DELIVERING STRATEGIC SOLUTIONS ACCA'S 2000 ANNUAL MEETING

Recent Developments

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§ 1:1 Price fixing

Price fixing between competitors, along with minimum vertical price fixing between a seller and its dealers, are considered the classic instances of *per se* illegal conduct under Section 1 of the Sherman Act. What is not so clear is how to identify concerted action that will rise to the level of actual price fixing, and what must be shown to establish causal injury even assuming that a pricing violation has been established. Decisions during the past year grappled with these and other significant issues involving claims of illegal price fixing.

Price fixing, like other claims brought under Sherman Act § 1, requires proof of concerted behavior. A noteworthy examination of the issue is seen in a recent case out of the Third Circuit, *In re Baby Food Antitrust Litigation.* The case holds that evidence of parallel prices, sporadic exchanges of price information between lower-level employees, and suggestive hyperbole in internal company documents was insufficient to raise a triable jury issue of illegal price fixing, where the evidence was equally consistent with the defendants' explanation that they were simply following the industry price leader in an oligopolistic market.

The plaintiffs included a class of wholesalers, supermarkets, and other direct purchasers of baby food products from the defendants. They claimed that over a period of nearly twenty years, the defendants had conspired to fix and raise wholesale prices for baby food sold in the United States. Collectively, the three defendants controlled over 98 percent of all baby food manufactured and sold in the country, making the industry a highly concentrated oligopoly. Of the three, Gerber was the industry leader, with a market share of roughly 70 percent and a premium brand image that generally commanded higher prices. Heinz was the value brand, with prices that tended generally to track Gerber prices but at a lower level. Beech-Nut vacillated during the period of the alleged conspiracy, starting out as a lower-priced value brand like Heinz but later switching to a premium image and price strategy like that of Gerber's. All defendants employed a common practice of setting published wholesale prices as a discount off suggested list price. However, because of a variety of discounts, rebates, and other reductions, actual transaction prices varied substantially between different customers. In addition, while Gerber tended to be the industry leader, on many occasions it would raise its price only to have the others lower theirs, and vice versa.

The plaintiffs presented an array of circumstantial evidence of alleged price fixing against this industry back-drop. In addition to evidence of parallel price movements, there was evidence of price information exchanges between lower-level employees, suggestive statements in internal company documents (e.g., that an industry "truce" existed), common attendance at industry trade shows and other meetings, and references to price leadership and following behavior in internal company memoranda. At the conclusion of discovery, the defendants moved for summary judgment, which the

and following behavior in internal company memoranda. At the conclusion of discovery, the defendants moved for summary judgment, which the district court granted.

As a preliminary matter, the Third Circuit noted that the nature of a plaintiffs proof of conspiracy can affect the choice of the governing legal standard. While "[g]enerally, price-fixing agreements are considered a *per se* violation of the Sherman Act," the per se rule does not hold "when the evidence consists of mere exchanges of information." Unlike hardcore price fixing,

Exchanges of information are not considered a *per se* violation because "such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." Gypsum [United States v. United States Gypsum Co., 438 U.S 422 (1978)], at 441 n. 16. Therefore, such exchanges of information are evaluated under a rule of reason analysis.

As for what goes into such an analysis, the court added:

This court has previously articulated what Section 1 rule of reason analysis entails. We laid down four steps of proof that a plaintiff must present: (1) that the defendants contracted, combined or conspired among each other; (2) that the combination or conspiracy produced adverse anti-competitive effects within the relevant product and geographic markets; (3) that the objects of and conduct pursuant to the contract or conspiracy were illegal; and (4) that the plaintiffs were injured as a proximate result of that conspiracy. [Citation omitted.] Under the rule of reason, all the evidence presented must be weighed to determine whether the defendants' purported price fixing practices violated the Sherman Act.

The plaintiffs argued that price information discussions between some of the defendants' employees constituted "direct" evidence of price fixing that brought them within the *per se* rule and took them beyond merely "circumstantial" proof The Third Circuit responded: "Direct evidence . . . must be evidence that is explicit and requires no inference to establish the proposition or conclusion being asserted. As we noted recently in *Rossi*, with direct evidence 'the fact finder is not required to make inferences to establish facts' 156 .3d at 466." Since the employee discussions "evinc[ed] only an exchange of information among the defendants" and did not prove price fixing without "drawing on inferences," the court concluded that at most, they were circumstantial proof of price fixing.

This only began the court's analysis, because as it next explained: "In the absence of direct evidence, the plaintiffs may nevertheless support their claim with circumstantial evidence of conscious parallelism" coupled with adequate "plus factors" evidence. More must be shown, however, than just the fact of parallel pricing. "In an oligopolistic market, meaning a market where there are few sellers, interdependent parallelism can be a necessary fact of life but be the result of independent pricing decisions." Accordingly, courts "require that evidence of a defendant's parallel pricing be supplemented with 'plus factors." The court offered the following general guidance on what this means:

The simple term "plus factors" refers to "the additional facts or factors required to be proved as a prerequisite to finding that parallel action amounts to a conspiracy." Areeda, *Antitrust Law* § 1433(e). They are necessary conditions for the conspiracy inference. [Citation omitted]; Areeda, § 1434. They show that the allegedly wrongful conduct of the defendants was conscious and not the result of independent business decisions of the competitors. The plus factors may include, and often do, evidence demonstrating that the defendants: (1) acted contrary to their economic interests; and (2) were motivated to enter into a price fixing conspiracy. *See Petruzzi's*, 998 F.2d at 1242.

Emphasizing that "no conspiracy should be inferred from ambiguous evidence or from mere parallelism when defendants' conduct can be explained by independent business reasons," the court cautioned that circumstantial proof is at most a rebuttable presumption:

Once the plaintiffs have presented evidence of the defendants' consciously parallel pricing and supplemented this evidence with plus factors, a rebuttable presumption of conspiracy arises. *Todorov*, 921 F.2d at 1456 n. 30. [T]he mere presence of one or more of these 'plus factors' does not necessarily mandate the conclusion that there was an illegal conspiracy between the parties, for the court may still conclude, based upon the evidence before it, that the defendants acted independently of one another, and not in violation of antitrust laws." *Balaklaw v. Lovell,* 822 F.Supp. 892 (N.D.N.Y. 1993); *Todorov*, 921 F.2d at 1456 n. 30.

The court went on to outline special proof requirements that arise when the issue of conspiracy arises in the context of an antitrust claim:

The extent of what constitutes a reasonable inference in the context of an antitrust case . . . is somewhat different from cases in other branches of the law in that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita,* 475 U.S. at 588. The acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences. *Petruzzi's*, 998 F.2d at 1232. Therefore, the Supreme Court has held in the antitrust context "that conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita,* 475 U.S. at 588 (citing *Monsanto,* 465 U.S. at 764**).** Thus, to withstand a motion for summary judgment 64a plaintiff seeking damages for a violation of § 1 must present evidence that tends to exclude the possibility that the alleged competitors acted independently." *Id.* The reason, of course, is that mistaken inferences in such a context "are especially costly because they chill the very conduct the antitrust laws are designed to protect." *Matsushita,* 475 U.S. at 594.

Having outlined general concepts, the court applied them to the record and concluded that the circumstantial evidence on which the plaintiffs had built their case was equally consistent with the defendants' oligopolistic market explanation. The price information exchanges were found to be limited to sporadic discussions between lower-level employees, none of whom were involved in actual pricing decisions:

Evidence of sporadic exchanges of shop talk among field sales representatives who lack pricing authority is insufficient to survive summary judgment. . . . Furthermore, to survive summary judgment, there must be evidence that the exchanges of information had an impact on pricing decisions.

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The plaintiffs tried to prove the requisite "impact on pricing decisions" with expert testimony that industry prices were purportedly 6.1 percent higher than where they should have been absent the information exchanges. According to the plaintiffs, this brought them within *United States v. Container Corp. of America*. The court distinguished that case as involving a far different set of facts:

In *Container Corp.,* the plaintiffs presented direct evidence of an agreement among the defendants to exchange pricing information, as well as evidence that once a defendant had the competitors' pricing information, in a "majority of instances," the defendant quoted the same price as his competitor. This compared to evidence of periods where there were no pricing exchanges and "exceptionally sharp and vigorous price reductions resulted." See *393* U.S. at *340* (Fortas, J., concurring). Conversely, in *Gypsum* [United States *v.* United States Gypsum Co., 438 U.S. 422 (1978)], the Court could not have been more clear: "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." 438 U.S. at 443 n. 16.

Gypsum, rather than *Container,* was held additionally to govern an assortment of internal company memoranda in which the defendants tried to anticipate future pricing behavior of their competitors and to conduct surveillance of what their competitors were doing. "In a highly competitive industry, as is the baby food industry, intensely dependent on marketing strategy, it makes common sense to obtain as much information as possible of the pricing policies and marketing strategy of one's competitors."

Also held insufficient to get to a jury was evidence that Heinz had refrained from entering the Chicago and Miami markets following a "trade war," and that a Heinz employee had referred to this decision as reflecting an industry "truce." The statement was viewed as mere "hyperbole" equally consistent with independent business behavior. "[T]he explanation for the use of the term by an employee without price-fixing authority is more plausibly explained as an exercise of independent business judgment by Heinz not to enter a new market." Similarly, expert evidence of a supposedly high degree of parallel pricing was viewed as uninformative, where the expert had based his conclusion on comparisons of the defendants' list prices and on trend lines of *average* industry transaction prices, rather than on actual transaction prices. Regarding the former, the court ruled:

In an industry with hundreds of products and a pervasive policy of allowing discounts and promotional allowances to purchasers, . . ., charts and reports focusing on *list prices* rather than *transactional prices* have little value. "Especially in an oligopoly setting, in which price competition is most likely to take place through less observable and less regular means than list prices, it would be unreasonable to draw conclusions about the existence of tacit coordination or supracompetitive pricing from data that reflect only list prices." *Brooke Group, 509 U.S.* at 236.

The expert's use of average transactional prices was likewise rejected as unreliable:

We do not believe that trend lines of *average prices* are a reliable indicator of transactional prices. Moreover, a trend line showing an increase in transaction prices for baby foods during *a* period *of* the economy when general food prices were increasing is readily understandable and charts depicting it are not helpful as evidence of parallelism.

Undoubtedly influencing the court throughout its analysis was the weak state of the plaintiffs transactional price evidence. The record showed that allowances and discounts off industry list prices were so pervasive that far from moving in lock-step, the defendants made similar pricing decisions only about 16 percent of the time and, in fact, priced differently 84 percent of the time. The Third Circuit saw these statistics as completely undermining the plaintiffs' use of allegedly parallel list prices. However, the court repeated that showing merely the fact of parallel pricing would not be enough, even at the transactional price level:

Because Gerber controlled *70* percent of the market in baby foods and was the acknowledged leader in this industry, Gerber's pricing understandably may have had an influence on its competitors' pricing. Conscious parallelism, however, *will* not be inferred merely because the evidence tends to show that a defendant may have followed a competitor's price increase. See, e.g., *Theatre Enterprises v. Paramount Film Dist. Corp.*, 346 U.S. 537, 541 (1954); *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.,* 851 F.2d 478, 484 (1st Cir. 1988).

Having disposed of the plaintiffs' documentary and expert evidence, the court summarily disposed of other purported "plus factors" on which the plaintiffs had relied. The defendants' attendance at trade shows and other industry meetings showed at most an "opportunity" to conspire, without in itself proving that conspiratorial action had actually taken place. Similarly, expert testimony that the defendants had the "motive to conspire" was rejected as proving too much, because "if, as the plaintiffs contend, the defendants had a motive to achieve higher prices, 'then every company in every industry would have such a 'motive.'" Finally, expert testimony of purportedly "excess" profits was rejected with the observation that "[i]n free capitalistic society, profit is always a motivating factor in the conduct of a business. Profit is a legitimate motive in pricing decisions, and something more is required before a court can conclude that competitors conspired to fix pricing in violation of the Sherman Act." Summary judgment for all defendants was thus affirmed.

Another case out of the Third Circuit (this one unpublished) illustrates the requirement that plaintiffs who establish antitrust liability must still prove that the defendant's anti-competitive acts "caused" the plaintiffs claimed injury. The case, *Juliano v. Sun Co.,* holds that a retail gasoline station failed to raise a triable jury issue that alleged acts of vertical price fixing by its supplier were the cause of its claimed injury, where the plaintiff had not separated out admitted losses caused by another business run out of the same premises. By aggregating its losses from both businesses, the plaintiff made it impossible to determine what, if any, causal relationship existed between the claimed acts of price fixing and the claimed injury to the plaintiffs retail gasoline business.

The plaintiff operated a franchised "Sunoco" gasoline station in Pennsylvania until it went out of business. According to the plaintiffs complaint, the

The plaintiff operated a franchised "Sunoco" gasoline station in Pennsylvania until it went out of business. According to the plaintiffs complaint, the cause of its failure was a vertical price fixing scheme that the defendant had imposed on its franchisees. The case arose prior to the Supreme Court's ruling in *State Oil Co. v. Khan* that vertical maximum price fixing (unlike vertical minimum price fixing) is not per se illegal. The district court had applied the old rule of *per se* illegality to the challenged price restraints but had gone on to grant summary judgment to the defendant anyway. In affirming, the Third Circuit viewed the issue as one of standing:

As we have recently noted, "the causal connection between the purportedly unlawful conduct and the injury" is an integral part of determining whether a plaintiff has established antitrust injury, and thus, standing. [Citation omitted.]

The plaintiffs' proof of causal injury consisted of deposition testimony by their owners attributing the business failure to the price fixing, together with limited price and profit data for only two days out of the allegedly four-year period for which they claimed injury. Absent was any evidence as to whether a different, non-gasoline business the plaintiffs ran out of the same location might have been the true cause of their failure. Concluded the court: "One could only speculate as to a possible causal relationship between Sun's pricing strategy and the failure of plaintiffs' business."

The Tenth Circuit had occasion to address summaryjudgment issues of conspiracy in *Mitchael v. Intracorp,Inc.* The case holds that a group of chiropractors failed to raise a triable jury issue that various insurance companies had conspired to fix prices and service protocols for chiropractic treatment of automobile accident victims. The court concluded that the plaintiffs' proof was equally consistent with lawful parallel behavior. Also noteworthy is the court's rejection of a novel argument that under the *Copperweld* doctrine, an affiliate of an insurance company should be treated as though it were itself an insurance company, making the alleged conspiracy "horizontal" in character.

The plaintiffs were a group of chiropractors who had sued several insurance companies and the non-carrier subsidiary (Intracorp) of an insurance company not named as a defendant. Intracorp provided a review service for insurance companies in which it evaluated the reasonableness of fees submitted by chiropractors for insured auto injuries. Intracorp procedure was to generally reject claims above 80 percent of the relevant regional average cost for similar services published in an industry publication called "Fee Facts." However, its recommendations were not binding, and insurance companies were free to reject them and did so on at least some occasions. At the close of extensive discovery, the district court had granted summary judgment to all defendants for failing to raise a genuine fact issue of illegal conspiracy.

In affirming, the Tenth Circuit first addressed a novel attempt by the plaintiffs to turn language taken from the Supreme Court's holding in *Copperweld Corp. v. Independence Tube Corp.* to their advantage. In *Copperweld,* the Court held that a Sherman Act § 1 claim could not be based solely on concerted action between a parent corporation and its wholly-owned subsidiary. The Court reasoned that like a single business and its unincorporated divisions, a corporate parent and its controlled subsidiary comprise a "single enterprise" that is legally incapable of conspiring with itself. The plaintiffs argued in *Mitchael* that this meant Intracorp should be viewed as standing in the shoes of its insurance company parent, making the other defendants' use of Intracorp a "horizontal" conspiracy between insurance companies. The court rejected the plaintiffs' strained logic, holding instead:

Like the district court, echoing the sentiments of another district court, we decline to be the first court to interpret *Copperweld* dicta in the expansive way plaintiffs wish. [Citation omitted.] In the absence of any specific evidence of concerted activity, we will not consider Intracorp as an insurance company on the same horizontal level as the Insurers merely because it happens to be the wholly owned subsidiary of a company, CIGNA, which owns other subsidiaries which are insurance companies.

The manner in which the court phrased its ruling is intriguing, for it apparently might have come to a different conclusion had there been "specific evidence" of "coordinated activity" between Intracorp and its affiliates.

In any event, the court next turned to the real issue before it: whether plaintiffs had presented sufficient conspiracy proof to get to a jury. The plaintiffs argued that the agreements between Intracorp and each insurance company to use its services were enough to clear that hurdle. The court disagreed:

We reject this argument. Absent some indication that these agreements have facilitated a conspiracy among the Insurers to restrain trade, we do not conclude that, standing alone, these individual agreements for Intracorp to review the reasonableness of fees charged are unlawful under § 1. See *Quality Auto Body, Inc. v. Allstate Ins. Co., 660* F.2d 1195, 1203 (7th Cir. 1981) (holding that agreements between insurance companies and auto repair shops to perform repairs at prevailing competitive rate did not alone violate antitrust laws).

The plaintiffs pointed to other circumstantial evidence (parallel behavior, meetings, opportunity, etc.) and argued that this, in combination with common use of Intracorp to process claims, established a triable jury issue of conspiracy. The court responded by first outlining its understanding of relevant Supreme Court precedent:

Circumstantial evidence may support the existence of an illegal § 1 agreement. [Citation omitted.] However, on summary judgment, antitrust law "limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 587-88 (1986). "To survive a motion for summary judgment . . . a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently." Id. at 588 (quoting *Monsanto Co. v. Spray-Rite Serv. Corp.,* 465 U.S. 752, 764 (1984); [citation omitted]. Thus, "[t]he acceptable inferences which we can draw from circumstantial evidence vary with the plausibility of the plaintiffs' theory and the danger associated with such inferences." *In re Baby Food Antitrust Litig.,* 166 F.3d 112, 124 (3d Cir. 1999). As we have observed, "ambiguous conduct that is as consistent with permissible competition as with illegal conspiracy does not by itself support an inference of antitrust conspiracy under Sherman Act section 1." *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal and Prof'l Publications, Inc.,* 63 F.3d 1540, 1556 (10th Cir. 1995).

Evidence of parallel behavior in rejecting claims in similar fact circumstances came within the rule that "[w]hile consciously parallel behavior may

Evidence of parallel behavior in rejecting claims in similar fact circumstances came within the rule that "[w]hile consciously parallel behavior may contribute to a finding of antitrust conspiracy, it is insufficient, standing alone, to prove conspiracy." Also held insufficient was evidence of telephone and other discussions between employees regarding their respective company procedures for reviewing and handling fee claims. Since there was no evidence that the discussions were of specific prices or price levels, the court found them to fall within the following rule:

Mere exchanges of information, even regarding price, are not necessarily illegal, in the absence of additional evidence that an agreement to engage in unlawful conduct resulted from, or was a part of, the information exchange. See *In re Baby Food Antitrust Litig.,* 166 F.3d 112, 118 (3d Cir. 1999); *United States v. Suntar Roofing, Inc.,* 897 F.2d 469, 475 (10th Cir. 1990).

Also of no help to the plaintiffs was Intracorp's admitted use of "Fee Facts" when making its recommendations. According to the plaintiffs, a conspiracy could be inferred from the defendants' awareness that Intracorp rejected fees if in excess of 80 percent of the published average for a region. The court countered:

While perhaps sounding initially appealing, the evidence shows this agreement would make little economic sense from the Insurer's perspective. Indeed, it would as likely result in *increased* costs for the Insurers, as chiropractors charging less than the 80 percent fee would be inclined to raise their fees to that level, if that is what all the Insurers were willing to pay, and plaintiffs' evidence in fact suggest just that.

Finally, the court pointed to the absence of any record evidence on such fundamental issues as how often claims were actually selected for review, how often Intracorp (as opposed to other available services) was actually used, and what percentage of the market for chiropractic services was allegedly affected by the claimed conspiracy. The failure to put the claimed conspiracy into at least some "economic" context was held to further weaken the plaintiffs' conspiracy theory and to render it "entirely speculative," leading the court to conclude, "[u]nder *Matsushita,* plaintiffs have simply failed to present evidence tending to exclude the possibility that the defendants acted independently out of a legitimate and reasonable concern to control chiropractic costs."

A case out of the Eleventh Circuit also addressed the issue of what circumstantial evidence will get a plaintiff past summary judgment on a claim of illegal price fixing. The case, *City of Tuscaloosa v. Hacros Chemicals, Inc.,* reversed summary judgment for some of the defendants while affirming summary judgment as to others. Key to the plaintiffs' success in keeping their case at least partially alive was the presentation of expert evidence that the "odds" the defendants could have priced as they did year-after-year without seeing at least some fluctuation in market shares were so remote as to be "miniscule."

The plaintiffs were Alabama municipalities that brought suit under the Sherman Act claiming that five chemical companies had conspired to fix prices for repackaged chlorine sold for use in municipal water treatment plants, pools, and other public facilities. According to the complaint, the defendants had secretly agreed in advance on sealed bids submitted to the municipalities when competing for municipal supply contracts. The district court had granted summary judgment to the defendants on the ground that the plaintiffs failed to present sufficient evidence of a conspiracy to get to a jury.

The Eleventh Circuit affirmed as to some defendants and reversed as to others. Summary judgment was affirmed as to two defendants whose sales in Alabama were virtually zero. The plaintiffs theorized that the lack of market share did not mean the two had not conspired, but simply that they got extra contract allotments in other states. However, this was not backed up with any actual evidence, leading the court to rule:

The appellants' case against Van Waters and PB & S thus amounts to an allegation that those two defendants took part in a conspiracy that earned them zero market share and zero dollars. There is no direct evidence against these two, and the circumstantial evidence, including the plaintiffs' expert testimony, does not support the conclusion that Van Waters and PB & S participated in a conspiracy that excluded them from the market. No trier of fact could find against Van Waters and PB & S on such a basis.

Summary judgment was reversed as to the next defendant, whose former chairman and CEO had openly admitted to third parties that his company had taken part in industry-wide price fixing. His testimony was held to have been improperly excluded as unreliable "hearsay" and instead, found to be "powerful direct proof' that his former company had conspired with someone.

This brought the court to the two remaining defendants, Industrial and Harcros. No similar "direct" evidence linked them to the claimed conspiracy, and the district court had found the plaintiffs' circumstantial proof to be too weak to counter the defendants' "oligopoly market" explanation for their behavior. As a threshold matter, the Eleventh Circuit agreed that conscious parallelism in an oligopolistic market can produce the superficial appearance of concerted price fixing:

[C]onscious parallelism is the practice of interdependent pricing in an oligopolistic market by competitor firms that realize that attempts to cut prices usually reduce revenue without increasing any firm's market share, but that simple price leadership in such a market can readily increase all competitors' revenues.

Rejecting "conscious parallelism" as in itself sufficient to infer a conspiracy, the court outlined what the plaintiffs would additionally have to show:

In sum, the plaintiffs first must produce evidence showing that the defendants engaged in consciously parallel action. Second, the plaintiffs must show "plus factors" that tend to exclude the possibility that the defendants merely were engaged in lawful conscious parallelism. One prominent "plus factor," to which antitrust plaintiffs often take recourse, is a showing that the defendants' behavior would not be reasonable or explicable (i.e., not in their legitimate economic self-interest) if they were not conspiring to fix prices or otherwise restrain trade-that is, that the defendants would not have acted as they did had they not been conspiring in restraint of trade.

The plaintiffs tried to meet this burden by pointing to supposedly incriminating statements taken from documents involving the two defendants.

The plaintiffs tried to meet this burden by pointing to supposedly incriminating statements taken from documents involving the two defendants. However, the statements had innocent as well as potentially incriminating interpretations, leading the court to conclude that the statement evidence was "in equipoise," and hence, not enough to get to a jury. Nevertheless, sufficient proof was found by combining the price and documentary evidence with expert testimony that the defendants could not have retained the steady profit and share levels ("incumbency rates") that they did over the years without conspiring. The court agreed with plaintiffs that based on this evidence, the matter should go to a jury. Summarized the court:

Oligopolists behaving in a legal, consciously parallel fashion could achieve high and rising prices, even as costs remained stable, by engaging in price leadership. See VI Areeda, *Antitrust Law* ¶ 1429, at 176. The odds that they could achieve a price and profit increase *and* maintain incredibly high incumbency rates – that is, maintain the very same distribution of municipal contracts year after year – are miniscule, however, unless the oligopolists were communicating with one another. In sum, this combination of high profits and high incumbency would not be likely to occur if the defendants either were vigorously competing with each other or were engaging in competitive price leadership. It would be permissible for a jury to find, therefore, that the defendants were not in fact competing for contracts but were concertedly protecting each others' incumbencies and pushing up prices.

Another case out of the Eleventh Circuit, *Lowell v. American Cyanamid Co*., addressed whether the "indirect purchaser" rule of *Illinois Brick* barred a vertical price fixing claim in which there was no allegation that intermediate resellers had "passed-on" any overcharge to them, and in which the direct-buying middlemen were not joined as parties. The court found that the doctrine was not a bar, and that the plaintiffs' complaint had been improperly dismissed.

The plaintiffs were a class of farmers who claimed that the defendant had fixed the minimum resale prices of independent dealers through a system of rebate contracts with the dealers. Under the contracts, dealers received a rebate on each sale of designated crop-protection products, but only if they sold at or above the defendant's recommended dealer list price. The list price was set at the wholesale price paid by the dealer to the defendant, so that the practical effect was to force dealers to adhere to suggested list if they wanted any profit on the sale. The district court had dismissed the suit on the ground that the plaintiffs were indirect purchasers without standing under *Illinois Brick Co. v. Illinois* and that the manufacturer could not be sued without joining the dealers as necessary parties.

The Eleventh Circuit reversed. Noting that *Illinois Brick* was 44 an extension of the Court's earlier prohibition against the *defensive* use of passing on" arguments in *Hanover Shoe, Inc. v. United Shoe Machinery,* the court held that "two rationales" underlay the Supreme Court's decision to apply the logic of *Hanover Shoe* to indirect-buying plaintiffs. The first was a concern that allowing offensive but not defensive use of pass-on arguments "would create a serious risk of multiple liability for defendants." The second was a concern with the administrative "uncertainties and difficulties" of adjudicating complex pass-on issues.

The Eleventh Circuit noted: "Neither of [these] rationales applies to the very different case of vertical conspiracy with no allegations of passing on." No problems of double recovery were present, "because only one illegal act (the vertical conspiracy) is present and likely only one set of potential plaintiffs (the farmers) exists." Similarly, the administrative complexities of a true indirect-purchaser situation were absent, because the claimed "overcharge" went directly from the affected dealers to the plaintiffs, thus avoiding the problems of "tracing the pass-on through many steps in the production process and determining how much was absorbed, how much was passed on, and by whom." Finally, the potential legal complications of interpleader implicit in *Illinois Brick* were held inapplicable:

[H]ere we have no such legal complexities. In all likelihood, the full extent of this litigation will be a class-action suit by Plaintiffs against American Cyanamid. That is it. Plaintiffs do not want to join the dealers, and American Cyanamid will have no incentive to bring the dealers in because it cannot seek contribution. [Citation omitted.] Also, suits, if any, by the dealers against American Cyanamid (which seem unlikely) could be handled separately as "the damage criteria are quite distinct and not overlapping for the dealer and the consumer." 7 Phillip E. Areeda, *Antitrust Law 183* (1986).

Concluded the court: "Illinois *Brick* does not apply to a single vertical conspiracy where the plaintiff has purchased directly from a conspiring party in the chain of distribution."

§ 1:2 Horizontal nonprice restraints

Territorial, customer, and other nonprice restraints on competition between horizontally-situated competitors are a category of offense long held to be per se illegal under Section 1 of the Sherman Act. Few cases involving these types of restraints reached the appellate court level during the past year-no doubt reflecting the fact that if the facts are there, these cases typically get settled. Still, the few that did appear addressed such issues as distinguishing potentially per se illegal interbrand restraints from vertical intrabrand situations subject to the more permissive rule of reason, and distinguishing lawful restraints ancillary to intellectual property licenses from illegal horizontal market allocations.

The distinction between interbrand and intrabrand restraints proved pivotal in the Second Circuit case of *Bogan v. Hodgkins*. The case holds that per se treatment was inappropriate for an alleged conspiracy between general insurance agents representing the same insurance company, where each agreed not to hire the other's downstream independent agents. The court reasoned that the agreement had none of the inherently anticompetitive characteristics of an interbrand conspiracy to allocate markets or boycott a competitor and was more in the nature of an "intrafirm" agreement involving only a single brand of product or service. Rule of reason rather than per se treatment was, therefore, held to apply.

The defendants were six independent contractors that served as general sales agents for Northwestern Mutual Life Insurance (NML) in the New York metropolitan area. As general agents, they contracted with downstream independent sales agents who handled the actual policy sales and renewals.

NML compensated its various tiers of agents with commissions that varied with the agent's position in the overall agency hierarchy. Actual policy terms and prices were set by NML and not the agents. The six defendants had expressly agreed not to recruit or hire each other's lower-tier sales agents without the consent of the agent's existing general agent. The plaintiffs were former downstream agents who had been terminated by one of the defendants and were then unable to obtain an agency appointment with any of the other defendants. However, the plaintiffs were able to obtain agency appointments from another life insurance company and continued to compete – just with a different brand of policy. The district court had granted summary judgment to the defendants.

The Second Circuit affirmed. The court assumed for purposes of the appeal that the challenged refusals were "primarily horizontal, rather than vertical." This assumption was not viewed as particularly meaningful, however, since:

Applying the rule of reason, the Supreme Court has read the Act to forbid only "'unreasonable" restraints, as a literal reading would absurdly bar all contracts. . . . In particular, not all cooperative conduct has a deleterious effect on competition; indeed, some cooperative arrangements foster rather than harm competition. *See, e.g., Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (noting that cooperative practices are acceptable if "designed to 'increase economic efficiency and render markets more, rather than less, competitive'.". .).

"Certain practices," continued the court, "are so obviously anticompetitive that courts consider these to be per se violations of the Sherman Act." A series of factors were then identified that are characteristic of practices deemed per se illegal. Beginning with past judicial experience as one such factor, the court observed:

Examples of per se illegal conduct include group boycotts, division of markets, and tying arrangements. . . . These categories reflect judicial experience with the rule of reason. *See Arizona v. Maricopa County Med. Soc`y,* 457 U.S. 332, 344 , 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982) ("Once experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, it has applied a conclusive presumption that the restraint is unreasonable").

A second characteristic noted was that "[o]nly 'manifestly anticompetitive' conduct . . . is appropriately designated per se illegal." Further, "[w]here cooperation is inherent in an enterprise, per se treatment is not always the appropriate measure of antitrust illegality." Finally, "[c]ourts have been reluctant to expand the categories of per se illegality. . . . The Supreme Court is slow to . . . extend per se analysis to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious."

The plaintiffs' complaint was held to "not fit into any of the established per se categories" and not to entail the sort of "manifestly anticompetitive" conduct that might warrant a new per se rule. The record contained no evidence of a geographic or market division among the defendants, so the plaintiffs' attempt to characterize the conduct as a "horizontal market allocation" was rejected as unsupported by the plaintiffs' proof. An alternative attempt to characterize the conduct as a "boycott" was described as the plaintiffs' "strongest argument" but likewise failed. *(See* the further discussion of this aspect of the case in § 1:3, *infra.)* Particularly telling in the court's view was the absence of an "interbrand" relationship of the type typically seen in per se cases. In contrast to these cases, explained the court:

The Bogans allege that the General Agents conspired to restrain trade in the market for experienced NML sales agents. The Agreement is, therefore, not a classic interfirm horizontal restraint of trade in insurance sales agents. Rather it is akin to an intra firm agreement, one between General Agents of the same company to restrain trade only in experienced sales agents of that company. No-switching restriction cases typically involve multiple companies. . . The agreement here is far from a typical per se illegal restraint, consistent with the fact that antitrust law shows more concern to protect inter rather than intrabrand competition. *See Nynex Corp. v. Discon, Inc., No.* 96-1570, 1998 WL 856129, at *5-7 (Dec. 14, 1998); *Northwest Power Prods., Inc. v. Omark Indus., Inc.,* 576 F.2d 83, 87 (5th Cir. 1978).

The court went on to assume, *arguendo,* that the challenged arrangement was "interbrand" in effect. This was held to still make no difference. The reason:

Even if the agreement were interfirm, we still would not afford it per se illegal treatment. . . . Although such agreements fall within the ambit of antitrust law, we have nonetheless denied them per se treatment because "a harmful effect upon competition [was] not clearly apparent." [Citation omitted.] Because the Agreement's anticompetitive effect on the market for insurance sales agents is not obvious, we do not find the Bogans to have made a case sufficient to cross the threshold to per se treatment.

No doubt influencing the court's reasoning was record evidence that NML agents competed with agents for other insurance companies. Hence, "while the Agreement may constrain General Agents to some degree, it does not allocate the market for agents to any meaningful degree."

Also rejected was the plaintiffs' attempt to show anti-competitive effects by narrowly defining a "submarket" consisting of just "NML sales agents." The court responded that "While a submarket may function as the relevant market for antitrust purposes, more is required than a showing that a product differs from others." In particular:

Defining a submarket is a fact-driven inquiry into "such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Brown Shoe Co. v. United States, 370 U.S. 294, 325, 82* S.Ct. *1502, 8* L.Ed.2d *510* (1962); *see also North Am. Soccer League v. NFL, 670* F.2d 1249, 1260 (2d Cir. 1982) (holding that the record of the case disclosed a distinct submarket for sports capital and skill).

The plaintiffs had presented no such evidence to support their submarket theory, and had relied simply on evidence that NML agents received "specialized training" that distinguished them from other carriers' agents. This was held to fall far short of what was required to survive summary judgment, because "[i]n the end, the problem with the Bogan's proposed submarket is that other insurance companies compete for the services of experienced NML agents, as is clearly evidenced by the Bogans having found other work after being terminated from NML."

judgment, because "[i]n the end, the problem with the Bogan's proposed submarket is that other insurance companies compete for the services of experienced NML agents, as is clearly evidenced by the Bogans having found other work after being terminated from NML."

Perhaps the most important part of the decision appears at the end in a footnote. Apparently, the plaintiffs had tried to finesse the court's emphasis on market definition and competitive effects by arguing that the "quick look" rule of reason ought to be applied in any event. The court rejected that argument:

To avoid examining the relevant market, market power, and anticompetitive effect in all cases in which conduct does not clearly fit within a per se category, the Supreme Court has sanctioned an intermediate inquiry, known as "quick look," if the conduct at issue is a "naked restriction." See *NCAA v. Board of Regents,* 468 U.S. 85, 109, 104 S. Ct. 2948, 82 L.Ed.2d 70 (1984). Under quick look, once the defendant has shown a procompetitive justification for the conduct, see id. at 113, "the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis," *United States v. Brown Univ.,* 5 F.3d 658, 669 (3d Cir. 1993).

Here, Hodgkins has countered the Bogans' characterization of the Agreement as a "naked restriction" with sound allegations of procompetitive benefit. Thus, at best the inquiry returns to the rule of reason, under which the plaintiffs concede they lose.

Summary judgment for the defendants was affirmed.

A recent case out of the Seventh Circuit addressed the distinction between "vertical" licensing restrictions in a trademark license versus "horizontal" market allocations between horizontally-situated firms. The case is *Generac Corp. v. Caterpillar, Inc.* It holds that territorial and field restrictions in a trademark license between two potential competitors v, -ere neither a per se illegal market allocation agreement, nor shown to be competitively unreasonable under the rule of reason.

The plaintiff manufactured backup generator equipment used by manufacturers to supply them with electricity when their primary power sources failed. Caterpillar was not itself a manufacturer of generators but had plans to produce a small generator that would have competed with some of the plaintiffs systems. Upon learning of Caterpillar's plans, the plaintiff proposed that it develop, manufacture, and serve as exclusive wholesale distributor for a line of generators to be sold under Caterpillar's "Olympian" trademark. Caterpillar agreed to the proposal.

As part of the license agreement, the plaintiff received exclusive rights to distribute "Olympian" brand equipment within a designated territory, while Caterpillar remained free to sell competing systems under a different trademark. The plaintiff, in turn, agreed not to sell its "Generac" brand generators over a specified size to any Caterpillar retail dealer inside or outside its territory, but remained free to continue supplying its own brand of systems to its own retail distributors. In addition, the plaintiff agreed that it would not enlarge its own distribution network within any existing Caterpillar dealer's territory so long as the dealer was adequately servicing "Olympian" brand equipment.

The license was for an indefinite duration and required twenty-four months' written notice to terminate without cause. After a falling out between the parties, Caterpillar gave notice of termination, and Generac brought suit under the Wisconsin Fair Dealership Law and the Sherman Act. The district court had dismissed the complaint.

The plaintiff argued on appeal that the contract between it and Caterpillar constituted a per se illegal "horizontal division" of product and territorial markets. The Seventh Circuit rejected the horizontal characterization:

What stands out prominently from the Generac-Caterpillar agreement is the fact that it involved a transfer of intellectual property rights: the trademark "Olympian." In exchange for the right to use the trademark and for access to Caterpillar's distribution network, Generac agreed to restrict its operations. Even though in some ways the companies may have operated in similar lines of business, this particular agreement was a vertical one in which Generac played the role of "supplier" and Caterpillar both upstream supplier of the trademark, and downstream purchaser of the finished goods.

"Vertical non-price restraints," continued the court, "such as the territorial and marketing restrictions at issue in this case, are evaluated under the rule of reason."

Having identified the rule of reason as the governing standard, the court applied it to the record. Caterpillar, it noted, remained free under the agreement to sell competing generator systems into the plaintiffs assigned territory, so long as it used a different trademark. This reserved freedom to compete was held fatal to the plaintiff's claim:

This clause alone makes it clear that the agreement could not possibly have led to a restriction in the supply of generator sets. Product markets are not defined in terms of one trademark or another; trademarks simply identify the origin of a product. Not even the most zealous antitrust hawk has ever argued that Amoco gasoline, Mobil gasoline, and Shell gasoline are three separate product markets, yet that absurd result would follow if we recognized Olympian trademarked generator sets as a separate market in this case.

Likewise, the restrictions on the plaintiffs ability to add dealers were held insufficient to support a per se (or rule of reason) claim, because the plaintiff could add dealers if an existing Caterpillar dealer failed to adequately cover its assigned service area. Concluded the court:

Again, no credible story of lowered output or increased price can be told on the basis of these provisions. This was instead a vertical agreement in which both parties restricted their actions somewhat in the interest of more efficient promotion of the covered products and better sales. . . . The district court correctly dismissed Generac's antitrust count.

§ 1:8 Price discrimination

§ 1:8 Price discrimination

Claims of illegal price discrimination are an anomaly in the field of federal antitrust law. Whereas other types of antitrust offenses reflect a basic rule that antitrust serves to protect competition generally, and not just specific competitors, a growing number of courts treat so-called "secondary line" claims by disfavored customers differently. According to these courts, the competitive injury that will support a secondary line claim may be just to the disfavored customer. Cases that appeared during the past year address this and such other issues as what is required to show predatory pricing for a primary-line claim between competing sellers, what is required to assert jurisdiction under the Act, whether favored and disfavored customers must be in competition to support a secondary-line claim, and what is a facility for purposes of a Section 2(d) or Section 2(e) claim.

A fundamental requirement under the Robinson-Patman Act is the presence of "sales" transactions involving a favored and disfavored buyer. A Third Circuit case applied this requirement to hold that allegations that a defendant offered allegedly discriminatory rates for electric power did not state a viable Robinson-Patman claim. The court reasoned that to have a viable claim, the plaintiff had to allege actual sales and not simply allegedly discriminatory price offers. The case is *Crossroads Cogeneration Corp. v. Orange & Rockland Utilities, Inc*.

The plaintiff was an independent power producer that owned and operated an electrical cogeneration facility in New Jersey. The defendant was an electric utility that had contracted with the plaintiff to buy excess electric power from the facility under a long-term purchase contract. The plaintiff had added a new turbine at the facility and then demanded that the defendant purchase the added power from the turbine at the contract rate (which had by then become well above-market). The defendant had not only refused to do so, but had allegedly approached one of the plaintiffs customers and "offered to sell it electricity at a . . . reduced price [that] was not offered to all customers."

The plaintiff brought suit, claiming in relevant part that the defendant had violated the Robinson-Patman Act. The district court had dismissed the claim. In affirming, the Third Circuit initially observed:

The Robinson-Patman Act, which amended the Clayton Act, prohibits price discrimination "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly." 15 U.S.C. § 13(a). In order to state a claim under the Robinson-Patman Act, a plaintiff must allege facts to demonstrate that (1) the defendant made at least two contemporary sales of the same commodity at different prices to different purchasers; and (2) the effect of such discrimination was to injure competition. *See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 219-27 (1993).

The "two sales" requirement was held fatal to the plaintiffs claim, since only an "offer" was alleged in the complaint. "Merely offering lower prices to a customer does not state a price discrimination claim." Alternatively, the court held that as a "competitor" in the market, the plaintiff had to plead some kind of injury to overall market competition, which it had failed to do. Specifically:

Crossroads has made no allegation of predatory conduct in any offers to customers that O&R has made, nor has it alleged any other competitive effect of O&R's offer. The mere fact of O&R's market share does not mean that approaching Crossroads' customer is an antitrust violation, so something additional must be alleged in order to survive dismissal. *See Barr Labs, 978* F.2d at *106-07.* Crossroads has not alleged any anticompetitive effect, such as below-market prices, or any other indicia of anticompetitive behavior.

Dismissal of the plaintiffs complaint was, accordingly, affirmed.

Section 2(c) of the Robinson-Patman Act was before the Sixth Circuit in an unpublished decision, *Zeller Corp. v. Federal Mogul Corp.* The case holds that a supplier's agreement to give a customer a $500,000 credit to be spread over a four-year period against the customer's purchases, was not a form of "brokerage" prohibited by Section 2(c). The plaintiff was a manufacturer of universal joints that had been a supplier to Federal Mogul Corp. (FMC). FMC had demanded a $400,000 "signing bonus" from the plaintiff to retain FMC's business. The plaintiff had refused to make the payment and, instead, had offered price discounts and volume rebates totaling $500,000. FMC declined the plaintiffs counter-offer and went with a competing supplier that allegedly agreed to give FMC a $500,000 credit to be applied against FMC purchases over a four year period. The contract with the favored supplier did not actually obligate FMC to purchase anything; rather, the amount of the total credit was applied against the regular price for products purchased during the period.

The plaintiff had challenged the credit under both Sections 2(a) and 2(c). On appeal, the plaintiff did not pursue its Section 2(a) claim (which had been dismissed), instead focusing on its Section 2(c) claim. According to the plaintiff, the credit was a disguised form of illegal brokerage. In affirming dismissal of the claim, the Sixth Circuit first traced the history of Section 2(c) back to a Congressional concern in the 1930s with dummy brokerages set up by large grocery chains to demand price concessions from their suppliers that were not available to smaller grocery stores. "Section 2(c) specifically prohibits the use of dummy brokerages and the demand for direct price concessions in lieu of brokerage."

The plaintiff argued that even though no "brokerage" was actually at issue, a de facto "payment in lieu of brokerage" was involved. The court rejected the plaintiffs analogy, stating that "[w]hile it is true that this court and others have expanded the reach of § 2(c) beyond the context of brokerages, such expansion has been limited to cases of commercial bribery, a theory not advanced by plaintiff in this case." Concluding that the plaintiffs position "lacks support in the legislative history," the court added that it would "call into question all manner of negotiated price reductions, discounts, credits, and access fees." Dismissal of the claim was affirmed.

A recent Eighth Circuit case addressed the difference between what is required to establish jurisdiction under the Robinson-Patman Act, versus the competitive relationship between favored and disfavored customers required to prove substantive liability for a secondary-line claim of price discrimination. The case, *Godfrey v. Pulitzer Publishi*ng *Co*., holds that a newspaper's sale of newspapers across a state line at allegedly discriminatory prices met the "in commerce" requirement for a Section 2(a) claim, and that jurisdiction did not require the plaintiff to further establish that it competed with the allegedly favored customer. However, proof of a competitive relationship between favored and disfavored customer was held to be part of the case that the plaintiff would ultimately have to prove to establish liability.

establish that it competed with the allegedly favored customer. However, proof of a competitive relationship between favored and disfavored customer was held to be part of the case that the plaintiff would ultimately have to prove to establish liability.

The defendant published the Saint Louis Post-Dispatch, which it sold to dealers in both St. Louis and across the Mississippi River in Illinois. The plaintiffs were a group of branch dealers located in Missouri and Illinois, none of whom operated in both I states. Under the defendant's distribution system, each dealer operated within a clearly defined exclusive service area. The plaintiffs claimed that the defendant had engaged in secondary-line price discrimination by selling its papers to other branch dealers at prices lower than those charged to the plaintiffs. The district court had allowed limited jurisdictional discovery and had then dismissed the complaint on jurisdictional grounds for failing to identify any favored or disfavored customer that was itself engaged in commerce across state lines.

The Eighth Circuit reversed, holding that the lower court had confused the issue of jurisdiction with an element of the plaintiff's substantive secondary-line claim. The court began by distinguishing the type of case before it from other types of Section 2(a) cases:

Courts and commentators compartmentalize Robinson-Patman claims into three types of violations. First, "[a] primary-line violation occurs where the discriminating seller's price discrimination adversely impacts competition with his-the seller's-competitors." *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.,* 842 F.2d 578, 584 n. 1 (2d Cir. 1987) [citations omitted]. "[A] secondary-line violation occurs where the discriminating seller's price discrimination injures competition among [the seller's] customers. . . ." *Id.* Finally, a tertiary violation occurs when, although "the purchasers of the discriminating seller did not compete directly, their customers competed within a unified market region." *Id.*

Whatever the nature of the claim, "[j]urisdiction under Section 2(a) of the Robinson-Patman Act is not established 'merely by showing that allegedly anti-competitive acquisitions and activities *affect* commerce." Rather:

With almost perfect consistency, the Court of Appeals have read the language requiring "either or any of the purchases involved in such discrimination (be) in commerce" to mean that § 2(a) applies only where "at least one of the two transactions which, when compared, generate discrimination . . . cross(es) a state line."

The district court had found that because the defendant sold papers originating in Missouri to customers located in Illinois, the threshold "in commerce" requirement was met. The Eighth Circuit affirmed this part of the lower court's decision. However, it found reversible error in an additional requirement the district court had grafted onto its jurisdictional test--that the plaintiff plead and show competition between itself and the favored customer to establish "jurisdiction." The appellate court held that this misconstrued the proper jurisdictional test under the Act:

According to the district court, appellants must also demonstrate a competitive relationship between the favored and disfavored branch dealers. The plain language of Section 2(a) suggests to us, however, that any inquiry into competition or into competitive relationships, tests and goes to a plaintiff's prima facie case, and not to jurisdiction. And, as the Supreme Court recently reiterated, federal courts do not lose jurisdiction on the mere possibility that a plaintiffs averments fail to state a cause of action. *Steel Co.,* 118 S.Ct. at 1010 (quoting *Bell v. Hood,* 327 U.S. 678, 682 (1946)).

While proof of a "competitive relationship" was, thus, rejected as part of the jurisdictional inquiry, a further aspect of the decision is at least equally important. Embedded in the court's ruling is its adoption of the requirement that proof of a competitive relationship between favored and disfavored buyers is part of the plaintiffs affirmative secondary-line case. In the court's words:

In summary, we hold that the narrow "in commerce" jurisdictional requirement for a secondary-line claim under Section 2(a) of the Robinson-Patman Act does not also require that the favored and disfavored buyers stand in a competitive relationship. The competitive relationship is simply an element of a plaintiffs prima facie case.

Claims of predatory pricing in violation of the Robinson-Patman Act and the Sherman Act were before the Ninth Circuit in *Kentmaster Manufacturing Co. v. Jarvis Products Corp.* In an amended decision, the court held that the plaintiffs own complaint allegations defeated claims that the defendant engaged in predatory pricing by selling original equipment at little or no charge, while making its profit on sales of spare parts needed to operate the equipment. Since it was conceded in the complaint that the total price of equipment plus parts was profitable, the court ruled that the defendant's pricing policy was not predatory under either statute as a matter of law.

The plaintiff and defendant were competing manufacturers of specialty equipment used in the slaughterhouse industry (cutters, saws, etc.) and of spare parts used in operating the equipment. The nature of the equipment was such that new parts were "required continuously" throughout the relatively brief (three to five year) lifespan of the equipment. In addition, because the parts of different manufacturers were not interchangeable, once a particular brand of equipment had been purchased, customers tended to continue buying their parts from that manufacturer. The defendant's market share was allegedly 80 percent of all sales of slaughterhouse equipment and parts, with the plaintiff accounting for most of the balance.

The gist of the plaintiffs complaint was that in an effort to knock the plaintiff out of the market completely, the defendant had begun making the following offer to the plaintiff's customers: the defendant would replace their existing "Kentmaster" brand equipment with new "Jarvis" brand equipment at "no cost to the customer, or at predatorily low prices." Because a number of customers accepted the offer, the plaintiff alleged that it had lost out on the "highly profitable" and "high volume business" of selling parts to them and to other prospective customers. The plaintiff claimed that the defendant's pricing was predatory and illegal under both Sherman Act § 2 and Robinson-Patman Act § 2(a). The district court had dismissed the complaint.

The Ninth Circuit affirmed and agreed with the lower court that the plaintiffs own complaint allegations undercut its claim as a matter of law. After reviewing the complaint, the court reasoned that it effectively defined the market as including *both* equipment and parts:

Kentmaster's description of its product is of a unit made up of equipment and of spares-a unit sold over a period where the purchaser of what might

Kentmaster's description of its product is of a unit made up of equipment and of spares-a unit sold over a period where the purchaser of what might be called section A knows that eventually he will be buying complementary section B. No rational purchaser would look only at A's price and suppose that he could have A without B. Since A will not work for long without B, and since no one else but Kentmaster makes B, the rational buyer of A must calculate the cost of B when he makes his initial purchase. Kentmaster alleges no special market imperfections, such as imperfect information, that would prevent consumers from accurately determining the total cost of A and B. According to Kentmaster's allegations, only an idiot would think of the cost of A without taking into account the cost of B.

Kentmaster's description of Jarvis's product is similar. No one can buy section C of the product without knowing that he must buy D. There is a single product, sold over time; the ration ally- calculated price is the price of C and D together.

Pointing to allegations that the sale of parts was a "highly profitable high volume business," the court further reasoned that this was "a straightforward admission that the total price of the single unit, C plus D, is not predatory. Rejecting the plaintiffs attempt to bring itself within the Supreme Court's *Kodak* case, the court said:

The case is significantly different from *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451 (1992), *but* decisively spoken to by dicta therein. . . . [I]n the dicta that are governing here, the Supreme Court declared that Kodak lost only if the trier of fact could find "that service and parts are two distinct products." *Id.* at 462. In our case, on the face of the complaint, Jarvis's equipment and spares are described so that they necessarily constitute a single product.

Alternatively, the court held that allegations in the plaintiff’s complaint negated the element of "antitrust injury" required to have standing. As explained by the court:

Not only does Kentmaster's own descriptions destroy its charge of predation; they also show there is no antitrust injury. Apparently, because Jarvis is said to be enlarging its market share, Jarvis's C and D is beating Kentmaster's price for Kentmaster's competitive product of sections A and B. To beat a competitor's prices is not an offense against the antitrust laws. To beat a competitor's prices is a boon to customers choosing between the competitors. To beat a competitor's prices is good business and normal business. Neither the Sherman Act nor Clayton Act claims can stand.

Presumably, the court did not mean to suggest that cutting prices is always per se procompetitive. Rather, cutting a price to a level that is still profitable is inherently procompetitive, at least absent truly exceptional market circumstances. In any event, the court went on to make clear that its reasoning applied to both of the plaintiff’s counts, Robinson-Patman as well as Sherman Act:

"By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 220 (1993). To prove a predatory pricing claim under Robinson-Patman requires the same showing of unfair, anti-competitive pricing required to prove a claim under section 2 of the Sherman Act. *Id.* at 222. For the reasons already stated, Kentmaster's complaint undermines its Robinson-Patman claim that Jarvis practiced such pricing.

In a dissenting opinion, Judge Pregerson disagreed with the manner in which the majority had summarily disposed of the plaintiff’s complaint. Pointing to the majority's assertion that rational customers would consider the cost of parts when buying the equipment, he argued that this was a fact issue at least warranting discovery and disposition on summary judgment. In addition, he took exception with the logic underlying the majority's position:

Under [the majority's] rationale, there could never be separate markets for products that are functionally related to each other. But the Supreme Court has rejected this assumption, suggesting that there could be separate markets for such functionally-related products as "cameras and film, computers and software, or automobiles and tires." *Eastman Kodak Co. v. Image Technical Servs., Inc.,* 504 U.S. 451, 463 (1992). Likewise, I believe that there could be separate markets for slaughterhouse equipment and spare parts.

In addition, he noted that even if the slaughterhouse equipment and spare parts were part of the same market, the fact that the defendant could recoup its losses on equipment sales did not necessarily absolve it of liability. "Every monopoly, if it is successful, will eventually recoup its losses. The point at which to ascertain predatory pricing is the initial sale." His conclusion:

Here, the initial "sale" took place when Jarvis delivered its equipment to Kentmaster's customers either for free or at below-cost prices. At that point, Jarvis's prices were predatory. Unlike the majority, I do not believe that the complaint's allegations about recoupment change this fact. On the contrary, the fact that Jarvis was able to recoup its losses through the sale of spare parts shows that Jarvis was succeeding in its attempt to create a monopoly.

In another case out of the Ninth Circuit, the court addressed the question of what constitutes a "facility" within the meaning of Section 2(e) of the Robinson-Patman Act (the section prohibiting discrimination in the provision of resale-related services and facilities to customers). The case *is Portland 76 Auto/Truck Plaza, Inc. v. Union Oil* Co. *of Cal*. It holds that leased truck stops, being "realty," did not qualify as "facilities" within the meaning of Section 2(e). Hence, a jury verdict that the defendant oil company had illegally discriminated in the quality of leasehold improvements provided to different franchisees was wrong as a matter of law.

The plaintiff was a company that purchased truck fuel for resale from the defendant, Unocal. It also leased a truck stop from Unocal at which it sold the fuel. Its truck stop had become rundown over the years through neglect by both the plaintiff and the defendant. As a consequence, it allegedly lost customers and sales to other neighboring Unocal franchisees that the defendant favored in providing leasehold improvements. A jury had found that Unocal's failure to provide similar leasehold support to the plaintiff violated Section 2(e), and the defendant appealed.

The Ninth Circuit reversed. It began by observing that the statutory language of Section 2(e) "[could] be read to treat a leased truck stop as a 'facility.'

The Ninth Circuit reversed. It began by observing that the statutory language of Section 2(e) "[could] be read to treat a leased truck stop as a 'facility,' as Portland 76 successfully claimed in the district court." Such a reading was rejected by the court based on its interpretation of the legislative history of the Act ("Considering what the words connoted when Congress used them, it is questionable whether 'contracting to furnish facilities' included leased realty") and court cases ("Reading it [the term 'facilities'] to include leaseholds . . . would put us in conflict with two other circuits who have considered the question.").

Most troublesome to the court was the hybrid nature of the relationship between the parties and the "uniqueness" of the leasehold improvements challenged as discriminatory. As explained by the court:

What is troubling about treating realty leased from the wholesaler as "facilities" for purposes of the Act is that Unocal and Portland 76 had two commercial relationships, not merely one. In their relationship as wholesaler and purchaser of fuel for resale, Unocal was prohibited by law from discriminating in the furnishing of facilities. But in their relationship as landlord and tenant, Unocal was selling something unique, a possessory interest in particular real estate, rather than something fungible, fuel. The word "discriminate" connotes treating like objects differently, so it is hard to apply the word to the leasing of real estate, ordinarily considered unique.

Finally, the court pointed to FTC guides on Sections 2(d) and 2(e) (found at 16 C.F.R. § 240.7) as further support for its conclusion that leasehold improvements are not facilities within the meaning of Section 2(e). While acknowledging that the list of services and facilities contained in the guides is "not exhaustive," the court ruled:

[T]here is nothing esoteric about listing a series of examples and considering whether something else is like the things in the list. If a retailer or wholesaler were asked which did not belong in the list – advertising allowances, handbills, demonstrators, catalogues, cabinets, displays, prizes, special packaging, and leased realty –almost everyone would pick out leased realty as being different. Thus the long established administrative interpretation shows an understanding that leased realty is not "facilities" in the statutory sense.

The jury’s verdict was reversed and judgment was entered for the defendant as a matter of law.

§ 2:11 Horizontal price fixing

Horizontal price fixing occurs when firms at the same level of the market structure (e.g., a group of manufacturers or a group of distributors) agree to fix or otherwise stabilize the prices that they will charge for their products or services. Such "horizontal" agreements are to be distinguished from the vertical forms of price fixing discussed in § 2:12, *infra.*

Agreements to horizontally fix prices have long been held per se illegal under Section 1 of the Sherman Act, thereby foreclosing defense arguments as to the reasonableness of the defendants' actions and removing the necessity of competitive "effects" and market analysis proof from the plaintiff’s affirmative case. This rule of conclusive illegality has been applied not only to agreements setting pricing floors (termed "minimum price fixing") but to agreements prescribing price ceilings (termed "maximum price fixing"). Not surprisingly, the more controversial decisions have been those concerned with maximum price fixing.

The Supreme Court reaffirmed these fundamental principles in 1982 in a case that arguably tested the outer limits of the per se price fixing doctrine, *Arizona v. Maricopa County Medical Society.* The case involved an agreement among competing physicians setting, by majority vote, the maximum fees that they would each charge for health services to specified health care insurers. The purported purpose of the arrangement was to hold down the cost of medical care. Notwithstanding this cost control objective, the Court held that the per se rule applied. Rejecting the argument that maximum price fixing should be treated differently from minimum price fixing, a split Court held that its prior decisions "place horizontal agreements to fix maximum prices on the same legal-if not economic-footing as, agreements to fix minimum or uniform prices."

Having labeled the agreement per se illegal price fixing, the Court refused to consider purportedly procompetitive justifications, stating: "The anti-competitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." Also rejected was the defense argument that a special rule of reason standard should be carved out for price restraints involving "professionals."

Maricopa, while controversial in its continued application of the per se label to even maximum price fixing, involved a relatively easy set of facts in the sense that the price fixing was both explicit and direct. Conspiracies between competitors to directly fix their prices — whether proven by direct or circumstantial evidence — are deemed per se illegal as "price fixing." The concept of price fixing has, however, been extended beyond such more obvious situations to encompass more indirect arrangements to fix or stabilize prices.

For example, in *United States v. Container Corp.*, illegal price fixing was found in an arrangement whereby competitors in a highly concentrated market regularly exchanged pricing information concerning prices currently being quoted to particular customers, thereby causing prices to stabilize at a uniform level, even though the Court specifically noted that there was no explicit "agreement to adhere to a price schedule." As a further illustration, illegal price fixing was found in *Interstate Circuit, Inc. v. United States,* notwithstanding the absence of an express agreement between the defendants to act in concert in setting prices. The case instead rested upon proof that one of the defendants had circulated a letter among the others, suggesting that they all adhere to a common course of Action. Without actually agreeing to do so, each of the other defendants began following the proposal. Citing evidence that no one defendant would have done so without the tacit assurance of similar action by the others, the Supreme Court held that illegal concerted action had been proven.

Other cases have similarly held that even indirect concerted action that has the effect of fixing or otherwise stabilizing prices can rise to the level of per se illegal price fixing. While repeatedly asserted by the courts, this principle has unfortunately been left largely undefined, with little concrete guidance as to when an indirect practice will be deemed a form of horizontal price fixing. As expressed by the Supreme Court itself, price fixing is

guidance as to when an indirect practice will be deemed a form of horizontal price fixing. As expressed by the Supreme Court itself, price fixing is not so much a set form of prohibited conduct as a "shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable."

Cases in which prices themselves are directly fixed or in which a limiting range of prices is specifically agreed upon, are generally categorized as price fixing, for the impact on price is both direct and apparent. Somewhat more difficult to categorize are those cases that do not involve prices per se but that do directly involve some facet of pricing, such as the availability of credit or trade-in allowances. In *Catalano, Inc. v. Target Sales, Inc.* the Supreme Court applied the price-fixing label to these arrangements as well, since aspects of competitive pricing were directly affected.

Extending the range of cases still further, the most difficult ones have been those in which the impact on prices or pricing behavior has been only indirect, through the operation of some arrangement not directly manipulative of prices. For example, prices may be effectively restrained by agreeing to limit supply, allocate territories, refrain from competitive bidding, or exchange current price information in a concentrated market setting. Can these "pure" situations of indirect action also amount to price fixing?

In resolving this question, the courts typically ask whether the arrangement was entered into with the "purpose and effect" of fixing or otherwise stabilizing prices." If both purpose and effect are shown, the price fixing label attaches, notwithstanding the indirect nature of the effect upon prices. Utilizing this analytical approach, the courts have found illegal indirect price-fixing in such diverse situations as an agreement among competitors to buy up excess supplies of a product, where done "for the purpose and with the effect" of stabilizing prices; an agreement to fix the percentage of a raw material used in a product, done with the "design and result" of depressing prices; an agreement to induce a supplier to refuse to deal with price discounters, having the "purpose" and "effect" of protecting the conspirators from "real or apparent price competition" and an agreement to refrain from competitive bidding for a product, entered into with the "anticompetitive purpose and effect" of maintaining price levels. In contrast, per se price fixing has been rejected in favor of the rule of reason for limited exchanges of price verification information between suppliers to address a legitimate concern with buyer fraud; and with restrictions on certain discount advertising practices imposed by a professional trade association on its members to protect consumers from deception and confusion.

Illustrative is the 1990 Supreme Court decision in *Palmer v. BRG of Georgia.* The plaintiffs were purchasers of bar review courses used to prepare for the Georgia bar exam. The defendants were a Georgia bar review company and a national firm providing similar services in Georgia and other states. After the national firm determined to exit the Georgia market, it offered the Georgia company a license to use the national firm's well-known trademarks within the state. As part of the license, the national firm agreed not to reenter the state, and the Georgia firm a-greed to refrain from expanding into the national firm's other retained service areas. License royalties included a percentage of the regional firm's student receipts. The price of bar review courses within the state jumped by more than 200 percent following the national firm's market exit. The plaintiffs alleged in relevant part that the territorial restrictions in the trademark license constituted per se illegal price fixing in light of the demonstrated rise in prices.

Summary judgment had been granted to the defendants on the ground that the national firm's decision to leave the market before entering into the trademark license, coupled with the absence of "direct" evidence of price fixing, precluded a per se challenge. The Supreme Court reversed. Pointing to the revenue sharing between the two firms and the immediate price increases that occurred following the national firm's departure from the market, the Court reasoned that this was sufficient to at least raise triable issues as to whether the agreement "was formed for the purpose and with the effect of raising the price of the bar review courses." If so, then the Court reasoned that the arrangement would fall within the following basic standard:

In *United States v. Socony-Vacuum Oil Co., 310 U.S. 150* (1940), we held that an agreement among competitors to engage in a program of buying surplus gasoline on the spot market in order to prevent prices from falling sharply was unlawful, even though there was no direct agreement on the actual prices to be maintained. We explained that [u]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se.*

The purpose-effect analysis of indirect price fixing is similarly seen in the 1979 Supreme Court decision of *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* The case involved a price-fixing challenge to Broadcast Music's practice of pooling copyrights on musical works owned by individual composers and then licensing use of the works only on a pooled basis. An indirect effect of the arrangement was to impede price competition among the individual copyright owners. Nevertheless, the Supreme Court held that per se illegal price fixing had not been proven, since it had not been established that the "purpose" as well as the "effect" of the arrangement was to restrict pricing behavior. In remanding the case for further analysis, the Court instructed that the legality of the practice instead be gauged by the more flexible rule of reason-an alternative analysis that should not be forgotten by practitioners in their search for governing analytical standards."

A variant of the purpose-effect analysis was employed in the 1984 Supreme Court decision of *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma* to reject per se analysis for what facially appeared to be direct horizontal price fixing. The case concerned a Sherman Act Section 1 challenge to an NCAA program with the major television networks that effectively fixed the prices paid for telecasts of college football games by restricting individual price negotiations between broadcasters and institutions. While conceding that horizontal price-fixing arrangements are normally subject to per se analysis, and that the challenged program certainly had the earmarks of such an arrangement, the Court concluded that the unique circumstances of the college football industry made this an inappropriate case for imposition of the per se standard. The industry was such that without some degree of horizontal restraint, the product itself college football competition-could not be made available. Hence, the purpose of the challenged restraint was not to stabilize price, but to serve another, potentially procompetitive objective. Citing *Broadcast Music, supra*, the Court concluded:

We have decided that it would be inappropriate to apply a *per se* rule to this case. This decision is not based on a lack of judicial experience with this type of arrangement. . . . Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

National Collegiate reflects a line of analysis that goes beyond a simplistic "purpose-effect" test such as that applied in *Palmer, supra*, and some of the older indirect price-fixing cases. Under this analysis, the focus is on what distinguishes a proper "per se" offense from conduct subject to the more flexible rule of reason. As discussed in § 2:9, *supra*, proper per se offenses are ones in which the anticompetitive consequences (higher prices, reduced output, fewer supply choices, etc.) are so clear and likely to occur that it becomes counterproductive to require proof of actual anticompetitive effect. *Container Corp., supra*, for example, can be viewed as a case in which the highly concentrated nature of the industry and the sharing of current price quotes by most of the industry players made it inevitable that prices would tend to move upward, as they did. In contrast, *National Collegiate, supra*, was a case in which the potential procompetitive objectives of the challenged arrangement-to make the product itself possible-made it inappropriate to apply a rigid per se "price fixing" label.

Consistent with this type of reasoning, recent appellate court cases involving allegations of indirect price fixing continue to apply purpose-effect reasoning, but with a greater focus on why the per se rule is being imposed in the first place. Potentially relevant issues, thus, include whether one can predict with a high degree of certainty that the challenged restraint will cause the sort of competitive harm of concern to the antitrust laws (e.g., higher prices, reduced output, reduced service quality and choices); whether the restraint has redeeming benefits (e.g., reduced costs or increased interbrand competition) worthy of being weighed against the negative effects; and whether the judiciary has sufficient experience with the type of restraint at issue to fairly make these predictions?

<§ 2:12 Vertical price fixing; price "suggestions" versus price "maintenance"

Vertical agreements to fix or stabilize prices (i.e., those between firms at different levels of the market structure) are discussed in the immediately following sections. Section 2:13 discusses the classic instance of a per se illegal vertical price restraint, involving the fixing of minimum resale prices. Section 2:14 addresses a form of vertical price fixing now subject to the more flexible rule of reason: vertical maximum price fixing. Section 2:15 discusses the distinction between vertical price fixing and merely unilateral price suggestions outside the scope of Section 1.

§2:13 -Vertical minimum price fixing

Prices are vertically fixed when firms at, different levels of the market structure (e.g., a manufacturer and one of its dealers) agree to fix prices at one or both market levels at a set amount or within a prescribed range. Vertical price fixing that sets floors ("minimum" vertical price fixing) has been viewed as inherently illegal under the antitrust laws since the early Supreme Court case of Dr. *Miles Medical Co. v. John D. Park & Sons Co.* The case involved express agreements between a manufacturer of trademarked proprietary medicines and its authorized dealers fixing their minimum resale prices. Without inquiring into the possible economic justification for the arrangement, the Supreme Court held that the agreements violated the Sherman Act, reasoning that since the manufacturer had sold its products, the public was "entitled to whatever advantage may be derived from competition in the subsequent traffic" of the product.

The Supreme Court has since repeatedly held that vertical minimum price-fixing arrangements are per se violations of Section 1 of the Sherman Act. For example, in *California Retail Liquor Dealers' Ass'n v. Midcal Aluminum, Inc.,* the per se standard was applied to a system of minimum resale price schedules posted with a state agency by wine producers, binding upon their wholesale customers. Concluded the Court: "This Court has ruled consistently that resale price maintenance illegally restrains trade."

While vertical minimum price fixing is treated as per se illegal, it is not defined as expansively as the concept of "horizontal" price fixing, discussed in § 2*:11, supra.* In a 1988 decision, the Supreme Court drew a distinction between horizontal price fixing and vertical price fixing, confining the latter in essence to situations in which prices are directly fixed.

Specifically, the Court held in *Business Electronics Corp. v. Sharp Electronics Corp.* that where a manufacturer and one of its dealers agreed to terminate a dealer known for its price-cutting activities, this did not amount to per se illegal vertical price fixing absent evidence of a further agreement on the prices to be charged by the remaining dealer or dealers. In so holding, the Court reiterated its earlier rulings distinguishing vertical agreements on minimum resale prices ("illegal per se since *Dr. Miles Medical* Co.") from vertical "nonprice" restraints (governed instead by the rule of reason). The challenged conduct was held to come within the latter category of nonprice activity, having at most an indirect pricing effect.

Of particular apparent concern to the Court was the chilling effect that a rule imposing per se illegality would have upon manufacturer behavior when attempting to terminate a dealer for lawful business reasons. Observed the Court: "In the vast majority of cases, it will be extremely difficult for the manufacturer to convince a jury that its motivation was to insure adequate services, since price cutting and some measure of service cutting usually go hand in hand." Given these concerns, it concluded that the balance tipped in favor of testing manufacturer terminations that only indirectly affect price under the rule of reason.

Horizontal price fixing was expressly placed in a different category. Specifically rejected were arguments by the plaintiff that since "indirect" horizontal price restraints have been subjected to per se analysis, the same should be true of vertical dealer terminations having an indirect pricing impact. Responded the Court:

[P]etitioner contends that since horizontal agreements have been held to constitute price fixing (and thus to be *per se* illegal) though they did not set prices or price levels, see, e.g., *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 647650 (1980) (per curiam), it is improper to require that a vertical agreement set prices or price levels before it can suffer the same fate. This notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality was explicitly rejected in *GTE Sylvania,* see 433 U.S. at 57, note 27*,* as it had to be, since a horizontal agreement to divide territories *is per se* illegal, see *United States v. Topco Associates, Inc.,* 405 U.S. 596, 608 (1972), while *GTE Sylvania* held that a vertical agreement to do so is not.

Applying this vertical-horizontal distinction, the Court placed indirect price-fixing cases such as *Catalano, supra,* in the distinguishable "horizontal" category, instead requiring stronger proof in a vertical case that prices or price levels have actually been set.

Applying this vertical-horizontal distinction, the Court placed indirect price-fixing cases such as *Catalano, supra,* in the distinguishable "horizontal" category, instead requiring stronger proof in a vertical case that prices or price levels have actually been set.

Further guidance on how one proves vertical price fixing is provided by another Supreme Court decision, *Monsanto Co. v. Spray-Rite Service Corp.* The case involved vertical price-fixing claims by a former Monsanto distributor that alleged that its dealership had been terminated as part of a resale price-fixing scheme between the manufacturer and other dealers. The Supreme Court held that the mere receipt by a manufacturer of complaints from several of its other dealers concerning the price-cutting practices of a particular dealer does not in itself establish the element of concerted (as opposed to merely unilateral) action needed to support a Section 1 price-fixing claim. However, by combining evidence of dealer complaints with such other circumstantial evidence as meetings and verbal assurances that action would be taken to force compliance, the Court found sufficient evidentiary support to uphold a jury verdict in the plaintiff's favor. Most significantly, the Court reaffirmed the per se illegality of agreements to actually fix resale prices, stating:

[An] important distinction in distributor-termination cases is that between concerted action to set prices and concerted action on nonprice restrictions. The former have been *per se* illegal since the early years of national antitrust enforcement. *See Dr. Miles Medical Co. v. John D. Park & Sons* Co., 220 U.S. 373, 404-409, 31 S. Ct. 376, 383-385, 55 L. Ed. 502(1911).

§ 2:14 -Vertical maximum price fixing

The Dr. *Miles, Midcal,* and *Monsanto* decisions discussed in § 2:13, *supra,* all involved pricing "floors," in which minimums were prescribed for dealer pricing. The impact of such arrangements upon competitive pricing is apparent, preventing prices from falling to the reduced levels that might otherwise result from dealer competition. For several decades, however, the Supreme Court did not limit the per se standard to only minimum pricing situations. Instead, the Court additionally extended the per se rule to vertical arrangements designed to impose a "ceiling" upon reseller prices, i.e., to vertical *maximum* price fixing. Thus, in *Albrecht v. Herald Co.*, per se liability was held to apply to a newspaper's policy of setting maximum resale price levels for its distributors, even though the policy was designed to counteract the market power enjoyed by certain of the distributors and thereby keep prices down.

This situation changed dramatically in 1997 with the Supreme Court's decision in *State Oil Co. v. Khan.* After reviewing the history of *Albrecht* and other more recent cases, the Court concluded that judicial experience has not borne out the need to condemn maximum vertical price restraints as inherently anticompetitive. Rather, the governing analysis for vertical maximum price fixing should be the same rule of reason applied to vertical nonprice restraints. According to the Court:

[V]ertical maximum price fixing, like the majority of commercial arrangements subject to the antitrust laws, should be evaluated under the rule of reason. In our view, rule of reason analysis will effectively identify those situations in which vertical maximum price fixing amounts to anticompetitive conduct.

In so ruling, the Court cautioned that it was not altering the traditional standard for minimum price fixing, and that "arrangements to fix minimum prices . . . remain illegal per *se*." Apparently, however, where a maximum price fixing scheme is used to "disguise" what is really minimum price fixing, the governing analysis will still lean toward the rule of reason. Thus, after expressly "acknowledg[ing] the possibility that maximum pricing might mask minimum pricing," the Court went on to state: "[W]e believe that such conduct . . . can be appropriately recognized and punished under the rule of reason." Not addressed was the question whether proof that a purported maximum pricing limit actually has minimum pricing effects might justify an abbreviated rule of reason analysis under the "quick look" approach seen in an increasing number of cases.

§2:15 -Price "suggestions" versus price "fixing"

Whether the claim is one for minimum vertical price fixing (still per se illegal) or maximum vertical price fixing (now subject to the rule of reason), a necessary element of a Section 1 claim for illegal price fixing will be proof that the defendant has engaged in "concerted" action, and not merely unilateral behavior outside the reach of Section 1. An oft-used distinction in this regard has been that between resale price "fixing" and mere resale price "suggestions." Just as it has long been the rule that vertical price fixing is per se illegal, it has also long been the law that a supplier does not engage in vertical price fixing when it simply suggests resale prices to its customers and then unilaterally refuses to deal with firms that do not follow the price suggestions. In *United States v. Colgate & Co*. the Supreme Court held that this conduct merely reflects the supplier's lawful right to "exercise his own independent discretion as to parties with whom he will deal," a position that has since been followed in numerous judicial decisions, and that was expressly reaffirmed by the Supreme Court in its *Monsanto* decision, *supra*. (See the more detailed discussion of concerted versus unilateral behavior in §§ 2:3 to 2:7, *supra*.)

The courts have attempted to distinguish lawful resale price suggestions valid under *Colgate* from illegal vertical price fixing by asking whether the supplier has done "something more" than merely announce preferred resale prices or engage in a unilateral refusal to deal with firms not adhering to its price suggestions. Thus, vertical price fixing has been found where suppliers have further demanded and received actual assurances from customers that they will follow the recommended prices, where suppliers have enlisted the active assistance of dealers or other third parties to enforce price suggestions, where suppliers have exploited special economic leverage that they have over their customers to force compliance, or where they have otherwise actively coerced customers into adhering to their price suggestions. Where, however, customers have remained free to either accept or reject the recommended prices, or the manufacturer's response has been confined to cutting off non-complying dealers, illegal vertical price fixing has not been found.

The distinction between illegal vertical price fixing and lawful resale price suggestions can result in some extremely fine line drawing, with some courts manifesting a clear willingness to move the line further than others in finding a practice to be a mere "suggestion" rather than an act of "coercive" price fixing. For example, in *Wisconsin Music Network, Inc. v. Muzak Ltd. Partnership,* the Seventh Circuit held that a franchisor's

national account program, in which it directly negotiated retail prices with large national end-user accounts, did not constitute per se illegal vertical price fixing. Under the program, franchisees were given the choice as to whether to participate and service the accounts on the terms and rates negotiated with the end-user, while the record showed that end-users desired the program for "the efficiency and benefits of a single contract." The rule of reason was held to govern the competitive legality of the challenged arrangement.

Similarly, in another decision out of the Seventh Circuit, *Jack Walters & Sons Corp. v. Morton Building, Inc.,* the court held that it was not illegal vertical price fixing for a supplier to run advertising promotions for the benefit of its dealers, in which its suggested retail prices were specifically listed, and to then monitor whether dealers were exceeding the advertised prices and to encourage dealers to comply. Likewise, in *Acquaire v. Canada Dry Bottling Co.,* the Second Circuit held that it was not per se illegal price fixing for a manufacturer to condition distributor participation in a promotional discount program on i) the distributors' adherence to the manufacturer's recommended list prices for the promotion, and (ii) their use of preprinted invoices with retail customers that disclosed both the manufacturer's price to the distributor and the recommended resale price to the customer. This was true even though the form had to be signed by the customer for the distributor to receive its promotional program credits. In contrast, the manufacturer's further refusal to release already-ordered product shipments to distributors that failed to adhere to its recommended list prices was held to be sufficiently "coercive" to use to the level of possible price fixing. In drawing this distinction, the court stated:

Evidence of pricing suggestions, persuasion, conversations, arguments, exposition or pressure is not sufficient to establish the coercion necessary to transgress § 1 of the Sherman Act. . . . Rather, evidence of threats of termination or other explicitly coercive conduct that secure adherence to fixed prices is what supports "a finding of an illegal combination."

A final example is the Ninth Circuit decision in *Dunn v. Phoenix Newspapers, Inc.* The Ninth Circuit there held that it was not illegal vertical price fixing for a newspaper to advertise suggested subscription prices in conjunction with a "direct consumer payment plan" under which subscribers paid the subscription price to the newspaper for repayment to the distributor. The court reasoned that distributors had never attempted to charge a different price and that market factors indicated that they would not have done so.

While in each *of* these cases, the arrangements were characterized as resale price "suggestions," they might just as well have been found sufficiently coercive to be labeled resale price fixing. For example, the result in *Jack Walters, supra,* can be contrasted with that in *Bender v. Southland Corp.* The Sixth Circuit there reversed summary judgment for the defendant, a franchisor, in a suit by a franchisee alleging that the defendant's system of suggesting retail prices, actually constituted per se illegal vertical price fixing. The court held that the plaintiff should have been allowed to go forward with its case, given evidence that the defendant had imposed a comprehensive reporting system in which its franchisees were required to report their retail prices whenever the defendant changed its resale price suggestions, even if their own prices remained unchanged. Further, the defendant had instructed its auditors and management personnel to aggressively monitor compliance with this reporting system. The Sixth Circuit concluded that this conduct may have gone beyond the permissible – "suggesting retail prices and attempting to persuade the plaintiffs to follow them" – and reached the level of the impermissible – "coercion." Coercion for this purpose was defined as "actual or threatened affirmative action, beyond suggestion or persuasion, taken by a defendant in order to induce 'a plaintiff to follow the defendant's prices."

Finding common threads in decisions such as *Acquaire, Jack Walters, Dunn* and *Bender* is extremely difficult, if not impossible. Nonetheless, as matters now stand, businessmen and practitioners have no choice but to make difficult judgment calls as to when a particular set of facts will – or will – not-cross over the line between a mere lawful price suggestion and potentially illegal vertical price fixing (per se illegal if "minimum," subject to further rule of reason analysis if "maximum").

Robinson-Patman Act (Clayton Act Section 2)

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§ 4:1 Statutory language

§ 4:1 Statutory language

Discriminations in price; cost justification and changed market conditions defenses:

Sec. 2(a). [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: 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: . . . 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. [15 U.S.C.A. § 13(a)]

Meeting competition defense:

Sec. 2(b). 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 . . . : 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. [15 U.S.C.A. § 13(b)]

Illegal brokerage payments:

See. 2(c). [I]t 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. [15 U.S.C.A. § 13(c)]

Discriminatory services or facilities compensation:

Sec. 2(d). [I]t shall be unlawful for any person engaged in commerce to pay or contract 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. [15 U.S.C.A. § 13(d)]

Discriminatory provision of services or facilities:

Sec. 2(e). [I]t 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. [15 U.S.C.A. § 13(e)]

Buyer inducements of price discriminations:

Sec. 2(f). [I]t 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.A. § 13(f)]

§ 4:2 Overview of the Robinson-Patman Act

The most complex and controversial of the antitrust laws are those provisions of the Clayton Act concerned with discriminatory pricing and promotional allowances (commonly referred to as the "Robinson-Patman Act" provisions). Stated broadly, Section 2(a) of the Clayton Act provides that a seller cannot discriminate in price between purchasers of goods of like grade and quality when substantial competitive injury may result. Sections 2(d) and (e) of the Act contain closely related provisions proscribing discriminatory promotional payments or services not made available to all competing customers on proportionally equal terms. Section 2(c) of the Act is specifically directed at de facto price discriminations resulting from unearned brokerage payments. Finally, buyer liability for the knowing inducement or receipt of unlawful discriminatory prices is covered by Section 2(f) of the Act.

Private as well as governmental enforcement mechanisms are available. The Federal Trade Commission enforces the Robinson-Patman Act through civil administrative proceedings. The Department of Justice is likewise empowered to enforce the Act through civil injunctive actions, although the Department has been openly critical of the Act for several years and has refrained from actively enforcing it. Criminal sanctions are even available for certain forms of price discrimination considered particularly pernicious, although this section has been rarely enforced. Supplementing these government actions are private suits for treble damages (i.e., three times the antitrust injury proven or injunctive relief).

The legislative history of the Act reveals an overriding congressional concern with two practices deemed competitively unfair. The first was the misuse of predatory price differentials by dominant sellers to drive their smaller competitors from the marketplace. The second was a purchaser-oriented concern that dominant buyers could similarly drive their competitors from the lower levels of the distribution hierarchy through misuse of their purchasing clout and not because of cost efficiencies or simple arm's length bargaining.

The judicial response to these legislative concerns has, unfortunately, been quite inconsistent. At the one extreme are cases that mechanically find liability without any real analysis as to whether competition has been truly harmed. At the other extreme are cases that look to the broader competitive impact of the particular pricing practice, while emphasizing the need to reconcile the prohibitions of the Robinson-Patman Act with the procompetitive objectives of the other antitrust laws. As discussed below, the choice between these extremes depends primarily upon the nature of the particular plaintiff asserting the claim: is the plaintiff a competitor of the defendant seller or is a plaintiff, instead, a disfavored dealer or other customer?

§ 4:3 Discriminatory pricing

Stated broadly, Section 2(a) of the Robinson-Patman Act prohibits discriminations in price between purchasers of goods of like grade and quality, where the effect may be to substantially lessen competition or to tend to create a monopoly [15 U.S.C.A. § 13(a)]. (See the specific statutory language in § 4:1, *supra*.) Actually, the precise language of Section 2(a) is far more complex, containing a number of intricate statutory elements. Of particular importance are the following prerequisites for 2(a) liability:

(a) The seller must be "engaged in commerce," the price discrimination must occur "in the course of such commerce," and at least one of the sales constituting the discrimination must itself be "in commerce."

(b) The discrimination must involve "sale" transactions to at least two different purchasers.

(c) The items involved must qualify as "commodities."

(d) The commodities must be "of like grade and quality."

(e) The seller's prices must be "discriminatory" as between the purchasers.

(f) The discriminatory sales must occur reasonably contemporaneously in time.

(g) The "effect" of such discrimination must be a reasonable possibility of (a) a substantial lessening of competition or tendency to create a monopoly in any line of commerce, or (b) injury, destruction or prevention of competition with the seller granting the discrimination, any person knowingly receiving the benefit of the discrimination, or a customer of either the seller or such favored person.

a. If the action is one for damages, the plaintiff must prove actual injury to it such as lost sales or profits, proximately caused by the discriminatory price granted to the favored customer or customers.

Assuming that an affirmative case of price discrimination is established under the above framework, it by no means follows that the inquiry is necessarily at an end. The defendant then has available to it a number of significant affirmative defenses (discussed in § 4:4), including in particular:

(a) The "cost justification" defense found in Section 2(a) itself, according to which price differentials are lawful which "make only due allowance" for cost savings in "manufacture, sale or delivery" resulting from "differing methods or quantities" in which the product is sold or delivered to different purchasers.

(b) The "meeting competition" defense of Section 2(b) of the Act, according to which it is a complete defense that the purportedly discriminatory price was "made in good faith to meet an equally low price of a competitor."

(c) The judicially recognized "availability defense," according to which it is not an act of price discrimination for a seller to offer two prices, one normal and the other reduced on certain reasonable terms being met, where both prices are realistically available to the allegedly disfavored customer.

(d) The judicially recognized "functional discount" defense, according to which sellers are permitted to use price differentials to compensate certain classes of customers (e.g., wholesalers) for the distributional services they perform.

The leading case construing the first element of an affirmative Section 2(a) case-the commerce requirement-is *Gulf Oil Corp. v. Copp Paving Co.* The Supreme Court there held that purely intrastate purchase transactions that arguably "affected" an instrumentality of interstate commerce (highways) were insufficient to satisfy the in commerce language of Section 2(a). Concluded the Court, the provision applies only where "at least one of the two transactions which, when compared, generate a discrimination . . . cross[es] a state line." A substantial effects test analogous to that under Sherman Act Section 1 was, thus, rejected for purposes of alleged violations of Section 2(a).

The rule articulated in *Gulf Oil* is softened somewhat by a further principle that treats interstate shipments of goods as still being in commerce until the "flow of commerce" has been broken. Applying this reasoning, commerce has been held satisfied within the meaning of Clayton Act Section 2 where goods shipped across state lines have been temporarily stored prior to actual sale. On the other hand, the flow of commerce has been held broken by such events as substantial processing of the goods, sales to in state customers, and incorporation of the goods into other products.

where goods shipped across state lines have been temporarily stored prior to actual sale. On the other hand, the flow of commerce has been held broken by such events as substantial processing of the goods, sales to in-state customers, and incorporation of the goods into other products.

The next key element, that of separate "sales" transactions, reflects the fact that Section 2(a) is by its very phrasing narrowly concerned with sales transactions that discriminate as between separate "purchasing" entities. Hence, non-sale transactions such as mere offers to sell, licenses, consignments, agencies and leases fall outside the proscriptions of the Act, although they may still fall within the coverage of some other antitrust provision. Additionally, since the sales must involve "separate purchasers," favoritism shown by a corporate parent to its controlled subsidiaries would fall outside the proscriptions of the Act. Mirroring this principle, at least one case has held that a manufacturer and its wholly-owned subsidiary constitute a single entity for purposes of a Robinson-Patman claim premised on wholesale price undercutting by the subsidiary.

Another fundamental requirement is that the discriminatory sales be reasonably contemporaneous in time and threaten competition within a common market segment, such that the prices being compared reflect a true competitive threat and are not simply the result of changing market forces over time or different markets in which the allegedly favored and disfavored customers do not really compete.

The next requirement, that the discrimination involve "commodities," has the effect of rendering the statute inapplicable to discriminations in the sale of services or other intangibles, although such discriminations may, like nonsale transactions, be subject to some other antitrust provision. The related requirement that the commodities be of "like grade and quality" has been gauged using a customer-oriented comparison of the physical characteristics and appearance of the products that asks whether there are differences affecting customer use, perception or marketability. The differences may not merely be in the trademarks attached to the products, however, and must be in the products themselves. Thus, in *Federal Trade Comm'n v. Borden Co.,* the Supreme Court held that goods that were physically identical except for brand name were of like grade and quality, even though brand differentiation had succeeded in distinguishing the products in the minds of consumers. Similarly, other courts have held that minor alterations in the physical characteristics of otherwise identical goods will not render them of "unlike" grade and quality. Rather, the alteration or other distinguishing feature must be significant.

The requirement that there be an actual "discrimination" in price has not been a difficult one to meet, for the Supreme Court has equated a price discrimination with a mere price difference as between at least two purchasers. For example, in *Texaco, Inc. v. Hasbrouck,* the Court held that this element was met by proof that the defendant had charged a higher price to the plaintiff, a retail customer, than that charged to two vertically-integrated wholesale customers that competed with the plaintiff at the retail level. Regarding the element of discrimination, the Court stated that "a price discrimination within the meaning of § 2(a) 'is merely a price difference'."

The pivotal inquiry in the cases has typically been into the next of the key elements of an affirmative case: whether the plaintiff has adequately demonstrated a threatened substantial anticompetitive effect caused by the defendant's acts of price discrimination. Proof of actual competitive injury is not required, with the test instead being whether a "reasonable possibility" exists that competitive harm will ultimately result from the defendant's acts. Beyond this generality, the analytical approaches differ, depending upon whether the injury asserted by the plaintiff is at the seller's own competitive level (termed primary line injury) or at some lower level of the distribution hierarchy (termed secondary line injury).

In the latter, "secondary" line type of case, prima facie proof of threatened competitive injury may be established by evidence of a substantial price discrimination between competing purchasers sustained over a significant period of time. Such an affirmative case is, however, merely prima facie, and may be overcome by other evidence sufficient to break the causal connection between the price differential and the alleged competitive harm to the plaintiff.

These basic principles can be seen in the leading case of *Falls City Industries, Inc. v. Vanco Beverage, Inc.* The case involved Section 2(a) allegations that a regional brewer had illegally discriminated in price between the plaintiff, a wholesale distributor of the defendant's beer located in Indiana, and another adjacent distributor just across the state line in Kentucky. Under state law, neither distributor could sell across state lines to the retail customers of the other, so that they were technically not in "competition" with one another. However, as a result of the higher prices that the plaintiff had to pay to the defendant for the beer, thereby driving up its own price, consumers in Indiana simply drove into Kentucky and purchased the beer from the favored distributor.

The Supreme Court upheld a verdict that these facts established a prima facie case of price discrimination in violation of Section 2(a). Since the case involved secondary line injury at the purchasing distributors' level, proof of the "substantial price discrimination between competing purchasers over time," coupled with the actual diversion of sales, was held sufficient to establish the required prima facie proof of threatened competitive injury to the plaintiff. Defense arguments that the state restrictions prevented the favored and disfavored buyers from being competitive with one another were rejected, given the evidence of actual customer diversion. Further, the Court observed that "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.

Similar principles were applied by the Supreme Court to uphold a jury verdict of illegal price discrimination based upon prima facie proof in *Texaco, Inc. v. Hasbrouck.* The defendant was an oil company that had granted special price discounts to two wholesale customers, knowing that most of the customers' sales were actually at the retail level rather than the wholesale level. The favored customers had used the discounts to aggressively cut their own retail prices. The plaintiffs were direct-buying retail customers from the defendant who allegedly lost substantial sales to the favored customers, due to their inability to match the lower prices.

The defendant did not deny charging different prices to the two favored wholesalers. Instead, it attempted to justify its pricing behavior on the ground that the favored customers made their purchases at a different "functional" level than the retailers, justifying special "functional discounts." The evidence established, however, that no significant storage or other wholesaling services were actually performed. Rather, the favored customers simply picked up gasoline from the defendant and delivered it directly to their own retail outlets. Based upon this evidence, a jury had found for the

simply picked up gasoline from the defendant and delivered it directly to their own retail outlets. Based upon this evidence, a jury had found for the plaintiffs, and the Supreme Court affirmed.

The Court began its analysis by identifying the general elements of a Robinson-Patman § 2(a) claim of price discrimination:

In order to establish a violation of the Act, respondents had the burden of proving four facts: (1) that Texaco's sales to [the favored customers] were made in interstate commerce; (2) that the gasoline sold to them was of the same grade and quality as that sold to respondents; (3) that Texaco discriminated in price as between [the favored customers] on the one hand and respondents on the other; and (4) that the discrimination had a prohibited effect on competition. 15 U.S.C. § 13(a). Moreover, for each respondent to recover damages, he had the burden of proving the extent of his actual injuries.

The first two elements were not in dispute. As for the third element – that there be a "discrimination" in price – the Court rejected defense arguments that the favored and disfavored customers must both make their purchases at the same functional level for a prohibited discrimination to occur. Other prior Supreme Court cases were cited as finding illegal discrimination involving customers at different functional levels, leading the Court to reiterate the long-standing rule that "a price discrimination within the meaning of Section 2(a) 'is merely a price difference'."

Having rejected an automatic rule that would have allowed different prices for customers buying at different distributional levels, the Court turned its attention to the fourth element: that the discrimination have a "prohibited effect" on competition. The early case of *Federal Trade Comm'n v. Morton Salt Co.* was cited for the rule that an "inference" of competitive injury was established by proof that "some purchasers had to pay their supplier 'substantially more for their goods than their competitors had to pay'." Observing that this inference might have been countered by other evidence or by proof of a legitimate functional discount, the Court concluded that the facts before it did not rebut the inference, given evidence that the plaintiffs had lost -substantial sales to the favored customers; that the price difference was substantial and sustained; and that the favored customers had made the bulk of their sales in a retail capacity without providing significant wholesaling services to justify their reduced prices.

Illustrative is *Dart Industries, Inc. v. Plunkett Co. of Oklahoma., Inc.* In relevant part, a terminated distributor alleged that its former supplier had violated the Robinson-Patman Act by charging its distributors higher prices than those charged to direct-buying accounts that dealt directly with the supplier. The court held that these price differences did not violate the Act, stating: "Illegal price discrimination requires that the same product be sold at different prices to competitors. There is no evidence that . . . the direct accounts were in competition with [the plaintiff]."

A caveat should be added in light of the Supreme Court's subsequent decision in *Hasbrouck, supra.* As discussed above, the Court there held that the competitive injury for a secondary line case had been "inferentially" established by evidence that the favored customers passed their cost savings along to retail competitors of the plaintiff. Thus, the requirement of competitive impact between favored and disfavored customers does not mean that the discriminatory payments must necessarily have occurred at the same competitive level – just that they end up having a competitive impact at the same level.

A few decisions have gone still further to hold that the threat to "competition" required for a secondary line case means more than just threatened injury to the specific plaintiff. However, these decisions reflect a distinctly minority (and shrinking) view that has been rejected by most courts in light of the legislative history of the Robinson-Patman Act amendments to Section 2(a). Illustrative of the prevailing view is the Third Circuit decision in *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.* The case involved price discrimination claims by a distributor of food products that it had been injured as a result of special price discounts given to a competing distributor by the defendant, but not extended to the plaintiff. The defendant argued that absent evidence of threatened injury to the broader market (as opposed to injury to the plaintiff specifically), the claim should be disposed of on summary judgment. In rejecting this argument, the court looked to the literal language of the statute to conclude that injury to a particular disfavored customer is an *alternative* to a broader showing of competitive market injury:

Section 2(a) specifies three possible consequences of price discrimination which will satisfy its "effects" proviso, i.e., that the discrimination in price had an adverse "effect" on competition. Although in section 2(a) the first two of these effects refer specifically to discriminatory practices which lessen competition or tend towards monopoly, i.e., *broad* competitive impacts, the third makes price discrimination illegal where it adversely affects the ability of individual companies to compete. Thus, section 2(a) makes it unlawful to discriminate in price where "the effect 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. . . ." 15 U.S.C. § 13(a). The language of the statute reflects concern both for the preservation of competition and for the protection of individual competitors.

Where the effect is instead felt at the primary line level (i.e., by firms that compete with the seller granting the discriminatory price), the evidentiary requirements differ considerably from those articulated for secondary line cases. The plaintiff must then either prove the possibility of harm through an in-depth analysis of market conditions, or "infer" such harm through proof of "predatory pricing." The courts have emphasized that evidence of a mere intent to capture sales is not enough; a longer-term objective of market control that appears plausible in light of the market evidence must additionally be shown for the defendant's pricing to be deemed predatory.

A 1993 decision by the Supreme Court clarified the inferential approach to proving threatened competitive injury from evidence of predatory pricing. The case is *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.* The plaintiff was a company that had introduced generic (non-branded) cigarettes to the U.S. market. The defendant was one of the leading manufacturers of branded cigarettes. According to the complaint, the defendant responded to the plaintiff's introduction of generic cigarettes by announcing its own generics at deeply discounted prices. A price war erupted, during which the defendant's prices dropped below its average total cost for a prolonged sixteen-month period and at times to a level even below its average variable cost. The plaintiff claimed that the motivating force behind the defendant's pricing was to force the plaintiff, along with the rest of the industry, into raising prices and adhering to a tacit practice of oligopolistic price following at higher price levels.

A jury had found for the plaintiff. However, the district court had entered judgment n.o.v. for the defendant, which the appellate court had affirmed. The Supreme Court agreed that no reasonable jury could have found the defendant's prices to be "predatory." Moreover, the Court came to this conclusion despite testimony presented by the plaintiff's expert witness as to why the pricing was predatory, and despite internal company documents of the defendant manifesting a subjective intent to stem competition from generic products. Writing for the Court, Justice Kennedy began his analysis by emphasizing that more must be shown to sustain a Robinson-Patman claim than a mere showing of a price difference between competing purchasers:

Although we have reiterated that "'a price discrimination within the meaning of [this] provision is merely a price difference'," [citations omitted], 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, § 13(a). "changing conditions affected the market for or the marketability of the goods concerned," ibid., or conduct undertaken "in good faith to meet an equally low price of a competitor," § 13(b); [citation omitted], 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." [Citations omitted.]

Turning to primary line cases specifically, the Court began with a narrowing interpretation of its earlier decision in *Utah Pie Co. v. Continental Baking Co.* That decision, noted the Court, has been criticized by some commentators as seeming 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 Court squarely rejected this contention and replaced amorphous notions of "intent" or "declining price structures" with a more objective, market-based analysis in which two prerequisites must be met:

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. * * *

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.

Regarding the first of these requirements, the Court observed that it is not enough that the defendant's price is below some general market level or below a competitor's costs. The cost benchmark utilized must be that of the defendant itself.

Although *Cargill* and *Matsushita* reserved as a formal matter the question "whether recover should ever be available . . . when the pricing in question is above some measure of incremental cost," [citations omitted], 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.

Also rejected was the notion that bad "intent" or "malice" might, of itself, make a price predatory even though competition has not been injured. Responded the Court:

Even an act of pure malice by one business competitor against another does not, without more, state a claim under the federal antitrust laws; those laws do not create a federal law of unfair competition or "purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945).

Turning to the second prerequisite – recoupment – the Court held that for recoupment to occur, below-cost pricing must be capable of both achieving its intended effects on the defendant's rivals and of restraining competition long enough for the defendant to raise its prices and recapture profits lost during the period of price cutting. Explained the Court:

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.

Continued the Court:

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. [Citation omitted.] 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.

The plaintiff did not claim that the defendant intended to drive it and other competitors from the market, as is more typically asserted in a primary line case. Rather, the plaintiff's theory was that the defendant sought to force higher market prices by "signalling" competitors to engage in tacit oligopolistic pricing at a higher price level. As support for the theory, the plaintiff relied on affidavit testimony of an economist and internal documents in which some of the defendant's employees expressed an intent to raise industry prices by countering the market entry of generic products

documents in which some of the defendant's employees expressed an intent to raise industry prices by countering the market entry of generic products.

Despite this evidence, the Court ruled that no reasonable jury could have found that the defendant realistically expected to recoup its lost profits through later supracompetitive pricing. Factors cutting against any such expectation included rapid industry changes, market instability, past industry pricing behavior, and the absence of any direct evidence that competitors actually viewed the defendant's behavior as price signalling. Since no express collusion was claimed, the Court reasoned that competitors had no way of knowing whether the defendant's pricing conduct was signalling or was, instead, simply an attempt to capture market share. "If even one other firm misinterpreted [the defendant's] entry as an effort to expand share, a chain reaction of competitive responses would almost certainly have resulted, and oligopoly discipline would have broken down, perhaps irretrievably." A market characterized by this sort of volatility was held to make long-term supracompetitive pricing unlikely and recoupment even more unpredictable. As for the expert testimony on which the plaintiff had largely built its case, the Court stated:

When an expert opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or otherwise render the opinion unreasonable, it cannot support a jury's verdict. [Citation omitted.] Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them. As we observed in *Matsushita,* "expert opinion evidence . . . has little probative value in comparison with the economic factors" that may dictate a particular conclusion.

Concluded the Court: "No inference of recoupment is sustainable on this record, because no evidence suggests that Brown & Williamson – whatever its intent in introducing [generics] may have been – was likely to obtain the power to raise the prices for generic cigarettes above a competitive level.

Brooke Group illustrates the so-called "inferential" approach to proving the threatened competitive harm for a "primary line" case with evidence of predatory, below-cost pricing. A case that illustrates the alternative approach of proving competitive harm through a full market analysis is the Third Circuit decision in *Indian Coffee Corp. v. Procter & Gamble Co.* The case was brought by a defunct coffee manufacturer against a competitor that had allegedly engaged in geographic price discrimination in violation of Robinson-Patman Section 2(a). The discriminatory pricing took the form of "price-off" coupons given by the defendant to its distributors in those territories where it faced competition from the plaintiff. The coupons were in turn passed along through the distribution chain to consumers, who could turn them in for price refunds. The evidence established that when the invoice credits were factored into the defendant's over-all price to the favored distributors, the defendant's price fell below its material and manufacturing costs. The evidence further showed that prior to dropping out of the market altogether, the plaintiff held an 18 percent market share, and that the defendant's pricing practices were a major contributing factor in the plaintiff's market exit.

The district court had directed a verdict for the defendant. The Third Circuit reversed, reasoning in relevant part as follows:

A price discrimination to a retailer on condition that he pass it on to a consumer so as to increase the discriminator's share of the geographic market is nevertheless a price discrimination. The effect on a primary line competitor of a discrimination in such a form is identical. Indeed it was the purpose of Congress in passing § 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. 13(d), to prevent facile avoidance of the prohibition against price discrimination by framing what is economically such a discrimination in another form.

Also rejected was the lower court's reasoning that the plaintiff had in any event failed to demonstrate actual "harm to competition." The Third Circuit concluded that the requisite harm was demonstrated by the apparent elimination of a regional competitor holding an 18 percent market share and by "evidence of sales below cost from which predatory intent could be inferred."

A final key element of a plaintiff's affirmative case for alleged price discrimination arises when the plaintiff seeks damages and not simply injunctive relief. Section 2(a) prohibits price discriminations that "may" substantially injure competition. However, the statutory provision providing for damages, Clayton Act Section 4, requires an additional showing that the plaintiff has been actually "injured in his business or property." In the 1981 decision of J. *Truett Payne Co. v. Chrysler Motor Corp.,* the Supreme Court construed this language as requiring a showing of actual competitive injury to the plaintiff causally related to the defendant's law violation, and squarely rejected a claim for "automatic damages" in the amount of the challenged price discrimination. Cases subsequent to that decision have accordingly required that for the plaintiff to recover damages, it must demonstrate not only the fact of the illegal discrimination, but a material causal connection between the lower price granted the favored customer or customers and actual competitive injury suffered by the plaintiff.

Illustrative is the Tenth Circuit decision in *World of Sleep v. La-Z-Boy Chair Co.* While the case arose under Clayton Act Section 2(e), its holding applies equally to damages for a Section 2(a) claim. The plaintiff was a retailer of reclining chairs that sued its manufacturer-supplier for alleged violations of Sherman Act Section 1 and Robinson-Patman Section 2(e). The defendant manufactured two lines of chairs essentially identical except for their brand names. One of the lines was marketed to furniture stores (including the plaintiff). The second branded line was marketed to department stores. Because department stores typically preferred preparing their own advertising for the products, the defendant granting them special advertising allowances not made available to purchasers of the furniture store brand. The plaintiff challenged this practice as a violation of Section 2(e). Following a jury verdict, judgment was entered in the plaintiff's favor.

On appeal, the Tenth Circuit reversed. Looking to the record as a whole, it concluded that the plaintiff had failed to demonstrate just how its ability to compete with favored retail competitors had been impeded. Citing the Supreme Court decision in *J. Truett Payne, supra,* the court held that proof of the discrimination alone was not enough to support the plaintiffs damages claim. Rather:

In *J. Truett Payne* the Supreme Court rejected the "automatic damages" rule with respect to § 2(a) violations, and concluded that the requisite injury and damages cannot be presumed from a showing of illegal discrimination alone. 451 U.S. at 563. That holding is equally applicable to a plaintiff seeking damages for a violation of § 2(e) because such damages are also governed by § 4 of the Clayton Act, the damages provision construed in *J. Truett Payne.* Under the Supreme Court's analysis, a plaintiff must show more than that he failed to receive a promotion allowance. He must show

that this disadvantage adversely affected his ability to compete with favored competitors, because this is the competitive injury the Robinson-Patman Act was intended to prevent. See *id.* at 563-64 and n.4. Such a showing may be made by proof that the illegal discrimination permitted a favored purchaser to lower its price and thereby reduce a plaintiff's sales or profits. *Id.* at n.4. A disfavored buyer might also show that as a result of paying more for its goods than its competitors, it was less able to "advertise, make capital expenditures, and the like."

The record indicated- that, rather than meeting this standard, the plaintiff had become even more successful in the face of the challenged advertising allowance. Its share of overall distribution had expanded, making it the second largest independent retailer of the defendant's chairs in the country. Its own advertising had remained effective in drawing customers, and no evidence had been offered to suggest that the challenged allowances had enabled competing favored dealers to lower their prices, divert sales, or force the plaintiff to operate at an unprofitable level. An award of damages in the plaintiff's favor was, accordingly, reversed.

In contrast to *World of Sleep,* the elements of causation and actual injury were held to have been met in the Sixth Circuit decision of *Allied Accessories and Auto Parts Co. v. General Motors Corp.* The plaintiff was a wholesale distributor of automobile parts. It sued General Motors for price discrimination after GM agreed to give a competing distributor an extra 10 percent discount for auto filters. The acknowledged reason for the discount was to enable the favored distributor to bid for a large mass-market retail account. The plaintiff alleged that as a result of the discount, it had lost out on competitive bidding for the retailer. The district court found for the plaintiff in a bench trial, and the Sixth Circuit affirmed.

In upholding the verdict, the appellate court rejected defense arguments that the wrong standards of "causation" and "injury" had been applied. The district court had found that factors other than the price difference had contributed to the customer's decision to buy from the favored distributor, but that the price difference had been a "material" factor in the customer's decision. The Sixth Circuit agreed that it was enough that the price discrimination was a "material" contributing factor, and that the discrimination did not have to be the "sole" or "primary" factor:

[The Act] does not require the plaintiff to prove that price discrimination was the sole or 'but for' cause of his injury. It is enough that the challenged price discrimination is a *material* cause of that injury. "[A] plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury." [Citation omitted.]

4:4 Defenses: Cost Justification, Meeting Competition, Availability Defense, and Functional Discounts

An express affirmative defense to allegations of unlawful price discrimination is found in Section 2(a) of the Robinson-Patman Act, known as the "cost justification" defense. According to this defense, price differentials are lawful which "make only due allowance" for cost savings in "manufacture, sale or delivery" resulting from "differing methods or quantities" in which the product is sold or delivered to particular customers. The burden of proving such a justification is on the defendant seller and must be based upon actual cost savings to the seller. However, recognizing the difficulties of calculating cost differentials attributable to specific customers, the courts allow the use of average cost comparisons between different customer classes, provided that the classes selected are truly representative of individual class members.

Illustrative is the 1987 Sixth Circuit decision in *Allied Accessories and Auto Parts Co. v. General Motors Corp.* The case concerned claims that the defendant, a manufacturer of oil filters, had granted 10 percent discounts to a distributor not granted to the plaintiff, thereby causing the plaintiff to lose a key account to the favored distributor. Judgment had gone for the defendant.

The Sixth Circuit reversed. Error was found in the standard applied to a "cost justification" defense asserted by the defendant. The defendant had arbitrarily created two classes of customers, one consisting of the favored distributor and the other consisting of its 2,000 other regular customers, including the plaintiff. No attempt was made to break the latter class down by geographic area, by volume of purchases, or in any other way. The purported cost rationale for separately classifying the one favored distributor was apparently that it was given a special contract in which the defendant's incentive programs and cooperative advertising were waived, thereby saving unspecified costs for the defendant. Held the court:

[T]his method of justifying a price discount violates a number of the principles set forth by the Supreme Court in Borden [United States v. Borden Co., 370 U.S. 460 (1962)]. First, defendant never offered to the class of 2,000 the option of giving up the additional GM services which [the favored distributor] was permitted to forego. . . . In regard to the cost savings allegedly peculiar to [the favored distributor] as a distributor of oil filters, plaintiff correctly notes that several of the services not provided to [the favored distributor] would have been unnecessary for any distributor selling to [the key account]. . . . Even more troublesome is GM's grouping of all its customers into a single 2,000 member class for the purposes of determining that [the favored distributor] was entitled to a price 10 percent lower than any other buyer. To say that all 2,000 had a contract entitling them to certain services by GM is not to prove that all of GM's customers possessed "such self sameness as to make the averaging of the cost of dealing with the group a reasonable indicium of the cost of dealing with any specific group member." Borden, 370 U.S. at 469.

A second statutory defense found in Section 2(a) covers "changed market conditions" that adversely affect the marketability of the defendant's goods, thereby justifying special price reductions. According to this defense, special price reductions are not illegal where they arise 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."

Historically, cases involving the changed market conditions defense have tended to focus on some of the easier and more obvious fact scenarios, such as instances of perishable or seasonal goods that must either be sold at special reduced rates or not be sold at all. The defense has not been so limited, however, and has been extended to other situations in which market events outside the defendant's discretionary control necessitate special pricing responses. The broader potential reach of the defense can be seen in the Tenth Circuit decision of *Comcoa, Inc. v. NEC Telephones, Inc.* There, a defendant successfully asserted technological obsolescence as a changed market condition that justified special volume discounts for customers

defendant successfully asserted technological obsolescence as a changed market condition that justified special volume discounts for customers purchasing the affected equipment. In describing the defense, the court was careful to confine it to situations in which the market conditions relied upon by the defendant as a justification for its pricing behavior are truly external and are not factors within the defendant's ability to manipulate and control:

Under the proviso, the seller can respond with a price change when its goods become unmarketable and "when certain special and temporary conditions involving the industry in general, as opposed to conditions affecting the seller's goods in particular, adversely affect the saleability of its products." [Citation omitted.]

A further express defense is found in Section 2(b) of the Act, known as the "meeting competition" defense. According to this defense, it is not unlawful for a seller to lower his price "in good faith to meet an equally low price of a competitor." The burden of proof is again on the seller, with the relevant inquiry being whether he can demonstrate that a "reasonable and prudent" person would have believed that the granting of a lower price "would in fact meet the equally low price of a competitor." Good faith, rather than absolute certainty, is the touchstone, so that as long as the seller acts in good faith, he may even inadvertently undercut the competitor's price without forfeiting the defense. While at least some verification by the seller is required to establish good faith, it may come through documentation or statements obtained from the favored customer, reports of similar offers to other customers, or analysis of pertinent market factors indicating the likelihood that a competing offer has indeed been made. For example, in the leading case of *Great Atlantic & Pacific Tea Co. v. Federal Trade Comm'n,* adequate verification was found in customer statements that the seller needed to lower its price to "be in the ballpark," even though the customer refused to provide further details and the seller ended up undercutting competitive prices, where prior sales and market conditions made it reasonable to believe that a lower offer had been made. Direct communications with competing sellers are not only unnecessary, but may subject the seller to price-fixing liability under Section 1 of the Sherman Act.

The basic principles underlying the meeting competition defense can be seen in the 1983 Supreme Court decision of *Falls City Industries, Inc. v. Vanco Beverage, Inc.* In relevant part, the Court rejected lower court reasoning that the defense could be applied only on a specific customer-by-customer basis. Concluded the Court: "Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions." The Court was careful to add the caveat that the reduced price must be offered in good faith, and that "[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. Also worthy of note is the Court's treatment of defense arguments that the defense is available only for "defensive" price offers: "Section 2(b) . . . 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.

Yet another noteworthy defense is not found in the Act itself but has been inferred by the courts. Known as the "availability" defense, this judicial doctrine holds that if the seller offers two prices, one normal and the other reduced, and if the reduced price is equally and realistically available to all customers, then a prohibited price discrimination simply does not occur. As expressed by one court, "Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that no price discrimination has occurred."

The basic elements of an "availability" defense can be seen in the Sixth Circuit decision in *Bouldis v. U.S. Suzuki Motor Corp.* In relevant part, the case involved claims by a former Suzuki dealer that the manufacturer had violated Section 2(a) of the Robinson-Patman Act by offering special quantity discounts to dealers purchasing specified minimum quantities. The purchasing conditions imposed were found to be "well within the means of the average Suzuki dealer," from which the court concluded that the availability defense applied. Held the court: "The practice of conditioning price concessions and allowances upon the customer's purchase of a specific quantity of goods will not give rise to a Robinson-Patman violation if the concessions are available equally and functionally to all customers. Also rejected was an argument that the defendant had violated Section 2(a) by refusing to make special credit arrangements available to the plaintiff, while offering such credit to other dealers. The record revealed that the manufacturer's refusal was actually due to the plaintiff's poor financial condition from which the court concluded: "Section 2(a) is not violated when the credit decisions are based upon legitimate business reasons.

For the availability defense to succeed, the lower price must be so structured as to be realistically available to competing buyers. Illustrative is the Eleventh Circuit case of *DeLong Equipment Co. v. Washington Mills Abrasive Co.* The plaintiff was a distributor of metal finishing abrasives manufactured by the defendant. The plaintiff alleged that it was terminated after refusing to take part in a conspiracy between the defendant and another distributor to pad the price of metal abrasives sold to one of the defendant's largest retail accounts. This was done by fraudulently informing the customer that it was receiving "special" abrasives, when it was actually receiving a product identical to the defendant's off-the-shelf inventory. The plaintiff reasoned that since the product was actually of like grade and quality with identical products sold to other customers at a lower price, a secondary line Robinson-Patman violation had occurred.

The district court had entered summary judgment for the defendant on the ground that the lower-priced, standard inventory was available to the plaintiff and the defrauded retailer. On appeal, the Eleventh Circuit reversed and remanded for trial, holding that the "availability" defense was not applicable to the case because of its unique facts. The court described the defense as follows:

The availability defense is stated when, although the seller offered different prices for the same commodity to different buyers, the lower price was available to all buyers. 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 the discrimination is not the proximate cause of the injury.

Continuing, the court reasoned that in the unique circumstances of the case, the defendant had effectively removed the lower priced stock inventory as a viable alternative for sales to the defrauded customer, by convincing it that its "special" product was not comparable to the other products. "Because [the defendant] did not offer stock prices on the media labeled 'special,' the stock price was not functionally available."

A blend of the cost justification and availability defenses can be seen in the so-called "functional discount" rule. Likewise a creature of judicial construction rather than express statute, this doctrine states that it is not a violation of the Act for a seller to grant a discount to a particular customer or class of customers in accordance with the distributional function performed by the customer. For example, wholesalers may receive a wholesale discount to reflect the added wholesaling functions that they perform over retail customers, while a large volume retailer performing special inventory storage functions might be granted a special discount to reflect this added responsibility. Discounts of this type are commonplace and reflect judicial reasoning that such pricing systems either can be cost justified, satisfy the requirements of the availability defense, or involve customers so competitively unrelated as to fail to meet even the minimal competitive injury standards for a Robinson-Patman secondary injury claim.

Illustrative is the Second Circuit decision in *FLM Collision Parts, Inc. v. Ford Motor Co.* There, a manufacturer's dual pricing system was upheld against charges of price discrimination, where the customer's price varied depending upon whether he was serving in a retail or a wholesale capacity. The court reasoned that the Robinson-Patman Act "does not prohibit the seller from offering different prices to each of its purchasers, such as one price when he functions as a retailer and a lower price when he functions as a wholesaler, provided all competing purchasers are treated equally."

The key requirement that "all competing purchasers be treated equally" took on renewed significance with the 1990 Supreme Court decision in *Texaco, Inc. v. Hasbrouck*. The Court there rejected a mechanical interpretation of the functional discount defense that would have simply asked whether or not the favored and disfavored customers made their purchases at different functional levels, holding instead that lower prices granted to a wholesaler but carried forward to the retail level do not necessarily qualify for the defense.

The defendant in *Texaco* was an oil company that had granted special price discounts to two wholesale customers, knowing that most of the customers' sales were actually made at the retail level through company-owned outlets, rather than at the wholesale level. The favored customers had used the discounts to aggressively cut their retail prices. The plaintiffs were direct-buying retail customers who lost substantial sales to the favored customers, due to their inability to match the lower prices.

The defendant did not deny charging different prices to the two favored wholesalers. Instead, it attempted to justify its pricing behavior on the ground that the favored customers made their purchases at a different "functional" level than the retailers, justifying special "functional discounts." However, the evidence established that no significant storage or other wholesaling services were actually performed. Rather, the favored customers simply picked up gasoline from the defendant and delivered it directly to their own retail outlets. Based upon this evidence, a jury had found for the plaintiffs, and the Supreme Court affirmed.

Specifically rejected were defense arguments that the favored and disfavored customers must both make their purchases at the same "functional" level for-a prohibited discrimination to occur. Other prior Supreme Court cases were cited as finding illegal discrimination involving customers at different functional levels, leading the Court to observe that "a price discrimination within the meaning of Section 2(a) 'is merely a price difference'."

Having rejected an automatic rule that would have allowed different prices for customers technically buying at different functional levels, the Court turned its attention to a more orthodox application of the defense. Pointing to the facts of the particular case before it, the Court concluded that the defendant had failed to meet its burden of establishing that the discount was, in fact, justified by bona fide functional services performed by the favored buyer:

The hypothetical predicate for . . . 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, both the District Court and the Court of Appeals concluded that even without viewing the evidence in the light most favorable to the respondents, there was no substantial evidence indicating that the discounts to [the favored customers] constituted a reasonable reimbursement for the value to Texaco of their actual marketing functions. [Citation omitted.] Indeed, [one favored customer] was separably compensated for its hauling function, and neither . . . maintained any significant storage facilities.

The Court was careful to confine its ruling to the weak factual showing before it. The continuing propriety of a functional discount defense, if supported by the evidence, was reconfirmed: "[A] functional discount that constitutes a reasonable reimbursement for the purchaser's actual marketing functions will not violate the Act.

§ 4:5 Illegal brokerage payments

Under Section 2(c) of the Robinson-Patman Act, sellers and buyers are prohibited from granting or receiving a "commission, brokerage . . . or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods." As construed by the Supreme Court in *Federal Trade Comm'n v. Henry Broch & Co.*, the purpose of the provision is to deter dummy commission or brokerage payments designed to indirectly effect a price discrimination and thereby circumvent the proscriptions of Section 2(a), the basic price discrimination provision.

While Section 2(c) is, thus, said to augment Section 2(a), it is actually far more stringent in operation. Proof of threatened anticompetitive effect is not an element of the plaintiff's affirmative case; moreover, neither the defense of cost justification nor that of meeting competition is available.

Significant features distinguishing a Section 2(c) case from one brought under Section 2(a) can clearly be seen in the Fifth Circuit decision of *Gibson v. Federal Trade Comm'n,* involving alleged kick-back payments by a manufacturer's representative to the owner of a chain of franchised retail discount stores. The representative split commissions with the owner that he received from the manufacturer on sales to the retail stores. The Fifth Circuit affirmed an FTC holding that the payments constituted an illegal brokerage arrangement in violation of Section 2(c), without inquiry into whether actual price discrimination within the meaning of the Act had occurred or into whether an anticompetitive "effect" had resulted. Reasoned the court: "Section 2(c) on its face absolutely prohibits the payment of brokerage except for services rendered and contains no requirement that a price discrimination occur."

While there is agreement that actual price discrimination within the meaning of Section 2(a) need not be demonstrated, there is considerable

While there is agreement that actual price discrimination within the meaning of Section 2(a) need not be demonstrated, there is considerable disagreement as to just how broad a reading should be given to the statutory objectives underlying a Section 2(c) case. Some courts take the position that the provision, while enacted primarily to curb price discrimination disguised as brokerage arrangements, is additionally concerned with preventing commercial bribery tending to undermine the sanctity of the employer-employee relationship. Other courts reject the view of Section 2(c) as being a mechanism to police the fiduciary employee-employer relationship and reason that the statute is simply concerned with preventing indirect price concessions.

The split of opinion is far from a mere semantic squabble, since the differing interpretations of legislative objective can have a very direct bearing upon such key issues as standing and proper case structure. For example, in *Municipality of Anchorage v. Hitachi Cable* customers whose employees had received allegedly illegal brokerage payments were held to have standing under Section 2(c), so as to further a perceived statutory purpose of preserving "the fiduciary relationship between a buyer and its agent." This rationale for finding standing is of course only as sound as the court's broad reading of the statute as being concerned not simply with secret price concessions, but with the protection of fiduciary obligations.

Whether the broader or the narrow view is taken, some relationship of employee or agent status must be shown between the person receiving the alleged brokerage fee or bribe and the favored-customer. Absent such a relationship, the Robinson-Patman Act – and its attendant focus upon price discriminations between different "customers" – simply does not apply. Illustrative of this point is the Fourth Circuit decision in *Jay Photography, Ltd. v. Olan Mills, Inc*. The plaintiffs were commercial photographers who brought suit against a competing photography studio for allegedly paying kickbacks to high schools in return for exclusive rights to take yearbook photographs and individual portrait pictures at the schools. The purported bribes consisted of a fee splitting arrangement between the high schools and the favored studio.

In affirming summary judgment for the defendant, the appellate court rejected arguments that the fee splitting constituted a form of commercial bribery. Rather:

[C]ircuit court cases finding commercial bribery in violation of Section 2(c) all involve the corruption of an agency or employment relationship. [Citation omitted.] Unlike these relationships, the relationship between the students and the schools does not rise to one akin to that of agency or employment. Without such a relationship to connect the students' purchasing decisions to the schools, the payments from the appellees to the schools do not cross the seller-buyer line.

§4:6 Discriminatory promotional payments, services, and facilities

Section 2(d) of the Robinson-Patman Act makes it an offense for a seller to compensate a customer for "services or facilities" furnished by the customer "in connection with the processing, handling, sale or offering for sale" of the seller's product, unless the payment is made "available on proportionally equal terms" to all other customers competing with the favored customer in the distribution of the product. Section 2(e) of the Act contains comparable language proscribing discriminations in the furnishing of the services or facilities themselves. (*See* the precise phrasing of the provisions in § 4:1, *supra*.)

Significant differences distinguish the offenses prescribed by these sections from the general price discrimination offense of Section 2(a). (*See* § 4:3, *supra*.) Evidence of likely anticompetitive effect is not an element of a case under Sections 2(d) or 2(e); rather, the plaintiff establishes its affirmative case with proof of the discrimination itself. In addition, the cost justification defense of Section 2(a) does not apply to cases arising under Sections 2(d) or 2(e). The meeting competition defense, in contrast, is available, while even a victorious plaintiff must still prove causally-related injury to its business in order to recover damages.

The range of services or facilities encompassed by Sections 2(d) and 2(e) is extremely broad: e.g., handbills, window displays, demonstrators, catalogs, storage space and equipment, prizes, advertising, and special training for employees. For the provisions to apply, however, the service or facility involved must be connected with the "resale" activities of the favored purchaser, as opposed to the initial sale by the seller to the purchaser or to other non-resale related activities. Consistent with this interpretation, the provisions have been held inapplicable to discriminatory credit terms connected with the initial sale to the purchaser, to preferential freight arrangements connected with the initial sale, and to mere refusals to sell the product to certain nonfavored person. Note that in these situations, while Section 2(d) and 2(e) may not apply, the general price discrimination prohibitions of Section 2(a) may be applicable.

The "resale" requirement for Section § 2(d) or 2(e) liability is illustrated by the Sixth Circuit decision of *Bouldis v. U.S. Suzuki Motor Corp.* In relevant part, the case involved challenges by a former Suzuki dealer to credit, freight, and cooperative advertising allowances offered to dealers by the manufacturer. The plaintiff contended that these allowances violated Sections 2(d) and 2(e) of the Act. In responding to the plaintiff's assertions, the court stressed that for these provisions to apply, the challenged payment or service "must occur in connection with commodities obtained by the purchaser for resale. (Emphasis in original.) Allegedly discriminatory credit terms offered by Suzuki to the dealers, as opposed to resales by the dealers, were held to fall outside the scope of the provisions. Similarly, alleged discrimination in the freight allowances was held outside Sections 2(d) and (e), since relating "to the initial sale of the product and not its resale."

A further limitation seen in at least some decisions is that the service or facility in question must be of an "advertising" or other "promotional" nature, thereby confining items such as favorable credit, freight or delivery arrangements to challenge under Section 2(a), rather than under Sections 2(d) or 1(e). Other courts disagree and construe the provisions as being more broadly concerned with "merchandising" services and facilities as well as advertising and promotional items, thereby pulling in additional items excluded under the narrower statutory construction.

To avoid liability under the provision, the seller must establish that the covered services or facilities (or payments for such items, if the challenge is brought under Section 2(d)), were "accorded on proportionally equal terms to all competing customers." Literal equality in treatment is not required. Rather, the items must be proportionalized on some basis that fairly treats competing customers on proportionally equal terms: e.g., as a function of

the dollar volume or quantity purchased from the seller. The system adopted must be made realistically available, so that a program that has the practical effect of foreclosing certain supposedly eligible participants from qualification will not satisfy the equal availability requirement.

Illustrative of the proportionality requirement and how it may be met is *Bouldis v. U.S. Suzuki Motor Corp.,* discussed above in connection with the "resale" requirement. Also at issue in the case were alleged discriminations in the provision of cooperative advertising allowances. The court held that such allowances on initial sales, unlike credit and freight allowances on initial sales, came within the statutory reach of Sections 2(d) and 2(e), since offered by the manufacturer for use by the dealers in connection with product resales. The defendant's allowances were held lawful since offered to dealers as a function of the number of products sold by each dealer. This formula was held to satisfy judicial and administrative guidelines on proportional equality. Explained the court:

Generally, to assure proportionality, the seller is free to devise any particular method, so long as the system utilized does not discriminate in favor of the large volume buyer. The Federal Trade Commission has stated that the best way to assure fairness in advertising allowances is to base the payments "on the dollar volume or on the quantity of goods purchased during a specified period."

In contrast, a defendant failed to meet the proportionality requirement in the Eleventh Circuit case of *Alan's of Atlanta, Inc. v. Minolta Corp.* where the items offered to favored versus disfavored customers were totally dissimilar in nature. The plaintiff was a retailer of camera equipment in the Atlanta area. It charged that Minolta had granted preferential advertising and promotional support to a dealer with which the plaintiff competed. The support included free equipment, free advertising, and other promotional subsidization not extended to the plaintiff and other dealers, and worth an estimated $350,000. The plaintiff had been offered a more limited form of financial assistance, consisting of credit extensions valued at approximately $27,000.

The district court had granted summary judgment to the defendant, reasoning that the credit assistance was a fair substitute for the promotional items. In reversing, the appellate court held that the defendant had failed to meet its burden of showing proportionality both in "legal" and "factual" terms:

[S]ections 2(d) and (e) require something more than access to different incentive programs before their "proportionally equal" standard is met. The sections' language requires that purchasers be given equal opportunity to participate in certain types of seller programs relating to the resale of products, such as advertising and promotional programs, and that the benefits under those programs be disbursed on equal terms to purchaser in proportion to some objective value of their participation. [Citations omitted.] Such a program may be one, for example, where an advertising fund is made available by a supplier to its retail-trade customers on a basis proportional to the dollar amount of the supplier's goods purchased by each retailer, the fund's moneys to be expended up to each retailer's earned limit according to the retailer's actual resale advertising.

The requirement of proportional availability to all competing "customers" would seem to suggest customers of the seller granting the payment, service or facility. However, in *Federal Trade Comm'n v. Fred Meyer, Inc.,* the Supreme Court interpreted the concept of a customer broadly to cover even the following situation. The seller had paid preferential promotional allowances to a direct-buying retailer not made available to retailers that purchased not from the seller, but through wholesalers. The customers of the wholesalers were held to be "customers" within the meaning of the provisions, so that the seller's program should have made comparable allowances available to them – presumably through the wholesalers. It is difficult to estimate the competitive impact of this decision. At the very least it puts manufacturers between the "rock and the hard place" of either not offering cooperative advertising or other resale promotional programs (probably unrealistic, if the manufacturer is to stay competitive), or having to enlist or go around their wholesale customers with support for the retail customers (complex and potentially unacceptable to the wholesaler).

An effort to inject some flexibility into the rule can be seen in the Fourth Circuit decision of *Eastern Auto Distributors v. Peugeot Motors of America.* The plaintiff was an import auto distributor that alleged that its supplier had violated Sections 2(d) and 2(e) by providing cash incentives and training facilities to some retail dealers but not to the plaintiff's dealers. In holding the plaintiff's allegations deficient, the court reasoned that the plaintiff had failed to allege that the affected dealers were in competition with one another. Stated the court:

An essential element of a claim under these provisions is the existence of competition between the favored customers and the disfavored customers. [Citation omitted.] Thus, discrimination by a seller in the provision of services to retail customers and wholesale customers would typically not be actionable since retailers and wholesalers do not normally compete with each other. [Citation omitted.] Similarly, a seller may lawfully discriminate in the provision of services to two -retail customers located in separate geographic markets since they do not compete for the same customers.

The Supreme Court cited *Fred Meyer, supra,* with continuing approval in its 1990 decision in Texaco, *Inc. v. Hasbrouck*, involving the "availability" defense as applied to a Robinson-Patman Section 2(a) claim. The Court held that a retailer could assert a Section 2(a) claim against a manufacturer that had granted lower prices to vertically integrated wholesaler-retailers, where the lower prices were not also made available to competing retailers.

One reading of the decision is that it simply holds that if the favored customer – whatever its technical label within the distribution hierarchy ("wholesaler," "dealer," etc.) – actually competes with the disfavored plaintiff, a claim can be asserted. In ruling as it did, however, the Court specifically cited *Fred Meyer* as precedent, thus breathing continued life into it.

§ 4:7 Buyer Liability

Section 2(f) of the Robinson-Patman Act is directed at buyers, as opposed to sellers, who "knowingly induce or receive a discrimination in price" which -is "prohibited" by Section 2(a) of the Clayton Act. (See the discussion of 2(a) liability in § 4:3, *supra.*)

The gravamen of the offense is the buyer's "knowledge." Specifically, it must be shown that the favored buyer knew that the price it was receiving was unlawful under Section 2(a): e.g., through awareness of different prices charged to its competitors under similar circumstances. Moreover, the Supreme Court has held that the buyer must not only have known that the price was discriminatory, but that the price was not cost justified or otherwise covered by one of the seller's affirmative defenses, thereby placing an extremely heavy burden of proof on the plaintiff. (See the

otherwise covered by one of the seller's affirmative defenses, thereby placing an extremely heavy burden of proof on the plaintiff. (See the discussion of defenses in § 4:4, *supra*.)

In *Great Atlantic & Pacific Tea Co.* v. Federal Trade Comm'n, the Supreme Court further extended these principles to hold that a buyer whose incomplete, but nevertheless truthful, assertions led a seller to undercut a competitive price offer could not be held liable under Section 2(f). According to the Court's reasoning, the incomplete but truthful assertions by the buyer gave the seller a "meeting competition" defense against 2(a) liability, thereby precluding 2(f) liability for the favored buyer. The Court left open the question of whether 2(f) sanctions might have applied had the buyer actually lied to the seller, thereby inducing the preferential price through outright deception, a situation in which at least one court has found liability.

By its terms, Section 2(f) applies only to knowing inducements of price discriminations, and not to knowing inducements of discrimination in promotional services, facilities or payments proscribed by Sections 2(d) or 2(e). (*See § 4:6, supra*.) This apparent loophole has been partially filled by application of the FTC Act to the knowing inducement of seller activity that would violate the latter provisions. Nevertheless, since the FTC Act is not enforceable by private parties, an obvious gap exists in the statutory framework – a gap which has led one court to simply finesse the problem by treating a "promotional allowance" as a "price discrimination" for purposes of 2(f) liability, thereby arguably doing violence to the clear statutory distinctions drawn between 2(a) discriminations and the specific forms of discrimination proscribed by Sections 2(d) and 2(e).

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