XIII. THE ROBINSON-PATMAN ACT

Richard Steuer & Daniel Francis[*]

[*] Many thanks to Daniel Hanley, Nathaniel Harris, Melissa Holyoak, Irving Scher, and Sandeep Vaheesan for helpful comments on an earlier draft of this Chapter.

A. Overview

When a seller charges you more (or less) than the next customer for the same item, that is price discrimination. Price discrimination, in this sense, is the sale of identical products or services to different buyers at different prices.[1] Not all price discrimination is unlawful, but under certain circumstances it can violate the federal Robinson-Patman Act of 1936 ("Act" or "RPA").[2]

Broadly speaking, the Robinson-Patman Act, codified at 15 U.S.C. §§ 13–13c as an amendment to the Clayton Act, prohibits sellers from threatening substantial harm to competition by charging different prices for the same goods to different customers under certain circumstances. The Act also prohibits some other practices, like providing disproportionate promotional support to different customers in the same market or paying "dummy brokerage" fees. The Act explicitly provides for certain defenses and courts have defined several others. It may be

[1] For a refresher on the economics of price discrimination, *see supra* § II.K. The definition in the text here is the core of the concept of price discrimination under the RPA. But economists often use a broader definition, focused on charging different price-cost margins to different customers. *See, e.g.*, Jonathan B. Baker, *Competitive Price Discrimination: The Exercise of Market Power Without Anticompetitive Effects*, 70 Antitrust L.J. 643, 643 & n.1 (2003) (emphasizing the gap between "economic price discrimination" and RPA price discrimination); Edward H. Cooper, *Price Discrimination Law and Economic Efficiency*, 75 Mich. L. Rev. 962, 962 (1977) ("Lawyers often bewail the fact that administration of [the RPA] frequently fails to conform to an economist's notion of discrimination."); *see also* Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 443 n.10 (1983) (noting this).

[2] Our focus in this Chapter will be on the federal Robinson-Patman Act. But many states have their own price discrimination laws, which vary in their content and scope. *See, e.g.*, CONN. GEN. STAT. § 35-45; VA. CODE ANN. § 59.1-9.7; *see generally* ABA, PRICE DISCRIMINATION HANDBOOK (2012).

enforced by government enforcers like the FTC or DOJ,[3] by disfavored customers,[4] and by injured competitors.[5]

A torrent of Robinson-Patman Act cases swept through the courts in the 1950s and 1960s, but enforcement waned in the decades that followed. The FTC has brought many fewer cases since 1980—hardly any in recent decades—and the DOJ has not seriously enforced the Act since the 1970s. Private enforcement has continued, although it has been discouraged by—among other things[6]—the introduction of stricter requirements for proving injury in Robinson-Patman cases, diminishing prospects for certifying class actions.[7]

Change may be in the wind. At the end of the Biden Administration, the FTC demonstrated interest in reviving the agency's Robinson-Patman enforcement authority,[8] culminating in the filing of two complaints at the very end of the Biden Administration: one in December 2024 against Southern Glazer's (an alcoholic beverage distributor) and another in January 2025 against PepsiCo (a soft drink manufacturer).[9] The PepsiCo complaint was withdrawn by the second Trump Administration, with the new FTC Chair labeling it "rushed" and "nakedly political."[10] But at the time of writing (June 2025), the Southern Glazer's litigation is proceeding and has survived a motion to dismiss.[11] Only time will tell whether this is the beginning of a genuine revival of the Act or a brief aberration.

The RPA is the most controversial component of antitrust jurisprudence. Over the years, it has faced both strong criticism and earnest support. Critics charge that the Act props up small, less efficient retailers and other resellers,

[3] *See*, *e.g.*, FTC v. Morton Salt Co., 334 U.S. 37 (1948). What about the states? As a "person" under the antitrust laws a state may sue for damages it has itself sustained in its "proprietary" capacity, and for injunctive relief (either in its own right or in a parens patriae capacity). *See* California v. American Stores Co., 495 U.S. 271 (1990) (state parens patriae injunctive suit challenging a merger); Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 261–62 (1972) ("[T]he United States Government, the governments of each State, and any individual threatened with injury by an antitrust violation may all sue for injunctive relief against violations of the antitrust laws[.] . . . [15 U.S.C. § 15] permits Hawaii to sue in its proprietary capacity for three times the damages it has suffered from respondents' alleged antitrust violations."); 15 U.S.C. § 12 (stating that the "antitrust laws" includes the Clayton Act), § 15 (right of action for treble damages for violation of the antitrust laws), § 26 (right of action for injunction). However, state parens patriae actions *for damages* under federal antitrust law are available only for violations of 15 U.S.C. §§ 1–7, which does not include the provisions of the RPA. *See* 15 U.S.C. § 15c. As a result, federal law does not empower states to assert parens patriae damages claims for price discrimination on behalf of their citizens: any such power must come from state laws.

[4] *See*, *e.g.*, Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006).

[5] *See*, *e.g.*, Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993). Note that different plaintiffs may be required to establish different elements for a liability finding. For example, competitors of a discriminating seller, advancing a "primary-line" claim under the RPA, are generally required to establish that the discriminatory sales were made below cost with a sufficient prospect of recouping the losses later. *See infra* §§ XIII.B–C (discussing elements of a violation and proper plaintiffs).

[6] *See*, *e.g.*, Brian Callaci, Daniel Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 Temple L. Rev. 185, 212 (2025) ("Private enforcement of the RPA is toothless at present. . . . The Supreme Court's revision of procedure may have made changes to substantive doctrine on the RPA moot."); Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 294 (December 2015) ("Of 200 reported cases with Robinson-Patman Act claims filed in federal court from 1996 to 2006, only three resulted in jury verdicts in favor of plaintiffs that were affirmed on appeal. One of those three ultimately was reversed by the Supreme Court."); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2080 (2015) (commenting that, in light of judicial development of the "recoupment" element of a primary-line RPA case "it has become nearly impossible for a plaintiff to win" such a claim).

[7] *See*, *e.g.*, Danvers Motor Co. v. Ford Motor Co., 543 F.3d 141, 147–50 (3d Cir. 2008) (challenged program affected individual buyers differently, precluding class certification); ABC Distrib., Inc. v. Living Essentials LLC, 2017 WL 2603311, at *3 (N.D. Cal. Apr. 7, 2017) ("[A] Robinson-Patman case is not well suited for class certification because its analysis is singularly individualistic.") (internal quotation marks and citation omitted); Mad Rhino, Inc. v. Best Buy Co., 2008 WL 8760854, at *4 (C.D. Cal. Jan. 14, 2008) ("Robinson-Patman cases are ill-suited for class actions.").

[8] *See*, *e.g.*, Alvaro M. Bedoya, *Returning to Fairness* (remarks of Sept. 22, 2022) 8 ("Certain laws that were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman—directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them."). *See also* Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Southern Glazer's Wine and Spirits, LLC FTC File No. 211-0155 (Dec. 12, 2024) 30 ("Treating the Robinson-Patman Act as a nullity for decades offended the separation of powers. That offense is vitiated today. But the Commission ought not to revive enforcement of the Act merely for the sake of reviving enforcement. We must exercise sound judgment in deciding when to enforce the Act. . . . We ought to enforce the Act where it will serve the broad public interest, and bring only those cases we are likely to win.")

[9] Complaint, FTC v. PepsiCo Inc., FTC File No. 221-0158 (F.T.C. filed Jan. 17, 2025); Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, Case No. 8:24-cv-02684 (C.D. Cal. filed Dec. 12, 2024).

[10] FTC, Press Release, *FTC Dismisses Lawsuit Against PepsiCo* (May 22, 2025).

[11] FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684, 2025 WL 1392166 (C.D. Cal. Apr. 17, 2025).

and that it harms consumers by leading to higher prices.[12] In 1977, DOJ issued a sharply critical report, concluding that "Robinson-Patman is ineffective when evaluated both in terms of its narrow, protectionist objectives, and in terms of its benefits to the welfare of society as a whole," and "[t]he greater the business community's compliance with Robinson-Patman . . . the greater the Act's deleterious impact upon competition."[13] But the RPA's supporters defend it as a shield for vulnerable businesses, and a guarantor of commercial fairness, often arguing that lower wholesale prices can represent an unfair advantage over smaller rivals, obtained through buyer power.[14] This debate continues, with supporters calling for greater enforcement of the Act and critics calling for the Act's repeal.

Why Is the RPA Controversial?

Why is the Robinson-Patman Act so controversial? As you begin your study of the RPA, it's helpful to start by asking why a seller might charge different prices to different customers. One reason is that the seller may get more value from dealing with some customers than from others (*e.g.*, because some sellers may provide a channel to reach more consumers or boost the profile of a brand). The seller may be willing to offer more accommodating terms, including lower prices, to more valuable customers in order to reach a deal. Another reason is that some customers may be willing to pay the seller more than others are willing to pay for the same product.

For example, a seller may be willing to accept a relatively low price in sales to:

- a customer that is able to facilitate many sales of a manufacturer's product or to drive demand for the product, perhaps because it is large, effective, or prestigious;
- a customer for which there are few or no easy substitutes from the seller's perspective (*e.g.*, a particular customer may offer the only practicable way to reach certain groups of end-consumers—perhaps because the customer has a commanding retail position, a distinctive location, or unique commercial relationships); or
- a customer that is a particularly low-cost trading partner (with respect to, for example, the costs of negotiation, training, monitoring, delivery, insurance, maintenance of necessary facilities to serve that customer, and so on).

Conversely, a customer may be willing to pay a relatively high price for a product because:

- it considers the product to be particularly desirable, or uses it in a particularly valuable way, or faces particularly low costs in using the product;
- it is an intermediary and its own customers (or end-consumers) strongly value or prefer the seller's product;
- it faces few or no wealth constraints; or
- it has access to few or no close substitutes for the seller's product.

As this illustrates, many factors contribute to price discrimination in the world, including by affecting what a buyer

---

[12] *See, e.g.*, Alden Abbott & Satya Marar, *The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare*, Mercatus Center Policy Brief (June 2023) 15 ("Net welfare is likely to be maximized by an outright repeal of the RPA[.]"); D. Daniel Sokol, *Analyzing Robinson-Patman*, 83 Geo. Wash. L. Rev. 2064, 2065 (2015) ("[T]he Act is based on faulty economics; as such, the very design of Robinson-Patman is flawed."); Herbert Hovenkamp, *Written Testimony on the Robinson-Patman Act to the Antitrust Modernization Committee* (July 2, 2005) ("As currently enforced the Robinson-Patman Act is a socially costly statute that produces no benefits to competition that could not be secured by means of litigation under the Sherman Act. At the same time, the statute imposes significant costs on manufacturers who depend on networks of independent dealers."); Herbert Hovenkamp, *The Robinson-Patman Act and Competition: Unfinished Business*, 68 Antitrust L.J. 125, 125 (2000) ("The secondary-line provisions of the Robinson-Patman Act are irritating to almost anyone who is serious about antitrust."); Wesley J. Liebeler, *Let's Repeal It*, 45 Antitrust L.J. 18, 22 (1976) ("[T]he Act ranks high on the list of things with which economic nonsense is associated."); Earl W. Kintner, A ROBINSON-PATMAN PRIMER (1970) 14 (noting that the RPA "has been variously described as unworkable, hopelessly obscure, and the 'Typhoid Mary' of antitrust").

[13] U.S. Dep't of Justice, U.S. DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 250 (1977).

[14] *See, e.g.*, Brian Callaci, Daniel Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 Temple L. Rev. 185, 195 (2025) ("The Biden administration's revival of the [RPA] is necessary and timely.") ("[In the RPA, fair] competition and fair treatment of businesses, fair wages to workers, and fair prices to producers took precedence over solely low prices to consumers and competition by any means."); Daniel A. Hanley, *Enforce the Robinson-Patman Act for a Fairer Economy*, AM. CONSERVATIVE (Dec. 14, 2023) ("Instance after instance shows the need to restrict the conduct of powerful buyers through vigorous enforcement of the RPA and the deleterious effects of not doing so."); Earl W. Kintner, A ROBINSON-PATMAN PRIMER (1970) vi ("[A] price discrimination law is necessary both to the nation as a whole and to the survival of the very businessman who criticizes [such a law].").

is willing to pay and what a seller is willing to accept. Moreover, not every price is negotiated individually: some trading partners may simply pay a "list price" without individualized deal-making.

So what happens when price discrimination is prohibited? The answer is complicated because it depends on what exactly is banned and what is permitted, and because different settings and different assumptions can produce different results. And, in practice, the many defenses to RPA liability often vitiate the rule. But, in theory at least, at least some of the following things may happen when a ban is imposed. Some customers that were previously favored may end up paying higher prices; some customers that were previously disfavored may end up receiving lower prices; the seller may now be unwilling to deal with some customers rather than sell to them at a non-discriminatory price; and some customers may be willing to begin dealing with the seller now that they are being offered a non-discriminatory price. It can be complicated to determine the extent to which these things will happen (or have already happened) in response to a ban on price discrimination.

A flat nondiscrimination requirement affects the process of bargaining on price in a variety of ways. For one thing, when a customer asks for a lower price, the seller knows that any price discount must be shared with all similarly situated competing customers, and this makes it more expensive for the seller to grant the discount.[15] For another thing, the customer may know that any price discount will be offered to its own competitors, making it less likely that the customer will pick up share as a result of the discount, and this will reduce the customer's incentive to ask for a discount in the first place. Both of these effects tend to discourage discounting, in ways that tend to drive up prices and harm consumers. But, on the other hand, the benefits of any discount actually given will be shared with other customers—at least, to the extent that the seller will continue to sell to those customers—including customers that would not have successfully bargained for a low price on their own account. This effect may tend to push down prices to those other customers, and to benefit end-consumers who purchase from them and would not have been able to buy from the customer who was favored by discrimination.

(Note that the RPA itself is *not* just a flat nondiscrimination requirement—otherwise this Chapter would be much shorter! As we shall see, it is much more complex, and includes a variety of exemptions and special doctrines, including some that reflect an effort to avoid deterring or punishing certain kinds of discounts.)

It is difficult to be confident about the effects of the RPA for at least three important reasons. One is that the empirical evidence about the welfare effects of bans on price discrimination is limited. This means that discussions about the "effects" of the RPA usually lean heavily on theoretical claims—and on background intuitions about how markets generally work—rather than robust evidentiary records.[16] (It is also worth remembering that we do not have really extensive empirical support for the costs and benefits of many kinds of antitrust enforcement.)

A second reason is that the RPA does not prohibit all forms of economic discrimination, and in particular it does not prohibit many practices that a seller might engage in as an alternative to traditional price discrimination. For example, the RPA does not prohibit a seller from differentiating the product and then providing different grades or versions of a product to different customers at different prices. Nor does it prohibit a seller from providing different quality levels to different customers for the *same* price, and in that way giving a good deal to favored customers. Nor does it prohibit disfavoring customers by simply refusing to sell to them at all. Nor does it prohibit discrimination that does not relate to sales of commodities: for example, leases, licenses, and the provision of services fall entirely outside the Act's scope (but may be covered by some state laws). As a result, some sellers may be able to "comply" with the RPA by shifting their business model rather than by charging non-discriminatory

[15] This may remind you of the effects of an MFN agreement, which can also make it more expensive to discount. *See supra* § VI.G.

[16] *See, e.g.*, Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 294 (December 2015) (noting that "the glut of academic commentary may mask the difficulty in actually measuring the economic effect of the Act" and that "the philosophical conflict between 'small business' and 'free market' legislation—and the hesitation to single out certain types of competitors as protection-worthy—may be supplanting a fact-based inquiry into whether the RPA works"); Joseph P. Bauer & Earl W. Kintner, *The Robinson-Patman Act; A Look Backwards, A View Forward*, 31 Antitrust Bull. 571, 589 (1986) ("Evidence of the actual effect of the act in promoting competition is meager."). This is not to say, of course, that there is *no* evidence. *See, e.g.*, John L. Peterman, THE SALT PRODUCERS' DISCOUNT PRACTICES BEFORE AND AFTER THE ROBINSON-PATMAN ACT AND THE FTC'S CHALLENGE TO THEM: THE MORTON AND INTERNATIONAL SALT CASES, FTC Bureau of Economics (Sept. 1995); Joseph P. Bauer & Earl W. Kintner, *The Robinson-Patman Act; A Look Backwards, A View Forward*, 31 Antitrust Bull. 571, 590 (1986) (highlighting a favorable 1975 study of eight specific RPA enforcement proceedings by the FTC).

prices. The result of all this is that it is not always clear what a business will do instead of discriminating in price when faced with the RPA.

The third reason is that the RPA, like some other legal rules, likely deters more behavior than it strictly forbids. For example, as we will see below, existing RPA law includes a "cost justification" defense that allows sellers to charge different prices to reflect differences in the costs of serving different customers.[17] But because accurate cost analysis is difficult and expensive, because it requires litigation discovery to establish, and because courts have construed the defense very narrowly, businesses are very likely deterred—at least to some extent—from granting cost-based discounts to customers even in circumstances where a cost justification could ultimately be shown. Any evaluation of the benefits and costs of the RPA must therefore grapple with the deterrent effects of the Act in practice—not just in an ideal world with perfect information.

The result of all this complexity is at least two kinds of debate over whether, and to what extent, the RPA should be enforced. The first debate is a battle within the consumer-welfare frame, over whether and when the harms to consumers from banning discriminatory pricing will exceed the benefits to consumers from doing so. For most of the last few decades, the weight of academic opinion has favored the view that the RPA generally does more harm than good, even though some forms of price discrimination may harm consumers.[18] The second debate is over whether, *even if it harms consumers in the short term*, RPA enforcement might still be a good thing in the long run perhaps because small businesses are particularly valuable to the competitive process and to society, because the RPA protects a relevant commercial fairness interest, or simply because Congress enacted the RPA and has not repealed it.

The text of the Robinson-Patman Act is a notoriously tangled read.[19] It consists of four sections of Title 15 of the U.S. Code: 15 U.S.C. § 13 contains the core price discrimination rules; 15 U.S.C. § 13a is a specialized and seldom-used provision that governs discrimination in "rebates, discounts, or advertising service charges," as well as underselling, and contains the Act's penalty provisions; 15 U.S.C. § 13b contains a limited exemption for cooperative associations; and 15 U.S.C. § 13c—which was added to the RPA by the Non-Profit Institutions Act of 1938—contains an exemption for purchases of supplies by certain educational and nonprofit organizations.

The Robinson-Patman Act amended the Clayton Act, and 15 U.S.C. §§ 13–13c are often called "Sections 2–2c of the Clayton Act." It is helpful to fix in your mind, right from the start, the difference between "Section 2(a)" (*i.e.*, 15 U.S.C. § 13(a), which is subsection (a) of Section 2) and "Section 2a" (*i.e.*, 15 U.S.C. § 13a, which is the section that *follows* Section 2).

Let's take a look at the statute.

15 U.S.C. § 13

Discrimination in price, services, or facilities

(a) Price; selection of customers

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or

---

[17] *See infra* § XIII.D.2.

[18] *See, e.g.*, Michael L. Katz, *The Welfare Effects of Third-Degree Price Discrimination in Intermediate Good Markets*, 77 Am. Econ. Rev. 154, 165 (1987) (noting that "intermediate good price discrimination may shift prices in a way that reduces output in the final good market and thus lowers consumers' surplus and welfare"); *see also id.* at 165 n 13 (warning that "[t]he present analysis does not provide support for the enforcement of the Robinson-Patman Act" and citing "a good survey of the analysis of the anticompetitive effects of the Act").

[19] *See, e.g.*, Earl W. Kintner, A ROBINSON-PATMAN PRIMER (1970) 14 (noting that the RPA has been described as "hopelessly obscure"); FTC v. Sun Oil Co., 371 U.S. 505, 530 (1963) (Harlan, J., separate memorandum) ("a singularly opaque and elusive statute"); Ruberoid Co. v. FTC, 189 F.2d 893, 894–95 (2d Cir. 1951) ("[T]he Act . . . is vague and general in its wording and . . . cannot be translated with assurance into any detailed set of guiding yardsticks."), *amended*, 191 F.2d 294 (2d Cir. 1951), *aff'd*, 343 U.S. 470 (1952).

any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Burden of rebutting prima-facie case of discrimination

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) Payment or acceptance of commission, brokerage, or other compensation

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) Payment for services or facilities for processing or sale

It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) Furnishing services or facilities for processing, handling, etc.

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) Knowingly inducing or receiving discriminatory price

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13a

Discrimination in rebates, discounts, or advertising service charges; underselling in particular localities; penalties

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.

15 U.S.C. § 13b

Cooperative association; return of net earnings or surplus

Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association.

15 U.S.C. § 13c

Exemption of non-profit institutions from price discrimination provisions

Nothing in the Act approved June 19, 1936, known as the Robinson-Patman Antidiscrimination Act, shall apply to purchases of their supplies for their own use by schools, colleges, universities, public libraries, churches, hospitals, and charitable institutions not operated for profit.

* * *

Happily, all this can be made much more straightforward. In a nutshell, the Robinson-Patman Act centrally prohibits:

> discrimination between customers with respect to:
>
> > the prices charged,
> >
> > the promotional allowances paid, or
> >
> > the promotional services and items furnished;
>
> in connection with the sale of "commodities" (*i.e.*, tangible things)
>
> of "like grade and quality"
>
> with—for a claim focused on discriminatory prices—the result that competition is harmed:
>
> > between the discriminating seller and its competitors (a "primary-line" case),
> >
> > between the favored and disfavored customers of the discriminating seller (a "secondary-line" case), or
> >
> > between the customers of the favored and disfavored customers of the discriminating seller (a

"tertiary-line" case);

subject to certain defenses and defensive doctrines, such as a defense that the seller is "meeting competition."

Generally speaking, there is no discrimination under the RPA if either the favorable terms are reasonably available to all relevant customers, even if not all of them take advantage of those terms, or the favorable terms are offered only to new customers and new customers are treated alike.

Notice that—unlike most of the rest of the antitrust system—the Robinson-Patman Act treats sellers and buyers differently. Among other things, it only applies to discrimination in selling, not discrimination in buying. But buyers can sometimes incur liability under the Robinson-Patman Act for inducing unlawful discrimination by a seller, pursuant to 15 U.S.C. § 13(f).

The RPA includes an unusual version of antitrust's "harm to competition" concept. In principle, classic price discrimination only violates the Act if "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." As you may already have seen in your studies of antitrust, the notion of "harm to competition" is often central to antitrust liability, and it is often identified with harmful impacts on consumers, like higher prices. But in the Robinson-Patman context, such injury can be inferred from the mere fact of sustained discrimination between customers, in what has become known as the "*Morton Salt* inference" after the Supreme Court's 1948 decision in *FTC v. Morton Salt*.[20] Moreover, not every provision of the RPA imposes a harm-to-competition test at all, even in this relaxed form. For example, discrimination in promotional allowances, services or materials is effectively *per se* illegal under the Act, without proof of injury to competition. We will discuss all this further below. For now it is enough to know that a particularly expansive version of harm to competition applies to some, but not all, of the RPA's provisions.

The Robinson-Patman Act is subject to some important exemptions. It does not apply to sales to the federal government, sales to states or their agencies when they do not resell in competition with private parties, most sales to nonprofit institutions, sales for export, or discrimination that is not "in" interstate commerce (although state discrimination law might apply in such cases).[21]

The standard remedy in a government Robinson-Patman action is an injunction. Damages for violations of the core provisions in 15 U.S.C. § 13 are available to private parties under Section 4 of the Clayton Act, but require proof of injury and the amount of damages incurred.[22] There is no private right of action for damages for violations of 15 U.S.C. § 13a.[23]

The Origins of the Robinson-Patman Act

The first federal law directly to address price discrimination was Section 2 of the Clayton Act of 1914. The chief concern motivating the 1914 law was the use of targeted price reductions by powerful national sellers to drive regional competitors out of business—effectively, aggressive discounting that rivals couldn't match.[24] Section 2 prohibited discrimination, the effect of which may be substantially to lessen competition or tend to create a monopoly. But courts interpreted the provision as concerned only with harm to competition *between sellers*—later termed "primary-line" discrimination—rather than competition between the customers of a discriminating seller.[25] (For example—in a fact pattern that was the focus of some concern at the time—a national seller might

[20] FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[21] *See infra* § XIII.E. (discussing exemptions from the scope of the RPA).

[22] *See generally supra* § XII.C. (discussing antitrust damages in general).

[23] Nashville Milk Co. v. Carnation, 355 U.S. 373, 382 (1958); Lang's Bowlarama, Inc. v. AMF Inc., 377 F. Supp. 405, 407 (D.R.I. 1974).

[24] Earl Kintner, A ROBINSON-PATMAN PRIMER (1970) 6–8.

[25] *See* Mennen Co. v. FTC, 288 F. 774, 776 (2d Cir. 1923), *overruled by* George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 252–54 (1929).

set prices in Local Market A at prices lower than it sets in Local Market B, with the result that the seller's local rivals in Local Market A might find it hard or impossible to survive.[26]) This limited interpretation was subsequently rejected by the Supreme Court.[27]

Subsequently, legislative attention focused on discrimination that affected competition between a seller's customers, and specifically on discounts demanded by powerful customers, particularly newly emerging chain stores such as the A&P grocery chain.[28] Policymakers recognized that the discounts obtained by big national retailers (combined with their other advantages) threatened to drive smaller customers, such as "Mom and Pop" grocers, out of business.[29] In 1936, in the shadow of this concern, the Clayton Act was amended by the Robinson-Patman Act, which added specific prohibitions against discrimination that harmed competition between customers of a seller. It also added prohibitions against discrimination in promotional assistance to customers (which was emerging as an alternate means of discrimination), created liability for buyers inducing unlawful discrimination, and added a prohibition against certain forms of commercial bribery.

As noted above, the Robinson-Patman Act has inspired vigorous criticism as well as determined support.[30] Here are some representative examples of these views.

Antitrust Modernization Commission, Report and Recommendations

April 2007

[1] Congress passed the Robinson-Patman Act in 1936 to respond to the concern of small businesses—such as "mom and pop" grocery stores—that they were losing share to larger supermarkets and chain stores and in some cases were being forced to leave the market. Small businesses complained that they could not obtain from suppliers the same price discounts that larger businesses demanded and received.

[2] To address this concern, Congress passed the Robinson-Patman Act, which prohibits sellers from offering different prices to different purchasers of "commodities of like grade and quality" where the difference injures competition. Different discount levels, or lower prices, can be offered only where: (1) the same discount is practically available to all purchasers; (2) a lower price is justified by a lower per-unit cost of selling to the "favored" buyer; (3) a lower price is offered in good faith to meet (but not beat) the price of a competitor; or (4) a lower price is justified by changing conditions affecting the market or marketability of the goods, such as where goods are perishable or seasonal or the business is closing or in bankruptcy. Other provisions of the Robinson-Patman Act ensure the goal of equal pricing by restricting the use of commissions and promotional expenses, for example. The Supreme Court has described the purpose of the Act:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages[.]

[FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948).]

[3] In its operation, however, the Act has had the unintended effect of limiting the extent of discounting generally

---

[26] You might remember an example of this kind of behavior from the *Utah Pie* case discussed in Chapter I. *Utah Pie* was litigated under the RPA, not the original 1914 Clayton Act. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

[27] George Van Camp & Sons Co. v. Am. Can Co., 278 U.S. 245, 252–54 (1929).

[28] For perspectives on the legislative history of the Act, *see, e.g.*, Brian Callaci, Daniel Hanley & Sandeep Vaheesan, *The Robinson-Patman Act as a Fair Competition Measure*, 97 Temple L. Rev. 185, 188–97 (2025); Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 211-0155 (Dec. 12, 2024) 1–7; Frederick M. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 Colum. L. Rev. 1059, 1061–74 (1957).

[29] *See, e.g.*, Joseph P. Bauer & Earl W. Kintner, *The Robinson-Patman Act; A Look Backwards, A View Forward*, 31 Antitrust Bull. 571 (1986) (noting that "the perceived ability of a large buyer to wield its economic power to exact from its suppliers lower prices than its smaller competitors could obtain" was an important motivation for the RPA); FTC, CHAIN STORES: FINAL REPORT ON THE CHAIN-STORE INVESTIGATION (1935) 64 ("Much more than a mere possibility and, in fact, a strong probability exists that the effect of price discriminations by manufacturers which make it possible for chain stores consistently to undersell their independent competitors 'may be to substantially lessen competition' between them and 'tend' to the creation of a monopoly.").

[30] *See supra* notes 12–14 and accompanying text.

and therefore has likely caused consumers to pay higher prices than they otherwise would. As one commentator has explained, the Robinson-Patman Act was designed to protect small businesses from larger, more efficient businesses. A necessary result is higher consumer prices. Moreover, the Act ironically appears increasingly to be ineffective even in protecting small businesses. Over time, many businesses have found ways to comply with the Act by, for example, differentiating products, so they can sell somewhat different products to different purchasers at different prices. Such methods are likely to increase the seller's costs—and thus increase costs to consumers—but do nothing to protect small businesses. The Act generally appears to have failed in achieving its main objective.

[4] An act that restricts price and other forms of competition is fundamentally inconsistent with the antitrust laws, which protect price and other types of competition that benefit consumers. Less than twenty years after Congress enacted the Robinson-Patman Act, the 1955 Report of the Attorney General's National Committee to Study the Antitrust Laws expressed hope that courts would reconcile interpretations of the Robinson-Patman Act with "broader antitrust policies" and "accommodate all legal restrictions on the distribution process to dominant Sherman Act policies." Fourteen years later, the Report of the White House Task Force on Antitrust Policy ("Neal Report") concluded, "the Robinson-Patman Act requires a major overhaul to make it consistent with the purposes of the antitrust laws." In 1977 the Department of Justice Report on the Robinson-Patman Act ("1977 DOJ Report") similarly found that the evidence "raises serious questions whether the Act advances the competitive goals of other antitrust laws." Both the Neal Report in 1969 and the 1977 DOJ Report recommended repeal or substantial modification of the Act due to the Act's high costs, limited or non-existent benefits, and inconsistency with other antitrust laws. In particular, the 1977 DOJ Report concluded that "serious consideration" should be given to repeal of the Robinson-Patman Act, and presented draft legislative options.

[5] In light of these longstanding issues, this [Antitrust Modernization] Commission also examined the Robinson-Patman Act. The Commission makes the following recommendation.

> *Congress should repeal the Robinson-Patman Act in its entirety.*

[6] The time has come to abandon piecemeal proposals for legislative changes to, or new court interpretations of, the Robinson-Patman Act. The Act is fundamentally inconsistent with the antitrust laws and harms consumer welfare. It is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.

{*Eds.: In support of this recommendation, the Report included the following conclusions:*}

[7] The Robinson-Patman Act is likely to harm competition and consumer welfare by prohibiting or discouraging price discrimination that lowers prices to consumers. [. . .]

[8] The Act harms consumer welfare by protecting competitors, rather than competition. [. . .]

[9] The Act may even harm small firms in some cases. [. . .]

[10] The Act increases costs of doing business and likely raises prices to consumers in a variety of ways. [. . .]

[11] The existing antitrust laws already protect consumers from anticompetitive price discrimination. [. . .]

[12] The Act is not the right tool through which to achieve "fairness for small businesses" and other social objectives. [. . .]

[13] The potential complexity of future enforcement of state versions of the Act is not a valid justification for continued consumer harm. [. . .]

Alden Abbott & Satya Marat, The Robinson-Patman Act: A Statute at Odds with Competition and Economic Welfare

Mercatus Center (June 2023)

[1] The historic decline in RPA enforcement has largely been driven by changes in economic learning and antitrust precedent since the statute's enactment. From the 1970s onward, American courts adjudicating Clayton Act

disputes have applied the "consumer welfare standard" as the antitrust benchmark for assessing business practices. More specifically, courts have struck down conduct as anticompetitive based on its harmful effect on consumers, as attested through higher prices, reduced innovation, and lower quality in products and services. This situation has led to jurists, scholars, and antitrust enforcement agencies—for example, the Department of Justice—alike criticizing the RPA for its focus on shielding competitors from their potentially more efficient and effective rivals rather than on promoting competition to protect consumers. Put simply, larger buyers typically undercut smaller rivals by increasing services, lowering prices, or making their products more attractive—thus benefiting consumers.

[*Eds.: The authors review the arguments against the RPA and stricter RPA enforcement:*

- *The RPA harms rather than protects small business.*
- *The RPA polices price differences rather than price discrimination, punishing efficient business practices as a result.*
- *Price discrimination can benefit consumers, helping calibrate and clear markets.*
- *The RPA is based on flawed, discredited economic theory.*
- *The RPA is redundant for policing predatory pricing.*
- *The limits on the RPA's meeting competition defense reduce rather than promote competition and consumer welfare, thus defeating the purpose of the antitrust laws.*
- *The RPA's treatment of secondary-line injury punishes injury to competitors even when competition and consumer welfare are enhanced.*
- *The RPA is not necessary or desirable for leveling the playing field for small business.*]

[2] The decline in RPA enforcement in . . . preceding decades has been driven by a combination of economic learning and understanding about the statute's adverse implications for competition and consumer welfare, thereby affirming its status as a protectionist measure that serves to shield competitors rather than foster vigorous economic competition. This scenario explains why bipartisan public commissions, jurists and judges, regulators, and economists alike have favored the repeal of the RPA, criticized it for its convoluted wording and adverse consequences, or advocated for its benign nonenforcement. Small businesses, including many that ironically became targets of RPA enforcement during the statute's heyday, struggle to compete against larger players in their respective fields for a variety of reasons, including the cost and difficulty of complying with patchworks of regulations and required permits and licenses at the local, state, and federal government levels, many of which do not improve customer or community safety, amenities, or welfare. There are also long-standing structural issues in the governance of labor markets that increasingly challenge small businesses to attract, train, and retain suitable staff. Addressing these issues would do more to level the playing field for vigorous economic competition than to arbitrarily shield businesses from competition owing to their rivals' negotiating power, especially because consumers (including impoverished Americans) frequently benefit from the exercise of such negotiating power. [. . .]

[3] Net welfare is likely to be maximized by an outright repeal of the RPA, which will prevent ideologically motivated officials from expending public resources in RPA lawsuits that are likely to diminish consumer welfare and make the American economy less competitive. Failing to give due weighting to efficient business practices that benefit consumers is antithetical to the procompetition purpose of the antitrust laws. It is also unfair to consumers—and, in particular, to the vast majority of Americans in poverty, who benefit from the negotiating power of large, vertically integrated entities—and to the majority of entrepreneurs who serve them. Regulatory reform that reduces unnecessary government-imposed costs, not the RPA, is an appropriate means to promote the interests of small businesses in an economically efficient, welfare-promoting manner.

Commissioner Alvaro M. Bedoya, Returning to Fairness

Remarks of Sept. 22, 2022

[1] In 1936, Congress spent months debating a bill to protect small-town grocers being driven out of business by powerful chain stores who got secret payoffs from their suppliers. "What are we trying to get away from these chains?" asked one of the bill's supporters. "What we are trying to take away from them is secret discounts, secret rebates, and secret advertising allowances. We are trying to take away from them those practices that are unfair."

[2] It wasn't just 1890 [the year the Sherman Act was passed] or 1936. Five times in 60 years, Congress passed antitrust laws that in letter or spirit demanded fairness for small business, often rural small business. Yet today, it is axiomatic that antitrust does not protect small business. And that the lodestar of antitrust is not fairness, but efficiency. How did this happen? What has this focus on efficiency meant for rural America? And what would it look like to return to fairness?

[3] . . . [I]ndependent groceries serve places that bigger companies do not. The lower the income, the lower the population, the more likely it is to be served by an independent.

[4] I recently watched video testimony of an independent grocer named R.F. Buche . . . . Mr. Buche owns 21 stores in South Dakota. All of them are in Indian country. Mr. Buche's family has been serving Indian country for 117 years. Many of his stores are the only place where locals can easily get fresh milk and produce. Many of them are over an hour's drive from the nearest big box store.

[5] Yet Mr. Buche faces challenges that those big box stores do not. Manufacturers sell products to the big box stores in sizes and packages that they don't offer to him. When he is offered the same products, he cannot get the same prices for them. And that's not because of quantity.

[6] Like most independent grocers, Mr. Buche works with a wholesaler. By bundling the orders of multiple independent grocers, that wholesaler can often meet the order sizes of the big box stores. But even then, his wholesaler is not given the same price. That price is kept secret.

[7] When the pandemic hit, manufacturers cut supplies to Mr. Buche and his wholesaler. "Picture this, please," he told Congress. "Pine Ridge, one of the poorest counties in the nation, not having . . . items like formula for babies on their grocery store shelf."

[8] The only way Mr. Buche could keep products like baby formula, ground beef, or Pedialyte on his shelves was by driving over a thousand miles each week to move essential products between his low-volume and high-volume stores. Yet when Mr. Buche would walk into a big box store 50 or 100 miles from his own, those shelves would be full of those products.

[9] What is happening to Mr. Buche is happening to independent groceries around the country. They are closing, by the thousand, creating food deserts across rural America.

[10] How did this happen?

[11] Efficiency happened. In 1936, Congress passed the Robinson-Patman Act, the law . . . that bans "unfair practices" like "secret discounts" and "secret rebates," available only to the large and powerful. When it passed that law, Congress went out of its way to "keep open the door of opportunity for the small-business man as well as large." For decades, Robinson-Patman was a mainstay of FTC enforcement. It arguably prohibits many of the practices Mr. Buche is experiencing.

[12] Then, as efficiency gained ground in the mid-1980s, a view took hold among enforcers and then courts: First, that Robinson-Patman was an outlier among antitrust statutes because the Congress that passed it focused on harms to supposedly inefficient small businesses. Second, that the law raised consumer prices. Enforcement slowed to a trickle, and then stopped completely.

[13] Those claims are unproven or incorrect. To my knowledge, some 86 years after its passage, there is not one empirical analysis showing that Robinson-Patman actually raised consumer prices. And none other than Professor Herbert Hovenkamp has explained that Robinson-Patman was not an outlier. According to him, the congressional debates around each of the other major antitrust laws were also "fairly dominated . . . by a strong desire to protect small business."

[14] I think we need to step back and question the role of efficiency in antitrust enforcement.

[15] If efficiency is so important in antitrust, then why doesn't that word, "efficiency," appear anywhere in the antitrust statutes that Congress actually wrote and passed?

[16] If efficiency is the goal of antitrust, then why am I charged by statute with stopping unfair methods of competition, and not "inefficient" ones?

[17] We cannot let a principle that Congress never wrote into law trump a principle that Congress made a core feature of that law. I think it is time to return to fairness.

[18] People may not know what is efficient—but they know what's fair. . . . It may be efficient for Pine Ridge to go without baby formula. We all know that that's not what fair markets look like.

[19] That visceral understanding of fairness has often been dismissed as ambiguous and impressionistic. I disagree. Because Congress and the courts have told us, directly and repeatedly, how to implement protections against unfairness.

[20] Certain laws that were clearly passed under what you could call a fairness mandate—laws like Robinson-Patman—directly spell out specific legal prohibitions. Congress's intent in those laws is clear. We should enforce them.

Mark W. Poe, The Critics Are Wrong: How the Robinson-Patman Act Has Been Misunderstood by Its Detractors

38 Antitrust 23 (Spring 2024)

[1] The most familiar criticisms [of the RPA] are based on unsupported assumptions or are targeted at straw-man mischaracterizations . . . . Furthermore, the criticisms are based on a misunderstanding (or disregard for) Congress's purpose in adopting the RPA. [. . .]

[2] The [Antitrust Modernization Commission] Report . . . [states] that . . . the Act has had the unintended effect of limiting the extent of discounting generally and therefore has likely caused consumers to pay higher prices than they otherwise would. Oddly, the AMC did not follow this claim about the operation of the RPA with examples in which RPA enforcement either limited discounting or caused consumers to pay higher prices. Nor did it cite to any study showing either thing. Instead, it cited Professor Hovenkamp, who "explained" that the RPA was designed to protect small businesses from larger, more efficient businesses, with the necessary result of higher consumer prices. But that section of Professor Hovenkamp's treatise [FEDERAL ANTITRUST POLICY, § 14.6a1 (3d ed. 2005)] cites nothing at all. [. . .]

[3] If large resellers are able to negotiate better prices, then prohibiting discrimination from that price baseline gives all buyers access to the large reseller price, and would undoubtedly result in *lower* consumer prices to more people. This is because if the bargaining is done by the stronger of two buyers, then the lower price becomes the price paid by everyone. [. . .]

[4] Another real-world data point is useful here. In the only two cases that the author's firm brought where the supplier has produced relative-cost information, the supplier has internally recognized that due to the exacting packaging and delivery requirements of Sam's Club and Costco, it is more costly to sell to these giants than to their independent competitors. [. . .]

[5] It is understandable why the RPA has persisted in the face of decades of repeal efforts. Surely the average American (and legislator) would agree with the general proposition that small businesses should share a level playing field with their giant chain competitors. And if they delved into the economics of the issue, they would be understandably skeptical of a pricing practice whose very purpose is to transfer consumer surplus from purchasers to suppliers . . . .

Mark Meador, Not Enforcing the Robinson-Patman Act is Lawless and Likely Harms Consumers

FedSoc Blog (July 9, 2024)

[1] While Congress has yet to take up repeal of the [Robinson-Patman Act], FTC and DOJ have constructively done so for the last several decades through a deliberate policy of non-enforcement, premised on the assumption

that enforcement would harm consumers. This non-enforcement has even been applauded by some on the right.

[2] Setting aside for a moment the merits of the law, conservatives and others who believe in our constitutional order and the rule of law should be deeply troubled by the suggestion that federal law enforcers can decide not to enforce a law simply because they disagree with the policy or outcomes it advances. That policy prerogative is reserved to Congress alone under Article I of the Constitution. [. . .]

[3] . . . It is entirely appropriate to question whether the RPA is good policy, but it remains the binding policy of the federal government. The only way to change that is for Congress to pass new legislation. Until that happens, it remains the duty of federal law enforcers to enforce the law as written.

[4] A better question is how best to enforce the RPA. While enforcers cannot simply choose not to enforce a constitutionally enacted law, they do have prosecutorial discretion to choose which cases are the best use of enforcement resources.

[5] Here, critics should concede that not all RPA enforcement is harmful to consumers. The 1977 DOJ report criticizing RPA enforcement implicitly acknowledges this when discussing the "waterbed effect," the market distortion where offering a discount demanded by one buyer drives a seller to increase prices for or deny discounts to other buyers.

[6] . . . [A]ccording to DOJ, it's reasonable to expect that the waterbed effect will occur in the grocery space, but that won't be the case in every other industry. Fair enough. But that is also an admission that enforcing the RPA actually makes sense in the grocery space and other industries with similar cost and pricing dynamics. [. . .]

[7] A blanket refusal to enforce RPA not only offends the rule of law, it throws the baby out with the bathwater and leaves helpless those consumers who are harmed. The FTC should exercise its prosecutorial discretion to investigate and bring RPA cases where it has evidence that consumers are harmed by price discrimination.

* * *

The rest of this Chapter offers a tour of Robinson-Patman law and policy. Section B will set out the doctrinal elements of a Robinson-Patman violation; Section C will distinguish between primary-line, secondary-line, and tertiary-line cases; Sections D will consider defenses to a violation of the core prohibition on price discrimination; Section E will consider the special cases of competitive bidding and custom products; Section F will briefly survey some important exemptions from the scope of the RPA; Section G will consider the circumstances under which a buyer can be liable for inducing a seller to engage in unlawful discrimination; Section H will consider liability for discrimination in promotional allowances; Section I will introduce the Act's brokerage and commercial bribery provision; and Section J will briefly explore the Act's criminal dimension.

NOTES

1) Why do you think the following take place? Based on what you have read so far, which of them seem to implicate the RPA?
    a. The outlets of a national fast-food chain charging different prices to consumers in different locations.
    b. An employer paying different wages to different employees.
    c. A national food manufacturer charging lower prices for food products to national supermarket chains than to individual grocery or convenience stores.
    d. An architect charging different fees to different clients for broadly similar work.
    e. A manufacturer of tractors charging different prices to different national customers.
    f. A regional coffee chain expanding into a new city and offering low coffee prices there for a year to build market share and gain reputation and loyalty.
2) How much should the history of the Robinson-Patman Act mean today, when so much retailing (and wholesaling) is conducted on the Internet? More generally, given how much commerce today involves digital products and other intangibles, is the history of the Act irrelevant?
3) A&P has gone out of business. Are there dominant buyers today that raise the same concerns: that is, that they might drive smaller rivals out of business by obtaining discounts that the rivals cannot match? (Remember that the Robinson-Patman Act applies only to "commodities.")

4) Look back at the extracts above. Whose view do you prefer?
5) Does it make a difference whether we think about the effects of price discrimination in the short or long run?
6) Can the purpose of an anti-price discrimination law be reconciled with the purpose of a competition law? Is price discrimination law antithetical to the goals of other antitrust laws or compatible with them?
7) What are the goals of antitrust law? Do they include protection of small businesses; preservation of decentralized economic/political power; promotion of local ownership/community involvement; protection of rural retailers; promotion of competition in the long run through preservation of a greater number of competitors? What should we look at to determine the answer?
8) Look at the passage of 15 U.S.C. § 13(a) that describes the competition test. It reads: ". . . 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."
    a. This language—including the phrases "may be" and "tend to"—indicates a concern with incipient harms. How could this incipiency concern apply in the context of price discrimination?
    b. Do you think courts should require proof of actual injury to competition or only a serious threat of such injury? What would these things look like in practice?
    c. Some of this language will be familiar to you from the rest of the Clayton Act, particularly Section 7. But the language "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 . . ." is distinctive to the RPA. What is its natural meaning? Why do you think it was included?
9) On the most natural reading of the statute's text, are retailers and other intermediate "customers" of a discriminating seller protected regardless of whether consumers are threatened? Should they be?
10) Should a "line of commerce" under the RPA include so-called "price discrimination markets," consisting of sets of vulnerable customers that can be targeted for supracompetitive prices?
11) Some communities and regions are "food deserts" in which there is limited competition among retailers selling grocery products. How, if at all, could the RPA affect such areas? For example: if a single small independent store is the only food retailer in a particular area, what effect, if any, would the RPA have?
12) Don't overlook state laws. Several states have price discrimination laws of their own, and some are not limited to "commodities" or otherwise subject to the same limitations as the Robinson-Patman Act. Do you think it is important that those state laws be construed compatibly with the RPA, to the extent possible?

B. Elements of a Section 2(a) Violation

There are several statutory prerequisites to pleading and proving a successful claim under the Robinson-Patman Act. These include: sales in interstate commerce; the actual sale of "commodities" of "like grade and quality" to two or more purchasers; and competition between sellers (for "primary-line" cases) or between the purchasers (for "secondary-line" cases) or their customers (for "tertiary-line" cases) and—in a classic price-discrimination case—injury to that competition. Additional requirements are imposed in private litigation: for example, a claim for damages requires injury to the plaintiff.

Different kinds of RPA claims implicate different elements and are subject to different defenses or defensive doctrines. The difference refers to the burden of proof: the "defenses" here are affirmative defenses with the burden of proof on the defendant; the "defensive doctrines" are arguments that tend to negate an element of the offense, for which the burden of proof is on the plaintiff. The following chart may help you to keep track of it all.

Selected RPA Elements, Defenses, and Defensive Doctrines

	SELECTED ELEMENTS			**DEFENSES AND DEFENSIVE DOCTRINES**					
Type of RPA Violation	**Discrimination**	**Interstate commerce**	**Threat of Injury to Competition**	**Meeting Competition**	**Cost Justification**	**Availability**	**Distress Merchandise**	**Introductory Offers**	**Functional Discount**
Section 2(a) / § 13(a): Traditional price discrimination	✓ (discrimination in commodity prices)	✓	✓	✓	✓	✓	✓	✓	✓
Section 2(c) / § 13(c): Commissions and brokerage	✗ (ban on certain practices relating to commissions and brokerage)	✓	✗ (*per se* prohibition)	✗	✗	✗	✗	✗	✗
Section 2(d) / § 13(d): Promotional allowances	✓ (discrimination in payments for promotion)	✓	✗ (*per se* prohibition)	✓	✗	✓	✗	✓	✗
Section 2(e) / § 13(e): Promotional services and facilities	✓ (discrimination in promotional services)	✓	✗ (*per se* prohibition)	✓	✗	✓	✗	✓	✗
Section 2(f) / § 13(f): Buyer inducement (requires seller illegality)	✓ (discrimination in commodity prices)	✓	✓	✓	✓	✓	✓	✓	✓

What does all this mean? Here is a rundown of the elements of a Section 2(a) claim, many of which are shared with one or more other provision of the RPA.

1. Interstate Commerce

Section 2(a) of the Act requires that the defendant and the discrimination be "in commerce," meaning *interstate* commerce in particular.[31] This is undoubtedly satisfied when at least one of the discriminatory sales has crossed a state line.[32] Some courts have indicated that it can, in principle, be satisfied in other cases if at least one such sale is sufficiently related to interstate transactions,[33] while others have insisted on a bright-line rule that at least one sale must cross a state line.[34]

2. Multiple Contemporaneous Sales by a Single Seller

The Act requires that goods be "sold" by the same seller to multiple "purchasers." (Affiliates under common control count as a single seller for this purpose; you can't avoid the RPA by selling to favored and disfavored purchasers through separate "puppet" subsidiaries![35]) This element requires at least two completed contracts of sale. Thus, for example, a sale at one price and an unaccepted offer to sell at a different price does not suffice.[36] Nor does a sale to one customer and a *refusal* to sell to another customer.[37]

---

[31] Note the difference from the Sherman Act's language, which requires effects on interstate commerce. Specifically, Section 1 of the Sherman Act penalizes "restraint of trade or commerce among the several States, or with foreign nations," and Section 2 penalizes "monopoliz[ation of] any part of the trade or commerce among the several States, or with foreign nations," or attempts or conspiracies to that end. 15 U.S.C. §§ 1, 2. By contrast, the RPA merely requires that "either or any of the purchases involved in [proscribed] discrimination are in commerce." 15 U.S.C. 13(a).

[32] Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 200–01 (1974).

[33] *See*, *e.g.*, Rittmann v. Amazon.com, Inc., 971 F.3d 904, 913 (9th Cir. 2020) (noting that "the Supreme Court has held that the actual crossing of state lines is not necessary to be 'engaged in commerce' for purposes of the Clayton and Robinson-Patman Acts") (citing *Gulf Oil*); Hampton v. Graff Vending Co., 516 F.2d 100, 102 (5th Cir. 1975) ("Generally, if it can be shown that goods shipped from outside the state are still within the 'practical, economic continuity' of the interstate transaction at the time of the intrastate sale of the goods, that latter sale will be considered 'in commerce' for purposes of the Robinson-Patman Act."). *See also* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 196 (1974) (noting that the plaintiff did not "contend that the local market in asphaltic concrete is an *integral part of the interstate market in other component commodities or products*") (emphasis added); Zoslaw v. MCA Distrib. Corp., 693 F.2d 870, 877–78 (9th Cir. 1982) ("[I]f goods from out of state are still within the 'practical, economic continuity' of the interstate transaction at the time of [an] intrastate sale, the latter sale is considered 'in commerce' for purposes of the Robinson-Patman Act. . . . [T]he flow of commerce ends when goods reach their 'intended' destination. In gauging the point of destination courts consider whether goods coming from out of state respond to a particular customer's order or anticipated needs. If so, the sales meet the 'in commerce' requirement even though the goods may be stored in a warehouse before actual sale to the buyer. However, goods leave the stream of commerce when they are stored in a warehouse or storage facility for general inventory purposes, that is, with no particular customer's needs in mind.") (citations omitted).

[34] *See*, *e.g.*, Able Sales Co. v. Compania de Azucar de Puerto Rico, 406 F.3d 56, 61 (1st Cir. 2005) ("To satisfy the 'in commerce' requirement, one of the discriminatory sales must cross a state line."); Bailey v. Allgas, Inc., 284 F.3d 1237, 1244 n.13 (11th Cir. 2002) ("[The in-commerce] requirement has been interpreted to mean at least one sale, whether it be the below-cost sale or the sale to which the below-cost sale is being compared, must have crossed a state line."); Diaz Aviation Corp. v. Airport Aviation Servs., Inc., 762 F. Supp. 2d 388, 396 (D.P.R. 2011) ("The present complaint is defective in regard to any allegation of . . . sales crossing a state line.").

[35] There is some uncertainty regarding whether mere ownership is enough to find a "single seller," or whether control is required as well. *Compare* Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 750–51 (1st Cir. 1994) (noting that "one would not want a seller to be able to defeat the statute's clear objectives by transforming unlawful, into lawful, price discrimination through the creation of a separately incorporated subsidiary 'distributor' that sells to the disfavored customers" and holding that "ownership alone makes a 'single seller' of a firm and its wholly owned distributor") *with* Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp., 785 F.2d 1240, 1243 (5th Cir. 1986) ("The same seller doctrine . . . is not to be invoked merely upon a showing that one seller is wholly owned by another. Instead, there must be an affirmative showing that the parent actively controls its subsidiary.") (internal quotation marks and citation omitted).

[36] *See, e.g.,* Bruce's Juices v. American Can Co., 330 U.S. 743, 755 (1947) ("At least two transactions must take place in order to constitute a discrimination."); Crossroads Cogeneration Corp. v. Orange & Rockland Utils., 159 F.3d 129, 142 (3d Cir. 1998) ("The district court dismissed Crossroads' claim because it failed to allege that O & R made any sales of energy at different prices. The complaint merely alleges that O & R has 'offered' to sell electricity at a rate lower than that charged by Crossroads. . . . Merely offering lower prices to a customer does not state . . . a price discrimination claim."); Terry's Floor Fashions, Inc. v. Burlington Indus., Inc., 763 F.2d 604, 615 (4th Cir. 1985) (emphasizing requirement of "two comparable, completed sales").

[37] L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1121 (5th Cir. 1982).

Importantly, the sales to favored and disfavored purchasers must be roughly contemporaneous,[38] a rule that "ensures that the challenged price discrimination is not the result of a seller's lawful response to a change in economic conditions between the sales."[39] And the Act does not apply at all to transactions that are not sales, such as leases, consignments, licenses, or intra-company transfers (*e.g.*, from one division or subsidiary to another).[40]

The RPA "Indirect Purchaser" Rule

Robinson-Patman Act cases have given rise to a doctrine called the "indirect purchaser" rule. Unfortunately, this is completely separate from, and unrelated to, antitrust's regular "indirect purchaser" rule that provides that customers of a defendant's customers generally cannot sue for "passed-on" overcharges.[41] (Why does antitrust so often attach the same label to two different concepts?[42])

The Robinson-Patman indirect purchaser rule is a principle of imputed pricing, designed to avoid "puppet" or "dummy" arrangements that might otherwise allow a defendant to evade the Act's prohibition on discrimination. Although, as noted above, discrimination under the RPA requires that the favorable and unfavorable prices are both charged by a single seller, courts nevertheless recognize that if A sells to B, and controls the price at which B resells the commodity, then the price charged by B can be imputed to A. Thus, for example, if A is making direct sales to X on favorable (or unfavorable) terms, and if B, *at A's direction,* is reselling to Y on unfavorable (or favorable) terms, the whole scheme can be treated as price discrimination by A.[43]

3. Different Prices

The seller must set different prices to different buyers for price discrimination to exist. The Supreme Court has said that price discrimination is "merely a price difference."[44] The relevant price is net price, not the nominal or "sticker" price: a net price reflects discounts, rebates, and other adjustments to the price paid.[45]

This is a strict requirement: the RPA applies to price discrimination and does not cover other forms of economic discrimination even when they might have a comparable effect. Thus, while charging different prices for the same products is the heart of a traditional RPA violation, charging the *same* price for *different* products is not prohibited

[38] U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1136 (9th Cir. 2023) ("within approximately the same period of time"); B-S Steel of Kansas, Inc. v. Texas Indus., Inc., 439 F.3d 653, 665 (10th Cir. 2006) ("reasonably contemporaneous" standard was not satisfied by a four-month gap); Atalanta Trading Corp v. FTC, 258 F.2d 365, 372 (2d Cir. 1958) (holding under Section 2(d) that a five-month gap precluded contemporaneity, and stating that "two trivial sales isolated in time by at least five months from the substantial sales on which the allowances were given do not violate either the letter or the spirit of Section 2(d)").

[39] U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1137 (9th Cir. 2023).

[40] *See*, *e.g.*, E & L Consulting, Ltd. v. Doman Indus. Ltd., 472 F.3d 23, 32–33 (2d Cir. 2006) (RPA does not apply to consignment contracts or preferential treatment of sales agents); Med. Supply Chain, Inc. v. Gen. Elec. Co., 144 F. App'x 708, 715 (10th Cir. 2005) (holding in a Section 2(e) case that the RPA does not apply to "real estate lease or financing"); Reserve Supply Corp. v. Owens-Corning Fiberglas Corp., 799 F. Supp. 840, 845 (N.D. Ill. 1990) (RPA does not apply to intracompany transfers); Fiore v. Kelly Run Sanitation, Inc., 609 F. Supp. 909, 916 (W.D. Pa. 1985) (holding in a Section 2(c) cases that the RPA does not apply to issuing of permits or "licensing transactions").

[41] *See supra* § XII.B.3.

[42] For example, "*Brown Shoe* factors" can mean either the factors used in *Brown Shoe* to inform market definition or (occasionally) the factors relied on by the Court in that case to analyze whether the transaction harmed competition.

[43] *See*, *e.g.*, New Albany Tractor, Inc. v. Louisville Tractor, Inc., 650 F.3d 1046, 1051–52 (6th Cir. 2011); Am. News Co. v. FTC, 300 F.2d 104, 109–10 (2d Cir. 1962); Iams Co. v. Falduti, 974 F. Supp. 1263, 1270–71 (E.D. Mo. 1997).

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

[45] *See, e.g.,* Conoco, Inc. v. Inman Oil Co., 774 F.2d 895, 902 (8th Cir. 1985) (holding that the "relevant figure was the amount actually paid by the buyer, i.e., invoice price less any discounts or allowances not reflected in the invoice price"); Raynor Mfg. Co. v. Raynor Door Co., 2009 WL 211942, at *9 (D. Kan. Jan. 27, 2009) ("'[P]rice' under the Robinson-Patman Act means the net price received by the seller."); Amsterdam Tobacco Inc. v. Philip Morris Inc., 107 F. Supp. 2d 210, 220 (S.D.N.Y. 2000) ("The term 'price,' under the Robinson-Patman Act, means the net price received by the seller from the two buyers in question. . . . Excise taxes are not an element of 'price' under the Robinson–Patman Act because excise taxes are set by and paid to the government, not the seller of the product.") (internal quotation marks and citations omitted).

by the Act.[46] Likewise, as noted above, completely refusing to sell to some purchasers is also not an RPA violation.[47] As this demonstrates, many forms of discriminatory treatment lie beyond the reach of the Act.

In claims for discrimination in promotion under Sections 2(d) or 2(e), courts impose a requirement that the promotional allowances or services must be "disproportionate."[48] We will return to promotional support below.[49]

4. Commodities

Section 2(a) of the Act prohibits only discrimination in the sale of "commodities" (and section 2(d) is limited to "products or commodities"). The term "commodities" is not defined in the Act but has been interpreted to mean tangible goods, and to exclude services or other intangibles.[50] This test is often easy to apply, but there are some anomalies. Electricity, for example, has been considered a commodity by some courts.[51] Despite the importance of this limitation under the federal RPA, some state price discrimination laws are not limited to tangible goods.[52]

5. "Like Grade and Quality"

Section 2(a) requires that the products sold at different prices must be of "like grade and quality." This phrase is not defined in the Act, but in practice this requirement is applied with a focus on the objective "characteristics" of the product.[53]

More generally, courts also require that a plaintiff must show that the transactions that are alleged to constitute discrimination must be "reasonably comparable." Thus, if the relevant terms of the sales contracts differ, there may be no proscribed discrimination.[54] As the Seventh Circuit once put it: "a seat on the 6:00 a.m. flight from Chicago to New York is not the same as a seat on the 5:00 p.m. flight, and a seat on the 5:00 p.m. flight reserved

---

[46] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1406 (7th Cir. 1989) ("[U]nder the Robinson–Patman Act, a firm is entitled to charge the same price to everyone even though its costs differ. Indeed, price differences that follow cost differences are treated as (legal) price discrimination and must be justified, see the first proviso to § 2(a). . . . Professor Mueller testified that Rose Acre engaged in three kinds of price discrimination, of which the first was charging the same price to customers in different cities. Economic price discrimination this undoubtedly was; legal price discrimination it just as surely was not.").

[47] L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1121 (5th Cir. 1982).

[48] *See*, *e.g.*, George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 144 (2d Cir. 1998) ("[Sections 2(d) and 2(e)] were designed to prohibit indirect price discrimination in the form of advertising and other promotional allowances made available to purchasers on disproportionate terms.").

[49] *See infra* § XIII.H.

[50] *See*, *e.g.*, Innomed Labs, LLC v. ALZA Corp., 368 F.3d 148, 156 (2d Cir. 2004); Union City Barge Line, Inc. v. Union Carbide Corp., 823 F.2d 129, 140–41 (5th Cir. 1987) (applying Section 2(c)); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1181–82 (8th Cir. 1982) (noting that "the Robinson-Patman Act does not cover sales of real property, intangibles, or services" but holding that electricity is a commodity for RPA purposes); Slep-Tone Ent. Corp. v. Coyne, 141 F. Supp. 3d 813, 833 (N.D. Ill. 2015) (declining to apply RPA to "operator licenses and venue licenses").

[51] *See*, *e.g.*, Hurt v. Com. Energy, Inc., 973 F.3d 509, 521 (6th Cir. 2020); Williams v. Duke Energy Int'l, 681 F.3d 788, 800 (6th Cir. 2012); City of Kirkwood v. Union Elec. Co., 671 F.2d 1173, 1181–82 (8th Cir. 1982).

[52] *See, e.g.*, FLA. STAT. ANN. § 540.01 (defining "commodity" to include "any article, product, thing of value, service or output of a service trade").

[53] *See*, *e.g.*, FTC v. Borden Co., 383 U.S. 637, 640-46 (1966) ("If two products, physically identical but differently branded, are to be deemed of different grade because the seller regularly and successfully markets some quantity of both at different prices, the seller could, as far as s 2(a) is concerned, make either product available to some customers and deny it to others, however discriminatory this might be and however damaging to competition."); Utah Foam Prods. Co. v. Upjohn Co., 154 F.3d 1212, 1217 (10th Cir. 1998) (noting emphasis on physical characteristics); Jays Foods, Inc. v. Frito-Lay, Inc., 614 F. Supp. 1073, 1085 (N.D. Ill. 1985) ("The physical and chemical identity of the two products, rather than brand names and consumer preferences, are conclusive of the like grade and quality question.").

[54] *See*, *e.g.*, Two Bros. Distrib. Inc. v. Valero Mktg. & Supply Co., 769 F. App'x 408, 412 (9th Cir. 2019) (unpublished) (noting that "material differences" between relevant contracts—including duration, purchase volume, and geographic scope—obviated any showing of discrimination); Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1188–896 (9th Cir. 2016) (declining to infer discrimination from price differences accompanied by different obligations with respect to "payment of license/royalty fees, maintenance of insurance, exclusive use of [a manufacturer's] parts, and compliance with policies, regulations, and procedures promulgated by [the manufacturer]"); Coal. For A Level Playing Field, L.L.C. v. AutoZone, Inc., 737 F. Supp. 2d 194, 212 (S.D.N.Y. 2010) ("[C]ourts have held that a seller is not obligated to charge the same prices for a commodity if its sales contracts with different buyers contain materially different terms. Thus, courts have long held that a seller may charge different prices for goods sold under long-term contracts than for those sold on the spot market.").

two weeks in advance is not the same as a seat on that flight for which the passenger had to stand by."[55]

6. Injury to Competition and the *Morton Salt* Inference

Section 2(a) bans price differences only if "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."[56] The Supreme Court has paraphrased this as a requirement that the discrimination must threaten to injure competition.[57] This test is unique to Section 2(a), and does not apply to claims under Sections 2(c), 2(d), 2(e): those are in effect *per se* offenses.[58]

The harm-to-competition test under Section 2(a) may be applied to competition at different levels of distribution, depending on the theory the plaintiff is advancing. Primary-line cases are centered on harm to competition between the discriminating seller and its own rivals.[59] Secondary-line cases are centered on harm to competition between favored and disfavored customers of the discriminating seller.[60] Tertiary-line cases are centered on harm to competition between customers of the favored and disfavored customers of the discriminating seller.[61] (Even a "quaternary-line" (!) or "fourth-level" injury—involving customers of customers of customers of a discriminating seller—can be the basis for a claim under appropriate circumstances.[62])

So what does the test mean? Is it the same as the "harm to competition" concept elsewhere in antitrust? In 2006, in *Volvo Trucks*, the Supreme Court stated that it would "resist interpretation" of the Robinson-Patman Act "geared more to the protection of existing *competitors* than to the stimulation of *competition*" and that in modern practice the Court construes the Act "'consistently with broader policies of the antitrust laws."[63] The Court explained that the "primary concern" of the antitrust laws is interbrand competition, and that the Robinson-Patman Act "signals no large departure from that main concern."[64] And it specifically indicated the importance of "evidence that any favored purchaser possesses market power," and of whether, rather than causing harm, "[a] supplier's selective price discounting fosters competition among suppliers of different brands."[65] This certainly suggests that the RPA should be understood consistently with the Supreme Court's contemporary focus on consumer welfare.[66]

But the Robinson-Patman Act itself, in defining the relevant injury, features the unusual words "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." This language does not appear in any of the other antitrust statutes. What should we make of it? Does it signal a greater emphasis on the protection of competitors, rather

---

[55] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1408 (7th Cir. 1989).

[56] 15 U.S.C. § 13(a).

[57] Volvo Trucks N. Am. V. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006) ("[T]he Act proscribes 'price discrimination only to the extent that it threatens to injure competition[.]'") *quoting* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993).

[58] *See* FTC v. Simplicity Pattern Co., 360 U.S. 55, 67–71 (1959) (Section 2(e)); George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 145 (2d Cir. 1998) (Sections 2(d) and 2(e)); Augusta News Co. v. Hudson News Co., 2000 WL 1772466, at *9 (D. Me. Nov. 29, 2000) (Section 2(c)).

[59] *See*, *e.g.*, Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993).

[60] *See*, *e.g.*, Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC Inc, 546 U.S. 164, 177 (2006); Aerotec Int'l, Inc. v. Honeywell Int'l, Inc., 836 F.3d 1171, 1187 (9th Cir. 2016).

[61] *See*, *e.g.*, G.L.M. Sec. & Sound, Inc. v. LoJack Corp., 2012 WL 4512499, at *11 (E.D.N.Y. Sept. 28, 2012).

[62] *See*, *e.g.*, Perkins v. Standard Oil Co., 395 U.S. 642, 647–48 (1969) ("Perkins' injuries resulted in part from impaired competition with a customer . . . of a customer . . . of the favored purchaser . . . . The Court of Appeals termed these injuries 'fourth level' and held that they were not protected by the Robinson-Patman Act. We conclude that this limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act.").

[63] Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 181 (2006).

[64] *Id.*

[65] *Id.*

[66] *See also* Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223–24 (1993) (stating in an RPA case that "we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws" and "[t]hat below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors") (internal quotation marks and citations omitted); Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69, 80 n. 13 (1979) (the RPA "should be construed consistently with broader policies of the antitrust laws").

than consumers?

Multiple appeal courts have held that, in secondary- and tertiary-line cases, the answer is yes: that is, that the harm-to-competition test in a price discrimination case under Section 2(a) can be satisfied, at least presumptively, by showing harm to competitors. The Ninth Circuit said in 1995 that "[t]he purpose of [the unusual language in Section 2(a)] was to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition nationwide, *allowing them instead to impose liability simply by proving effects to individual competitors*."[67] This was, of course, a marked divergence from the usual axiom that antitrust protects "competition, not competitors."[68] In a subsequent decision, the Ninth Circuit emphasized that this pro-competitor understanding did not extend to primary-line cases.[69] Other appellate courts have agreed, holding that in secondary- and tertiary-line cases harm to competition can be inferred from harm to competitors.[70] However, as noted above, *Volvo Trucks* suggests that the ultimate harm-to-competition test should turn on the likelihood of overall consumer harm, just as it does in traditional antitrust analysis. There is thus at least a fair argument that any inference of such harm from competitor injury should be rebuttable by a showing that consumer harm—in the traditional antitrust sense—is unlikely.

This issue—whether the RPA should be understood as a component of consumer-focused antitrust, or as a different, more *competitor*-focused enterprise—is central to debates about the value and future of the Act.

A particular point of controversy is the so-called "*Morton Salt* inference." In 1948, in a secondary-line case involving quantity discounts offered by a salt manufacturer, the Supreme Court held that injury to competition under the RPA may be inferred from the existence of a significant price difference over a substantial period of time.[71] The *Morton Salt* inference does not apply in primary-line cases, in the wake of the Supreme Court's insistence in *Brooke Group* that, in such cases, a plaintiff must show harm to competition in the traditional antitrust sense (thus aligning primary-line RPA cases with the law of predatory pricing under Section 2 of the Sherman Act).[72] But the *Morton Salt* inference remains applicable today in secondary- and tertiary-line cases. In *Volvo Trucks* the Court reaffirmed that "a permissible inference of competitive injury may arise from evidence that a favored competitor received a

---

[67] Rebel Oil Co., Inc. v. Atlantic Richfield Co. 51 F.3d 1421, 1446 n.18 (9th Cir. 1995) (emphasis added); *see also* Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 657 (9th Cir. 1997) ("[T]he language that the Robinson-Patman Act added to § 2(a) of the Clayton Act—'to injure, destroy, or prevent competition'—expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination."); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 192 (1st Cir. 1996) ("In contrast to the Sherman Act and the Clayton Act, which were intended to proscribe only conduct that threatens consumer welfare, the Robinson-Patman Act's framers intended to punish perceived economic evils not necessarily threatening to consumer welfare per se.") (internal quotation marks and citation omitted).

[68] *See*, *e.g.*, Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977).

[69] Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 658 (9th Cir. 1997) ("Congress' concern for the fate of individual competitors, as expressed in the legislative history of the Robinson-Patman Act, focussed on secondary-line, not primary-line competition.").

[70] George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 142–44 (2d Cir. 1998) (noting and applying, in a secondary-line case, the proposition that "competitive injury may be inferred from evidence demonstrating injury to an individual competitor"); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 192 (1st Cir. 1996) ("The purpose of this passage was to relieve secondary-line plaintiffs—small retailers who are disfavored by discriminating suppliers—from having to prove harm to competition marketwide, allowing them instead to impose liability simply by proving effects on individual competitors.").

[71] FTC v. Morton Salt Co., 334 U.S. 37, 50–51 (1948) ("It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a 'reasonable possibility' that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. This showing in itself is sufficient to justify our conclusion that the Commission's findings of injury to competition were adequately supported by evidence.").

[72] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993) ("If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it."). *See also id.* at 220 ("Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.") (internal quotation marks and citation omitted); George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 142–43 (2d Cir. 1998) (noting *Brooke Group*'s impact on primary-line cases); Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 658 (9th Cir. 1997) ("We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims."); Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp., 79 F.3d 182, 193 (1st Cir. 1996) ("[T]he *Brooke Group* opinion on its face applies only to primary-line cases, not secondary-line cases. . . . Thus, we hold that the *Morton Salt* rule continues to apply to secondary-line injury cases such as the present one.").

significant price reduction over a substantial period of time."[73] Since that time multiple lower courts have reaffirmed the validity of the inference outside the primary-line context.[74]

Although the *Morton Salt* inference is alive and well for secondary-line and tertiary-line claims, it is not clear whether the inference can be rebutted by evidence showing that the price disparity did not actually cause a significant loss of sales to the disfavored customer. Even before *Volvo Trucks*, the Supreme Court had said that "[i]n the absence of direct evidence of displaced sales, [the *Morton Salt*] inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits."[75] Accordingly, several courts—including the Second, Third, and D.C. Circuits—have concluded that evidence breaking the causal chain between the discrimination and lost sales can rebut the inference.[76]

So what's the bottom line? In sum, today, courts generally allow harm to competition under the RPA to be inferred from either: (1) a showing that the discrimination has caused the disfavored buyer to lose sales to the favored buyer[77]; or (2) a showing, *à la Morton Salt*, that a significant price disparity existed between competitors for a substantial period,[78] with—as noted above—a question mark hanging over whether the inference of harm from such a disparity can be rebutted.[79] However, in the wake of *Volvo Trucks* there is at least a strong argument that the ultimate test is whether consumer harm through effects on interbrand competition is sufficiently threatened, and that lost sales and sustained price disparities create only a rebuttable inference of harm.

In a primary-line case, the Supreme Court has imposed additional obligations on a plaintiff. Specifically, a plaintiff must show both that the discriminatorily low price is below an appropriate measure of the seller's costs, *and* that the seller has a sufficient prospect of recouping its losses.[80] The result is to bring the law of primary-line RPA cases into near alignment with the law of predatory pricing under Section 2 of the Sherman Act, discussed in Chapter

---

[73] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006); *see also* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 559 (1990) (discussing the inference with approval, and characterizing it as the proposition that "injury to competition may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay") (internal quotation marks and citation omitted); Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435–36 (1983) (affirming the inference).

[74] *See*, *e.g.*, Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 210 (2d Cir. 2015); Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 213 (3d Cir. 2007); FTC v. S. Glazer's Wine & Spirits, LLC, No. 8:24-CV-02684, 2025 WL 1392166, at *5 (C.D. Cal. Apr. 17, 2025); Napleton's Arlington Heights Motors, Inc. v. FCA U.S. LLC, 214 F. Supp. 3d 675, 688 (N.D. Ill. 2016); W. Convenience Stores, Inc. v. Suncor Energy (U.S.A.) Inc., 970 F. Supp. 2d 1162, 1173–75 (D. Colo. 2013).

[75] Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983) ("In the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.").

[76] *See*, *e.g.*, Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 212–13 (2d Cir. 2015) ("It is well established, however, that the *Morton Salt* inference is simply an inference and may be rebutted. Specifically, the inference may be rebutted by evidence that favored purchasers were diverting only a de minimis number of customers. . . . [A]n extended discovery process resulted in almost no evidence of diverted sales or other indicia of potential competitive injury."); Feesers, Inc. v. Michael Foods, Inc., 498 F.3d 206, 213 (3d Cir. 2007) ("The inference, if it is found to exist, would then have to be rebutted by defendants' proof that the price differential was not the reason that Feesers lost sales or profits."); Cities of Anaheim, Riverside, Banning, Colton, & Azusa, Cal. v. FERC, 941 F.2d 1234, 1249 (D.C. Cir. 1991) (a defendant "may overcome the [*Morton Salt*] presumption of potential effects by presenting substantial evidence that there was no reasonable probability the price discrimination harmed competition"); Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988) ("It is clear that *Morton Salt*'s inference of competitive injury may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits, In reason, the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman. That is to say, a sustained and substantial price discrimination raises an inference, but it manifestly does not create an irrebuttable presumption of competitive injury. Specific, substantial evidence of absence of competitive injury . . . is, in our view, sufficient to rebut what is, after all, only an inference. . . . [I]f the respondent's evidence demonstrates that there is no competitive injury (or reasonable possibility of competitive injury) to begin with, then evidence breaking the causal connection is obviously impossible to adduce. There is, under those circumstances, no causal connection to break."). *But see* Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 658 (9th Cir. 1997) ("[I]n a secondary-line Robinson-Patman case, the *Morton Salt* inference that competitive injury to individual buyers harms competition generally may not be overcome by proof of no harm to competition").

[77] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006); Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 437 & n.8 (1983) (emphasizing diversion evidence); FTC v. Sun Oil Co., 371 U.S. 505, 518–19 (1963) (same); Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 210 (2d Cir. 2015) ("Plaintiffs attempting to establish competitive injury generally have two routes available to them: showing substantial discounts to a competitor over a significant period of time, known as the *Morton Salt* inference, or proof of sales lost to favored purchasers."); J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990) ("Injury to competition is usually shown in either of two ways: proof of lost sales or profits, . . . or under the *Morton Salt* test, proof of a substantial price discrimination between competitors over time.").

[78] Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 177 (2006).

[79] *See supra* notes 75–76 and accompanying text.

[80] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

VII.[81] The legal standards are not quite identical: the Court has indicated that under the Robinson-Patman Act a defendant must have a "reasonable prospect" of recoupment, while under Section 2 of the Sherman Act a "dangerous probability" is required.[82]

Private Litigation Under the RPA: Standing, Injunctive Relief, and Damages

Just as in other kinds of antitrust cases, private litigants under the RPA face additional requirements, beyond those that apply to a government plaintiff seeking injunctive relief. In order to have standing to bring a case for damages or injunctive relief under Sections 4 and 16 of the Clayton Act respectively,[83] a private plaintiff must show that it is threatened with, or has sustained, actual injury as a proximate result of the discrimination.[84] Moreover, this must be *antitrust* injury: that is, injury of the kind that the antitrust laws were intended to prevent.[85]

A plaintiff seeking injunctive relief must also show that enjoining discrimination would remedy the harm, and this may be difficult or impossible if the defendant has altogether stopped dealing with the plaintiff, or if the plaintiff has gone out of business.[86]

In order to recover damages, a private plaintiff must also show not only that it has been injured, but the amount of its damage.[87] Relevant damages may reflect lost sales, and/or lost profits on sales actually made.[88] When unlawful conduct has been established, this is a somewhat permissive standard. Courts do not require "concrete, detailed proof of injury," and are willing—at least to some extent—to rely on "just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes."[89] But this has limits. A

[81] *See supra* § VII.D.3.

[82] Brooke Group v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 224 (1993).

[83] 15 U.S.C. §§ 15, 26

[84] *See*, *e.g.*, Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648 (1969) ("Before an injured party can recover damages under the Act, he must, of course, be able to show a causal connection between the price discrimination in violation of the Act and the injury suffered."); J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 562 (1981) ("To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."); Hasbrouck v. Texaco, Inc., 842 F.2d 1034, 1042 (9th Cir. 1987) ("Under section 2(a), all that is required to establish illegal price discrimination is proof that competitive injury may result. Once such a showing is made, the plaintiff is entitled to an injunction preventing defendant from engaging in the anti-competitive conduct."), *aff'd*, 496 U.S. 543 (1990); Precision Printing Co. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 353 (W.D. Pa. 1998) ("[T]he mere likelihood of injury to competition or a competitor will suffice if the plaintiff seeks only an injunction[.]").

[85] See, e.g., U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1134 (9th Cir. 2023) (RPA plaintiff under Section 2(d) "must show a threat of antitrust injury"); Spartan Concrete Prods., LLC v. Argos USVI, Corp., 929 F.3d 107, 113 (3d Cir. 2019) (under Section 2(a) a "plaintiff must have proof of antitrust injury—some showing of actual injury attributable to something the antitrust laws were designed to prevent.") (internal quotation marks and citation omitted); Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 214 (2d Cir. 2015) (noting antitrust-injury requirement that plaintiff's "injuries are the type of injury contemplated by the Robinson–Patman Act").

[86] *See*, *e.g.*, B-S Steel of Kansas, Inc. v. Texas Indus., Inc., 439 F.3d 653, 668 (10th Cir. 2006) (denying standing for injunctive relief where the plaintiff "is no longer a purchaser . . . from the appellees and has failed to show any possibility that it might resume such purchases in the future"); H.L. Hayden Co. of New York v. Siemens Med. Sys., Inc., 879 F.2d 1005, 1022 (2d Cir. 1989) ("Since Siemens is no longer selling to Hayden or Schein Dental, as is its right . . . there is no danger that it will sell to them on discriminatory terms . . . and accordingly no basis for a Robinson-Patman injunction."); Intimate Bookshop v. Barnes & Noble, Inc., 2003 WL 22251312, at *10 (S.D.N.Y. Sept. 30, 2003) ("Since Intimate is no longer in business and there is no evidence before this Court supporting any threat of continuing injury, injunctive relief is not available.").

[87] *See*, *e.g.*, Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556 (1990) ("[F]or each respondent to recover damages [under the RPA], he had the burden of proving the extent of his actual injuries."); Drug Mart Pharmacy Corp. v. American Home Prods. Corp., 472 F. Supp.2d 385, 425 (E.D.N.Y. 2007) (warning against confusing "the showing of injury necessary to establish a prima facie case under section 2(a) of the Robinson-Patman Act with the showing of actual injury to the individual competitor-plaintiff necessary for the recovery of damages").

[88] *See*, *e.g.*, J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1540 (3d Cir. 1990) (emphasizing "evidence that the substantial price discrimination[,] reflected in the resale prices of [the plaintiff] and the favored competitors[,] directly resulted in [the plaintiff] losing certain sales and losing profits on other sales because it had to cut its margins"); Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 427 (E.D.N.Y. 2007) (holding that plaintiffs had failed to prove that "competitors—the favored purchasers—lowered their prices in a manner which affected plaintiffs' profits").

[89] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565 (1981) (internal quotation marks and citation omitted); *see also*, *e.g.*, Texaco Inc. v. Hasbrouck, 496 U.S. 543, 572 (1990) ("There is no doubt that respondents' proof of a continuing violation of the Act throughout the 9-year period was sufficient. Proof of the specific amount of their damages was necessarily less precise."); Huntsman Chem. Corp. v. Holland Plastics Co., 208 F.3d 226, at *7 (10th Cir. 2000) (unpub.) ("It is well established that a 'relaxed' damage rule applies once a plaintiff establishes anticompetitive injury from a Robinson-Patman Act violation.").

plaintiff may not, for example, simply claim "automatic damages" equal to the amount of the price difference multiplied by volume of sales.[90] Instead it must prove the sales it lost to the favored purchaser or purchasers, and the profits it would have earned from those sales, or the lost value of the business if it has been driven out of business.[91] Of course, evidence suggesting that the harm was attributable to other causes will undermine this showing.[92]

NOTES

1) What should "antitrust injury" mean in the context of the Robinson-Patman Act? Should it have the same meaning in this context as it has under the rest of the antitrust laws (that is, that a plaintiff can recover "only if the loss stems from a competition-*reducing* aspect or effect of the defendant's behavior"[93])? When will price discrimination, alone, have this effect?
2) What about the Act's prohibition against conduct that may lessen competition or "injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination"? Are the "broader policies" of the antitrust laws consistent with this clause, which itself is also part of the "antitrust laws?"
    a. More generally, does it make sense to construe, or try to construe, the Robinson-Patman Act "consistently with broader policies of the antitrust laws," given the Act's focus on discrimination?[94]
3) The Court said in *Volvo Trucks* that the Robinson-Patman Act "signals no large departure from [the antitrust laws'] main concern." If that is correct, why should the *Morton Salt* inference survive for secondary- and tertiary-line plaintiffs? Do you think the Supreme Court was implicitly narrowing the rights of secondary-line plaintiffs? Do you agree with the Court's effort to make the RPA consistent with the rest of the modern antitrust system?
4) The Robinson-Patman Act has been described as a highly technical statute with many prerequisites, as enumerated above. Would it be better to have a simpler prohibition against abusing substantial market power by inducing discriminatory prices? (How would you draft such a statute?) In what ways would such an approach be simpler, and in what ways would it involve greater complexity?
5) Is there an overlap between the RPA and the other provisions of law you have studied, including Sections 1 and 2 of the Sherman Act, and Section 5 of the FTC Act? What practices would violate both the RPA and another antitrust law?
6) Do you agree that the assessment of "like grade and quality" should be based on "objective" characteristics? What makes a characteristic objective? Could a brand ever be an objective characteristic?

C. Primary-, Secondary- and Tertiary-Line Cases

[90] J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561-63 (1981).

[91] *See*, *e.g.*, Enter. Indus., Inc. v. Texas Co., 240 F.2d 457, 458 (2d Cir. 1957) ("The gross loss was the profit on any sales that it would have made to the nine competitors' customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors. From this must, however, be deducted what added profit it may have got by being free to charge what it chose, particularly in the through traffic where there was little competition."); Huntsman Chem. Corp. v. Holland Plastics Co., 208 F.3d 226 (10th Cir. 2000) (citing *Texaco Inc. v. Hasbrouck* for the proposition that damages may be based on an estimate of "what the plaintiffs' profits would have been if they had paid the same prices as their favored competitors"); Drug Mart Pharmacy Corp. v. Am. Home Prods. Corp., 472 F. Supp. 2d 385, 427 (E.D.N.Y. 2007) ("[D]amages may not be based on the pricing margin caused by the discrimination, but on estimates of plaintiffs' sales absent the discrimination[.]").

[92] *See*, *e.g.*, Water Craft Mgmt., L.L.C. v. Mercury Marine, 361 F. Supp. 2d 518, 540 (M.D. La. 2004) ("It is even more difficult to prove that Water Craft's losses were attributable to Mercury's alleged violation of the antitrust laws because the testimony and evidence presented at the trial supports a finding that other reasons led to the eventual demise of the LA Boating store.").

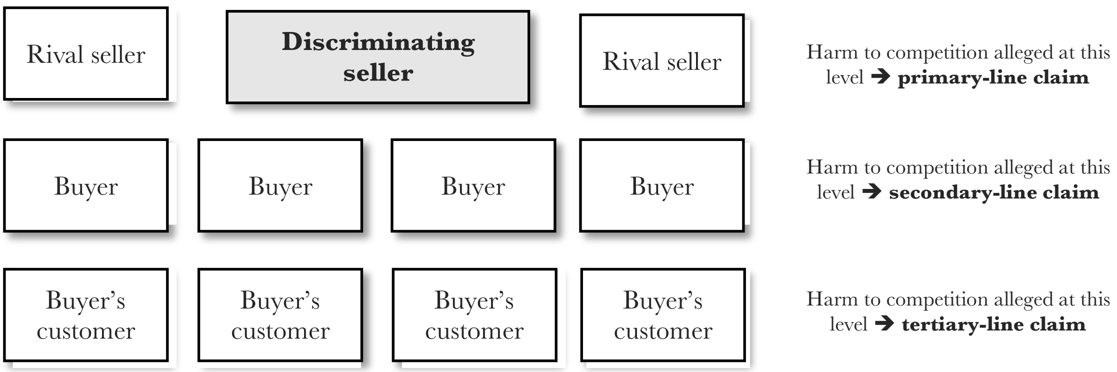
[93] Atl. Richfield v. USA Petroleum, 495 U.S. 328, 344 (1990); *see also* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 116 (1986) ("To hold that the antitrust laws protect competitors from the loss of profits due to [vigorous] price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for it is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.") (internal quotation marks, brackets, and citation omitted).

[94] Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 181 (2006) ("[W]e continue to construe the Act consistently with broader policies of the antitrust laws.") (internal quotation marks and citation omitted).

Distinguished

As the Supreme Court described in *Volvo Trucks*, there are three principal types of Robinson-Patman discrimination claims: "primary-line," "secondary-line," and "tertiary-line" claims. "Primary-line cases entail conduct—most conspicuously, predatory pricing—that injures competition at the level of the discriminating seller and its direct competitors. Secondary-line cases . . . involve price discrimination that injures competition among the discriminating seller's customers. Tertiary-line cases involve injury to competition at the level of the purchaser's customers."[95] (In theory, there is no limit. Quaternary-line cases—and beyond!—are possible, but they are very rare in practice.)

Primary, Secondary, and Tertiary Line Discrimination



1. Primary-Line Price Discrimination

The original objective of the Clayton Act's price discrimination provision was to prevent powerful sellers from eliminating competitors by targeting the competitors' customers with special lowball prices.[96] This is what is known today as "primary-line discrimination."

At first, the Supreme Court adopted a strict rule against such practices,[97] but later came to the conclusion that such an approach failed adequately to distinguish between anticompetitive discrimination and aggressive, procompetitive price competition. In what is still the leading decision, *Brooke Group*, the Court held that to establish a claim of primary-line price discrimination through such predatory pricing, a plaintiff must prove among other things that the defendant sold at prices below its costs—the same rule that the Court applies to predatory pricing claims under Section 2 of the Sherman Act. (You may remember *Brooke Group* from Chapter VII. Although it is an important monopolization authority today, recall that it was actually a Robinson-Patman Act case.)

Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.

509 U.S. 209 (1993)

Justice Kennedy.

[1] This case stems from a market struggle that erupted in the domestic cigarette industry in the mid–1980's. Petitioner Brooke Group, Ltd., whom we, like the parties to the case, refer to as Liggett because of its former corporate name, charges that to counter its innovative development of generic cigarettes, respondent Brown &

---

95 Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176 (2006).

96 *See, e.g.*, 51 Cong. Rec. 14, 250 (Aug. 26, 1914) (Sen. Cummins) ("[Section 2 of the proposed legislation is] the section to prohibit and prevent what is known as local price cutting, and in that way eliminating competition in the community."); 51 Cong. Rec. 14,226 (Aug. 25, 1914) (Sen. Reed) ("Section 2 is aimed at a discrimination in the prices between different communities. It seeks to prevent a practice which has been commonly charged against the Standard Oil and other great concerns, namely, of maintaining high prices or satisfactory prices to them in the great body of the country, but in some State or some community, for the purpose of destroying a competitor, of dropping their prices there locally until the competitor is driven out of business, is bankrupted and ruined. Then, having driven competition from the field and established a complete monopoly, they raise the price so as to recoup all losses, and at the same time they have rid themselves of a troublesome competitor.").

97 *See, e.g.*, Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). You may remember the *Utah Pie* case from Chapter I.

Williamson Tobacco Corporation introduced its own line of generic cigarettes in an unlawful effort to stifle price competition in the economy segment of the national cigarette market. Liggett contends that Brown & Williamson cut prices on generic cigarettes below cost and offered discriminatory volume rebates to wholesalers to force Liggett to raise its own generic cigarette prices and introduce oligopoly pricing in the economy segment. We hold that Brown & Williamson is entitled to judgment as a matter of law. [. . .]

[2] Although we have reiterated that a price discrimination within the meaning of [the RPA] is merely a price difference, the statute as a practical matter could not, and does not, ban all price differences charged to "different purchasers of commodities of like grade and quality." Instead, the statute contains a number of important limitations, one of which is central to evaluating Liggett's claim: By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition. The availability of statutory defenses permitting price discrimination when it is based on differences in costs, "changing conditions affecting the market for or the marketability of the goods concerned," or conduct undertaken "in good faith to meet an equally low price of a competitor," § 13(b), confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, the Robinson–Patman Act should be construed consistently with broader policies of the antitrust laws.

[3] Liggett contends that Brown & Williamson's discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market. This type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury. We last addressed primary-line injury over 25 years ago, in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). {*Eds.: Utah Pie is excerpted in Chapter I.*} In *Utah Pie*, we reviewed the sufficiency of the evidence supporting jury verdicts against three national pie companies that had engaged in a variety of predatory practices in the market for frozen pies in Salt Lake City, with the intent to drive a local pie manufacturer out of business. We reversed the Court of Appeals and held that the evidence presented was adequate to permit a jury to find a likelihood of injury to competition.

[4] *Utah Pie* has often been interpreted to permit liability for primary-line price discrimination on a mere showing that the defendant intended to harm competition or produced a declining price structure. The case has been criticized on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition. We do not regard the *Utah Pie* case itself as having the full significance attributed to it by its detractors. *Utah Pie* was an early judicial inquiry in this area and did not purport to set forth explicit, general standards for establishing a violation of the Robinson-Patman Act. As the law has been explored since *Utah Pie*, it has become evident that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under § 2 of the Sherman Act. There are, to be sure, differences between the two statutes. For example, we interpret § 2 of the Sherman Act to condemn predatory pricing when it poses a dangerous probability of actual monopolization, whereas the Robinson-Patman Act requires only that there be "a reasonable possibility" of substantial injury to competition before its protections are triggered. But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market.

[5] Accordingly, whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs. Although *Cargill* and *Matsushita* reserved as a formal matter the question whether recovery should ever be available when the pricing in question is above some measure of incremental cost, the reasoning in both opinions suggests that only below-cost prices should suffice, and we have rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm's competitors inflict injury to competition cognizable under the antitrust laws. As a general rule, the exclusionary effect of prices above a relevant measure of cost either reflects the lower cost structure of the alleged predator, and so represents competition on the merits, or is beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price-cutting. To hold that the antitrust laws protect competitors

from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result. [. . .]

[6] Even in an oligopolistic market, when a firm drops its prices to a competitive level to demonstrate to a maverick the unprofitability of straying from the group, it would be illogical to condemn the price cut: The antitrust laws then would be an obstacle to the chain of events most conducive to a breakdown of oligopoly pricing and the onset of competition. Even if the ultimate effect of the cut is to induce or reestablish supracompetitive pricing, discouraging a price cut and forcing firms to maintain supracompetitive prices, thus depriving consumers of the benefits of lower prices in the interim, does not constitute sound antitrust policy.

[7] The second prerequisite to holding a competitor liable under the antitrust laws for charging low prices is a demonstration that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices. . . . Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers. [. . .]

[8] For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly. . . .

[9] If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market. The plaintiff must demonstrate that there is a likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it. As we have observed on a prior occasion, in order to recoup their losses, predators must obtain enough market power to set higher than competitive prices, and then must sustain those prices long enough to earn in excess profits what they earlier gave up in below-cost prices.

[10] Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market. If market circumstances or deficiencies in proof would bar a reasonable jury from finding that the scheme alleged would likely result in sustained supracompetitive pricing, the plaintiff's case has failed. In certain situations—for example, where the market is highly diffuse and competitive, or where new entry is easy, or the defendant lacks adequate excess capacity to absorb the market shares of his rivals and cannot quickly create or purchase new capacity—summary disposition of the case is appropriate.

[11] These prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury. As we have said in the Sherman Act context, predatory pricing schemes are rarely tried, and even more rarely successful, and the costs of an erroneous finding of liability are high. The mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition; because cutting prices in order to increase business often is the very essence of competition; mistaken inferences are especially costly, because they chill the very conduct the antitrust laws are designed to protect. It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.

2. Secondary-Line Price Discrimination

In a secondary-line claim, a plaintiff typically alleges that the defendant charged a higher price to the plaintiff and a lower price to the plaintiff's competitor for identical goods, harming competition between the plaintiff and its competitors.

An allegedly disfavored purchaser claiming secondary-line price discrimination must prove that, in commerce,[98] the same seller made two or more reasonably contemporaneous actual sales,[99] at different prices,[100] of commodities[101] of like grade and quality[102] to purchasers that compete against each other for the same customers, resulting in injury, or a threat of injury, to competition.[103] As noted above, the necessary threat of harm to competition can be proved by: (1) showing actual lost sales or profits as a result of the discrimination; or (2) relying on the *Morton Salt* inference, which requires the plaintiff to show a significant price difference between competing purchasers for a substantial period, and which may or may not—depending on the circuit in which the litigation takes place—be rebuttable by evidence tending to show that the price difference did not result in lost sales or profits.[104]

The leading Supreme Court decision on secondary-line price discrimination is also its most recent pronouncement on the RPA as a whole. It was an unusual situation: the products were custom made, the allegedly disfavored purchaser was not always a purchaser at all, and it almost never competed against the allegedly favored purchasers. This proved fatal to the plaintiff's claim.

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.

546 U.S. 164 (2006)

Justice Ginsburg.

[1] This case concerns specially ordered products—heavy-duty trucks supplied by Volvo Trucks North America, Inc. ("Volvo"), and sold by franchised dealers through a competitive bidding process. In this process, the retail customer states its specifications and invites bids, generally from dealers franchised by different manufacturers. Only when a Volvo dealer's bid proves successful does the dealer arrange to purchase the trucks, which Volvo then builds to meet the customer's specifications.

[2] [Reeder-Simco GMC, Inc. ("Reeder"), a Volvo dealer sued Volvo under the Robinson-Patman Act and a state franchise act {*Eds.: not an antitrust law*}, alleging that Reeder lost sales and profits because Volvo had offered other dealers better prices. Reeder won at trial—with the jury awarding $1.3 million on the Robinson-Patman claim and $513,750 on the state law claim—and prevailed on appeal on both claims. Only the Robinson-Patman claim was before the Supreme Court.]

[3] We granted review . . . to resolve the question whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination proscribed by Robinson-Patman, absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. . . . [T]he Robinson-Patman Act, we hold, does not reach the case Reeder presents. The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.

I

[4] [Volvo made heavy-duty trucks. Reeder sold those trucks under a franchise agreement that renewed every year, provided that Reeder met Volvo's sales objectives. Most of Reeder's sales occurred through competitive bidding, where the customer specified its requirements and invited bids from several dealers it had selected. When a Volvo dealer was invited to bid, it then asked Volvo for a discount or "concession" from the published wholesale price (which was 80% of the published retail price). Volvo decided on a case-by-case basis whether to offer a discount and, if so, how much to offer. The dealer then used the discount to prepare its bid, but actually purchased

[98] *See supra* § XIII.B.1.
[99] *See supra* § XIII.B.2.
[100] *See supra* § XIII.B.3.
[101] *See supra* § XIII.B.4.
[102] *See supra* § XIII.B.5.
[103] *See supra* § XIII.B.6.
[104] *See supra* § XIII.B.6.

trucks from Volvo only if and when the customer accepted its bid.]

[5] Reeder was one of many Volvo dealers, each assigned by Volvo to a geographic territory. Reeder's territory encompassed ten counties in Arkansas and two in Oklahoma. Although nothing prohibits a Volvo dealer from bidding outside its territory, Reeder rarely bid against another Volvo dealer. In the atypical event that the same retail customer solicited a bid from more than one Volvo dealer, Volvo's stated policy was to provide the same price concession to each dealer competing head to head for the same sale.

[6] [In 1997, Volvo determined that it had too many dealers and that it would be better to have fewer dealers, each with a larger territory. At the same time, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received. Reeder suspected that Volvo planned to eliminate Reeder as a dealer.]

[7] At trial, Reeder's vice-president, William E. Heck, acknowledged that Volvo's policy was to offer equal concessions to Volvo dealers bidding against one another for a particular contract, but he contended that the policy "was not executed." Reeder presented evidence concerning two instances over the five-year course of its authorized dealership when Reeder bid against other Volvo dealers for a particular sale. One of the two instances involved Reeder's bid on a sale to Tommy Davidson Trucking. Volvo initially offered Reeder a concession of 17%, which Volvo, unprompted, increased to 18.1% and then, one week later, to 18.9%, to match the concession Volvo had offered to another of its dealers. Neither dealer won the bid. The other instance involved Hiland Dairy, which solicited bids from both Reeder and Southwest Missouri Truck Center. Per its written policy, Volvo offered the two dealers the same concession, and Hiland selected Southwest Missouri, a dealer from which Hiland had previously purchased trucks. After selecting Southwest Missouri, Hiland insisted on the price Southwest Missouri had bid prior to a general increase in Volvo's prices; Volvo obliged by increasing the size of the discount.

[8] Reeder dominantly relied on comparisons between concessions Volvo offered when Reeder bid against non-Volvo dealers, with concessions accorded to other Volvo dealers similarly bidding against non-Volvo dealers for other sales. Reeder's evidence compared concessions Reeder received on four occasions when it bid successfully against non-Volvo dealers (and thus purchased Volvo trucks), with more favorable concessions other successful Volvo dealers received in connection with bidding processes in which Reeder did not participate. Reeder also compared concessions offered by Volvo on several occasions when Reeder bid unsuccessfully against non-Volvo dealers (and therefore did not purchase Volvo trucks), with more favorable concessions received by other Volvo dealers who gained contracts on which Reeder did not bid.

[9] [A Reeder witness testified that Reeder had not looked for instances in which it received a larger concession than another Volvo dealer, adding only that it was "possible" such instances occurred. Nor had Reeder endeavored to determine by statistical analysis whether it had been disfavored, on average, compared to another dealer or set of dealers. The jury found a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo's discriminatory pricing injured Reeder, awarding damages. A divided Court of Appeals for the Eighth Circuit affirmed.]

[10] We granted certiorari to resolve this question: May a manufacturer be held liable for secondary-line price discrimination under the Robinson-Patman Act in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer? Satisfied that the Court of Appeals erred in answering that question in the affirmative, we reverse the Eighth Circuit's judgment.

II

[11] [. . .] To establish the secondary-line injury of which it complains, Reeder had to show that (1) the relevant Volvo truck sales were made in interstate commerce; (2) the trucks were of like grade and quality; (3) Volvo discriminated in price between Reeder and another purchaser of Volvo trucks; and (4) the effect of such discrimination may be to injure, destroy, or prevent competition to the advantage of a favored purchaser, i.e., one who received the benefit of such discrimination. It is undisputed that Reeder has satisfied the first and second requirements. Volvo and the United States, as *amicus curiae*, maintain that Reeder cannot satisfy the third and fourth requirements, because Reeder has not identified any differentially priced transaction in which it was both a "purchaser" under the Act and "in actual competition" with a favored purchaser for the same customer.

[12] A hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.

III

[14] The evidence Reeder offered at trial falls into three categories: (1) comparisons of concessions Reeder received for four successful bids against *non-Volvo* dealers, with larger concessions other successful Volvo dealers received for *different sales* on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons of concessions offered to Reeder in connection with several unsuccessful bids against *non-Volvo* dealers, with greater concessions accorded other Volvo dealers who competed successfully for *different sales* on which Reeder did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which Reeder bid against another Volvo dealer (head-to-head comparisons). The Court of Appeals concluded that Reeder demonstrated competitive injury under the Act because Reeder competed with favored purchasers at the same functional level and within the same geographic market. As we see it, however, selective comparisons of the kind Reeder presented do not show the injury to competition targeted by the Robinson-Patman Act.

[15] Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-à-vis Reeder. Reeder simply paired occasions on which it competed with *non-Volvo* dealers for a sale to Customer A with instances in which other Volvo dealers competed with *non-Volvo* dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months.

[16] We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality. No similar risk of manipulation occurs in cases kin to the chainstore paradigm. Here, there is no discrete "favored" dealer comparable to a chainstore or a large independent department store—at least, Reeder's evidence is insufficient to support an inference of such a dealer or set of dealers. For all we know, Reeder, on occasion, might have gotten a better deal vis-à-vis one or more of the dealers in its comparisons.

[17] Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area. At that initial stage, however, competition is not affected by differential pricing; a dealer in the competitive bidding process here at issue approaches Volvo for a price concession only after it has been selected by a retail customer to submit a bid. Competition for an opportunity to bid, we earlier observed, is based on a variety of factors, including the existence *vel non* of a relationship between the potential bidder and the customer, geography, and reputation. . . . That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales. In sum, the purchase-to-purchase and offer-to-purchase comparisons fail to show that Volvo sold at a lower price to Reeder's "competitors," hence those comparisons do not support an inference of competitive injury.

[18] Reeder did offer evidence of two instances in which it competed head to head with another Volvo dealer. When multiple dealers bid for the business of the *same* customer, only one dealer will win the business and thereafter purchase the supplier's product to fulfill its contractual commitment. Because Robinson-Patman prohibits only discrimination between different *purchasers*, Volvo and the United States argue, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. We need not decide that question today. Assuming the Act applies to the head-to-head transactions, Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial. *See* 1 ABA Section of Antitrust Law, ANTITRUST LAW DEVELOPMENTS 478–79 (5th ed. 2002) ("No inference of injury to competition is permitted when the discrimination is not substantial." (collecting cases)).

[19] Reeder's evidence showed loss of only one sale to another Volvo dealer, a sale of 12 trucks that would have generated $30,000 in gross profits for Reeder. Per its policy, Volvo initially offered Reeder and the other dealer

the same concession. Volvo ultimately granted a larger concession to the other dealer, but only after it had won the bid. In the only other instance of head-to-head competition Reeder identified, Volvo increased Reeder's initial 17% discount to 18.9%, to match the discount offered to the other competing Volvo dealer; neither dealer won the bid. In short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the "favored" Volvo dealer.

IV

[20] Interbrand competition, our opinions affirm, is the primary concern of antitrust law. The Robinson-Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder and embraced by the Court of Appeals, we would resist interpretation geared more to the protection of existing competitors than to the stimulation of *competition*. In the case before us, there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman's governance to such cases, we continue to construe the Act consistently with broader policies of the antitrust laws.

[21] For the reasons stated, the judgment of the Court of Appeals for the Eighth Circuit is reversed, and the case is remanded for further proceedings consistent with this opinion.

Justice Stevens, with whom Justice Thomas joins, dissenting.

[22] [The jury in this case] could infer that Volvo's pricing policies were comparable to a secret catalog listing one set of low prices for its "A" dealers and a higher set for its "B" dealers like Reeder, with an exception providing for the same prices where an "A" dealer and a "B" dealer were engaged in negotiations with the same customer at the same time. [. . .]

[23] Volvo does not dispute that the evidence was sufficient to support the jury finding that Reeder and the favored dealers operated in the same geographic market. [. . .]

[24] We have [in previous cases] treated as competitors those who sell in a single, interstate retail market. Under this approach—uncontroversial until today—Reeder would readily prevail. There is ample evidence that Volvo charged Reeder higher prices than it charged to competing dealers in the same market over a period of many months. That those higher prices impaired Reeder's ability to compete with those dealers is . . . obvious . . . .

[25] Volvo nonetheless argues that no competitive injury could have occurred because it never discriminated against Reeder when Reeder and another Volvo dealer were seeking concessions with regard to the same ultimate customer. In Volvo's view, each transaction was a separate market, one defined by the customer and those dealers whom it had asked for bids. For each specific customer who has solicited bids, Reeder's only "competitors" were the other dealers making bids. Accordingly, if none of these other dealers were Volvo dealers, then Reeder suffered no competitive harm (relative to other Volvo dealers) when Volvo gave it a discriminatorily high price. [. . .]

[26] The Court appears to hold that, absent head-to-head bidding with a favored dealer, a dealer in a competitive bidding market can suffer no competitive injury.[4] It is unclear whether that holding is limited to franchised dealers who do not maintain inventories, or excludes virtually all franchisees from the effective protection of the Act. In either event, it is not faithful to the statutory text.

[27] As the Court recognizes, the Robinson-Patman Act was primarily intended to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers. Whether that statutory mission represented sound economic policy is not merely the subject of serious debate, but may well merit Judge Bork's characterization as "wholly mistaken economic theory." [Robert H. Bork, THE ANTITRUST PARADOX 382

[4] Indeed, if Volvo's argument about the meaning of "purchaser," ultimately meets with this Court's approval, then the Robinson-Patman Act will simply not apply in the special-order context. Any time a special-order dealer fails to complete a transaction because the high price drives away its ultimate customer, there will be no Robinson-Patman violation because the dealer will not meet the "purchaser" requirement, and any time the dealer completes the transaction but at a discriminatorily high price, there will be no violation because the dealer has no "competition" (as the majority sees it) for that specific transaction at the moment of purchase.

(1978).] I do not suggest that disagreement with the policy of the Act has played a conscious role in my colleagues' unprecedented decision today. I cannot avoid, however, identifying the irony in a decision refusing to adhere to the text of the Act in a case in which the jury credited evidence that discriminatory prices were employed as means of escaping contractual commitments and eliminating specifically targeted firms from a competitive market. The exceptional quality of this case provides strong reason to enforce the Act's prohibition against discrimination even if Judge Bork's evaluation (with which I happen to agree) is completely accurate.

3. Tertiary-Line Price Discrimination

A tertiary-line case is similar to a secondary-line case, but involves competitive harm at the level of customers of the customers of the discriminating seller. For example, if a manufacturer discriminates between two wholesalers, and each wholesaler resells to retailers that compete against one another, the retailers that buy from the *disfavored* wholesaler may face a disadvantage when competing against the retailers that buy from the *favored* wholesaler. As a result, the disadvantaged retailers may have a tertiary-line claim against the manufacturer.[105]

Note that in some cases, a customer-of-a-customer might compete directly against a customer of the discriminating seller, creating a hybrid secondary-line/tertiary-line claim. For example, suppose that a discriminating seller sells widgets to A (on favorable terms) and B (on unfavorable terms). A resells the widgets at retail, but B acts only as a wholesaler, selling them to retailers X and Y. On these facts, X and Y (on the "tertiary line") and A (on the "secondary line") might compete against one another. The Supreme Court has held that, in such a case, the fact that there is an additional link in the chain of sales to X and Y does not preclude an RPA claim based on the resulting competitive disadvantage faced by A.[106]

NOTES

1) Why did the Court in *Brooke Group* limit primary-line Robinson-Patman liability to cases involving pricing below cost? Would it be better to simply impose liability whenever price discrimination harms competition and injures the plaintiff seller?
2) A plaintiff can sometimes choose whether to challenge predatory pricing under the Robinson-Patman Act or under Section 2 of the Sherman Act. What is the difference between the two?
3) After *Volvo Trucks*, can a plaintiff ever win a secondary-line Robinson-Patman case in cases where competing dealers, bidding against each other to sell custom-made products to the same customer, are being offered different prices by the manufacturer? (In other words, do you agree with footnote 4 of Justice Stevens' dissent, in paragraph 26 of the extract?) Could this be considered unfair competition under Section 5 of the FTC Act?
4) Did *Volvo Trucks* successfully reconcile the Robinson-Patman Act with the goals of the other antitrust laws? Is the resulting accommodation satisfactory?
5) The plaintiff in *Volvo Trucks* presented only what the Court termed "mix-and-match" evidence of discrimination, and the plaintiff had already received damages for franchise act violations. Do you think these factors might have influenced the Court's analysis of the Robinson-Patman claim?
6) Can you think of some plausible situations in which a plaintiff might have a tertiary-line price discrimination claim? Is such a right of action ever necessary, given that secondary-line claims can be brought by disfavored customers? (Hint: can you think of any cases in which secondary-line litigation might *not* be adequate for this purpose?)

D. Defenses to a 2(a) Claim

There are a number of defenses provided in the Robinson-Patman Act itself, and other defenses have been defined by the courts. The defense asserted most frequently in Robinson-Patman cases is the "meeting competition" defense, discussed next, grounded in the text of Section 2(b). Other important grounds of defense include: the

[105] *See, e.g.*, Dynegy Mktg. & Trade v. Multiut Corp., 648 F.3d 506, 522 (7th Cir. 2011) ("Tertiary-line cases involve injury to competition among the customers of the differently treated purchasers."); Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 862 (6th Cir. 2007) ("'[T]ertiary-line' cases entail injury to competition at the level of the purchaser's customers.").

[106] *See* Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 648 (1969).

existence of cost justifications; the practical availability of the favorable terms to all competing buyers; changing conditions; introductory offers; and the "functional discount" doctrine.

Some of these (like cost justification) are affirmative defenses, for which the burden of proof is on the defendant. Others (like availability and functional discount) are "defensive doctrines"—arguments that the plaintiff has failed to establish an essential element of the offense.

1. Meeting Competition

The meeting competition defense is found in the statute itself. Section 2(b) permits charging a lower price, or providing more favorable "services or facilities" (*i.e.*, promotional assistance), "in good faith to meet an equally low price of a competitor, or the services or facilities offered by a competitor."[107] (Note that the standard is "meet," not "beat."[108])

The burden of proving the defense is on the defendant seller.[109] The seller must show "the existence of facts that would lead a reasonable person to believe that the seller's lower price would meet the equally low price of a competitor," and that the seller's "lower price was a good faith response to a competitor's lower price."[110] But "as long as the seller acts in good faith, it may even inadvertently undercut the competitor's price without forfeiting this defense."[111] The defense applies to efforts both to win new customers and to retain old ones.[112] The customer need not be telling the truth about competing offers, so long as the defendant is in good faith.[113] When it applies, it offers a "complete defense."[114]

While the typical case involves meeting competition for the business of an individual customer, the defense is not so limited. Competitive responses on a geographic-area basis, for example, can fall within the defense, if made in good faith to respond to competitive offers.[115] The defense is available in cases involving customers that solicit competitive bids from suppliers.[116]

The Supreme Court addressed the meeting competition defense, and some of the most common issues arising in connection with it, in the 1983 *Falls City* case. Falls City was a brewer in Louisville, Kentucky. It sold beer to wholesalers in Kentucky and neighboring Indiana. On one side of the Kentucky/Indiana state line is Henderson County, Kentucky, where the only Falls City wholesaler was Dawson Springs. On the other side of the state line

---

[107] 15 U.S.C. § 13(b).

[108] Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 446 (1983).

[109] 15 U.S.C. § 13(b) (contemplating "a seller . . . showing" the applicability of the defense). *See also*, *e.g.*, Hoover Color Corp. v. Bayer Corp., 199 F.3d 160, 164 (4th Cir. 1999) (noting the "heavy burden imposed on a seller attempting to obtain summary judgment on the basis of the meeting competition defense"); Zoslaw v. MCA Distrib. Corp., 594 F. Supp. 1022, 1032 (N.D. Cal. 1984) (noting that "the burden in the context of the meeting competition defense is on the defendant").

[110] Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 451 (1983).

[111] Water Craft Mgmt., LLC v. Mercury Marine, 361 F. Supp. 2d 518, 547 (M.D. La. 2004).

[112] Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 446 (1983).

[113] *See* Great Atlantic & Pacific Tea Co., Inc. v. FTC, 440 U.S. 69 (1979) (examining the issue under Section 2(f)).

[114] *See* Standard Oil Co. v. FTC, 340 U.S. 231, 246–47 (1951) ("[T]here has been widespread understanding that, under the Robinson-Patman Act, it is a complete defense to a charge of price discrimination for the seller to show that its price differential has been made in good faith to meet a lawful and equally low price of a competitor. This understanding is reflected in actions and statements of members and counsel of the Federal Trade Commission. Representatives of the Department of Justice have testified to the effectiveness and value of the defense under the Robinson-Patman Act. We see no reason to depart now from that interpretation."); *but see id.* at 247 n.14 (noting ambiguities in legislative history relating to the meeting-competition defense).

[115] Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 448 (1983) ("There is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses. . . . Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions."); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1045–46 (9th Cir. 1981)("Although the Robinson-Patman Act places emphasis on individual competitive situations, rather than upon a general system of competition, we are not convinced that market-wide price reductions are fatal to the defense in all instances. Rather, section 2(b) permits the justification of a seller's lower prices which are granted not only to particular customers tempted by competitive prices, but which respond in a given area by blanket price reductions co-extensive with the price competition to be met. But the price competition zone cannot be perceived to be smaller than the zone of price reduction. That is, a defendant may not use the existence of a competitive offer to one of its customers as an excuse aggressively to reduce prices to others when it has no reasonable basis to believe that competitors are extending similar offers throughout the market. But when grounds for such a belief do exist, section 2(b) may permit market-wide reductions.") (internal quotation marks and citations omitted).

[116] *See infra* § XIII.E.1.

is Vanderburgh County, Indiana, where the only Falls City wholesaler was Vanco. The two wholesalers—Dawson Springs and Vanco—sold to different sets of retailers, because of state-law restrictions, so they never competed head-to-head for the business of any individual retailer.

Falls City charged Dawson Springs a lower price for beer than it charged Vanco. (Among other things, an Indiana state law prohibited Falls City from charging different prices to different Indiana wholesalers, so Falls City could not lower its price to Vanco without also lowering its price to other wholesalers elsewhere in Indiana.) Not surprisingly, some end-consumers crossed state lines to buy beer. In particular, consumers in Indiana often went to Kentucky to buy Falls City beer (despite an Indiana law, largely ignored, prohibiting importation of beer without a permit).

Vanco sued Falls City under §2(a) of the Robinson-Patman Act for charging Vanco more than it charged Dawson Springs. The District Court upheld the claim, finding that although the two wholesalers did not resell to the same retailers, they competed for ultimate resale to many of the same end-consumers, and the lower prices charged to Kentucky wholesalers were being passed on to consumers. The District Court rejected Falls City's effort to invoke the "meeting competition" defense. The Court of Appeals for the Seventh Circuit affirmed. The Supreme Court granted certiorari to review the holdings on injury to competition and the meeting competition defense.

In a passage not excerpted here, the Court held that the relevant injury to competition was established because the alleged discrimination harmed competition between competing retailers who bought from the wholesalers (*i.e.*, a tertiary-line effect): Vanco was suing for harm that resulted from the competitive disadvantage faced by its retailers.[117] The following extract focuses on the meeting-competition defense.

Falls City Industries, Inc. v. Vanco Beverage, Inc.

460 U.S. 428 (1983)

Justice Blackmun.

[1] Section 2(b) of the Clayton Act, as amended by the Robinson-Patman Act, provides that a defendant may rebut a prima facie showing of illegal price discrimination by establishing that its lower price to any purchaser or purchasers "was made in good faith to meet an equally low price of a competitor." The United States Court of Appeals for the Seventh Circuit has concluded that the "meeting-competition" defense of § 2(b) is available only if the defendant sets its lower price on a customer-by-customer basis and creates the price discrimination by lowering rather than by raising prices. We conclude that § 2(b) is not so inflexible. [. . .]

[2] When proved, the meeting-competition defense of § 2(b) exonerates a seller from Robinson-Patman Act liability. This Court consistently has held that the meeting-competition defense 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. The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller's competitors. [. . .]

[3] On its face, § 2(b) requires more than a showing of facts that would have led a reasonable person to believe that a lower price was available to the favored purchaser from a competitor. . . . [T]he defense requires that the seller offer the lower price in good faith for the purpose of meeting the competitor's price, that is, the lower price must actually have been a good-faith response to that competing low price. In most situations, a showing of facts giving rise to a reasonable belief that equally low prices were available to the favored purchaser from a competitor will be sufficient to establish that the seller's lower price was offered in good faith to meet that price. In others, however, despite the availability from other sellers of a low price, it may be apparent that the defendant's low offer was not a good-faith response. [. . .]

[4] Almost 20 years ago, the FTC set forth the standard that governs the requirement of a good-faith response.

> At the heart of Section 2(b) is the concept of good faith. This is a flexible and pragmatic, not a

[117] Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 436–38 (1983).

> technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.

[In the Matter of] Continental Baking Co., 63 F.T.C. 2071, 2163 (1963).

[5] Whether this standard is met depends on the facts and circumstances of the particular case, not abstract theories or remote conjectures.

[6] . . . Although the District Court characterized the Indiana prices charged by Falls City and its competitors as "artificially high," there is no evidence that Falls City's lower prices in Kentucky were set as part of a plan to obtain artificially high profits in Indiana rather than in response to competitive conditions in Kentucky. Falls City did not adopt an illegal system of prices maintained by its competitors. The District Court found that Falls City's prices rose in Indiana in response to competitors' price increases there; it did not address the crucial question whether Falls City's Kentucky prices remained lower in response to competitors' prices in that State.

[7] Vanco . . . [argues] that the existence of industrywide price discrimination within the single geographic retail market itself indicates tacit or explicit collusion, or market power inconsistent with a good-faith response. By its terms, however, the meeting-competition defense requires a seller to justify only its lower price. Thus, although the Sherman Act would provide a remedy if Falls City's higher Indiana price were set collusively, collusion is relevant to Vanco's Robinson-Patman Act claim only if it affected Falls City's lower Kentucky price. If Falls City set its lower price in good faith to meet an equally low price of a competitor, it did not violate the Robinson-Patman Act.

[8] Moreover, the collusion argument founders on a complete lack of proof. Persistent, industrywide price discrimination within a geographic market should certainly alert a court to a substantial possibility of collusion. Here, however, the persistent interstate price difference could well have been attributable, not to Falls City, but to extensive state regulation of the sale of beer. Indiana required each brewer to charge a single price for its beer throughout the State, and barred direct competition between Indiana and Kentucky distributors for sales to retailers. In these unusual circumstances, the prices charged to Vanco and other wholesalers in Vanderburgh County may have been influenced more by market conditions in distant Gary and Fort Wayne than by conditions in nearby Henderson County, [Kentucky]. Moreover, wholesalers in Henderson County competed directly, and attempted to price competitively, with wholesalers in neighboring Kentucky counties. A separate pricing structure might well have evolved in the two States without collusion, notwithstanding the existence of a common retail market along the border. Thus, the sustained price discrimination does not itself demonstrate that Falls City's Kentucky prices were not a good-faith response to competitors' prices there.

[9] The Court of Appeals explicitly relied on two other factors in rejecting Falls City's meeting-competition defense: [(1)] the price discrimination was created by raising rather than lowering prices, and [(2)] Falls City raised its prices in order to increase its profits. Neither of these factors is controlling. Nothing in § 2(b) requires a seller to lower its price in order to meet competition. On the contrary, § 2(b) requires the defendant to show only that its lower price was made in good faith to meet an equally low price of a competitor. A seller is required to justify a price difference by showing that it reasonably believed that an equally low price was available to the purchaser and that it offered the lower price for that reason; the seller is not required to show that the difference resulted from subtraction rather than addition.

[10] A different rule would not only be contrary to the language of the statute, but also might stifle the only kind of legitimate price competition reasonably available in particular industries. In a period of generally rising prices, vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts. Thus, a price discrimination created by selective price increases can result from a good-faith effort to meet a competitor's low price.

[11] Nor is the good faith with which the lower price is offered impugned if the prices raised, like those kept lower, respond to competitors' prices and are set with the goal of increasing the seller's profits. A seller need not choose between ruinously cutting its prices to all its customers to match the price offered to one, and refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs. Nor need a seller choose between keeping all its prices ruinously low to meet the price offered to one, and ruinously raising

its prices to all customers to a level significantly above that charged by its competitors. A seller is permitted to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily changing the seller's price to its other customers. The plain language of § 2(b) also permits a seller to retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily freezing his price to his other customers.

[12] Section 2(b) does not require a seller, meeting in good faith a competitor's lower price to certain customers, to forgo the profits that otherwise would be available in sales to its remaining customers. The very purpose of the defense is to permit a seller to treat different competitive situations differently. The prudent businessman responding fairly to what he believes in good faith is a situation of competitive necessity might well raise his prices to some customers to increase his profits, while meeting competitors' prices by keeping his prices to other customers low.

[13] Vanco also contends that Falls City did not satisfy § 2(b) because its price discrimination was not a defensive response to competition. According to Vanco, the Robinson-Patman Act permits price discrimination only if its purpose is to retain a customer. We agree that a seller's response must be defensive, in the sense that the lower price must be calculated and offered in good faith to "meet not beat" the competitor's low price. Section 2(b), however, does not distinguish between one who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price in an attempt to gain new customers. Such a distinction would be inconsistent with that section's language and logic, would not be in keeping with elementary principles of competition, and would in fact foster tight and rigid commercial relationships by insulating them from market forces.

[14] The Court of Appeals also relied on [FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945)] for the proposition that the meeting-competition defense places emphasis on individual competitive situations, rather than upon a general system of competition, and does not justify the maintenance of discriminatory pricing among classes of customers that results merely from the adoption of a competitor's discriminatory pricing structure.

[15] There is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses. . . . Congress intended to allow reasonable pricing responses on an area-specific basis where competitive circumstances warrant them. . . . Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.

[16] Section 2(b) specifically allows a lower price to any purchaser or purchasers made in good faith to meet a competitor's equally low price. A single low price surely may be extended to numerous purchasers if the seller has a reasonable basis for believing that the competitor's lower price is available to them. Beyond the requirement that the lower price be reasonably calculated to "meet not beat" the competition, Congress intended to leave it a question of fact whether the way in which the competition was met lies within the latitude allowed. Once again, this inquiry is guided by the standard of the prudent businessman responding fairly to what he reasonably believes are the competitive necessities.

[17] A seller may have good reason to believe that a competitor or competitors are charging lower prices throughout a particular region. In such circumstances, customer-by-customer negotiations would be unlikely to result in prices different from those set according to information relating to competitors' territorial prices. A customer-by-customer requirement might also make meaningful price competition unrealistically expensive for smaller firms such as Falls City, which was attempting to compete with larger national breweries in 13 separate States.

[18] . . . Territorial pricing . . . can be a perfectly reasonable method—sometimes the most reasonable method—of responding to rivals' low prices. We choose not to read into § 2(b) a restriction that would deny the meeting-competition defense to one whose areawide price is a well-tailored response to competitors' low prices.

[19] Of course, a seller must limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors. A response that is not reasonably tailored to the competitive situation as known to the seller, or one that is based on inadequate verification, would not meet the standard of good faith. Similarly, the response may continue only as long as the competitive circumstances justifying it, as reasonably

known by the seller, persist. One choosing to price on a territorial basis, rather than on a customer-by-customer basis, must show that this decision was a genuine, reasonable response to prevailing competitive circumstances. Unless the circumstances call into question the seller's good faith, this burden will be discharged by showing that a reasonable and prudent businessman would believe that the lower price he charged was generally available from his competitors throughout the territory and throughout the period in which he made the lower price available.

[20] In summary, the meeting-competition defense requires the seller at least to show the existence of facts that would lead a reasonable and prudent person to believe that the seller's lower price would meet the equally low price of a competitor; it also requires the seller to demonstrate that its lower price was a good-faith response to a competitor's lower price.

[21] . . . [T]he statute places the burden of establishing the defense on Falls City, not Vanco. There is evidence in the record that might support an inference that these requirements were met, but whether to draw that inference is a question for the trier of fact, not this Court.

[22] Accordingly, the judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

2. Cost Justification

The cost justification defense also is included in the statute itself. Section 2(a) provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered." Such cost savings may result, for example, from "differing methods or quantities in which the commodities in question are sold or delivered."[118] But this defense has been interpreted to require a formidable degree of mathematical precision, and as a result relatively few sellers have relied on it successfully.[119] This reality has an important effect on the operation of the RPA—and therefore its effects and reputation—and it has been criticized, including by those who generally support the Act and its enforcement.[120]

The burden of proving cost justification is on the defendant seller, which "must show that the [relevant] price reductions given [to the favored customer] did not exceed the actual cost savings [from selling to that customer]." This burden is subject to a "requirement of exactitude" that is "ill suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors."[121]

However, the defense does not strictly require cost justification at the level of each *individual* transaction. Class- or category-based pricing may qualify for the defense. The Supreme Court has explained that such a class must be "composed of members of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicium of the cost of dealing with any specific group member. High on the list of 'musts' in the use of the average cost of customer groupings under the [cost justification] proviso of [Section] 2(a) is a *close resemblance of the individual members of each group on the essential point or points which determine the costs considered*."[122]

In *United States v. Borden,* in 1962, the Court considered Borden's class-based pricing, which distinguished between

---

[118] United States v. Borden Co., 370 U.S. 460, 467 (1962).

[119] *See* United States v. Borden Co., 370 U.S. 460, 469–72 (1962) (rejecting class-based price discrimination). The difficulty of establishing the cost justification offense was criticized sharply in the 1977 DOJ report on the Act. U.S. Dep't of Justice, U.S. DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 18–22 (1977) (noting that "the cost defense is as difficult to prove as the prima facie case is easy to establish" and that "[t]he difficulty of complying with the FTC's rigid cost justification requirements, plus the expense of collecting data through methods foreign to most accountants and businessmen, make the barriers to practical utilization of the defense almost insurmountable"). *But see, e.g.*, Thurman Indus., Inc. v. Pay' N Pak Stores, Inc., No. C84-1171R, 1987 WL 14673, at *4 (W.D. Wash. Aug. 6, 1987) (granting summary judgment for defendant where "Defendant offered specific evidence as to the cost justification defense" and "Plaintiff offered no evidence to rebut [it]").

[120] *See* Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 290 (December 2015) ("[C]ourts should give significant weight to a defendant's reasonable ex ante attempt to cost justify a price difference. Higher scrutiny should be reserved for ex post attempts to match cost savings to price differences, which arguably may align only by coincidence").

[121] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18 (1990) (quoting in part 3 E. Kintner & J. Bauer, FEDERAL ANTITRUST LAW § 23.10, p. 345 (1983)).

[122] United States v. Borden Co., 370 U.S. 460, 469 (1962).

two categories: Category A contained two large chains, operating a total of 254 stores between them; Category B contained 1,322 independent stores, further divided into brackets based on purchasing volume.[123] The Court held that Borden's approach was insufficiently granular to qualify for the cost justification defense, effectively because there was some relevant variation within the categories:

> [S]uch a grouping for cost justification purposes, composed as it is of some independents having volumes comparable to, and in some cases larger than, that of the chain stores, created artificial disparities between the larger independents and the chain stores. It is like averaging one horse and one rabbit. . . . A cost justification based on the difference between an estimated average cost of selling to one or two large customers and an average cost of selling to all other customers cannot be accepted as a defense to a charge of price discrimination. This volume gap between the larger independents and the chain stores was further widened by grouping together the two chains, thereby raising the average volume of the stores of the smaller of the two chains in relation to the larger independents. . . . [This approach also] attributed to many independents cost factors which were not true indicia of the cost of dealing with those particular consumers. To illustrate, each independent was assigned a portion of the total expenses involved in daily cash collections, although it was not shown that all independents paid cash and in fact Borden admitted only that a 'large majority' did so.
>
> Its justification emphasized its costs for 'optional customer service' and daily cash collection with the resulting 'delay to collect.' As shown by its study these elements were crucial to Bowman's cost justification. In the study the experts charged all independents and no chain store with these costs. Yet, it was not shown that all independents received these services daily or even on some lesser basis. Bowman's studies indicated only that a large majority of independents took these services on a daily basis. Under such circumstances the use of these cost factors across the board in calculating independent store costs is not a permissible justification, for it possibly allocates costs to some independents whose mode of purchasing does not give rise to them. The burden was upon the profferer of the classification to negate this possibility, and this burden has not been met here.[124]

3. Availability

The "availability" doctrine permits suppliers to provide different prices to competing customers so long as the lower prices are "practicably available" or "functionally available" to all competing customers.[125] This requires that competing customers all be made aware of such availability and have the practicable opportunity to achieve the more favorable pricing, for example, by purchasing a minimum quantity of goods from the seller over a specified period of time in order to qualify for a quantity discount.

This proposition is not explicit in the statute but derives from pronouncements of the courts and the FTC.[126] The underlying principle is that if discounts and other special terms are practicably or realistically available to all competing customers, whether they all choose to take advantage of the offer or not, there is no discrimination within the meaning of the Act. As a result, courts have held that the plaintiff has the burden of showing that the discounts are *not* practicably available to the disfavored business, as part of its showing of discrimination.[127]

---

[123] United States v. Borden Co., 370 U.S. 460, 465 (1962).

[124] United States v. Borden Co., 370 U.S. 460, 469–71 (1962).

[125] *See, e.g.*, Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 866 (6th Cir. 2007) ("Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury.") (internal quotation marks omitted), *quoting* Shreve Equipment, Inc. v. Clay Equip. Corp., 650 F.2d 101, 105 (6th Cir. 1981); Bookends & Beginnings LLC v. Amazon.com, Inc., 2022 WL 18144916, at *21 (S.D.N.Y. Aug. 24, 2022) ("[T]he doctrine of functional availability means that there is no violation of the RPA if the price concessions and allowances are available equally and functionally to all customers.") (internal quotation marks and citations omitted).

[126] *See*; *see also* Precision Printing Co. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 350 (W.D. Pa. 1998) ("The functional availability defense is a judicial graft on § 2(a) and is not explicitly embodied in the text of the statute.").

[127] *See* Mathew Enter., Inc. v. Chrysler Grp., LLC, 738 F. App'x 569, 571 (9th Cir. 2018) ("As the existence of functional availability demonstrates that plaintiff has not met its burden of proof, the district court's allocation of the burden of proof of price discrimination to plaintiff was not erroneous.") (internal quotation marks and citation omitted); Smith Wholesale Co. v. R.J.

This means, for example, that quantity discounts may be offered without violating the Act, so long as the discounts are realistically attainable by all customers that compete against one another for the same business—*i.e.*, all of them are capable of purchasing the quantities required to qualify for the discounts if they so choose.[128] This in turn requires that purchasers are given notice of the availability of the discounts; a discount program that is not disclosed to a seller is hardly available to it![129]

However, the doctrine can apply where individual buyers are unable to take advantage of the discounts due to factors that are within the buyer's own control. Thus, for example, the Sixth Circuit has noted that "courts have refused to find price discrimination under § 13(a) when the purchaser's decision or capacity to take advantage of the best discount made available on a reasonably equivalent basis to all dealers who made the commitment to obtain them was determined by elements within its control—i.e., unrelated investments; poor credit ratings; management issues, inventory decisions, or marketing strategies; or a decision to promote the competitor's product—and not by disproportionately small purchasing power or the pricing structure itself."[130] The court held in that case that a discount may still be functionally available even if a particular purchaser is precluded from taking advantage of it because of that purchaser's own "marketing strategy and brand prioritization[.]"[131] Similarly, the Ninth Circuit in *General Auto Parts* rejected a claim by the plaintiff, General, that it was a victim of discrimination when it failed to qualify for volume discounts because of how it had chosen to make its purchases:

> General purchased in large enough quantities to qualify for the volume discounts; it lost the benefit of the discounts *because it chose to purchase items one at a time.* General's owner testified that cash flow and storage space limitations prevented General from purchasing in larger quantities, but he also admitted that he had never evaluated the economic feasibility of obtaining additional credit or storage facilities. It would be speculative to infer that GPC's discounts were functionally beyond General's reach[.][132]

If the requirements for a reasonably available discount are not met and a supplier still wants to provide the discount to a customer, the supplier must rely on another defense—such as the meeting competition defense—in order to do so.

4. Changing Conditions

Section 2(a) includes an exception to allow perishable goods, distress merchandise, and other goods that become out of date at the end of a season, to be sold at a discount. It immunizes "price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned."[133] It therefore applies not only to fruit that is about to rot but goods that are about to be replaced with new models.[134]

Reynolds Tobacco Co., 477 F.3d 854, 867 (6th Cir. 2007) ("functional availability is technically not an affirmative defense, but the negation of an element of the plaintiff's case") (internal quotation marks and citation omitted); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F.3d 320, 326 (5th Cir. 1998) ("a price discount equally available to all purchasers for the same customer and product is not price discrimination"); *see also* Precision Printing Co. v. Unisource Worldwide, Inc., 993 F. Supp. 338, 350 (W.D. Pa. 1998) ("Although often referred to as a defense, [functional availability] really is not a defense at all and is more properly thought of as the functional availability doctrine.").

[128] *See, e.g.*, FTC v. Morton Salt Co., 334 U.S. 37, 42–43 (1948) (rejecting availability argument where "[t]heoretically, [the relevant] discounts are equally available to all, but functionally they are not. For as the record indicates . . . no single independent retail grocery store, and probably no single wholesaler, bought as many as 50,000 cases or as much as $50,000 worth of table salt in one year. Furthermore, the record shows that, while certain purchasers were enjoying one or more of respondent's standard quantity discounts, some of their competitors made purchases in such small quantities that they could not qualify for any of respondent's discounts").

[129] *See, e.g.*, Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350, 355–56 (E.D. Wis. 1979) ("No matter how facially objective the defendant's requirements for distributor status are, if only some purchasers are aware of their existence, it cannot be said that the distributor status and price discount are practically available to all.").

[130] Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 872 (6th Cir. 2007).

[131] Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 880 (6th Cir. 2007).

[132] Gen. Auto Parts Co. v. Genuine Parts Co., 293 F. App'x 515, 516 (9th Cir. 2008) (unpublished).

[133] 15 U.S.C. § 13(a).

[134] *See* Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655, 661 (10th Cir. 1991) (obsolescence or introduction of new models can suffice to establish the changing conditions defense).

The Tenth Circuit has said that, "[a]lthough the factual scenarios that give rise to the changing conditions defense are not confined to those specifically set forth in the statute, the changing conditions defense is limited to circumstances which are similar to those named in the statute."[135] Courts have applied the defense to sales of eggs with a short shelf life,[136] telephone systems that become obsolete,[137] and "a normal change in car models, made in good faith,"[138] but declined to apply it to mere retail price fluctuations.[139]

5. Introductory Offers

Courts have permitted sellers to offer "introductory discounts" to encourage dealers to switch to their products, or to support newly opening dealers, so long as the discount is available to all new purchasers.[140] Thus, in *Dairy King*, the district court applied the introductory discount exception to a discount "available to any new distributor of [the seller's] products or any distributor who persuaded a retailer to carry [the seller's] products it had not previously carried."[141] The supplier need not offer the special introductory offers to existing outlets, to new outlets that are not competitors, or to new outlets in other markets.[142]

6. Functional Discounts

The "functional discount" rule allows sellers to charge different prices to customers that perform different functions for the seller. For example, if a seller charges a lower price to resellers that provide wholesaler services, and a higher price to resellers that only sell to the public, a discount that accounts for the expense of providing the wholesaling function may qualify for treatment as a "functional discount" and, as such, may not be illegal. This reflects the fact that some customers may perform a valuable function (like warehousing or wholesaling) that other customers do not, and that the terms of trade with the seller should be allowed to reflect such differences. It is ultimately a way of arguing that a pricing practice does not in fact constitute a discriminatory discount; accordingly, it is the plaintiff's burden to show that a price difference fails to qualify as a functional discount.[143]

---

[135] Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655, 661 (10th Cir. 1991)

[136] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. 680, 691–92 (S.D. Ind. 1988).

[137] Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655, 661 (10th Cir. 1991).

[138] Valley Plymouth v. Studebaker-Packard Corp., 219 F. Supp. 608, 613 (S.D. Cal. 1963).

[139] Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1173 (7th Cir. 1972).

[140] Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126, 128 (D. Md. 1986) (noting discount was "equally available to all new . . . distributors").

[141] Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126, 128 (D. Md. 1986). *See also* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 929 (9th Cir. 1980) (declining to find unlawful price discrimination in connection with "one-time discounts on a particular product, given to merchants who had not previously stocked the item" where evidence indicated that "the introductory discounts were equally available to any qualified purchaser in any market"); Interstate Cigar Co. Inc. v. Sterling Drug Inc., 655 F.2d 29, 31 (2d Cir. 1981) (noting that a "discount offered to new distributors may well have increased competition by inducing newcomers to enter the M-O distribution field").

[142] *See* Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc., 627 F.2d 919, 929 (9th Cir. 1980) (noting undisputed evidence that "the introductory discounts were equally available to any qualified purchaser in any market"); Interstate Cigar Co. v. Sterling Drug Inc., 1980 WL 1862, at *4 (S.D.N.Y. July 3, 1980) (declining to find discrimination where "defendants' 'new distribution allowance' was equally available on identical terms and administered with an even hand to 'old' and 'new' purchasers . . . . Both the [relevant discounts] were equally and not selectively available to all customers who qualified for each discount. Furthermore, the 25% discount was indeed available in fact to 'old' purchasers since it was entirely possible that 'old' purchasers, by refraining from purchasing . . . for a period of time, could qualify as 'new' purchasers. Since this low price was available to all, in fact as well as in theory, in this respect the 'new distribution allowance' is valid."), *aff'd sub nom.* Interstate Cigar Co. Inc. v. Sterling Drug Inc., 655 F.2d 29 (2d Cir. 1981); Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126, 128 (D. Md. 1986) (noting discount was "equally available to all new . . . distributors").

[143] U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1139 (9th Cir. 2023) ("[I]n contrast to the cost-justification defense, it is the plaintiff's burden to prove that the price discrimination was not the result of a lawful functional discount."); Sw. Paper Co., LLC v. Hansol Paper, 2013 WL 11238487, at *4 (C.D. Cal. Apr. 15, 2013) ("It is important to note that functional discounts are not an affirmative defense that must be pled and proven by the defendant."); Coal. For A Level Playing Field, L.L.C. v. AutoZone, Inc., 737 F. Supp. 2d 194, 211 (S.D.N.Y. 2010) ("[A] plaintiff must show that a claimed functional discount is not genuine to carry its burden of showing potential harm to competition."); *see also* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 n.18 (1990) (citing with approval scholarship that emphasizes that a plaintiff bears the burden of showing that the functional-discount doctrine does not apply). For criticism, see *See* Mark A. Glick, David G. Mangum & Lara A. Swensen, *Towards a More Reasoned Application of the Robinson-Patman Act: A Holistic View Incorporating Principles of Law and Economics in Light of Congressional Intent*, 60 Antitrust Bull. 279, 291 (December 2015) ("This allocation of burdens is counterintuitive and, in our view, unjustifiably flips on its head the requirements for what is essentially a cost justification defense. Asking the RPA plaintiff to allege and then to

The Supreme Court has said that a discount "that merely accords due recognition and reimbursement for actual marketing functions" performed by the customer is "not illegal."[144]

The issue becomes trickier to resolve when some customers perform mixed functions: for example, when some customers act as both wholesaler and retailer (*i.e.*, by selling both to other retailers and to end-consumers). In such cases, courts have allowed such a "mixed" customer to be treated more favorably than a pure retailer where it can be demonstrated that the discount (1) only applies to the extent that the customer is actually performing the valuable function and (2) the discount reasonably reflects *either* the function's cost to the wholesaler *or* the savings to the manufacturer from the function.[145] The Supreme Court has suggested that there exists some margin for error in the quantification, but that the discount may not be "completely untethered to either the supplier's savings or the wholesaler's costs."[146]

So what functions justify a discount? Courts have applied the functional discount rule to permit discounts in exchange for a variety of marketing services that are useful to the supplier. One court, for example, held that functional discounts might extend to a purchaser's provision of "prime placement" in stores, creation and sending advertising mailers, provision of delivery and online-sales services, and participation in coupon programs.[147] Another court did so with respect to a customer that was acting as a sales agent, installing equipment, paying to train its own employees and customers, and offering warranty services as well as regulatory compliance functions.[148] By contrast, a court has declined to apply the functional-discounts rule when favorable treatment was given to distributors performing repair services, indicating that discounts based on pre-sale services (such as installation and training) were "properly within the scope of the functional discount defense," and that those based on post-sale services (such as repair) were not.[149]

It is not clear whether a functional discount, or the opportunity to earn one, must be equally available to all similarly situated dealers. After all, for example, most manufacturers do not need all of their retailers also to function as wholesalers. The best view might be that functional discounts need not be available to all competing customers, as the premise of the functional-discount rule is that the recipient of a functional discount is not in fact receiving more "favorable" treatment in the first place.

The leading case on functional discounts is the 1990 *Hasbrouck* case, which involved retail service stations and wholesale gasoline distributors that were largely integrated into retailing themselves.

Texaco Inc. v. Hasbrouck

496 U.S. 543 (1990)

Justice Stevens.

[1] [Texaco] sold gasoline directly to respondents [*i.e.*, twelve independent retail service station operators] and several other retailers [(*i.e.*, service station operators)] in Spokane, Washington, at its [regular] . . . prices while it granted substantial discounts to two distributors. During the period between 1972 and 1981, the stations supplied

---

substantiate the cost structure related to services allegedly provided by the favored buyer requires evidence uniquely within the defendant's possession. This somewhat illogical burden-shifting may represent a tacit judicial nod to the Act's critics[.]").

[144] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 562 (1990); *see also* American Book Sellers Ass'n v. Barnes & Noble, Inc., 135 F. Supp.2d 1031, 1058–61 (N.D. Cal. 2001) (noting that "[a] price differential that is reasonably related to the purchaser's costs in performing marketing functions for the supplier, or to the supplier's savings in having those functions performed by the purchaser, is not illegal under the Robinson–Patman Act," and discussing the doctrine).

[145] *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 561 (1990) ("Only to the extent that a buyer actually performs certain functions, assuming all the risk, investment, and costs involved, should he legally qualify for a functional discount. Hence a distributor should be eligible for a discount corresponding to any part of the function he actually performs on that part of the goods for which he performs it.") (quoting REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 208 (1955)); *see also* American Book Sellers Ass'n v. Barnes & Noble, Inc., 135 F. Supp. 2d 1031, 1061 (N.D. Cal. 2001) (same).

[146] Texaco Inc. v. Hasbrouck, 496 U.S. 543, 563 (1990). *See also* U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1141 (9th Cir. 2023) (no abuse of discretion where some evidence supported the application of the functional discount doctrine, even if it did not "establish a particularly precise relationship between the discounts and [the provided] services").

[147] U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC,, 89 F.4th 1126, 1140 (9th Cir. 2023).

[148] Servicetrends, Inc. v. Siemens Med. Sys., Inc., 870 F. Supp. 1042, 1058–59 (N.D. Ga. 1994).

[149] Allied Sales and Service Co. v. Global Indus. Technologies, Inc., 2000 WL 726216, at *16 & n.21 (S.D. Ala. 2000).

by the two distributors increased their sales volume dramatically, while respondents' sales suffered a corresponding decline. Respondents filed an action against Texaco . . . alleging that the distributor discounts violated § 2(a) of the [Robinson-Patman Act]. Respondents recovered treble damages, and the Court of Appeals for the Ninth Circuit affirmed the judgment. We granted certiorari to consider Texaco's contention that legitimate functional discounts do not violate the Act because a seller is not responsible for its customers' independent resale pricing decisions. While we agree with the basic thrust of Texaco's argument, we conclude that in this case it is foreclosed by the facts of record.

[2] Respondents are 12 independent Texaco retailers. They displayed the Texaco trademark, accepted Texaco credit cards, and bought their gasoline products directly from Texaco. Texaco delivered the gasoline to respondents' stations. [. . .]

[3] [The market for gasoline in Spokane was highly competitive and, because of traffic patterns in this relatively small city, service stations competed against other stations across the city. The market share of Texaco's independent retailers was on the decline, and several went out of business. Meanwhile, two gasoline distributors supplied by Texaco, Gull and Dompier, prospered. Gull resold the gasoline under its own "Gull" trademark while Dompier displayed the Texaco trademark. Gull and Dompier picked up the gasoline at Texaco's bulk storage facility and delivered it to the service stations themselves, while Texaco delivered the gasoline to the independent Texaco retailers. Texaco provided distributor discounts and hauling allowances to Gull and Dompier: as a result, Texaco charged them less for gasoline than it charged the independent retailers.]

[4] Texaco [argues] that although it charged different prices, . . . at least to the extent that Gull and Dompier acted as wholesalers, the price differentials did not injure competition. [. . .]

[5] In *FTC v. Morton Salt Co.*, 334 U. S. 37, 46–47 (1948), we held that an injury to competition may be inferred from evidence that some purchasers had to pay their supplier substantially more for their goods than their competitors had to pay. Texaco, supported by the United States and the Federal Trade Commission as *amici curiae* (the Government), argues that this presumption should not apply to differences between prices charged to wholesalers and those charged to retailers. Moreover, they argue that it would be inconsistent with fundamental antitrust policies to construe the Act as requiring a seller to control his customers' resale prices. The seller should not be held liable for the independent pricing decisions of his customers. [. . .]

[6] . . . A supplier need not satisfy the rigorous requirements of the cost justification defense in order to prove that a particular functional discount is reasonable and accordingly did not cause any substantial lessening of competition between a wholesaler's customers and the supplier's direct customers.[18] The record in this case, however, adequately supports the finding that Texaco violated the Act.

[7] The hypothetical predicate for [lawful] functional discounts is a price differential that merely accords due recognition and reimbursement for actual marketing functions. Such a discount is not illegal. In this case, however, . . . there was no substantial evidence indicating that the discounts to Gull and Dompier constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions. Indeed, Dompier was separately

[18] In theory, a supplier could try to defend a functional discount by invoking the Act's cost justification defense, but the burden of proof with respect to the defense is upon the supplier, and interposing the defense has proven difficult, expensive, and often unsuccessful. Moreover, to establish the defense a seller must show that the price reductions given did not exceed the actual cost savings, and this requirement of exactitude is ill suited to the defense of discounts set by reference to legitimate, but less precisely measured, market factors.

Discounters will therefore likely find it more useful to defend against claims under the Act by negating the causation element in the case against them: A legitimate functional discount will not cause any substantial lessening of competition. The concept of substantiality permits the causation inquiry to accommodate a notion of economic reasonableness with respect to the pass-through effects of functional discounts, and so provides a latitude denied by the cost justification defense. We thus find ourselves in substantial agreement with the view that: "Conceived as a vehicle for allowing differential pricing to reward distributive efficiencies among customers operating at the same level, the cost justification defense focuses on narrowly defined savings to the seller derived from the different method or quantities in which goods are sold or delivered to different buyers. Moreover, the burden of proof as to the cost justification defense is on the seller charged with violating the Act, whereas the burden of proof remains with the enforcement agency or plaintiff in circumstances involving functional discounts since functional pricing negates the probability of competitive injury, an element of a prima facie case of violation." [James F.] Rill, *Availability and Functional Discounts Justifying Discriminatory Pricing*, 53 Antitrust L.J. 929, 935 (1985) (footnotes omitted).

compensated for its hauling function, and neither Gull nor Dompier maintained any significant storage facilities.

[8] Despite this extraordinary absence of evidence to connect the discount to any savings enjoyed by Texaco, Texaco contends that the decision of the Court of Appeals cannot be affirmed without departing from established precedent, from practicality, and from Congressional intent. This argument assumes that holding suppliers liable for a gratuitous functional discount is somehow a novel practice. That assumption is flawed.

[9] As we have already observed, the "due recognition and reimbursement" concept . . . would not countenance a functional discount completely untethered to either the supplier's savings or the wholesaler's costs. The longstanding principle that functional discounts provide no safe harbor from the Act is likewise evident from the practice of the Federal Trade Commission, which has, while permitting legitimate functional discounts, proceeded against those discounts which appeared to be subterfuges to avoid the Act's restrictions.

[10] Indeed, far from constituting a novel basis for liability under the Act, the fact pattern here reflects conduct similar to that which gave rise to Perkins v. Standard Oil Co. of Cal., 395 U. S. 642 (1969). Perkins purchased gas from Standard, and was both a distributor and a retailer. He asserted that his retail business had been damaged through two violations of the Act by Standard: First, Standard had sold directly to its own retailers at a price below that charged to Perkins; and, second, Standard had sold to another distributor, Signal, which sold gas to Western Hyway, which in turn sold gas to Regal, a retailer in competition with Perkins. The question presented was whether the Act—which refers to discriminators, purchasers, and their customers—covered injuries to competition between purchasers and the customers of customers of purchasers. We held that a limitation excluding such "fourth level" competition would be "wholly an artificial one." We reasoned that from Perkins' point of view, the competitive harm done him by Standard is certainly no less because of the presence of an additional link in this particular distribution chain from the producer to the retailer. The same may justly be said in this case. The additional link in the distribution chain does not insulate Texaco from liability if Texaco's excessive discount otherwise violated the Act.

[11] Perhaps respondents' case against Texaco rests more squarely than do most functional discount cases upon direct evidence of the seller's intent to pass a price advantage through an intermediary. This difference, however, hardly cuts in Texaco's favor. In any event, the evidence produced by respondents also shows the scrambled functions which have more frequently signaled the illegitimacy under the Act of what is alleged to be a permissible functional discount. Both Gull and Dompier received the full discount on all their purchases even though most of their volume was resold directly to consumers. The extra margin on those sales obviously enabled them to price aggressively in both their retail and their wholesale marketing. To the extent that Dompier and Gull competed with respondents in the retail market, the presumption of adverse effect on competition recognized in the *Morton Salt* case becomes all the more appropriate. Their competitive advantage in that market also constitutes evidence tending to rebut any presumption of legality that would otherwise apply to their wholesale sales.

[12] The evidence indicates, moreover, that Texaco affirmatively encouraged Dompier to expand its retail business and that Texaco was fully informed about the persistent and marketwide consequences of its own pricing policies. Indeed, its own executives recognized that the dramatic impact on the market was almost entirely attributable to the magnitude of the distributor discount and the hauling allowance. Yet at the same time that Texaco was encouraging Dompier to integrate downward, and supplying Dompier with a generous discount useful to such integration, Texaco was inhibiting upward integration by the respondents: Two of the respondents sought permission from Texaco to haul their own fuel using their own tank wagons, but Texaco refused. The special facts of this case thus make it peculiarly difficult for Texaco to claim that it is being held liable for the independent pricing decisions of Gull or Dompier.

[13] As we recognized in *Falls City Industries*, the competitive injury component of a Robinson-Patman Act violation is not limited to the injury to competition between the favored and the disfavored purchaser; it also encompasses the injury to competition between their customers. This conclusion is compelled by the statutory language, which specifically encompasses not only the adverse effect of price discrimination on persons who either grant or knowingly receive the benefit of such discrimination, but also on customers of either of them. Such indirect competitive effects surely may not be presumed automatically in every functional discount setting, and, indeed, one would expect that most functional discounts will be legitimate discounts which do not cause harm to

competition. At the least, a functional discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions will not violate the Act. When a functional discount is legitimate, the inference of injury to competition recognized in the *Morton Salt* case will simply not arise. Yet it is also true that not every functional discount is entitled to a judgment of legitimacy, and that it will sometimes be possible to produce evidence showing that a particular functional discount caused a price discrimination of the sort the Act prohibits. When such anti-competitive effects are proved—as we believe they were in this case—they are covered by the Act.

[14] The judgment is affirmed.

NOTES

1) To provide evidence to support a meeting competition defense, sellers frequently use "meeting competition forms" to record the basis for their belief that their lower price is being offered in good faith to meet a competitive offer. Otherwise, a basis asserted in litigation months or years later might be challenged as pretextual, invented after the fact. Information in a meeting competition record should include the source of the information and as much detail as possible, including—if available—documentation showing the competitor's offer. Would you advise a seller to contact its competitor to verify the terms of the competitive offer? What concerns might this raise? *See* Timothy J. Muris, *Neo-Brandesian Antitrust: Repeating History's Mistakes* (Am. Enter. Inst. Working Paper No. 2023-02) 27–30 (highlighting some tensions between the meeting-competition defense under the RPA, on the one hand, and the Sherman Act, on the other).
2) If, based on a seller's experience, the competitive offer that a customer claims to have received seems too good to be true, the seller ordinarily may not, in good faith, rely on the customer's representation without seeing the offer in writing or seeing some other proof.
3) Section 2(b) provides that a seller may show that its "lower price or the furnishing of services or facilities" was made in good faith "to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." So, could a seller meet a competitor's offer to furnish promotional services or facilities with a lower price? Does the seller need to meet a low price with a low price, and "services or facilities" with services or facilities? Or could the seller meet a low price with services or facilities (or vice versa)?
4) Why have a cost justification defense? How demanding do you think courts should be in applying it?
5) Customers often vary considerably in size and financial resources. Does this mean that sellers cannot ever offer discounts for very large volumes, because they will not be within reach to other customers?
6) Should a significant change in market price suffice to trigger the "changing conditions" defense? Does it matter what caused the price change?
7) There are two separate ways in RPA law for a defendant seller to argue that it is lawful to discriminate in favor of A over B because A is saving the seller money: the cost justification defense and the functional discount doctrine. What are the differences between the two legal rules? Should the same standards of proof apply to each rule?
8) The Court instructs that a functional discount must be "tethered" to either the seller's savings or the wholesaler's costs. How can a seller—or a court—determine whether functional discounts it provides constitute a "reasonable reimbursement for the purchasers' actual marketing functions"? Does this require a court to calculate a "fair price" for a service?
9) If a customer functions both as a wholesale warehouse operator and, to a more limited extent as a retailer, should it be entitled to a wholesale discount on all of its purchases? Should it matter whether the customer performs a warehousing function both for sales to third-party retailers and for sales though its own retail outlets?

E. Competitive Bidding

Competitive bidding situations present special issues since the winning bid ordinarily will "beat" other bids. Where a seller is responding to a request for bids from a customer that competes against one or more of the seller's other customers in reselling the goods to consumers, discrimination could result if the seller's other customers are not offered the same pricing as the customer soliciting the bids, and the seller's bid actually is accepted. Thus, for example, if Customers A and B each solicit bids from Seller X, resulting in Seller X winning both bids, and if the winning bid price to A is different from the winning bid price to B, the result may be a price difference of a kind that would usually raise RPA concerns.

In principle, submitting different bids to different customers may qualify as price discrimination contrary to Section 2(a). Thus, in *Quaker Oats* in 1964, the FTC held that "if one purchaser receives lower bids from a seller than the seller makes to other purchasers under the same conditions and at approximately the same time, the resulting sales may be—and in the present case, we find, are—sufficiently comparable" for purposes of applying the prohibition against price discrimination.[150]

But a strict application of the discriminatory-pricing rule may be balanced by the application of the "meeting competition" defense. In *Beatrice Foods* in 1969, the FTC held that in competitive bidding contests the meeting competition defense can apply where the seller exercises good faith to calculate a bid that it believes would approximately meet the bids that competitors are expected to submit.[151] The Commission stated: "Precisely meeting the exact prices of competitive bids can have no realistic meaning" in this context.[152] And "[t]o require that Beatrice adhere to a precise '[m]eet but not beat' criterion under these circumstances, where the Beatrice representative otherwise exhibited every element of good faith, is not reasonable. To hold otherwise would be effectively to outlaw such bidding situations by insisting upon an artificial and rigid test."[153]

The facts of *Beatrice Foods* illustrate how this approach may work in practice. Beatrice Foods, the seller, was bidding to supply Kroger, a supermarket chain. It calculated its bid by predicting who the low bidder would be among its competitors, estimating what that bidder's bid would likely be—based on Beatrice's knowledge of that bidder's habits and its pricing to other accounts—and coming up with a bid that Beatrice expected would undercut the other bidder by a small amount. Beatrice was able to identify evidence that it was trying in good faith to meet competition, albeit with a slightly better bid that would win the business. Kroger beat it down somewhat by insisting that Beatrice had to do even better in order to win, and Beatrice was permitted to lower its bid further as long as it believed in good faith that it was meeting a competitive bid. The Commission was satisfied that "Beatrice's officials proceeded with caution and business acumen and . . . they made their winning bid in the belief that they were bidding in good faith to meet a competitive bid."[154] (It turned out that Kroger had been misleading Beatrice in an effort to elicit a lower bid, but the Commission concluded that Beatrice was acting in good faith.[155])

Commissioner Dixon dissented: "The opinion, as I read it, stands for the proposition that a large buyer can use his purchasing power to induce a supplier to discriminate in price regardless of the anticompetitive consequences of such discrimination, and that the supplier can with impunity succumb to such inducement under the protection of the Section 2(b) proviso [the meeting competition defense] without regard to whether the lower price he is meeting may be unlawful."[156] Commissioner Dixon asserted that "Congress did not intend that Section 2(b) should be used to permit a large buyer to negotiate lower prices by having suppliers bid against one another for his business without regard to the legality of such discriminatory offers."[157]

As illustrated in *Beatrice Foods* and other cases, the meeting competition defense can apply to competitive bidding, if a supplier can demonstrate that it was making a good faith effort to meet anticipated competitive bids and to win the bidding by no more than a reasonable margin.

What about competitive bidding by multiple resellers of the *same* brand? Where a supplier has two or more potential customers bidding against one another to resell the same product to the same account, defendants have argued that no Robinson-Patman liability can attach if the seller offers a better price to one potential reseller than another, so long as no more than one of the potential resellers ultimately can win the bid and thus become an

---

[150] In the Matter of Quaker Oats Co., 66 F.T.C. 1131 (1964).

[151] In the Matter of Beatrice Foods Co., 76 F.T.C. 719, 811 (1969)

[152] *Id.* at 812.

[153] *Id.*

[154] *Id.* at 759.

[155] *Id.* at 819 (noting that the Kroger manager "went beyond the bounds of permissible bargaining" and "failed to convey any correct information about the price levels being quoted by others").

[156] *Id.* at 824 (Commissioner Dixon concurring in part, dissenting in part).

[157] *Id.*

actual "customer" of the supplier for this sale. (In other words, in this situation there is only one ultimate "sale," not two as the RPA generally requires.[158])

Volvo raised this argument in the *Volvo Trucks* case, but the Supreme Court declined to decide the issue.[159] In his dissent, Justice Stevens pointed out that, at least with regard to custom-made products as distinguished from products resold from inventory, if Volvo's argument were to meet with the Court's approval, the Act "will simply not apply in the special-order context."[160] "Any time a special-order dealer fails to complete a transaction because the high price drives away its ultimate customer," he argued, "there will be no Robinson-Patman violation because the dealer will not meet the 'purchaser' requirement, and any time the dealer completes the transaction but at a discriminatorily high price, there will be no violation because the dealer has no 'competition' (as the majority sees it) for that specific transaction at the moment of purchase."[161] The Third Circuit has since accepted an equivalent argument.[162]

F. Exemptions

Certain types of transactions are exempt from the Robinson-Patman Act or simply beyond its reach. These include:

- **Sales to government.** Sales to the federal government and federal agencies are exempt, and it is likely that sales to state governments and agencies are also, except where they resell in competition against private entities.[163]
- **Sales to nonprofits.** The Non-Profit Institutions Act, 15 U.S.C. § 13c, exempts non-profit institutions that purchase supplies for their own use.[164]
- **Sales for export.** Section 2(a) explicitly applies only "where [the relevant] commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States."[165] As a result, it does not apply to sales for export, or sales to customers outside the United States.[166]
- **Cooperatives.** Cooperatives enjoy a limited exemption under the RPA. The Act provides that "Nothing in this Act shall prevent a cooperative association from returning to its members, producers, or consumers the whole, or any part of, the net earnings or surplus resulting from its trading operations, in proportion to their purchases or sales from, to, or through the association."[167] The Supreme Court has emphasized that this is not a "blanket exception" from the RPA and that it does not affect cooperatives

---

[158] *See supra* § XIII.B.2.

[159] Volvo Trucks North Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 187 & n.4 (2006) (Stevens, J., dissenting).

[160] *Id.* at 187 n.4 (Stevens, J., dissenting).

[161] *Id.*

[162] Toledo Mack Sales & Serv., Inc. v. Mack Trucks, Inc., 530 F.3d 204, 228 (3d Cir. 2008) ("Regardless of any competition between the dealers during the bidding process, only a dealer whose bid is accepted by a customer will actually buy a truck . . . . Therefore, only one sale, not two, actually results.").

[163] Jefferson County Pharm. Ass'n v. Abbott Labs., 460 U.S. 150, 154 (1983) ("[A]ssuming, without deciding, that Congress did not intend the [RPA] to apply to state purchases for consumption in traditional governmental functions, and that such purchases are therefore exempt, the exemption does not apply where a State has chosen to compete in the private retail market."); Champaign-Urbana News Agency, Inc. v. J.L. Cummins News Co., Inc., 632 F.2d 680, 688–92 (7th Cir. 1980) (noting that "the Robinson-Patman Act Amendments were not intended to include purchases by the federal government" and concluding that a federal government instrumentality was immune to RPA liability); *see also* Sea-Land Serv., Inc. v. Alaska R. R., 659 F.2d 243, 246 (D.C. Cir. 1981) (noting that "the United States, its agencies and officials, remain outside the reach of the Sherman Act").

[164] 15 U.S.C. § 15c. *See also* Abbott Labs. v. Portland Retail Druggists Ass'n, 425 U.S. 1, 14 (1976) ("[T]he test [under Section 2(c)] is the obvious one inherent in the language of the statute, namely, 'purchases of the [nonprofit's] supplies for their own use'; and that 'their own use' is what reasonably may be regarded as use [by] *the hospital* in the sense that such use is a part of and promotes the hospital's intended institutional operation in the care of persons who are its patients").

[165] 15 U.S.C. 13(a).

[166] *See, e.g.,* Able Sales Co. v. Compania de Azucar de Puerto Rico, 406 F.3d 56, 63–65 (1st Cir. 2005); Shulton, Inc. v. Optel Corp., 1986 WL 15617, at *21 (D.N.J. Sept. 29, 1986); G.D. Searle & Co. v. Interstate Drug Exch., Inc., 117 F.R.D. 495, 496 (E.D.N.Y. 1987) ("The Robinson Patman Act . . . which affects the pricing of goods sold for use or resale within the United States, does not apply to sales of goods for export.").

[167] 15 U.S.C. § 13b.

"so far as concerns their dealings with others."[168]

G. Buyer Liability for Inducement: Section 2(f)

Buyers can be liable under Section 2(f) of the Act if they "knowingly . . . induce or receive a discrimination in price which is prohibited" under the Act.[169] Section 2(f) is a derivative liability provision: the buyer will only be liable if the seller's discrimination actually satisfies all the elements of a law violation.[170] If a seller's discrimination is covered by an affirmative defense, the buyer is not liable under Section 2(f).[171]

Moreover, the buyer inducement must be *knowing*. "A buyer is not liable under s 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses."[172] The Second Circuit has added the gloss that, "[a]lthough knowledge must be proved, it need not be by direct evidence; circumstantial evidence, permitting the inference that petitioners knew, or in the exercise of normal care would have known, of the disproportionality of the payments is sufficient."[173] And the Ninth Circuit has required that a plaintiff show "that the buyer knew both that (1) he was receiving a lower price than a competitor and (2) the seller would have 'little likelihood of a defense' for offering that price."[174]

The Supreme Court examined buyer liability at some length in the 1979 *A&P* case. The case involved a supermarket chain, A&P, and a supplier of dairy products, Borden, from which A&P allegedly induced discriminatory prices. (A&P, of course, was the same chain that provided the impetus for passage of the Robinson-Patman Act in 1936.[175])

Great Atlantic & Pacific Tea Co., Inc. v. FTC

440 U.S. 69 (1979)

Justice Stewart.

[1] The question presented in this case is whether the petitioner, the Great Atlantic & Pacific Tea Co. ("A&P"), violated § 2 (f) of the Clayton Act by knowingly inducing or receiving illegal price discriminations from the Borden Co. ("Borden").

[2] The alleged violation was reflected in a 1965 agreement between A&P and Borden under which Borden undertook to supply "private label" milk to more than 200 A&P stores in a Chicago area that included portions of Illinois and Indiana. This agreement resulted from an effort by A&P to achieve cost savings by switching from the sale of "brand label" milk (milk sold under the brand name of the supplying dairy) to the sale of "private label" milk (milk sold under the A&P label).

[3] To implement this plan, A&P asked Borden, its longtime supplier, to submit an offer to supply under private

---

[168] Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co., 472 U.S. 284, 292–93 (1985) (quoting 80 Cong.Rec. 9419 (1936) (remarks of Rep. Utterback)); *see also* Am. Motor Specialties Co. v. FTC, 278 F.2d 225, 229 (2d Cir. 1960) ("[The cooperative provision] does not confer upon cooperative associations any blanket exemption from the Robinson-Patman Act. It only protects a cooperative association from charges of violating the Act premised upon the association's method of distributing earnings.").

[169] 15 U.S.C. § 13(f).

[170] Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 77–78 (1979) ("Congress did not provide in § 2(f) that a buyer can be liable even if the seller has a valid defense. The clear language of § 2(f) states that a buyer can be liable only if he receives a price discrimination prohibited by this section. If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.") (internal quotation marks omitted); Cash & Henderson Drugs, Inc. v. Johnson & Johnson, 799 F.3d 202, 215 (2d Cir. 2015) ("A buyer cannot be liable unless the seller of the goods is liable under another section of the Act."); Thurman Indus., Inc. v. Pay'N Pak Stores, Inc., 709 F. Supp. 985, 994–95 (W.D. Wash. 1987) ("Defendant violates section 2(f) only if plaintiff can show that there was a price discrimination prohibited by section 2(a). . . . For an alleged price discrimination to fall within the jurisdictional bounds of section 2(a), at least one of the two transactions which, when compared, generate a discrimination must cross a state line.").

[171] Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 78 (1979).

[172] Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 74 (1953).

[173] Am. News Co. v. FTC, 300 F.2d 104, 110 (2d Cir. 1962).

[174] Gorlick Distribution Centers, LLC v. Car Sound Exhaust Sys., Inc., 723 F.3d 1019, 1022 (9th Cir. 2013).

[175] *See supra* § XIII.A.

label certain of A&P's milk and other dairy product requirements. After prolonged negotiations, Borden offered to grant A&P a discount for switching to private-label milk provided A&P would accept limited delivery service. Borden claimed that this offer would save A&P $410,000 a year compared to what it had been paying for its dairy products. A&P, however, was not satisfied with this offer and solicited offers from other dairies. A competitor of Borden, Bowman Dairy, then submitted an offer which was lower than Borden's.

[4] At this point, A&P's Chicago buyer contacted Borden's chain store sales manager and stated: "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." When the Borden representative asked for more details, he was told nothing except that a $50,000 improvement in Borden's bid "would not be a drop in the bucket."

[5] Borden was thus faced with the problem of deciding whether to rebid. A&P at the time was one of Borden's largest customers in the Chicago area. Moreover, Borden had just invested more than $5 million in a new dairy facility in Illinois. The loss of the A&P account would result in underutilization of this new plant. Under these circumstances, Borden decided to submit a new bid which doubled the estimated annual savings to A&P, from $410,000 to $820,000. In presenting its offer, Borden emphasized to A&P that it needed to keep A&P's business and was making the new offer in order to meet Bowman's bid. A&P then accepted Borden's bid after concluding that it was substantially better than Bowman's.

I

[6] [The FTC found that A&P had violated § 2(f) and the Court of Appeals for the Second Circuit affirmed, holding that there was substantial evidence to support the Commission's findings and that, as a matter of law, A&P could not successfully assert a meeting-competition defense because—even if Borden hadn't known that its offer was better than Bowman's—A&P certainly knew. The Supreme Court granted certiorari.]

II

[7] As finally enacted, § 2 (f) provides:

> That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price *which is prohibited by this section.*

[8] Liability under § 2 (f) thus is limited to situations where the price discrimination is one "which is prohibited by this section." While the phrase "this section" refers to the entire § 2 of the Act, only subsections (a) and (b) dealing with seller liability involve discriminations in price. Under the plain meaning of § 2 (f), therefore, a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense. In either situation, there is no price discrimination "prohibited by this section." The legislative history of § 2 (f) fully confirms the conclusion that buyer liability under § 2 (f) is dependent on seller liability under § 2 (a).

[9] The derivative nature of liability under § 2 (f) was recognized by this Court in Automatic Canteen Co. of America v. FTC, 346 U.S. 61 [(1953)]. In that case, the Court stated that even if the Commission has established a prima facie case of price discrimination, a buyer does not violate § 2 (f) if the lower prices received are either within one of the seller's defenses or not known by the buyer not to be within one of those defenses.

[10] The Court thus explicitly recognized that a buyer cannot be held liable under § 2 (f) if the lower prices received are justified by reason of one of the seller's affirmative defenses.

III

[11] [A&P], relying on this plain meaning of § 2 (f) and the teaching of the *Automatic Canteen* case, argues that it cannot be liable under § 2 (f) if Borden had a valid meeting-competition defense. The [FTC], on the other hand, argues that [A&P] may be liable even assuming that Borden had such a defense. The meeting-competition defense, the [FTC] contends, must in these circumstances be judged from the point of view of the buyer. Since A&P knew for a fact that the final Borden bid beat the Bowman bid, it was not entitled to assert the meeting-competition defense even though Borden may have honestly believed that it was simply meeting competition. Recognition of a meeting-competition defense for the buyer in this situation, the [FTC] argues, would be contrary to the basic

purpose of the Robinson-Patman Act to curtail abuses by large buyers.

[12] The short answer to these contentions of the respondent is that Congress did not provide in § 2 (f) that a buyer can be liable even if the seller has a valid defense. The clear language of § 2 (f) states that a buyer can be liable only if he receives a price discrimination "prohibited by this section." If a seller has a valid meeting-competition defense, there is simply no prohibited price discrimination.

[13] In the *Automatic Canteen* case, the Court warned against interpretations of the Robinson-Patman Act which extend beyond the prohibitions of the Act and, in so doing, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation. Imposition of § 2 (f) liability on the petitioner in this case would lead to just such price uniformity and rigidity.

[14] In a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices. Because of the evils of collusive action, the Court has held that the exchange of price information by competitors violates the Sherman Act. Under the view advanced by the respondent, however, a buyer, to avoid liability, must either refuse a seller's bid or at least inform him that his bid has beaten competition. Such a duty of affirmative disclosure would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers.

[15] As in the *Automatic Canteen* case, we decline to adopt a construction of § 2 (f) that is contrary to its plain meaning and would lead to anticompetitive results. Accordingly, we hold that a buyer who has done no more than accept the lower of two prices competitively offered does not violate § 2 (f) provided the seller has a meeting-competition defense.[15]

IV

[16] Because both the Commission and the Court of Appeals proceeded on the assumption that a buyer who accepts the lower of two competitive bids can be liable under § 2 (f) even if the seller has a meeting-competition defense, there was not a specific finding that Borden did in fact have such a defense. But it quite clearly did.

[17] The test for determining when a seller has a valid meeting-competition defense is whether a seller can 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. A good-faith belief, rather than absolute certainty, that a price concession is being offered to meet an equally low price offered by a competitor is sufficient to satisfy the § 2 (b) defense. Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.

[18] Under the circumstances of this case, Borden did act reasonably and in good faith when it made its second bid. The petitioner, despite its longstanding relationship with Borden, was dissatisfied with Borden's first bid and solicited offers from other dairies. The subsequent events are aptly described in the opinion of the Commission:

[15] In Kroger Co. v. FTC, 438 F. 2d 1372 [(6th Cir. 1971)], the Court of Appeals for the Sixth Circuit held that a buyer who induced price concessions by a seller by making deliberate misrepresentations could be liable under § 2 (f) even if the seller has a meeting-competition defense.

This case does not involve a "lying buyer" situation. The complaint issued by the FTC alleged that "A&P accepted the said offer of Borden with knowledge that Borden had granted a substantially lower price than that offered by the only other competitive bidder and without notifying Borden of this fact." The complaint did not allege that Borden's second bid was induced by any misrepresentation. The Court of Appeals recognized that the Kroger case involved a "lying buyer," but stated that there was no meaningful distinction between the situation where "the buyer lies or merely keeps quiet about the nature of the competing bid."

Despite this background, the respondent argues that A&P did engage in misrepresentations and therefore can be found liable as a "lying buyer" under the rationale of the Kroger case. The misrepresentation relied upon by the respondent is a statement allegedly made by a representative of A&P to Borden after Borden made its second bid which would have resulted in annual savings to A&P of $820,000. The A&P representative allegedly told Borden to "sharpen your pencil a little bit because you are not quite there." But the Commission itself referred to this comment only to note its irrelevance, and neither the Commission nor the Court of Appeals mentioned it in considering the § 2 (f) charge against A&P. This is quite understandable, since the comment was allegedly made after Borden made its second bid and therefore cannot be said to have induced the bid as in the Kroger case.

Because A&P was not a "lying buyer," we need not decide whether such a buyer could be liable under § 2 (f) even if the seller has a meeting-competition defense.

> Thereafter, on August 31, 1965, A&P received an offer from Bowman Dairy that was lower than Borden's August 13 offer. On or about September 1, 1965, Elmer Schmidt, A&P's Chicago unit buyer, telephoned Gordon Tarr, Borden's Chicago chain store sales manager, and stated, "I have a bid in my pocket. You [Borden] people are so far out of line it is not even funny. You are not even in the ball park." Although Tarr asked Schmidt for some details, Schmidt said that he could not tell Tarr anything except that a $50,000 improvement in Borden's bid "would not be a drop in the [bucket]." Contrary to its usual practice, A&P then offered Borden the opportunity to submit another bid.

[19] Thus, Borden was informed by the petitioner that it was in danger of losing its A&P business in the Chicago area unless it came up with a better offer. It was told that its first offer was "not even in the ball park" and that a $50,000 improvement "would not be a drop in the bucket." In light of Borden's established business relationship with the petitioner, Borden could justifiably conclude that A&P's statements were reliable and that it was necessary to make another bid offering substantial concessions to avoid losing its account with the petitioner.

[20] Borden was unable to ascertain the details of the Bowman bid. It requested more information about the bid from the petitioner, but this request was refused. It could not then attempt to verify the existence and terms of the competing offer from Bowman without risking Sherman Act liability. Faced with a substantial loss of business and unable to find out the precise details of the competing bid, Borden made another offer stating that it was doing so in order to meet competition. Under these circumstances, the conclusion is virtually inescapable that in making that offer Borden acted in a reasonable and good-faith effort to meet its competition, and therefore was entitled to a meeting-competition defense.

[21] Since Borden had a meeting-competition defense and thus could not be liable under § 2 (b), the petitioner who did no more than accept that offer cannot be liable under § 2 (f).

[22] Accordingly, the judgment is reversed.

Justice Marshall, dissenting in part.

[23] The Court purports to reserve this "lying buyer" issue, but the derivative standard it adopts today belies the reservation. If "prohibited by this section" means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad faith are necessarily irrelevant.

[24] I would hold that under § 2 (f), the Robinson-Patman Act defenses must be available to buyers on the same basic terms as they are to sellers. To be sure, some differences in the nature of the defenses would obtain because of the different bargaining positions of sellers and buyers. With respect to the meeting-competition defense at issue here, a seller can justify a price discrimination by showing that his lower price was offered in "good faith" to meet that of a competitor. In my view, a buyer should be able to claim that defense—independently of the seller—if he acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happens to beat the competitor's. But a buyer who induces the lower bid by misrepresentation should not escape Robinson-Patman Act liability. This definition of the meeting-competition defense both extricates buyers from an impossible dilemma and respects the congressional intent to prevent buyers from abusing their market power to gain competitive advantage.

[25] Accordingly, I dissent from the Court's adoption of a derivative standard for determining buyer liability and its resolution of disputed factual issues without a remand.

NOTES

1) What is the value, if any, of a buyer-inducement liability provision, given that the discrimination itself is unlawful?
2) If the RPA was motivated by a concern that big buyers might pressure suppliers to give them more favorable deals than their competitors, why is buyer liability secondary and derivative, rather than primary and independent?
3) How would you deal with a "lying buyer" issue of a kind highlighted in footnote 15 of paragraph 15?
4) Buyers today have the ability to rely on artificial intelligence to conduct negotiations to purchase goods. If a program occasionally causes a seller to engage in price discrimination that harms a competing buyer, should

this be tolerated? What if it happens more often? How often is too often?

5) Do you think any buyers *should* be allowed to ask for and obtain discriminatory prices?

H. Promotional Allowances: Sections 2(d) and 2(e)

Sometimes manufacturers and other sellers help their customers to promote and market their goods to customers and end-consumers further downstream. Whenever a seller provides such promotional assistance to competing customers, the seller must comply with Sections 2(d) and 2(e) of the Robinson-Patman Act. These provisions prohibit discrimination in furnishing promotional payments (including advertising allowances, "slotting allowances" for preferential shelf placement, and "spiffs" or other payments to a customer's salespeople), services (such as in-store demonstrators), or facilities (i.e., physical materials such as signs or display racks), subject to many of the same defenses that apply to traditional price discrimination claims. Together, these two provisions help to "close off the possibility of circumventing subsection [2(a)] by concealing price discrimination as advertising benefits."[176]

The difference between a Section 2(d) claim and a Section 2(e) claim turns on what the seller is providing: under Section 2(d), "the purchaser supplies the services or facilities and the supplier repays the purchaser," while under Section 2(e) "the seller supplies the services and facilities for use of the customer in facilitating resales."[177] The two provisions provide in full:

> (d) Payment for services or facilities for processing or sale
>
> It shall be unlawful for any person engaged in commerce to pay or contact for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.
>
> (e) Furnishing services or facilities for processing, handling, etc.
>
> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

The RPA's promotional allowance provisions are unusual in that they are the subject of a set of guidelines promulgated by the FTC. These guidelines, codified at 16 C.F.R. Part 240, are known formally as the "Guides for Advertising Allowances and Other Merchandising Payments and Services," and informally as the "Fred Meyer Guides" to reflect the fact that they were adopted in the wake of the Supreme Court's 1968 decision in *FTC v. Fred Meyer, Inc.*[178]

---

[176] Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 748 (7th Cir. 2016). *See also* FTC v. Fred Meyer, Inc., 390 U.S. 341, 350–51 (1968) ("One of the practices disclosed by the [FTC's] investigation was that by which large retailers induced concessions from suppliers in the form of advertising and other sales promotional allowances. The draftsman of the provision which eventually emerged as s 2(d) explained that, even when such payments were made for actual sales promotional services, they were a form of indirect price discrimination because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not.").

[177] George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 144 (2d Cir. 1998); *see also* Kirby v. P. R. Mallory & Co., 489 F.2d 904, 909 (7th Cir. 1973) ("Sections 2(d) and (e) of the Act deal with discrimination in the field of promotional services made available to purchasers who buy for resale. Where the seller pays the buyer to perform the service, Section 2(d) applies. Where the seller furnishes the service itself to the buyer, Section 2(e) applies.").

[178] FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

1. The Elements of a Promotional-Allowance Violation

A violation of Section 2(d) or 2(e) requires discrimination, by a single seller, among competing customers with respect to the provision of promotional allowances, services, or facilities.

Many of these elements will be familiar from the discussion of the elements of a 2(a) violation, discussed above.[179]

Interstate commerce. Just like price discrimination under Section 2(a),[180] promotional-allowance discrimination must be "in commerce," even though the relevant language does not appear on the face of Section 2(e).[181]

Multiple contemporaneous allowances. Just as Section 2(a) requires multiple contemporaneous sales,[182] Sections 2(d) and 2(e) require provision of promotional allowances (under Section 2(d)) or of services or facilities (under Section 2(e)) to competing purchasers at "approximately the same time."[183] The test appears identical to that applied under Section 2(a).[184]

Disproportionate allowances. While liability under Section 2(a) requires that a seller has charged different prices to favored and disfavored customers, liability under Sections 2(d) or 2(e) requires that a seller provide promotional support that is "disproportionate."[185] A "proportionate" (*i.e.*, nondiscriminatory) allowance program is one that is functionally available to all competing customers, meaning that at least to some extent all relevant customers must be able to participate, and that benefits under the program are tied to a reasonably objective measure (such as sales volume).[186]

---

[179] *See supra* § XIII.B.

[180] *See supra* § XIII.B.1.

[181] L&L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116 (5th Cir. 1982) ("Although [§] 2(e) does not explicitly state similar requirements, the jurisdictional bases of [§] 2(a) have been incorporated into [§] 2(e)."); Shreveport Macaroni Mfg. Co. v. F.T.C., 321 F.2d 404, 408 (5th Cir. 1963) ("[Section 2(d)] is applicable so long as the transaction, and we suppose this means sale, with either the favored or the competing disfavored customer crosses a state boundary. . . . Here the product sold to Childs crossed the state line into Texas for resale, and this was sufficient to give the Commission jurisdiction over the alleged discriminatory allowances even under these authorities.")

[182] *See supra* § XIII.B.2.

[183] England v. Chrysler Corp., 493 F.2d 269, 272 (9th Cir. 1974)

[184] *See*, *e.g.*, Atalanta Trading Corp v. FTC, 258 F.2d 365, 372 (2d Cir. 1958) (holding under Section 2(d) that a five-month gap precluded contemporaneity, and stating that "two trivial sales isolated in time by at least five months from the substantial sales on which the allowances were given do not violate either the letter or the spirit of Section 2(d)"); England v. Chrysler Corp., 493 F.2d 269, 272 n.4 (9th Cir. 1974) ("It is clear that the competing customers requirement is not satisfied where there is a time span of sixteen months between the awards.").

[185] *See*, *e.g.*, George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 144 (2d Cir. 1998) ("[Sections 2(d) and 2(e)] were designed to prohibit indirect price discrimination in the form of advertising and other promotional allowances made available to purchasers on disproportionate terms.").

[186] See, e.g., U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1141 (9th Cir. 2023) ("Under section 2(d), it is unlawful for a seller to pay anything of value to or for the benefit of a customer for any services or facilities furnished by or through such customer in connection with the sale of the products unless the payment is available on proportionally equal terms to all other customers competing in the distribution of such products.") (internal quotation marks and ellipsis omitted); Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 745 (7th Cir. 2016) ("Any price discrimination that is concealed as promotional 'services or facilities' (provided directly or reimbursed) is also prohibited . . . whether or not it interferes with competition, unless the payments or the actual services are available on proportionally equal terms to all."); Orologio of Short Hills Inc v. The Swatch Grp. (U.S.) Inc., 653 F. App'x 134, 141 (3d Cir. 2016) ("[E]ntities . . . that provide products to retailers . . . may not offer promotional assistance—e.g., . . . co-op funding, tagging, and slotting fees . . . —to its retailers unless (1) the programs are administered based on some objective, 'proportionally equal' criteria, rather than at the whim of the supplier, and (2) all retailers that compete with one another are on notice of the availability of such programs."); Schoenkopf v. Brown & Williamson Tobacco Corp., 637 F.2d 205, 211 (3d Cir. 1980) ("It may be as well or even instead the tobacco companies' failure to effectively offer the plans by informing all vendors of their existence. The promotional allowance programs may be objectionable either in their large-scaled cost-benefit balance or in the fact that not all presumably competing customers are informed and aware of them."); Alterman Foods, Inc. v. FTC, 497 F.2d 993, 1001 (5th Cir. 1974) ("To meet [the non-discrimination] requirement, a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must take affirmative action to inform them of the availability of the promotion programs."); Hygrade Milk & Cream Co. v. Tropicana Prods., Inc., 1996 WL 257581, at *13 (S.D.N.Y. May 16, 1996) ("In order to establish a violation of §§ 2(d) or (e), Plaintiffs must show that 1) [the defendant] provided payments or services to customers in connection with the resale of goods; and 2) such payments or services were not available to competing customers on proportionally equal terms."). The Ninth Circuit has recently held that customers are in competition with one another for this purpose if a plaintiff can prove that: "(1) one customer has outlets in geographical proximity to those of the

In a 1953 decision, the FTC's hearing examiner described the test in the following terms:

> [Under the RPA] [p]ayments must be made in good faith for services or facilities actually rendered and there should be a fair and reasonable relation between the amount of the payment and the type of service rendered. . . . [N]o standards are laid down in the law for accomplishing this result. Indeed no standard could be laid down which would insure exact proportionality with the mathematical accuracy of a slide rule. {*Eds.: a slide rule is a mechanical calculating device, seldom seen today.*} . . . [N]evertheless the intent of Congress in enacting Section 2 (d) is clear. Prior to the enactment of the Robinson-Patman Act, payments for services and facilities rendered (particularly in the advertising field) were often used for the purpose of discriminating among customers. It was that evil that Section 2 (d) was intended to eliminate. Consequently, every plan providing payment for promotional services and facilities should be carefully scrutinized to see that it does conform to the express Congressional intent. It must be honest in its purpose and fair and reasonable in its application.[187]

There is no single or easy way to assure proportional equality.[188] But the FTC's Fred Meyer Guides, discussed below,[189] highlight the possibility of "basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period."[190] As the Guides make clear, "[w]hen a seller offers to competing customers alternative services or allowance that are proportionally equal and at least one such offer is usable in a practical sense by all competing customers, and refrains from taking steps to prevents customers from participating, it has satisfied its obligation to make services and allowances 'functionally available' to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act."[191] In general, a seller should take "reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers," including "offering alternative terms and conditions under which customers can participate."[192]

Proportionality also requires that competing customers receive a "notification . . . includ[ing] enough details of the offer in time to enable [them] to make an informed judgment whether to participate."[193] No particular method is required for providing notification, and different means may be used so long as each customer is informed. But it does not appear to require that all customers have access to the same menu of options, so long as all competing customers have access to at least one usable option on proportionally equal terms.[194]

Promotional services or facilities. Both Section 2(d) and Section 2(e) are tied to promotional "services and facilities": Section 2(d) deals with payments for such services and facilities, while Section 2(e) deals with the direct furnishing of them. The phrase "services or facilities" is not defined in the Act, but has been interpreted broadly, to include the provision of in-store demonstrators, advertising, signage, catalogs, display racks, cabinets, and

---

other; (2) the two customers purchased goods of the same grade and quality from the seller within approximately the same period of time; and (3) the two customers are operating on a particular functional level such as wholesaling or retailing." U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1142 (9th Cir. 2023).

187 In the Matter of Lever Bros. Co., 50 F.T.C. 494, 512 (1953).

188 *See* Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 484–5 (2d Cir. 1962) (noting that "[d]etermination of what a seller must do in order that payments of the sort described in § 2(d) should be 'available' to all customers has not been easy" and discussing the standard).

189 *See infra* § XIII.H.2.

190 FTC, Guides for Advertising Allowances and Other Merchandising Payments and Services (the "Fred Meyer Guides"), 16 C.F.R. §§ 240 *et seq.*, at §§ 240.9(a).

191 Fred Meyer Guides § 240.10(a)(3).

192 Fred Meyer Guides § 240.10(a)(1).

193 Fred Meyer Guides § 240.10(b).

194 United States v. Simplicity Pattern Co., 360 U.S. 55, 61 n.4 (1959) (suggesting this in dicta); In the Matter of Lever Bros., 50 F.T.C. 494 (1953). *Cf.* Woodman's Food Market v. Clorox Co., 833 F.3d 743 (7th Cir. 2016) (special package sizes for "warehouse club" stores).

special packaging.[195] Notably, it does not include the provision of special product sizes, such as large packs.[196]

One unifying principle is that the allowances, services, or facilities must be in support of the promotion and resale of the products.[197] This does not include payments, services, or facilities provided in connection with the seller's initial sale of the products to the retailer or other customer, such as preferential credit, product allocation, leases, or technical support.[198]

Sales of products and commodities. Just as Section 2(a) is tied to sales of "commodities," Sections 2(d) and 2(e) are effectively tied to sales of "products or commodities," and "commodities," respectively. There is no relevant distinction between products and commodities: the scope of Sections 2(d) and 2(e) is effectively identical to that of Section 2(a); it applies only to tangible products.[199]

Competition. Unlike Section 2(a), liability under Sections 2(d) and 2(e) does not require harm to competition.[200] However, the relevant discrimination must still take place between customers that are themselves in competition with one another.[201] The absence of a competitive-injury requirement may create incentives for plaintiffs to try to turn a 2(a) claim into one under 2(d) or 2(e); the FTC has noted that "courts have not hesitated to reject claims under Sections 2(d) and 2(e) which more properly should be brought under Section 2(a)."[202]

Defenses and defensive doctrines. To what extent do the usual RPA defenses and defensive doctrines,

---

[195] *See, e.g.,* Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 484 F.3d 865, 872 (6th Cir. 2007) (listing examples of services and facilities); Lewis v. Philip Morris Inc., 355 F.3d 515, 522 (6th Cir. 2004) (same); Nat'l Flour Co. v. Bay State Milling Co., No. 88 C 3989, 1989 WL 134293, at *3 (N.D. Ill. Oct. 24, 1989) (furnishing sales personnel); *but see* Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of California, 153 F.3d 938, 941–47 (9th Cir. 1998) (concluding that a realty lease was not a service or facility under the RPA); Hinkleman v. Shell Oil Co., 962 F.2d 372, 380 (4th Cir. 1992) ("[W]e would exclude real estate leases from the prohibitions of section 2(e) because they do not serve to promote a commodity to the ultimate retail consumer.").

[196] *See* Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 750 (7th Cir. 2016) ("Size alone is not enough to constitute a promotional service or facility for purposes of subsection 13(e); any discount that goes alone with size must be analyzed under subsection 13(a); and the convenience of the larger size is not a promotional service or facility."); *see also id.* ("[An interpretation of section 13(e) that covered different product varieties or pack sizes] would wipe out the seller's discretion to choose which products to sell to whom. . . . No court has ever held that the Robinson–Patman Act goes that far, and we have no inclination to be the first."); *but see id.* at 750 ("This is not to say that it would be impossible under different facts to imagine package size or design as part of a 'service or facility' when combined with other promotional content. For example, the [FTC] distinguishes football shaped packages offered just before the Superbowl, or Halloween-branded 'fun-size' individually wrapped candies near Halloween, from Clorox's large packs. *These examples could fall within subsection 13(e), but they are not before us today.*") (emphasis added).

[197] *See* Woodman's Food Mkt., Inc. v. Clorox Co., 833 F.3d 743, 748 (7th Cir. 2016) ("[T]he terms 'services or facilities' in subsection 13(e) refer only to those services or facilities connected with promoting the product, rather than sweeping in any attribute of the product that makes it more desirable to consumers."; Lewis v. Philip Morris Inc., 355 F.3d 515, 524 (6th Cir. 2004); In the Matter of Herbert R. Gibson, Sr., 95 F.T.C. 553 (F.T.C. 1980) ("Two features differentiate Sections 2(d) and 2(e) from the provisions of Section 2(a). The first is that the seller must either provide 'services or facilities' or make payment in consideration of 'services or facilities furnished by or through [the] customer.' It has been held that the service or payment at issue must be promotional in nature, such as for advertising. The second is that the payment made or service rendered must be in connection with the 'processing, handling, sale, or offering for sale' of a product by the customer, i.e., it must bear a nexus to the resale or preparation for resale by the retailer.") (citations omitted); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 910 (7th Cir. 1973) ("[I]t is apparent that the payments and services to [a buyer] are provided not in connection with the original sale . . . but rather with respect to projected resales. The alleged violations in this case are [*i.e.*, therefore] properly exclusively subsumed under §§ 2(d) and 2(e), rather than § 2(a).").

[198] *See, e.g.*, Freightliner of Knoxville, Inc. v. DaimlerChrysler Vans, LLC, 484 F.3d 865, 873 (6th Cir. 2007); Bouldis v. U.S. Suzuki Motor Corp., 711 F.2d 1319, 1328 (6th Cir 1983).

[199] *See, e.g.*, FTC v. Fred Meyer, Inc., 390 U.S. 341, 343 (1968) ("Section 2(d) makes it unlawful for a supplier in interstate commerce to grant advertising or other sales promotional allowances to one customer who resells the supplier's products or commodities unless the allowances are available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.") (internal quotation marks omitted); Med. Supply Chain, Inc. v. Gen. Elec. Co., 144 F. App'x 708, 715 (10th Cir. 2005) (unpub.) (holding in a Section 2(e) case that the RPA does not apply to "real estate lease or financing"); Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 373 (3d Cir. 1985) (noting that preferences in a sales agency relationship are not subject to Sections 2(a), 2(e), or 2(f)).

[200] Lewis v. Philip Morris Inc., 355 F.3d 515, 525 (6th Cir. 2004) ("Unlike section 2(a), violations of sections 2(d) and 2(e) do not explicitly require an injury to competition."); George Haug Co. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 145 (2d Cir. 1998) ("Section 2(d) and (e) differ from 2(a) in that no injury to competition need be demonstrated."); Monsieur Touton Selection v. Future Brands, LLC, 2006 WL 2192790, at *4 (S.D.N.Y. Aug. 1, 2006) ("[S]ections 2(d) and (e), unlike section 2(a), do not require demonstration of an injury to competition.").

[201] *See, e.g.*, U.S. Wholesale Outlet & Distribution, Inc. v. Innovation Ventures, LLC, 89 F.4th 1126, 1142–43 (9th Cir. 2023).

[202] In the Matter of Herbert R. Gibson, Sr., 95 F.T.C. 553 (1980).

described above,[203] apply to promotional-allowance claims?

Meeting competition. Section 2(b) explicitly provides for the rebuttal, on meeting-competition grounds, of a claim based on a "lower price *or the furnishing of services or facilities to any purchaser or purchasers*" if "made in good faith to meet an equally low price of a competitor, *or the services or facilities furnished by a competitor*."[204] As a result, the meeting-competition defense is available in promotional-allowance cases.[205]

Cost justification. The Supreme Court has held that there is no "cost justification" defense under Section 2(e), explaining in 1959's *FTC v. Simplicity Pattern Co.*: "[T]he only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the s 2(b) proviso. We cannot supply what Congress has studiously omitted."[206] Faced with arguments about the economic wisdom of such a rule, the Court demurred: "Entirely aside from the fact that this Court is not in a position to review the economic wisdom of Congress, we cannot say that the legislative decision to treat price and other discriminations differently is without a rational basis. In allowing a 'cost justification' for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings."[207]

Availability. As noted above, the issue of whether the allowances are available to other buyers appears on the face of Sections 2(d) and 2(e), and it is commonly central in promotional-allowance cases.

Changing conditions. Courts do not appear to have generated much case law on the application of the "changing conditions" defense to promotional-allowance claims. Unlike Section 2(a), there is no language in the statute that explicitly provides for such a defense. In principle, though, the defense may nevertheless apply, as it amounts to an argument that—in light of relevant changes in market conditions—what may appear to be discrimination does not in fact involve comparably situated buyers.

Introductory offers. As with price discrimination, special promotional allowances, services, and facilities may be offered to new customers only, provided that there is no discrimination among competing new customers in the same marketing area during the same period of time.[208]

Requirements for private litigation. Just as in any other private litigation, a plaintiff in private litigation must establish actual or threatened injury,[209] and—in a damages claim—the amount of such injury.[210]

---

[203] *See supra* § XIII.D.

[204] 15 U.S.C. 13(b).

[205] Alan's of Atlanta, Inc. v. Minolta Corp., 903 F.2d 1414, 1419–20 (11th Cir. 1990) ("In crafting the RPA the drafters and construers of the Act saw fit to allow a seller to breach the requirements of sections 2(a), (d), and (e) if it could prove that in so doing it was merely meeting the already prevalent prices of a competitor."); Bookends & Beginnings LLC v. Amazon.com, Inc., 2022 WL 18144916, at *26 (S.D.N.Y. Aug. 24, 2022) (noting that "the meeting-competition defense in Section 2(b) applies to claims brought under Section 2(d) and 2(e)"); Am. Booksellers Ass'n, Inc. v. Houghton Co., 1995 WL 787394, at *7 (S.D.N.Y. Oct. 31, 1995) ("A publisher may make available to book retailers in connection with the resale of its books promotional allowances that are not proportionally equal only on the basis of the meeting competition exception.").

[206] FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959).

[207] FTC v. Simplicity Pattern Co., 360 U.S. 55, 67–68 (1959).

[208] *See*, *e.g.*, Dairy King, Inc. v. Kraft, Inc., 645 F. Supp. 126, 128 (D. Md. 1986) ("Plaintiffs have failed to allege that the 1982 promotion was not equally available to all new Breakstone distributors or that it was merely a device to circumvent the Robinson-Patman Act. Rather, plaintiffs have simply contended that no "new business" exception to the Act exists and ignored the cases holding that introductory discounts are permissible."); *see also* Matthew Enter. v. Chrysler Grp., 738 F. App'x 569, 570 (9th Cir 2018).

[209] Lewis v. Philip Morris Inc., 355 F.3d 515, 525 & n.13 (6th Cir. 2004) (noting that "[u]nlike section 2(a), violations of sections 2(d) and 2(e) do not explicitly require an injury to competition," but that "[i]n private suits, however, courts have required injury-in-fact and causation"); Maddaloni Jewelers, Inc. v. Rolex Watch U.S.A., Inc., 354 F. Supp. 2d 293, 310 (S.D.N.Y. 2004) (dismissing a claim under Sections 2(d) and 2(e) for failure to raise a triable issue of fact regarding antitrust injury).

[210] *See*, *e.g.*, Callahan v. Scott Paper Co., 541 F. Supp. 550, 559 (E.D. Pa. 1982) (stating, in a case alleging both price discrimination and promotional-allowance discrimination: "To recover in these lawsuits, plaintiffs would have to show more than Scott's price discrimination; they would be required to establish actual injury resulting therefrom. . . . [P]laintiffs must show more than a theoretical negative effect; they must in addition establish with reasonable certainty the quantitative impact of Scott's antitrust violations upon them.").

2. The Fred Meyer Guides

Extensive guidance for promotional support has been provided by the Federal Trade Commission in Guides it issued after the Supreme Court decided the *Fred Meyer* case in 1968.[211] Formally titled "Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §§ 240, et seq., they are popularly referred to as the "Fred Meyer Guides." The Guides have been updated occasionally, most recently in 2014.[212]

Advertising Allowances and Other Merchandising Payments and Services

16 C.F.R. Part 240

§ 240.1 Purpose of the Guides.

The purpose of these Guides is to provide assistance to businesses seeking to comply with sections 2(d) and (e) of the Robinson-Patman Act (the "Act"). The guides are based on the language of the statute, the legislative history, administrative and court decisions, and the purposes of the Act. Although the Guides are consistent with the case law, the Commission has sought to provide guidance in some areas where no definitive guidance is provided by the case law. The Guides are what their name implies—guidelines for compliance with the law. They do not have the force of law. They do not confer any rights on any person and do not operate to bind the FTC or the public.

§ 240.2 Applicability of the law.

(a) The substantive provisions of section 2(d) and (e) apply only under certain circumstances. Section 2(d) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Pays a customer for promotional services or facilities provided by the customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(b) Section 2(e) applies only to:

(1) A seller of products

(2) Engaged in interstate commerce

(3) That either directly or through an intermediary

(4) Furnishes promotional services or facilities to a customer

(5) In connection with the resale (not the initial sale between the seller and the customer) of the seller's products

(6) Where the customer is in competition with one or more of the seller's other customers also engaged in the resale of the seller's products of like grade and quality.

(c) Additionally, section 5 of the FTC Act may apply to buyers of products for resale or to third parties. See §

[211] FTC v. Fred Meyer, 390 U.S. 341 (1968).

[212] *See* FTC, Press Release, *FTC Approves Final Amendments to Guides to Help Businesses Comply with Law Regarding Promotional Allowances and Services* (Sept. 24, 2014).

240.13 of these Guides.

§ 240.3 Definition of seller.

Seller includes any person (manufacturer, wholesaler, distributor, etc.) who sells products for resale, with or without further processing. For example, selling candy to a retailer is a sale for resale without processing. Selling corn syrup to a candy manufacturer is a sale for resale with processing.

§ 240.4 Definition of customer.

A customer is any person who buys for resale directly from the seller, or the seller's agent or broker. In addition, a “customer” is any buyer of the seller's product for resale who purchases from or through a wholesaler or other intermediate reseller. The word “customer” which is used in section 2(d) of the Act includes “purchaser” which is used in section 2(e).

Note: There may be some exceptions to this general definition of “customer.” For example, the purchaser of distress merchandise would not be considered a “customer” simply on the basis of such purchase. Similarly, a retailer purchasing solely from other retailers, or making sporadic purchases from the seller or one that does not regularly sell the seller's product, or that is a type of retail outlet not usually selling such products (e.g., a hardware store stocking a few isolated food items) will not be considered a “customer” of the seller unless the seller has been put on notice that such retailer is selling its product.

> *Example 1:* A manufacturer sells to some retailers directly and to others through wholesalers. Retailer A purchases the manufacturer's product from a wholesaler and resells some of it to Retailer B. Retailer A is a customer of the manufacturer. Retailer B is not a customer unless the fact that it purchases the manufacturer's product is known to the manufacturer.
>
> *Example 2:* A manufacturer sells directly to some independent retailers, to the headquarters of chains and of retailer-owned cooperatives, and to wholesalers. The manufacturer offers promotional services or allowances for promotional activity to be performed at the retail level. With respect to such services and allowances, the direct-buying independent retailers, the headquarters of the chains and retailer-owned cooperatives, and the wholesaler's independent retailer customers are customers of the manufacturer. Individual retail outlets of the chains and the members of the retailer-owned cooperatives are not customers of the manufacturer.
>
> *Example 3:* A seller offers to pay wholesalers to advertise the seller's product in the wholesalers' order books or in the wholesalers' price lists directed to retailers purchasing from the wholesalers. The wholesalers and retailer-owned cooperative headquarters and headquarters of other bona-fide buying groups are customers. Retailers are not customers for purposes of this promotion.

§ 240.5 Definition of competing customers.

Competing customers are all businesses that compete in the resale of the seller's products of like grade and quality at the same functional level of distribution regardless of whether they purchase directly from the seller or through some intermediary.

> *Example 1:* Manufacturer A, located in Wisconsin and distributing shoes nationally, sells shoes to three competing retailers that sell only in the Roanoke, Virginia area. Manufacturer A has no other customers selling in Roanoke or its vicinity. If Manufacturer A offers its promotion to one Roanoke customer, it should include all three, but it can limit the promotion to them. The trade area should be drawn to include retailers who compete.
>
> *Example 2:* A national seller has direct-buying retailing customers reselling exclusively within the Baltimore area, and other customers within the area purchasing through wholesalers. The seller may lawfully engage in a promotional campaign confined to the Baltimore area, provided that it affords all of its retailing customers within the area the opportunity to participate, including those that purchase through wholesalers.
>
> *Example 3:* B manufactures and sells a brand of laundry detergent for home use. In one metropolitan area, B's detergent is sold by a grocery store and a discount department store. If these stores compete with each other, any allowance, service or facility that B makes available to the grocery store should also be made

available on proportionally equal terms to the discount department store.

§ 240.6 Interstate commerce.

The term “interstate commerce” has not been precisely defined in the statute. In general, if there is any part of a business which is not wholly within one state (for example, sales or deliveries of products, their subsequent distribution or purchase, or delivery of supplies or raw materials), the business may be subject to sections 2(d) and 2(e) of the Act. (The commerce standard for sections 2(d) and (e) is at least as inclusive as the commerce standard for section 2(a).) Sales or promotional offers within the District of Columbia and most United States possessions are also covered by the Act.

§ 240.7 Services or facilities.

The terms “services” and “facilities” have not been exactly defined by the statute or in decisions. One requirement, however, is that the services or facilities be used primarily to promote the resale of the seller's product by the customer. Services or facilities that relate primarily to the original sale are covered by section 2(a). The following list provides some examples—the list is not exhaustive—of promotional services and facilities covered by sections 2(d) and (e):

- Cooperative advertising;
- Handbills;
- Demonstrators and demonstrations;
- Catalogues;
- Cabinets;
- Displays;
- Prizes or merchandise for conducting promotional contests;
- Special packaging, or package sizes; and
- Online advertising.

Example 1: A seller offers a supermarket chain an allowance of $500 per store to stock a new packaged food product and find space for it on the supermarket's shelves and a further allowance of $300 per store for placement of the new product on prime display space, an aisle endcap. The $500 allowance relates primarily to the initial sale of the product to the supermarket chain, and therefore should be assessed under section 2(a) of the Act. In contrast, the $300 allowance for endcap display relates primarily to the resale of the product by the supermarket chain, and therefore should be assessed under section 2(d).

Example 2: During the Halloween season, a seller of multi-packs of individually wrapped candy bars offers to provide those multi-packs to retailers in Halloween-themed packaging. The primary purpose of the special packaging is to promote customers' resale of the candy bars. Therefore, the special packaging is a promotional service or facility covered by section 2(d) or 2(e) of the Act.

Example 3: A seller of liquid laundry detergent ordinarily packages its detergent in containers having a circular footprint. A customer asks the seller to furnish the detergent to it in special packaging having a square footprint, so that the customer can more efficiently warehouse and transship the detergent. Because the purpose of the special packaging is primarily to promote the original sale of the detergent to the customer and not its resale by the customer, the special packaging is not a promotional service or facility covered by section 2(d) or 2(e) of the Act.

§ 240.8 Need for a plan.

A seller who makes payments or furnishes services that come under the Act should do so according to a plan. If there are many competing customers to be considered or if the plan is complex, the seller would be well advised to put the plan in writing. What the plan should include is described in more detail in the remainder of these Guides. Briefly, the plan should make payments or services functionally available to all competing customers on proportionally equal terms. (See § 240.9 of this part.) Alternative terms and conditions should be made available to customers who cannot, in a practical sense, take advantage of any of the plan's offerings. The seller should inform competing customers of the plans available to them, in time for them to decide whether to participate. (See § 240.10 of this part.)

§ 240.9 Proportionally equal terms.

(a) Promotional services and allowances should be made available to all competing customers on proportionally equal terms. No single way to do this is prescribed by law. Any method that treats competing customers on proportionally equal terms may be used. Generally, this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified period. However, other methods that result in proportionally equal allowances and services being offered to all competing customers are acceptable.

(b) When a seller offers more than one type of service, or payments for more than one type of service, all the services or payments should be offered on proportionally equal terms. The seller may do this by offering all the payments or services at the same rate per unit or amount purchased. Thus, a seller might offer promotional allowances of up to 12 cents a case purchased for expenditures on either newspaper or Internet advertising or handbills.

> *Example 1:* A seller may offer to pay a specified part (e.g., 50 percent) of the cost of local advertising up to an amount equal to a specified percentage (e.g., 5 percent) of the dollar volume of purchases during a specified period of time.
>
> *Example 2:* A seller may place in reserve for each customer a specified amount of money for each unit purchased, and use it to reimburse these customers for the cost of advertising the seller's product.
>
> *Example 3:* A seller should not provide an allowance or service on a basis that has rates graduated with the amount of goods purchased, as, for instance, 1 percent of the first $1,000 purchased per month, 2 percent of the second $1,000 per month, and 3 percent of all over that.
>
> *Example 4:* A seller should not identify or feature one or a few customers in its own advertising without making the same, or if impracticable, alternative services available on proportionally equal terms to customers competing with the identified customer or customers.
>
> *Example 5:* A seller who makes employees available or arranges with a third party to furnish personnel for purposes of performing work for a customer should make the same offer available on proportionally equal terms to all other competing customers or offer useable and suitable services or allowances on proportionally equal terms to competing customers for whom such services are not useable and suitable.
>
> *Example 6:* A seller should not offer to pay a straight line rate for advertising if such payment results in a discrimination between competing customers; e.g., the offer of $1.00 per line for advertising in a newspaper that charges competing customers different amounts for the same advertising space. The straight line rate is an acceptable method for allocating advertising funds if the seller offers small retailers that pay more than the lowest newspaper rate an alternative that enables them to obtain the same percentage of their advertising cost as large retailers. If the $1.00 per line allowance is based on 50 percent of the newspaper's lowest contract rate of $2.00 per line, the seller should offer to pay 50 percent of the newspaper advertising cost of smaller retailers that establish, by invoice or otherwise, that they paid more than that contract rate.
>
> *Example 7:* A seller offers each customer promotional allowances at the rate of one dollar for each unit of its product purchased during a defined promotional period. If Buyer A purchases 100 units, Buyer B 50 units, and Buyer C 25 units, the seller maintains proportional equality by allowing $100 to Buyer A, $50 to Buyer B, and $25 to Buyer C, to be used for the Buyers' expenditures on promotion.

§ 240.10 Availability to all competing customers.

(a) Functional availability.

(1) The seller should take reasonable steps to ensure that services and facilities are useable in a practical sense by all competing customers. This may require offering alternative terms and conditions under which customers can participate. When a seller provides alternatives in order to meet the availability requirement, it should take reasonable steps to ensure that the alternatives are proportionally equal, and the seller should inform competing customers of the various alternative plans.

(2) The seller should insure that promotional plans or alternatives offered to retailers do not bar any competing

retailers from participation, whether they purchase directly from the seller or through a wholesaler or other intermediary.

(3) When a seller offers to competing customers alternative services or allowances that are proportionally equal and at least one such offer is useable in a practical sense by all competing customers, and refrains from taking steps to prevent customers from participating, it has satisfied its obligation to make services and allowances "functionally available" to all customers. Therefore, the failure of any customer to participate in the program does not place the seller in violation of the Act.

> *Example 1:* A manufacturer offers a plan for cooperative advertising on radio, TV, or in newspapers of general circulation. Because the purchases of some of the manufacturer's customers are too small this offer is not useable in a practical sense by them. The manufacturer should offer them alternative(s) on proportionally equal terms that are useable in a practical sense by them. In addition, some competing customers are online retailers that cannot make practical use of radio, TV, or newspaper advertising. The manufacturer should offer them proportionally equal alternatives, such as online advertising, that are useable by them in a practical sense.
>
> *Example 2:* A seller furnishes demonstrators to large department store customers. The seller should provide alternatives useable in a practical sense on proportionally equal terms to those competing customers who cannot use demonstrators. The alternatives may be services useable in a practical sense that are furnished by the seller, or payments by the seller to customers for their advertising or promotion of the seller's product.
>
> *Example 3:* A seller offers to pay 75 percent of the cost of advertising in daily newspapers, which are the regular advertising media of the seller's large or chain store customers, but a lesser amount, such as only 50 percent of the cost, or even nothing at all, for advertising in semi-weekly, weekly, or other newspapers or media, such as the Internet, that may be used by small retail customers. Such a plan discriminates against particular customers or classes of customers. To avoid that discrimination, the seller in offering to pay allowances for newspaper advertising should offer to pay the same percent of the cost of newspaper advertising for all competing customers in a newspaper of the customer's choice, or at least in those newspapers that meet the requirements for second class mail privileges. While a small customer may be offered, as an alternative to advertising in daily newspapers, allowances for other media and services such as envelope stuffers, handbills, window banners, Web sites, and the like, the small customer should have the choice to use its promotional allowance for advertising similar to that available to the larger customers, if it can practicably do so.
>
> *Example 4:* A seller offers short term displays of varying sizes, including some which are useable by each of its competing customers in a practical business sense. The seller requires uniform, reasonable certification of performance by each customer. Because they are reluctant to process the required paper work, some customers do not participate. This fact does not place the seller in violation of the functional availability requirement and it is under no obligation to provide additional alternatives.

(b) Notice of available services and allowance.: The seller has an obligation to take steps reasonably designed to provide notice to competing customers of the availability of promotional services and allowances. Such notification should include enough details of the offer in time to enable customers to make an informed judgment whether to participate. When some competing customers do not purchase directly from the seller, the seller must take steps reasonably designed to provide notice to such indirect customers. Acceptable notification may vary. The following is a non-exhaustive list of acceptable methods of notification:

(1) By providing direct notice to customers;

(2) When a promotion consists of providing retailers with display materials, by including the materials within the product shipping container;

(3) By including brochures describing the details of the offer in shipping containers;

(4) By providing information on shipping containers or product packages of the availability and essential features of an offer, identifying a specific source for further information;

(5) By placing at reasonable intervals in trade publications of general and widespread distribution announcements of the availability and essential features of promotional offers, identifying a specific source for further information;

and

(6) If the competing customers belong to an identifiable group on a specific mailing list, by providing relevant information of promotional offers to customers on that list. For example, if a product is sold lawfully only under Government license (alcoholic beverages, etc.), the seller may inform only its customers holding licenses.

(c) A seller may contract with intermediaries or other third parties to provide notice. See § 240.11.

> *Example 1:* A seller has a plan for the retail promotion of its product in Philadelphia. Some of its retailing customers purchase directly and it offers the plan to them. Other Philadelphia retailers purchase the seller's product through wholesalers. The seller may use the wholesalers to reach the retailing customers that buy through them, either by having the wholesalers notify these retailers, or by using the wholesalers' customer lists for direct notification by the seller.

> *Example 2:* A seller that sells on a direct basis to some retailers in an area, and to other retailers in the area through wholesalers, has a plan for the promotion of its product at the retail level. If the seller directly notifies competing direct purchasing retailers, and competing retailers purchasing through the wholesalers, the seller is not required to notify its wholesalers.

> *Example 3:* A seller regularly promotes its product at the retail level and during the year has various special promotional offers. The seller's competing customers include large direct-purchasing retailers and smaller retailers that purchase through wholesalers. The promotions offered can best be used by the smaller retailers if the funds to which they are entitled are pooled and used by the wholesalers on their behalf (newspaper advertisements, for example). If retailers purchasing through a wholesaler designate that wholesaler as their agent for receiving notice of, collecting, and using promotional allowances for them, the seller may assume that notice of, and payment under, a promotional plan to such wholesaler constitutes notice and payment to the retailer. The seller must have a reasonable basis for concluding that the retailers have designated the wholesaler as their agent.

§ 240.11 Wholesaler or third party performance of seller's obligations. A seller may contract with intermediaries, such as wholesalers, distributors, or other third parties, to perform all or part of the seller's obligations under sections 2(d) and (e). The use of intermediaries does not relieve a seller of its responsibility to comply with the law. Therefore, in contracting with an intermediary, a seller should ensure that its obligations under the law are in fact fulfilled.

§ 240.12 Checking customer's use of payments. The seller should take reasonable precautions to see that the services the seller is paying for are furnished and that the seller is not overpaying for them. The customer should expend the allowance solely for the purpose for which it was given. If the seller knows or should know that what the seller is paying for or furnishing is not being properly used by some customers, the improper payments or services should be discontinued.

§ 240.13 Customer's and third party liability.

(a) Customer's liability.

Sections 2(d) and (e) apply to sellers and not to customers. However, where there is likely injury to competition, the Commission may proceed under section 5 of the Federal Trade Commission Act against a customer who knows, or should know, that it is receiving a discriminatory price through services or allowances not made available on proportionally equal terms to its competitors engaged in the resale of a seller's product. Liability for knowingly receiving such a discrimination may result whether the discrimination takes place directly through payments or services, or indirectly through deductions from purchase invoices or other similar means. In addition, the giving or knowing inducement or receipt of proportionally unequal promotional allowances may be challenged under sections 2(a) and 2(f) of the Act, respectively, where no promotional services are performed in return for the payments, or where the payments are not reasonably related to the customer's cost of providing the promotional services. *See*, *e.g.*, American Booksellers Ass'n v. Barnes & Noble, 135 F. Supp. 2d 1031 (N.D. Cal. 2001); but see United Magazine Co. v. Murdoch Magazines Distrib., Inc. 2001 U.S. Dist. Lexis 20878 (S.D.N.Y. 2001). Sections 2(a) and 2(f) of the Act may be enforced by disfavored customers, among others.

> *Example 1:* A customer should not induce or receive advertising allowances for special promotion of the

seller's product in connection with the customer's anniversary sale or new store opening when the customer knows or should know that such allowances, or suitable alternatives, are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 2: Frequently the employees of sellers or third parties, such as brokers, perform in-store services for their grocery retailer customers, such as stocking of shelves, building of displays and checking or rotating inventory, etc. A customer operating a retail grocery business should not induce or receive such services when the customer knows or should know that such services (or usable and suitable alternative services) are not available on proportionally equal terms to all other customers competing with it in the distribution of the seller's product.

Example 3: Where a customer has entered into a contract, understanding, or arrangement for the purchase of advertising with a newspaper or other advertising medium, such as the Internet, that provides for a deferred rebate or other reduction in the price of the advertising, the customer should advise any seller from whom reimbursement for the advertising is claimed that the claimed rate of reimbursement is subject to a deferred rebate or other reduction in price. In the event that any rebate or adjustment in the price is received, the customer should refund to the seller the amount of any excess payment or allowance.

Example 4: A customer should not induce or receive an allowance in excess of that offered in the seller's advertising plan by billing the seller at “vendor rates” or for any other amount in excess of that authorized in the seller's promotional program.

(b) Third party liability.

Third parties, such as advertising media, may violate section 5 of the Federal Trade Commission Act through double or fictitious rates or billing. An advertising medium, such as the Internet, a newspaper, broadcast station, or printer of catalogues, that publishes a rate schedule containing fictitious rates (or rates that are not reasonably expected to be applicable to a representative number of advertisers), may violate section 5 if the customer uses such deceptive schedule or invoice for a claim for an advertising allowance, payment or credit greater than that to which it would be entitled under the seller's promotional offering. Similarly, an advertising medium that furnishes a customer with an invoice that does not reflect the customer's actual net advertising cost may violate section 5 if the customer uses the invoice to obtain larger payments than it is entitled to receive.

Example 1: A newspaper has a “national” rate and a lower “local” rate. A retailer places an advertisement with the newspaper at the local rate for a seller's product for which the retailer will seek reimbursement under the seller's cooperative advertising plan. The newspaper should not send the retailer two bills, one at the national rate and another at the local rate actually charged.

Example 2: A newspaper has several published rates. A large retailer has in the past earned the lowest rate available. The newspaper should not submit invoices to the retailer showing a high rate by agreement between them unless the invoice discloses that the retailer may receive a rebate and states the amount (or approximate amount) of the rebate, if known, and if not known, the amount of rebate the retailer could reasonably anticipate.

Example 3: A radio station has a flat rate for spot announcements, subject to volume discounts. A retailer buys enough spots to qualify for the discounts. The station should not submit an invoice to the retailer that does not show either the actual net cost or the discount rate.

Example 4: An advertising agent buys a large volume of newspaper advertising space at a low, unpublished negotiated rate. Retailers then buy the space from the agent at a rate lower than they could buy this space directly from the newspaper. The agent should not furnish the retailers invoices showing a rate higher than the retailers actually paid for the space.

§ 240.14 Meeting competition.

A seller charged with discrimination in violation of sections 2(d) and (e) may defend its actions by showing that particular payments were made or services furnished in good faith to meet equally high payments or equivalent services offered or supplied by a competing seller. This defense is available with respect to payments or services offered on an area-wide basis, to those offered to new as well as old customers, and regardless of whether the discrimination has been caused by a decrease or an increase in the payments or services offered. A seller must reasonably believe that its offers are necessary to meet a competitor's offer.

§ 240.15 Cost justification.

It is no defense to a charge of unlawful discrimination in the payment of an allowance or the furnishing of a service for a seller to show that such payment or service could be justified through savings in the cost of manufacture, sale or delivery.

NOTES

1) Why do you think the RPA prohibits discrimination between customers in price and promotional support but does not prohibit (or even apply to) discrimination among customers by a seller with respect to other forms of support and value?
2) Some customers prefer promotional assistance to price discounts while other customers never advertise or promote products and prefer to offer "everyday low prices," supported by discounts from the manufacturer. Does it make sense in this environment to calculate discrimination in price separately from discrimination in promotional allowances? Would it make more sense to compare the value of discounts and promotional allowances together in determining whether customers are being favored or discriminated against? In 2014, when the FTC conducted its most recent review of the Guides, it decided to retain the interpretation preventing discounts and promotional allowances from being counted together in determining whether or not a customer had suffered discrimination.[213] Do you agree?
3) Do you think there should be a cost justification defense for discrimination in the provision of promotional assistance?
4) Do you think there should be a requirement of proving competitive injury in cases alleging discrimination in the provision of promotional assistance? Can that view be reconciled with the statutory text?
5) Look back at the previous Section. Liability for buyer inducement seems limited by the language of Section 2(f) to discrimination in price. Is there a good reason to punish the inducement of a discrimination in price, but *not* to punish an inducement of a discrimination in promotional allowances? Should Section 5 of the FTC Act (which prohibits "unfair methods of competition," as described in Chapter XI) cover buyer inducement of non-price violations of the RPA?

I. Brokerage and Commercial Bribery: Section 2(c)

Section 2(c) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.[214]

Section 2(c) is an anomaly under the RPA, as it does not require any actual discriminatory treatment of trading partners.[215] It is not often applied in practice.

The Second Circuit has said that "[t]he sine qua non of a § 2(c) violation . . . is an improper payment, i.e., a payment of a commission, brokerage, or discount other than for services actually rendered."[216] Among other things, it operates to prevent sellers from using fake (or "dummy") brokerage arrangements to conceal what are

[213] 79 Fed. Reg. 58,245, 58,247 (Sept. 29, 2014).
[214] 15 U.S.C. § 15(c).
[215] FTC v. Washington Fish & Oyster Co., 271 F.2d 39, 44 (9th Cir. 1959) ("The gist of the violation under section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory.").
[216] Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212, 223 (2d Cir. 2004).

really discriminatory prices, by designating as a "commission" or "brokerage fee" what is really a discount.[217] It has also been interpreted by a number of courts to prohibit "commercial bribery" in which an unlawful payment is paid from buyer to seller or vice versa.[218]

Section 2(c) is subject to some requirements that apply under Section 2(a), but not others. Like Section 2(a), Section 2(c) applies only in connection with sales of commodities ("goods, wares, or merchandise"),[219] and requires that the relevant sales must be in commerce.[220]

But, unlike Section 2(a), Section 2(c) does not require harm to competition: it is effectively a *per se* rule.[221] Moreover, courts have held that because proof of a Section 2(c) violation is unrelated to discrimination or competition, it is not subject to the usual RPA defenses or defensive doctrines, including cost justification,[222] or even meeting competition.[223] Consequently, other defenses—such as those relating to introductory offers—are likely to be similarly unavailable.

In 2022, FTC Commissioner Alvaro Bedoya called for a renaissance in commercial-bribery enforcement. What do you think a plaintiff would need to prove to establish that drug rebates constituted commercial bribery under the RPA? What about other payments charged by intermediaries?

Commissioner Alvaro M. Bedoya, Regarding Policy Statement of the Federal Trade Commission on Rebates and Fees in Exchange for Excluding Lower-Cost Drug Products

June 16, 2022

[1] We live in the wealthiest country in the world. The companies who make insulin, and the middlemen who control our access to insulin, make billions off of it. And yet one in four Americans with diabetes cannot afford the insulin they need. One in four Americans ration their insulin. [. . .]

[2] In a competitive market, companies compete to lower their prices. It appears that in the insulin market, companies compete to raise them. At least that is the conclusion of a recent years-long investigation by the Senate Finance Committee led by Senator Chuck Grassley of Iowa and Senator Ron Wyden of Oregon. That study laid

---

217 Hix Corp. v. Nat'l Screen Printing Equip. Inc., 108 F. Supp. 2d 1204, 1206 (D. Kan. 2000) ("A dummy broker is a fiction, set up by the buyer, that renders no services and yet collects a 'brokerage' fee from the seller.").

218 Stephen Jay Photography, Ltd. v. Olan Mills, Inc., 903 F.2d 988, 992 (4th Cir. 1990) (assuming without deciding that Section 2(c) prohibits commercial bribery and noting judicial support for that interpretation); Env't Tectonics v. W.S. Kirkpatrick, Inc., 847 F.2d 1052, 1066 (3d Cir. 1988) ("[T]his court has concluded that as a general matter commercial bribery is actionable under 2(c), [and] it has also held that a plaintiff must show that the illegal payments in question crossed the line from buyer to seller or vice versa."); Grace v. E. J. Kozin Co., 538 F.2d 170, 173 (7th Cir. 1976) ("One of the purposes of [Section 2(c)] is to protect the integrity of the principal-agent relationship where a violation has an anti-competitive effect."); *see also* FTC v. Henry Broch & Co., 363 U.S. 166, 169 n.6 (1960) ("[T]he debates on the bill show clearly that s 2(c) was intended to proscribe other practices such as the 'bribing' of a seller's broker by the buyer.").

219 *See*, *e.g.*, Freeman v. Chicago Title & Tr. Co., 505 F.2d 527, 529–30 (7th Cir. 1974); May Dep't Store v. Graphic Process Co., 637 F.2d 1211, 1214 (9th Cir. 1980); Fiore v. Kelly Run Sanitation, Inc., 609 F. Supp. 909, 916 (W.D. Pa. 1985) (holding in a Section 2(c) cases that the RPA does not apply to issuing of permits or "licensing transactions").

220 Rotec Indus. Inc. v. Mitsubishi Corp., 348 F.3d 1116, 1121–22 (9th Cir. 2003) ("Nothing in Gulf Oil's analysis . . . was unique to section 2(a). Rather, Gulf Oil spoke of the Robinson-Patman Act in its entirety, and since Gulf Oil, we have indicated that the Act's jurisdictional provisions are co-extensive in scope. . . . We hold that the jurisdictional analysis under section 2(c) of the Robinson-Patman Act is governed by the standard announced by the Supreme Court in Gulf Oil. The reach of section 2(c) extends only to persons and activities which are themselves within the flow of commerce among the states or with foreign nations, but does not extend to all activities which affect such commerce.").

221 Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft, 716 F.2d 245, 247 (4th Cir. 1983) ("Nothing in the language of section 2(c), however, requires proof of an adverse effect on competition before a violation may be found where there is an admitted payment of a commission or other compensation to an agent of the purchaser."); Augusta News Co. v. Hudson News Co., 2000 WL 1772466, at *9 (D. Me. Nov. 29, 2000) ("Litigants proceeding pursuant to Section 2(c) are assisted by the fact that the conduct prohibited in Section 2(c) is deemed unlawful per se, whereas litigants proceeding pursuant to Section 2(a) must prove injury to competition."); Philip Morris, Inc. v. Grinnell Lithographic Co., 67 F. Supp. 2d 126, 136 (E.D.N.Y. 1999) ("[I]t is well established that certain practices are per se unlawful under the Robinson–Patman Act as inherently anticompetitive, while others are not. Commercial bribery falls within the former category.").

222 FTC v. Henry Broch & Co., 363 U.S. 166, 176 (1960).

223 FTC v. Washington Fish & Oyster Co., 271 F.2d 39, 44 (9th Cir. 1959); Ideal Plumbing Co. v. Benco, Inc., 529 F.2d 972, 977 (8th Cir. 1976).

a significant part of the blame on rebates demanded by pharmacy benefit managers, the middlemen between drug manufacturers, insurers, and your pharmacy.

[3] For those of you who are not lawyers, what the Commission is saying today boils down to this: *We will use every tool we have to investigate what's going on with drug manufacturers, pharmacy middlemen, and insulin prices.*

[4] I want to highlight one of those legal tools—the commercial bribery provisions of the Robinson-Patman Act. For decades, this law has fallen into disfavor and disuse. But for decades before that, the law was referred to as the "Magna Carta of Small Business," and while it may be flawed, it was nonetheless a cornerstone of antitrust enforcement.

[5] We have not forgotten about Robinson-Patman. While the law is best known for addressing price discrimination—charging one price to one customer and another price to a different one—an equally critical part of the Act outlaws commercial bribery.

[6] If buyers (say, an insurer and their insured customers) use an agent (say, a PBM) to negotiate on their behalf, and that agent takes payment from the seller (say, a drug manufacturer), this may create a conflict of interest. It may also be commercial bribery violating Robinson-Patman. If those words—"commercial bribery"—sound too strong, I urge you to review a complaint filed last month by the State of Arkansas. It alleges, in detail, how "PBMs have come up with numerous ingenious methods to *hide* renamed Manufacturer Payments in order to keep them for themselves."

[7] Federal courts have also recognized Robinson-Patman commercial bribery claims against PBMs and drug manufacturers. In 1998, a federal court in Delaware sustained a generic manufacturer's Robinson-Patman claims against a branded drug manufacturer for alleged kickback payments made to PBMs and others. In 2021, a federal court in New Jersey took up drug wholesaler's Robinson Patman claims against PBMs and drug manufacturers for a similar scheme involving alleged kickbacks for insulin. Although the court dismissed, without prejudice, the wholesaler's claim for lack of antitrust standing, it cited several other parties who could claim standing. This suggests that courts may be open to Robinson-Patman claims involving PBMs and drug manufacturers. The FTC may be in the best position to bring those claims.

NOTES

1) What defenses, if any, do you think should apply to a Section 2(c) claim?
2) If Congress were revising the RPA today, and had decided to keep the statute but consider changes, would you recommend eliminating, narrowing, expanding, or preserving Section 2(c)?
3) Would you favor the application of Section 2(c) to middleman payments like those that Commissioner Bedoya describes? Under what circumstances?

J. Criminal Coverage: Section 2a

Though often overlooked—and not enforced for many years—the Robinson-Patman Act includes a criminal provision. 15 U.S.C. § 13a provides criminal penalties up to one year in prison and a fine of $5,000 (which has not been raised since enacted in 1936) for price discrimination and sales at unreasonably low prices.[224] It provides in full:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of

[224] 15 U.S.C. § 13a.

> destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.
>
> Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than $5,000 or imprisoned not more than one year, or both.[225]

This section is not an "antitrust law," as those laws are defined in the Clayton Act,[226] and therefore is not subject to private enforcement.[227] It can be enforced only by the U.S. Department of Justice, which has not initiated any prosecutions under this section in decades.

The language of § 13a is somewhat obscure and imprecise. Among other things, although the term "unreasonably low prices" is not defined, the Supreme Court has held that it means "below cost prices" unless "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," and that, so understood, it is not unconstitutionally vague.[228]

NOTES

1) Can you think of any circumstances in which you would support a criminal prosecution under § 13a?
2) Why do you think "[selling at] unreasonably low prices for the purpose of destroying competition or eliminating a competitor" is included in § 13a but not in the core prohibition in § 13(a)?
3) When, if ever, do you think an antitrust agency should decline to enforce a statutory provision enacted by Congress? Does your answer turn on whether the provision is civil or criminal?
4) Could § 13a ever be fully enforced? What would that involve?

K. The Return of Federal Enforcement?

After decades of near-zero federal enforcement of the RPA, the FTC filed two complaints in the closing weeks of the Biden Administration. Is the federal government back in the business of RPA enforcement?

The first of these cases was filed in December 2024 against Southern Glazer's. The complaint charges that Southern Glazer's "is the largest coast-to-coast distributor of wine and spirits in the United States. For years, [it] has violated the Robinson-Patman Act by selling wine and spirits to small, independent 'mom and pop' businesses at prices that are drastically higher than the prices Southern charges large national and regional chains. Southern's discriminatory pricing practices have victimized independent and family-owned neighborhood grocery stores, local convenience stores, and other independent retailers across the country."[229] The complaint (which is still heavily redacted at the time of writing) alleged among other things that:

- "Southern often sets the deepest available discounts at quantity purchase levels that only a few specific large chain customers can attain and that are not justified by cost savings achieved by Southern."[230]
- "Southern often allows favored large chain retailers to combine purchases over a specified period to qualify for cumulative quantity discounts. . . . Large chain retailers were able to qualify for these cumulative volume thresholds by combining purchases across many stores or by utilizing warehouses. In contrast, small independent retailers often operate only a single store or handful of locations and generally have limited storage space."[231]
- Southern funded "scan rebates" (point-of-sale discounts, awarded at the cash register, for end-consumers)

[225] 15 U.S.C. § 13a.
[226] 15 U.S.C. § 12.
[227] Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 382 (1958) (holding no private right of action under § 13a).
[228] *See* United States v. National Dairy Products Corp., 372 U.S. 29, 33–37 (1963); Nashville Milk Co. v. Carnation Co., 355 U.S. 373 (1958).
[229] Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684 (C.D. Cal. filed Dec. 12, 2024) ¶ 1.
[230] Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684 (C.D. Cal. filed Dec. 12, 2024) ¶ 38.
[231] Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684 (C.D. Cal. filed Dec. 12, 2024) ¶ 42.

for large chain retailers that are "not made available to competing disfavored independent retailers."[232]

All three Democratic Commissioners voted to issue the complaint; both Republican Commissioners voted against it. The majority, and each of the two dissenters, issued long and substantive statements. The following short extracts give just a flavor of some of the exchange between the majority and Commissioner Holyoak regarding the relationship between the RPA and "harm to competition." Then-Commissioner (now Chair) Ferguson also dissented, indicating some willingness to support RPA cases—including because "unelected bureaucrats cannot take it upon themselves to repeal a law"[233]—but suggesting that, given scarce resources, secondary-line cases should only be brought "when there is strong evidence that the favored purchasers possess market power."[234]

In April 2025, the U.S. District Court for the Central District of California denied Southern Glazer's motion to dismiss the complaint, relying in part on the *Morton Salt* inference.[235]

Statement of Commissioner Alvaro M. Bedoya Joined by Chair Lina M. Khan and Commissioner Rebecca Kelly Slaughter In the Matter of Southern Glazer's Wine and Spirits, LLC

FTC File No. 211-0155 (Dec. 12, 2024)

[1] This complaint is important on its own merits. But it bears special significance as the first Robinson-Patman action filed by the Federal Trade Commission—or any federal agency—in nearly a quarter century. When it was passed, Robinson-Patman was seen, along with the Sherman Act of 1890 and the FTC and Clayton Acts of 1914, as the fourth pillar of antitrust law. People called it the "Magna Carta" for small business.

[2] Then, for much of the last half-century, discussions of Robinson-Patman were dominated by confident and at times florid denunciations of the law's impact on competition. Robinson-Patman is "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory," proclaimed Judge Bork in *The Antitrust Paradox*. More sober critiques, including from former chairmen and commissioners of the FTC, boil down to the argument that Robinson-Patman is an anticompetitive outlier in the antitrust laws that protects inefficient smaller retailers from the cost-cutting efficiencies of national businesses—raising prices to consumers. Against this backdrop, law enforcers let the law fall dormant.

[3] The claim that this law raises prices on consumers is stunningly untethered from any empirical research. More importantly, these arguments are so hyperbolic that they make it hard to understand why Congress passed Robinson-Patman, and why they wrote it the way they did. That history reveals that Robinson-Patman was never aimed at protecting the inefficient. Instead, the law sought to ensure that large companies did not abuse their power to exploit legal loopholes and secure "secret discounts, secret rebates, and secret advertising allowances" unavailable to their competitors. If anything, Robinson-Patman is a pro-consumer law that seeks to prevent the oligopoly prices of a market dominated by a small number of powerful retailers. [. . .]

[4] Southern Glazer's Wine and Spirits sells one out of every three liquor bottles in the United States. Southern is one of the country's ten largest privately held companies. Its power in some states appears to allow it to be a gatekeeper of liquor distribution. The complaint alleges that Southern routinely charges small, independent retailers significantly more for the same bottles of certain wine and spirits than national and regional chains in the exact same geographic area. [. . .]

[5] Commissioner Holyoak devotes 22 pages to an attack on the Supreme Court precedent in *Morton Salt* and the clear legislative intent of Congress. Commissioner Holyoak argues that Robinson-Patman is not intended to protect against harm to competitors, but instead general competition. This position is contrary to the plain reading

[232] Complaint, FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684 (C.D. Cal. filed Dec. 12, 2024) ¶ 49.

[233] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 211-0155 (Dec. 12, 2024) 23.

[234] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Southern Glazer's Wine and Spirits, LLC, FTC File No. 211-0155 (Dec. 12, 2024) 27.

[235] FTC v. Southern Glazer's Wine and Spirits, LLC, No. 8:24-cv-2684, 2025 WL 1392166, at *5–6 (C.D. Cal. Apr. 17, 2025).

of the statute, well-established case law, and the express statements of the people whom the Constitution empowers to write American law.

[6] Section 2(a)'s competitive injury element is established by showing that the effect of the discrimination may be "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 plain meaning of this clause is that it (1) targets harm that arises from discriminatory pricing that benefits a favored purchaser, and (2) prevents the injury to those who compete with that favored purchaser. [. . .]

[7] [The *Morton Salt* inference of competitive harm from discrimination among competitors {*Eds.: see supra § XIII.B.6 for a refresher*}] has been affirmed repeatedly by the Supreme Court. Even in [Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006)] . . . the Court did not question the holding, but instead set it aside . . . . The [*Volvo Trucks*] Court even included harm to competitors in its recitation of the elements of a secondary-line Robinson Patman claim. Circuit courts are also in agreement that harm to competitors is the relevant harm under the Act. [. . .]

[8] Commissioner Holyoak's dissent relies on *Brooke Group* to support her argument that Robinson-Patman does not recognize harm to competitors in secondary-line cases. This reliance is misplaced. First, the holding of the *Brooke Group* opinion on its face applies only to primary-line cases, not secondary-line cases. I am aware of no instance in which a court has applied *Brooke Group* in a secondary-line price discrimination case.

[9] Second, lower courts have consistently held that the Supreme Court's holding in that case is not applicable to secondary-line cases. Courts have done this because the statutory structure that prohibits primary-line price discrimination stands on an entirely different footing than the statutory scheme that proscribes secondary-line discrimination. . . .

[10] Thus, Robinson-Patman's purpose of protecting individual competitors, not just market competition[,] is still applicable in secondary-line cases, even though not applicable in primary-line cases after *Brooke Group*.

[11] This reasoning is made clearer when one considers the species of harm that *Brooke Group* confronted. *Brooke Group* concerned predatory pricing, conduct separately proscribed by [the] Sherman Act. Thus, a primary-line plaintiff bears the same substantive burden as under the Sherman Act, that is, the plaintiff must show that the predator stands some chance of recouping his losses.

[12] There is no such "predator" in secondary-line cases. There is no firm alleged to be pricing below its own costs or doing so in an effort to (and with a dangerous probability of) excluding its own rivals. Instead, the potential effect occurs in a market different from the one in which the seller operates. This is why the same analogy to predatory pricing cases may not be made to secondary-line price discrimination claims, and *Brooke Group* is inapplicable. [. . .]

[13] Past critics of Robinson-Patman tried to repeal the law. They failed. Having failed, they quietly struck it down through non-enforcement. Now that the law is revived, the dissenting arguments—and in particular Commissioner Holyoak's dissent—would use the courts to amend it in a way that would make it even harder to enforce. [. . .]

[14] The point of Robinson-Patman is that the same rules should apply to everyone. It is time to enforce it.

Dissenting Statement of Commissioner Melissa Holyoak In the Matter of Southern Glazer's Wine and Spirits, LLC

FTC File No. 211-0155 (Dec. 12, 2024)

[1] We begin with first principles. The goal of antitrust can be stated in one word: competition. Competition promotes rivalrous markets, facilitates the allocation of resources to their best and most highly valued use, spurs innovation, and maximizes consumer welfare. It also stimulates growth and expands economic opportunity. But effective competition depends upon the freedom of firms to choose prices that reflect the information and knowledge available to them. Indeed, price competition is the electric cord that links today's ideas with tomorrow's

economic prosperity. Of course, a firm's prerogative to set its prices does not give it license to engage in anticompetitive conduct or otherwise impede the competitive process. And yet the fact remains that vigorous competition can harm rivals while benefiting consumers. Because competition on the merits may cause harm to rivals, the antitrust agencies and courts often struggle to calibrate antitrust policy so that it promotes conduct that facilitates competition while proscribing conduct that harms it. . . .

[2] But today's Complaint presents no such difficulty—it condemns conduct that is plainly innocuous or even procompetitive. Specifically, the Complaint condemns Southern Glazer's Wine and Spirits, LLC (Southern Glazer's) for selling its product at lower prices to some retailers relative to others. Such a theory of antitrust harm is based on a patently untrue assertion that mere price differences offered to downstream buyers diminish competition in the retail sale of wine and spirits. Indeed, it manifestly defies logic to suggest that the mere presence of discounting is dispositive proof that there has been harm to competition. [. . .]

[3] That is not to say that enforcement of the Robinson-Patman Act is never warranted. As a Federal Trade Commissioner, I take seriously that *Congress* enacted the Robinson-Patman Act. And as law enforcers, the Commission must faithfully execute the law. But we must take care to enforce the law as Congress wrote it and should only bring those cases that satisfy the statutory requirements Congress has outlined. Today's Complaint is inconsistent with the statute Congress has written. As the Supreme Court has instructed, the Commission should not advance arguments that require us to construe the Robinson-Patman Act inconsistent with broader policies of the antitrust laws, especially where that inconsistent application harms consumers. [. . .]

[4] Unlike Sections 2(c)–(e), Section 2(a) of the Robinson-Patman Act is not a *per se* prohibition—that is, to prove a 2(a) violation, the government must demonstrate that the discriminatory practice may cause a substantial lessening of competition or injure, destroy, or prevent competition. But the Complaint effectively ignores these words, citing speculative harm to competitors as evidence of harm to competition. Critically, the Complaint's approach to antitrust harm—elevating the interests of competitors over competition—is at odds with the plain text of the Act. And it flies in the face of efforts by courts, scholars, and practitioners to reconcile the Robinson-Patman Act with broader antitrust law. Legal precedent, scholarship, and relevant evidence illustrate the Complaint's anachronistic and atextual approach. [. . .]

[5] To argue that harm to competitors—rather than harm to competition—satisfies the competitive effects proviso of the Robinson-Patman Act, the Complaint cites the familiar [FTC v. Morton Salt Co., 334 U.S. 37 (1948)] case. [. . .]

[6] Decided nearly eight decades ago, *Morton Salt* has been the subject of extensive debate. Its oversimplification of price differentials as competitive injury led the Commission and courts in the 1960s to focus on protecting competitors rather than competition. . . .

[7] While the Commission has not litigated a Robinson-Patman case in three decades, the Supreme Court had occasion to address the Act in two recent cases, [Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993)] and [Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006)], which each stand for the same proposition: the Robinson-Patman Act protects competition, not competitors. [. . .]

[8] [In *Brooke Group*], the Court quoted the text of Section 2(a) and explained that the statute has "important limitations," including that the Section "condemns price discrimination only to the extent that it threatens to injure competition." Emphasizing Section 2(a)'s instruction to only condemn price discrimination when it adversely affects competition, the Court observed that "Congress did not intend to outlaw price differences that result from or further the forces of competition." Indeed, "cutting prices in order to increase business often is the very essence of competition." "Thus, 'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'" [. . .]

[9] The Majority today appears to ignore *Brooke Group* and instead proceeds with a secondary-line price discrimination claim based solely on whether Southern sold products at different prices to different customers, regardless of whether such price differences may substantially lessen or injure competition. This argument appears to be based, at least in part, on the view that *Brooke Group* only applies to primary-line discrimination. This argument is wrong and has no support in either the text or legislative history of the Robinson-Patman Act.

[10] To begin with, the plain text of the Act does not ascribe a more rigorous antitrust harm requirement to primary-line relative to secondary-line injury. In fact, the Act makes no distinction between the two theories of harm at all. [. . .]

[11] The same competitive effects language applies to both types of discrimination. And because each theory of harm is qualified by the injury to competition requirement, it is textually impossible that *Brooke Group*'s competitive effects requirement can be limited to only primary-line theories of harm. [. . .]

[12] [In *Volvo*,] [o]ver a decade after Brooke Group, the Supreme Court again read the Robinson-Patman Act consistently with the broader antitrust laws. In *Volvo* . . . the Court held that because there was no evidence that . . . favored and disfavored Volvo dealers were actually competing, the comparisons and alleged price differences could not support an inference of competitive injury. The *Volvo* Court resolved the secondary-line issue in favor of protecting competition, rather than competitors.

[13] Taken together, *Brooke Group* and *Volvo* demonstrate that the Supreme Court demands more than just price differentials to satisfy competitive injury. And while *Volvo* recognized the existence of the *Morton Salt* inference—that competitive injury may be inferred from price differentials—it did not address the soundness of the inference. I am doubtful that the Court would or should uphold such an inference today. First, the judicially created *Morton Salt* inference contradicts the plain text of the Robinson-Patman Act. Section 2(a) requires both price discrimination and competitive injury:

> It shall be unlawful for any person . . . [1] to *discriminate in price* between different purchasers of [2] commodities of like grade and quality, [3] where either or any of the purchases involved in such discrimination are in commerce, . . . and [4] 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 . . . .

[14] Indeed, the *Volvo* Court recognized that discrimination and competitive injury are separate elements. But the *Morton Salt* inference—as relied on by the Majority in today's Complaint—illogically collapses the first and fourth requirements of the statute, allowing a plaintiff to satisfy requirement four (competitive injury) by only providing evidence satisfying requirement one (discrimination in price). Such a reading violates the plain text of the statute by eliminating the Act's requirement that there must be competitive injury for a violation of Section 2(a). Statutory interpretation disfavors readings (or the creation of inferences) that write out portions of the statute. [. . .]

[15] *Second*, while the Supreme Court has sought to reconcile Section 2(a) of the Robinson-Patman Act with other antitrust laws, the *Morton Salt* inference instead creates a chasm between the Robinson-Patman Act and the Sherman Act and the remainder of the Clayton Act, both of which require plaintiffs to prove competitive injury. No canon of statutory interpretation justifies an abandonment or lessening of a plaintiff's burden in antitrust matters, especially when the courts have repeatedly placed the burden upon plaintiffs, except in narrow circumstances where *per se* illegality has been adopted.

[16] *Third*, the Majority cannot argue that the inference is permissible because there is an opportunity for rebuttal. Had the Robinson-Patman Act envisioned an inference-[rebuttal[236]] framework, it would have included the rebuttal in 2(b). For example, the Act deliberately and expressly provides an opportunity for "rebutting the prima facie" case in Section 2(b), where a defendant can show that price differences were "made in good faith to meet an equally low price of a competitor." Notably, neither Section 2(b) nor the rest of the statute specifies any other method of rebuttal. If Congress had intended to create an inference and rebuttal framework, it could have done so.

[17] And *finally*, the basis on which the *Morton Salt* inference was founded is a house of cards. As the Commission's subsequent expert analysis revealed, the price differentials in *Morton Salt* did not cause competitive injury. In antitrust law, the courts have applied presumptions and burden-shifting frameworks based upon economic learning and the courts' experience analyzing similar conduct or restraints. In this context, neither economic

[236] {*Eds.: "inference-rebuttable" in the original.*}

learning nor judicial experience has revealed that price discrimination causes consistent anticompetitive effects that justify any such inference or presumption. [. . .]

[18] In short, the case law and the text of the Robinson-Patman Act require a showing of harm to competition and consumers. I have seen no evidence demonstrating that Southern Glazer's pricing practices reduce output, raise prices, or otherwise harm consumers or competition generally, much less in any relevant market, consistent with what is required to demonstrate competitive injury. . . . Without evidence of harm to competition, the Commission should not proceed with the Complaint. [. . .]

[19] [T]he appropriate focus for today's Complaint is whether favored retailers are overbuying inputs as an exclusionary strategy to raise disfavored retailers' input costs and accordingly gain market power in the wine and spirits market. Such conduct is referred to as Raising Rivals' Costs overbuying (RRC).

[20] The RRC framework addresses the situation where a firm's vertical conduct causes an increase in the costs of one or more rivals. . . . The RRC framework can be used to evaluate whether a favored retailer's receipt of the discounts raised a disfavored retailer's costs and ultimately "injures, destroys, or prevents" the ability of the disfavored retailer to compete. If the favored retailer's receipt of the discounts does raise a disfavored retailer's costs, it will likely enable the favored retailer to exercise greater market power in the wine and spirits market—or even potentially monopolize that market—to the detriment of the disfavored retailer and consumers. . . .

[21] . . . [A]n RRC theory in this case would need to address whether there exists a coherent economic theory under which favored retailers, Southern Glazer's, and wine and spirits suppliers all individually have an incentive to participate in a set of pricing and discounting practices that would, ultimately, enable a set of favored retailers to charge supracompetitive prices. [. . .]

[22] Commissioner Philip Elman once observed that if "the Robinson-Patman Act as administered serves mainly as an obstacle to effective competition, it is surely a matter of concern." Today's Complaint reinvigorates an interpretation of the Robinson-Patman Act that should cause great concern. To make matters worse, the Complaint presents competition as an exercise in equality of outcome, attempting to preserve the interests of competitors at the expense of the American people. But "social security is not the province of this Commission. The only way to have competition is to compete."

* * *

The second of the modern FTC RPA cases was filed in January 2025 against Pepsi. The FTC's complaint alleged that Pepsi favored a single customer—not named in the complaint but widely reported to be Walmart[237]—by furnishing it with "promotional payments, allowances, and services while failing to make similar benefits available to competitors on proportionally equal terms."[238]

Again, the vote to authorize the complaint was 3-2 along party lines. The heavily redacted majority statement announced that, following in the wake of the *Southern Glazer's* complaint, in filing the *Pepsi* lawsuit "the Commission resurrects two more provisions of the Act, faithfully enforcing the law that helps level the playing field for all retailers."[239] The majority indicated that the time was ripe to file a complaint, stating that the investigation had already been in progress for "nearly two and a half years," and that "directing staff to continue to spin their wheels in terabytes of Pepsi data looking for further confirmation of the patently illegal scheme alleged in the complaint would be an abdication of our duty."[240] The statement specifically indicated that "[t]he alleged facts also establish reason to believe that Pepsi's conduct is harming competition and driving up prices."[241]

---

[237] *See*, *e.g.*, Alina Selukh, *Pepsi accused of illegal pricing deals with "a large, big box retailer" in U.S. lawsuit*, NPR (Jan. 17, 2025); Leah Nylen & Josh Sisco, *PepsiCo Sued by FTC Over Pricing Bias in Sales to Retailers (2)*, Bloomberg News (Jan. 17, 2025).

[238] Complaint, FTC v. Pepsico, Inc., Case 1:25-cv-664 (S.D.N.Y. filed Jan. 17, 2025).

[239] Statement of Chair Lina M. Khan and Commissioner Alvaro M. Bedoya, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (Jan. 17, 2025) 1.

[240] Statement of Chair Lina M. Khan and Commissioner Alvaro M. Bedoya, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (Jan. 17, 2025) 4–5.

[241] Statement of Chair Lina M. Khan and Commissioner Alvaro M. Bedoya, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (Jan. 17, 2025) 1.

Commissioner Holyoak dissented, calling the complaint "the worst case I have seen in my time at the Commission," and criticizing the majority for "rush[ing] the case out the door before it had evidence to support the allegations. I am astounded that the [m]ajority has such little regard for our staff that it is willing to send them to court like a lamb to the slaughter."[242] And then-Commissioner (now Chair) Ferguson was similarly critical: "This case is . . . about partisan politics, pure and simple. It is the single most brazen assertion of raw political power I have witnessed during my time as a Commissioner."[243] The prospect that litigation discovery might turn up supportive evidence was not enough, he argued: "We hold our resources in trust for the American taxpayer. That trust does not permit us to file politically motivated lawsuits and hope we uncover evidence justifying those suits years later."[244]

In May 2025, the FTC—under Republican leadership following the 2024 Presidential election—withdrew the complaint. In the accompanying press release, Chair Andrew Ferguson called the case "a nakedly political effort to commit [the second Trump] administration to pursuing little more than a hunch that Pepsi had violated the law."[245]

NOTES

1) What factors do you think led to the filing of the two recent RPA cases? Do you expect more in the next year or two?
2) What factors should guide antitrust enforcers in figuring out *whether* a complaint should be filed? Should an enforcer consider the wisdom of Congress in creating the underlying law? The impact on particular constituencies (such as consumers, small businesses, vulnerable populations, or other groups)? What factors do you think are (a) permissible, (b) mandatory, and (c) optional for an enforcer to consider?
3) What factors should guide antitrust enforcers in figuring out *when* a complaint should be filed? If you were an FTC Commissioner, how would you determine whether the staff had done enough investigatory work? Would the responsiveness of the target, or other market participants, affect your view?
4) What disagreements are visible in the dueling extracts from the *Southern Glazer's* statements? Whose position do you find more appealing?
5) Does Commissioner Holyoak's approach suggest an effort to reconcile the RPA with the rest of antitrust jurisprudence? What are the merits and demerits of such an effort?
6) Do you think the Supreme Court would affirm, eliminate, or modify the *Morton Salt* inference today?
7) The two RPA complaints were filed just before the transition from the Biden Administration to the second Trump Administration. How should an incoming Administration think about complaints filed by a previous Administration? Should there be a presumption of continuity (and if so, how strong should it be?), or should the new officials form a completely fresh view about the desirability of the pending enforcement actions, and modify or withdraw them as appropriate? What are the benefits and costs of each approach?

[242] Dissenting Statement of Commissioner Melissa Holyoak, In the Matter of PepsiCo, Inc., FTC File No. 2210158 (Jan. 17, 2025) 1.
[243] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (Jan. 17, 2025) 1.
[244] Dissenting Statement of Commissioner Andrew N. Ferguson, In the Matter of Non-Alcoholic Beverages Price Discrimination Investigation, FTC File No. 2210158 (Jan. 17, 2025) 5.
[245] FTC, Press Release, *FTC Dismisses Lawsuit Against PepsiCo* (May 22, 2025).