulted from a person's or firm's practice of price discrimination is seldom reversed by the courts. This is due, in part, to the respect which judges accord to the expert status of the Commission in matters of trade regulation. It is due also to the fact-finding powers of the Commission, which are similar to those of a trial court.

---

57 26 F.T.C. 666 (1938).
61 "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 52 STAT. 113 (1938), 15 U.S.C. § 45(c) (1932).
reviewing court may disagree with the Commission, but if the Commission's findings as to the facts are supported by substantial evidence, they are not subject to reversal. This principle was clearly recognized in a leading case involving misleading advertising, where the judge said:

I reluctantly concur in the result, because the Commission has made findings of deception of the public, which there is some evidence to support, though in my opinion it is greatly outweighed by contrary evidence.62

Findings of the Federal Trade Commission on the issue of competitive effect are, therefore, likely to be conclusive. The Commission's holdings on this point have been overruled in only one instance since the passage of the Robinson-Patman Act in 1936.63

INJURY TRACEABLE TO PRICE DISCRIMINATION

In order to subject a person to legal liability, it is necessary to show not only that he is guilty of wrongful acts or omissions and that another person was injured, but also that the injury was a direct result of the wrongful acts or omissions of the first party.64 This is the doctrine of proximate cause.65 It is one of the fundamental principles of the law of torts. It should be an equally valid precept in the field of antitrust regulation.

It is normally necessary, therefore, to have some causal relationship between the price discrimination charged and

This has been interpreted to mean "supported by substantial evidence." Beer, Federal Trade Law and Practice 287-88 (1942).

62 Indiana Quartered Oak Co. v. FTC, 26 F.2d 340, 342-43 (2d Cir. 1928) (concurring opinion).

63 See Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), cert. denied for late filing, 342 U.S. 206 (1952). Even in this case, the court appeared reluctant to reverse the Commission. The court, in its opinion, stressed the fact that the Commission had itself overturned the findings of the trial examiner and that one of the commissioners had dissented.

64 Cooley, Torts 49-50 (rev. ed. 1930).

65 "The early common law made no distinction between proximate and remote cause as the basis of liability, either civil or criminal. A man not only acted at his peril, but was liable for all the consequences of his acts, no matter how remote. . . . But by the modern rule liability for harm is imposed only upon the person whose wrongful act or omission is the proximate cause of the harm, not upon one whose wrong is merely the remote cause." Ibid.
the injury to competition required by Section 2(a) of the Robinson-Patman Act, even though this may be difficult to do in some cases. There is no doubt that non-price factors, such as the promotional skills used in selling the product and the services offered in regard to the product, play an important role in the buying decision. It is not logical, therefore, to infer an injury to competition from a mere showing that the seller supplying the retailer discriminated against him. Such a retailer may, actually, make substantial gains against his rivals, despite the fact that he may be forced to pay a somewhat higher price for his goods than they. He may be able to do this by establishing cordial relations with his customers, by the use of skillful selling techniques, or by maintaining attractive store displays. On the other hand, it is also possible that his business may decline, not because he pays a higher price for his stock than his competitors, but because he is rude to customers, closes his shop early in the day, or for any one of a large variety of reasons. It is, therefore, not proper to relate automatically a business reversal to a contemporary price discrimination against the person or firm experiencing such reversal. In order for a discrimination in price to violate Section 2(a), it must directly cause the injury to competition required by that Section.

The courts have, unfortunately, given scant attention to the proximate cause doctrine in price discrimination cases. Several recent opinions have, however, resurrected this traditional doctrine of the common law in its application to Robinson-Patman Act litigation. In Klein v. Lionel Corp., the court said:

There must be a proximate relationship between the injury to his business, of which the defendant complains, and the alleged illegal act of the defendant, which is asserted as the cause of the injury. The injury must be the natural or probable effect of the asserted illegal act.

---

The proximate cause doctrine is especially significant in cases where a price discrimination is alleged in regard to products which are subsequently sold as part of a larger product. Thus, in *Minneapolis-Honeywell Regulator Co. v. FTC*, it was held that a difference in price of two to three dollars charged to different oil-burner manufacturers on the purchase of regulator controls, for use in heating plants, did not violate Section 2(a). The court stated:

It may be true that if the manufacturers were generally selling controls as such, a differential of two or three dollars in the price they paid for them would have a substantial effect on the price obtained. Under such circumstances a finding that a competitive advantage in purchase price paid would necessarily give rise to a competitive advantage in sale price would perhaps be justified. But where the controls were used in the manufacture of burners, the cost of which was determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few—it cannot be said that discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so.

The court, thus, said that there was no injury-traceable to the discrimination; that there was no proximate relationship between the discrimination in price on the regulator controls and the competition of heating plants, of which the controls became a part.

No case has ever been adjudicated by the Commission or the courts involving price discrimination as between customers purchasing for the purpose of industrial consumption. The probable reason for this is that the relationship between a discrimination in price in the sale of operating supplies and capital equipment, which normally constitute only a small fraction of total business expenses, and the ability of the purchaser to compete in his line of endeavor is likely to be extremely remote.

There is one important exception to the principle that there must be a causal relationship between a discrimination

---

70 191 F.2d 786 (7th Cir. 1951), *cert. denied for late filing*, 344 U.S. 206 (1952).
in price and the injury to competition required by Section 2(a). This is in cases where the discrimination is alleged to affect first-line competition. This point can best be explained by means of an illustration. Let it be assumed that Smith sells to two non-competing accounts at different prices, this difference not being justifiable under any of the defenses of the Robinson-Patman Act. As a result of the price quoted to one of these accounts, a competitor of Smith, by the name of Jones, loses a customer. This could possibly be an injury to Jones, an injury to first-line competition. The injury, however, did not result from the discriminatory character of the two sales made by Smith. It resulted from the price involved in only one of the transactions, and this could be either the higher or the lower of the two prices. It resulted from the fact that this price, whether it was the lower or the higher one, was less than the price offered by Jones to the same account. The discriminatory nature of Smith's transactions was completely unrelated to the injury, if any, caused to Jones. If Smith had charged both of his customers the same price, there would have been no violation of Section 2(a), even if he had taken business away from Jones. The mere fact that he charged different prices to non-competing accounts, however, makes the transactions subject to legal attack. The soundness of this exception to the proximate cause principle is very doubtful.

**Reasonably Unavoidable Injury**

The law does not normally afford a redress for an injury which could have been avoided by the injured party in the exercise of reasonable care. It may, therefore, be assumed that a court would not find an injury "with" competition where a seller refused to meet his competitors' price, even though he were able to do so without serious loss. If, as a result of such a deliberate policy, he were to lose a substan-

---


tial amount of business, there would be no legal recourse. The fact that he had been charged a discriminatory price would probably be immaterial under such circumstances.

Although there has been no litigation on this point, it seems safe to conclude, on the basis of the general context of American common and statutory law, that the injury to competition contemplated by Section 2(a) of the Robinson-Patman Act must have been unavoidable in the exercise of reasonable prudence on the part of the person injured.

In summary, therefore, the competition "with" clause of Section 2(a) does not apply to every minor injury to a competitor resulting from a discrimination in price. It refers only to actual or potential injury which is substantial in nature, which is unavoidable in effect, and which directly results from the discrimination.

**LEVELS OF COMPETITION**

Section 2(a) of the Robinson-Patman Act specifically states the levels of competition at which "competition with" a competitor must be injured before the Section applies. Section 2(a) reads, in part:

...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. . . .

The Act, therefore, speaks of three levels of competition: that at which the seller operates; that at which the buyer operates; that at which customers of the buyer operate.

---

74. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1952) (emphasis added). The word "knowingly" in the phrase "who either grants or knowingly receives" is of little significance and may be disregarded, except where buyer liability is sought to be established under Section 2(f). See Shniderman, "The Tyranny of Labels"—A Study of Functional Discounts Under the Robinson-Patman Act, 60 Harv. L. Rev. 571, 581-82 (1947).

75. The phrase "either of them" in the clause "or with the customers of either of them" refers to the seller granting the discrimination or the buyer receiving it. Customers of the seller who might be injured by the discrimination are, necessarily, competitors of the buyer receiving it; otherwise, there would be no effect on competition. These customers of the seller operate at the second level of competition. The clause "or with the customers of either of them," therefore, really means "or with the customers of the buyer."
The Commission has, on at least one occasion, extended the coverage of the Act to include a fourth-level of competition, that is, competition with customers of a customer of the buyer.\textsuperscript{76}

The debates in Congress indicate clearly that the Robinson-Patman Act was primarily designed to prohibit discriminations in price which might adversely affect competition with the purchasers receiving such discriminations. The statute was so worded, however, that it also embraced discriminations which might inflict injury on competitors of the seller. The most common type of discrimination in price which gives rise to first-line injury is local price cutting, which is sometimes undertaken by a seller operating in a large area in order to eliminate local competitors. There have been few such cases under the Robinson-Patman Act.\textsuperscript{77}

Most of the cases arising under Section 2(a) of the Robinson-Patman Act are primarily concerned with injury to competition between customers of the seller and their competitors. Where a purchaser increases his sales or profits as a direct result of receiving a preferential price from a particular seller, which is not made available to his competitors, injury "with" competition at the secondary level exists. In order for a violation of Section 2(a) to arise, it is not essential for the favored buyer to translate the discrimination he has received into a lower resale price than his competitors; it is sufficient if the benefits of the preference are employed in some way to enhance his competitive position, such as to

\textsuperscript{76} Matter of Miami Wholesale Drug Corp., 28 F.T.C. 485 (1939). In this case, a drug distributor who sold to other wholesalers demanded and received a discrimination in price which he passed on to those wholesalers who bought from him, who passed it on, in turn, to their retailer accounts. Receipt of this discrimination by the Miami Wholesale Drug Corporation was held to be a violation of Section 2(f) of the Robinson-Patman Act, since it was found to injure competition at the second level (Miami and its competitors), at the third level (Miami's wholesaler customers and their competitors) and at the fourth level (the retailers buying from Miami's wholesaler customers and their competitors).

\textsuperscript{77} The leading case of first-line injury to competition under Section 2(a) of the Robinson-Patman Act is E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944), where the Muller Company was charged with cutting the price of its chicory in certain markets where it faced competition, while maintaining a higher price elsewhere.
increase advertising, to expand sales personnel, or even to augment profits.\textsuperscript{78}

The secondary line of commerce is, however, not limited to customers who resell the commodity purchased. It also includes customers who purchase products for industrial consumption, and buyers who purchase components for use in other goods.\textsuperscript{79}

Cases involving injury to competition with customers of a favored purchaser, that is, with competition at the third level, arise extremely infrequently.\textsuperscript{80} They are likely to occur only when a purchaser who has been granted a preferential price by the seller passes on a part of this lower price to his own customers. The Federal Trade Commission decision in the \textit{Standard Oil} litigation suggests the possibility that injury to third-line competition may occur when a wholesaler passes on a portion of his trade discounts to retailers, especially when he does so with the knowledge and acquiescence of the original seller.\textsuperscript{81}

\textbf{CONCLUSION}

Not every price differential is outlawed by the Robinson-Patman Act. Section 2(a) of the Act establishes its own standards for determining which differentials are permissible and which are proscribed. The most controversial of these requirements concerns that dealing with competitive injury. The Robinson-Patman Act retained all of the original language of the Clayton Act in this respect, and added words of its own. The new language shifted the emphasis of the Section from prohibition of those discriminations in price which might injure competition in general to those which might injure competition with individual competitors. This change constituted a radical departure from the philosophy underlying the Sherman and the Clayton Acts.

\textsuperscript{78} See Seidman, \textit{Price Discrimination Cases} 22 (1952).
\textsuperscript{79} Ibid.
\textsuperscript{80} See Austin, \textit{Price Discrimination}, Committee on Continuing Legal Education 29, 48 (1954).
Some injury to competitors is an inevitable concomitant of the competitive process. It is, in fact, one of the goals which induces competitors to compete successfully. The Robinson-Patman Act is not, therefore, concerned with every minor laceration suffered by a competitor as a result of a discriminatory price. It is concerned only with those injuries which tend to debilitate the future effectiveness of the competitive process. Drawing the line between rivalry which is salutary and that which may lead to ominous consequences requires the surgical skills of a learned practitioner. Unfortunately, there have been numerous legal decisions in the past where the rough-and-ready hand of the butcher was more in evidence than the delicate fingers of the surgeon.

Since the Robinson-Patman Act is designed to "nip in the bud" practices which are deemed to have a tendency to create a monopoly, it is concerned as much with potential as with actual injury. This means that the Commission and the courts, which are saddled with the responsibility of detecting such tendencies, must often deal with future and unknown happenings not susceptible of accurate measurement. The reliance on presumptions, such as that developed in the Moss case, is therefore understandable, but it is in no way justifiable. The law of the land must be dictated by social, political and economic objectives, not by considerations of evidentiary expediency.

The fact that violations of Section 2(a) will be easier to prove if all sellers are required to have a uniform price to all buyers is certainly no reason for administering the Act in this direction; and it is no answer to state that the Moss principle concerns procedural questions, rather than substantive rights. The truth remains that most pricing policies other than those of identical prices to all buyers are today unsafe, regardless of their ultimate legality. To the busi-

---

82 The late Mr. Justice Jackson once opined: "The law of this case, in a nutshell, is that no quantity discount is valid if the Commission chooses to say it is not." FTC v. Morton Salt Co., 334 U.S. 37, 58 (1948) (dissenting opinion). As a result of the Moss principle, the same may be said about almost any price differential in interstate commerce. The effect-on-competition requirement of Section 2(a) has, in effect, been read out of the statute in a number of decisions.
nessman, the test of a pricing policy is its freedom from protracted and expensive legal litigation, not its ability to be vindicated before the Supreme Court of the United States.

The competitive-effect proviso of the Robinson-Patman Act is the crucial cornerstone of the Act. Interpreted in one way, it inhibits vigorous competition and goes against the stream of the other antitrust laws. Interpreted in another way, it becomes a well-adjusted member of the American antitrust family. The Report of the Attorney General's Committee urged that interpretation of this proviso be based on the vigor of competition in the market rather than hardship to individual businessmen. The author concurs in this recommendation.

---