

# CAVEAT EMPTOR UNDER THE ROBINSON-PATMAN ACT—A REAPPRAISAL OF CURRENT DEVELOPMENTS IN BUYER'S LIABILITY

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The 1936 Robinson-Patman amendment to the Clayton Act was conceived in an atmosphere of hostility to the chain stores which supposedly received discriminatory prices not available to their small competitors.<sup>1</sup> Although the amendment creates a formidable array of legal hurdles for buyers of any size or functional type, the legislative history of the amendment negates any inference that Congress sought to impose any rigid rule of caveat emptor on buyers subject to the Act.

Indeed the congressional intent to halt coercive practices<sup>2</sup> of giant buyers,<sup>3</sup> which had an actual and visible impact on competition<sup>4</sup> was

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<sup>1</sup> 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964). The Act amends § 2 of the 1914 Clayton Act, which generally prohibited price discriminations in the sale of commodities in interstate commerce "where the effect . . . may be to substantially lessen competition or tend to create a monopoly in any line of commerce." 38 Stat. 730 (1914).

<sup>2</sup> The whole legislative history of the Act is marked by frequent references to coercion. See *Final Report on the Chain Store Investigation*, S. Dkt. No. 4, 74th Cong., 1st Sess. 24-25 (1934); Remarks by Representative Patman, *Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 6 (1935). See also the remarks by H. B. Teegarden before the same committee to the effect that the bill is directed at the "use of that buying power to *extract* price concessions, rebates, and differentials that are now warranted by any serving to the manufacturer." *Id.* at 15. (Emphasis added.)

<sup>3</sup> The evils at which Congress sought to strike in amending the existing Clayton Act were well summarized by Representative Wright Patman in the House debates on the proposed amendment:

Mr. Chairman, there has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstances and for the same quantities of goods.

80 Cong. Rec. 8111 (1936).

<sup>4</sup> According to Representative Patman's keynote remark on the chain store problem: [T]he day of the independent merchant is gone unless something is done quickly. He cannot possibly survive under that system. So we have reached the crossroads; we must either turn the food and grocery business of this country . . . over to a few corporate chains or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist . . .

*Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 5-6 (1935).

translated into a series of prohibitions directed at sellers.<sup>5</sup> Recognizing the predatory nature of the practices at which the legislation was directed, buyer's liability was created where unlawful discriminatory concessions were received, but only where the buyer had *actual knowledge* of the *illegality* of the concession.<sup>6</sup>

Because buyer's liability is based upon a showing that a seller has violated a complex and imprecise statute and that the buyer knew of this violation, the tests for liability of buyers present some of the most difficult interpretative problems of the 1936 amendment.<sup>7</sup> The heart of the problem lies in the judicial and administrative treatment of the crucial requirement of knowledge of illegality. Obviously, if the buyer is required on pain of prosecution to beware of *all* price concessions not accorded to competitors, a premium is placed on a tacit buying price uniformity and withdrawal from vigorous competition. There can be no dispute that such a standardization of buying prices is contrary to the statutory intent of the Robinson-Patman Act<sup>8</sup> and serves no legitimate economic purpose. On the other hand, the predatory exaction of illegal prices, with full knowledge of illegality, may result in drastic competitive inequities favoring particular buyers.

On balance, it seems very clear that the purpose of the Act, to restrict the predatory and knowing solicitation of illegal prices, while allowing buyers to compete vigorously for price benefits which are not illegal, can only be accomplished by a realistic administrative and judicial appraisal of the buyer's actual knowledge of the legality of the prices which he receives. In scope, this article seeks to review the recent decisions and guidelines of the Federal Trade Commission and the courts to determine whether this criterion of realistic appraisal has been followed. The pivotal questions reviewed are:

1. Have the Federal Trade Commission and the courts laid down concise rules of seller liability under the Robinson-Patman Act which

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<sup>5</sup> Rather than to strike directly at the practices of buyers, Congress sought to follow the statutory pattern of § 2 of the 1914 Clayton Act which contained prohibitions against sellers. According to the *Final Report of the Chain Store Investigation*, *supra* note 2, at 24, these original provisions were critically defective because of a proviso sanctioning discriminations because of differences in the quantities of sale.

<sup>6</sup> Section 2(f) dealing with buyers was designed to facilitate resistance to "sacrificial price cuts" by enabling a small buyer to fend off a predatory buyer by pleading the illegality of his coercive demands. 80 Cong. Rec. 9419 (1936).

<sup>7</sup> See Att'y Gen. Nat'l Comm. Antitrust Rep. 197 (1955), predicting that "many complexities will attend full development of the buyer's liability."

<sup>8</sup> The legislative history indicates clearly that the bill "does not authorize or contemplate price fixing." 80 Cong. Rec. 3116 (1936) (remarks by Senator Logan). See also statement of Representative Summers. 80 Cong. Rec. 8110 (1936).

are readily understandable by the buyer in his day-to-day operations?

2. What approach have the Federal Trade Commission and the courts taken to the question of the buyer's actual understanding of Robinson-Patman Act liability?

3. Has the pattern of enforcement adopted by the Federal Trade Commission and the courts placed a premium upon tacit price uniformity or developed other competitive inequities?

At the threshold of these questions, the reader is invited to review the burdens which the buyer faces as evidenced in the comprehensive sweep of complex statutory prohibitions against sellers. In relevant part, section 2(a) of the Robinson-Patman Act prohibits a supplier from discriminating in the prices accorded to his customers on goods of "like grade and quality" where the effect of such discrimination may be to substantially lessen competition.<sup>9</sup> If the Commission proves these facts in a 2(a) proceeding, the seller may then establish a defense by coming forward with evidence to establish that (1) he is meeting competition in good faith; (2) the discriminatory price is cost justified; or (3) the discriminatory price was "in response to changing conditions."<sup>10</sup>

While section 2(a) is conditioned on a showing of competitive impact, Congress adopted a test of per se illegality for particularized types of discriminatory practices such as the granting of dummy brokerage for which the buyer rendered no service, and advertising allowances and services which were not available to all competitors on a proportionally equal basis. There is no question that brokerage, advertising allowances, and services were considered to be particularized vehicles of price discrimination by Congress.<sup>11</sup>

Section 2(c) of the Act prohibits a seller from allowing brokerage or discounts in lieu of brokerage to its customers in connection with their purchases except when such allowances are given "for services rendered."<sup>12</sup> Section 2(d) prohibits a supplier from according promotional allowances to one customer when such allowances are not available to competing customers on a proportionally equal basis.<sup>13</sup> Section 2(e) prohibits a supplier from according discriminatory services to one customer when such services are not available to competing customers on a proportionally equal basis.<sup>14</sup>

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<sup>9</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(a) (1964).

<sup>10</sup> See § 2(b) of the Act, 38 Stat. 730 (1936), 15 U.S.C. § 13(b) (1964), and § 2(a), 38 Stat. 730 (1936), 15 U.S.C. § 13(a) (1964).

<sup>11</sup> See Final Report on the Chain Store Investigation, S. Dkt. No. 4, 74th Cong., 1st Sess. 24-28 (1934).

<sup>12</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(c) (1964).

<sup>13</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(d) (1964).

<sup>14</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(e) (1964).

While a comprehensive list of the types of discriminatory benefits is enunciated in the sections applicable to suppliers, no such clarity is found in the sections dealing with buyers. Section 2(f) of the Act prohibits buyers from *knowingly* receiving *discriminatory* prices that violate section 2(a).<sup>15</sup> Section 2(c) by its terms applies to both buyers and sellers and hence prohibits a buyer's receipt of brokerage or discounts in lieu of brokerage.<sup>16</sup> However, no section of the Robinson-Patman Act refers in any way to a buyer's receipt of discriminatory promotional allowances or services which are not available to competitors on a proportionally equal basis.

This then is the statutory background against which the question of buyer's liability must be reviewed.

### I. BUYER LIABILITY UNDER SECTION 2(f)

#### A. Section 2(f) and the Automatic Canteen Doctrine

Prerequisite to buyer's liability under section 2(f) is a showing that a seller has violated section 2(a) and that the buyer knew of the violation when he received the discriminating price.

The Supreme Court's landmark decision in the *Automatic Canteen*<sup>17</sup> case laid down clear and concise ground rules for the presentation of cases against buyers, delineating both the Commission's burden of proof and the criteria for ascertaining the buyer's knowledge that he was receiving illegal concessions.

Automatic Canteen Co. was engaged in leasing automatic vending machines to distributors and in buying and reselling commodities to be sold in those machines. The record in the administrative proceeding showed that it had solicited and received prices which were as much as one-third below those which its competitors paid. The Commission held that proof that the seller had violated section 2(a) plus evidence that the buyer knew he was receiving a favored price was sufficient to establish a violation. According to the Commission, when such evidence was introduced, the burden of proving cost justification, or lack of knowledge, was thrown on the buyer.<sup>18</sup>

On appeal, the Supreme Court held that the Commission had the original burden of presenting evidence to show (1) that the price received was not cost justified and (2) that the buyer knew that it was not cost justified or otherwise within the seller's defenses.<sup>19</sup> While

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<sup>15</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(f) (1964).

<sup>16</sup> 38 Stat. 730 (1936), 15 U.S.C. § 13(c) (1964).

<sup>17</sup> 346 U.S. 61 (1953).

<sup>18</sup> 46 F.T.C. 861, 896 (1950).

<sup>19</sup> *Supra* note 17, at 79.

the Court merely indicated that the original burden of going forward with the evidence was on the Commission, the burden imposed by the Court was in fact substantial. Thus, the Court stated that to demonstrate a prima facie case the Commission need only show that the buyer

knew that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor. If the methods or quantities differ, the Commission must only show that such differences *could not give* rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings.<sup>20</sup>

Thus, in a 2(f) proceeding, the Court flatly held that the Commission must at the threshold prove that the price discrimination "could not" be cost justified in a case where methods or quantities differ. Moreover, the Court imposed a substantial burden on the Commission in proving the buyer's knowledge of illegality. In reversing the Commission decision against Automatic Canteen, it made clear:

1. that a buyer is not charged with notice of illegality merely because he knows that he is receiving a lower price than his competitors;<sup>21</sup>
2. that a buyer is not charged with notice of illegality merely because he initiated the request and bargained for a lower price than that given to his competitors;<sup>22</sup>
3. that a buyer is not charged with notice of illegality merely because he did not obtain information demonstrating that the price he received is justified before accepting that price.<sup>23</sup>

It is evident that the *Automatic Canteen* decision is based upon the Court's careful evaluation of conflicting policy considerations and its conclusion that section 2(f) *does not* and *should not* embody any doctrine of caveat emptor when a buyer is charged with receipt of a price discrimination. The Court rejected the Commission's contention that enforcement of section 2(f) must be simplified, stating that the

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<sup>20</sup> *Supra* note 17, at 80. (Emphasis added.) Some commentators have tended to obscure the extent of the Commission's burden by emphasizing the fact that the Court only purported to be dealing with the burden of going forward with the evidence, rather than the ultimate burden of proof. See Rowe, Price Discrimination Under the Robinson-Patman Act 441-43 (1962). However, in dealing with this initial burden the court clearly stated that the Commission must assume the absolute burden of proof on the question of cost justification as a part of its prima facie case, if there were differences in the methods by which competitors were served.

<sup>21</sup> *Supra* note 17, at 71.

<sup>22</sup> *Supra* note 17, at 71-72.

<sup>23</sup> *Supra* note 17, at 81.

Commission's interpretation "might readily extend beyond the prohibitions of the Act" and "help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."<sup>24</sup> On the other hand, the Court emphasized that the competitive goals of the antitrust laws could only be effected by "sturdy bargaining between buyer and seller"<sup>25</sup> and that the buyer cannot be placed at his peril "whenever he engages in price bargaining."<sup>26</sup>

### B. *Group Buying Cases Under Section 2(f)*

Following the decision in the *Automatic Canteen* case, the Federal Trade Commission reoriented its program for enforcement of section 2(f) in order to concentrate on preventing groups of individual purchasers from banding together for the purpose of obtaining special prices not available to their competitors.

It is fair to say that section 2(f) has come to be used primarily to attack group buying programs. Economically, these proceedings are significant inasmuch as the Commission has pressed its attack even when the members of such groups are small businessmen who are poorly situated to evaluate the complexities of the seller prohibitions in the Robinson-Patman Act. The emphasis which the Commission has placed on cases against small cooperative buyers is surprising in the light of *Automatic Canteen's* rejection of any rule of caveat emptor and the legislative history indicating that the Act was passed to curb the predatory activities of large buyers.<sup>27</sup>

Between 1936 and 1965, one-half of the thirty 2(f) cases adjudicated before the Commission were brought against buying groups.<sup>28</sup> Thirteen of the twenty-one 2(f) cease and desist orders which the Com-

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<sup>24</sup> *Supra* note 17, at 63.

<sup>25</sup> *Supra* note 17, at 74.

<sup>26</sup> *Supra* note 17, at 73.

<sup>27</sup> See, e.g., 80 Cong. Rec. 8111 (1936); 79 Cong. Rec. 9078 (1935). As the Commission stated in its opinion in *Shulton, Inc.*, Trade Reg. Rep. ¶ 16992 (1964):

The Robinson-Patman Act was passed "to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."

<sup>28</sup> *National Parts Warehouse*, Trade Reg. Rep. ¶ 16700 (1963); *Automotive Jobbers, Inc.*, 60 F.T.C. 19, 33 (1962); *Automotive Southwest, Inc.*, 57 F.T.C. 590, 596 (1960); *Southwestern Warehouse Distribs., Inc.*, 57 F.T.C. 611, 621 (1960); *March of Toys, Inc.*, 57 F.T.C. 486, 496 (1960); *Albright's*, 55 F.T.C. 1556 (1959); *American Motor Specialties Co., Inc.*, 55 F.T.C. 1430 (1959); *D & N Auto Parts Co.*, 55 F.T.C. 1279 (1959); *Borden-Aicklen Auto Supply Co.*, 55 F.T.C. 1279 (1959); *Hunt-Marquardt, Inc.*, 55 F.T.C. 910 (1958); *Midwest Warehouse Distribs., Inc.*, 55 F.T.C. 414 (1958); *Warehouse Distribs., Inc.*, 55 F.T.C. 188 (1958); *Atlas Supply Co.*, 48 F.T.C. 53 (1951); *Associated Merchandising Corp.*, 40 F.T.C. 578 (1945); *Golf Ball Mfrs. Ass'n*, 26 F.T.C. 824 (1938).

mission ultimately obtained in this period of time were against buying groups.<sup>29</sup> The only three 2(f) proceedings in which the Commission has prevailed before reviewing courts were directed at buying groups.<sup>30</sup>

In particular, the Commission has concentrated its group buying attack on the efforts of small jobbers engaged in the purchase and sale of automotive replacement parts. In twelve cases, the Commission attacked the operations of jobber cooperatives allegedly set up for the purpose of obtaining a volume rebate which the members could not have received on the basis of their individual purchases.<sup>31</sup> The cooperative members argued that they had to band together to meet the competition of larger integrated purchasers. Although section 4 of the Robinson-Patman Act permits cooperatives to distribute earnings to members, both the Second and the Fifth Circuits have affirmed Commission 2(f) decisions against cooperative programs to rebate members in proportion to their individual purchases.<sup>32</sup> Two proceedings are still pending before the Commission.<sup>33</sup> Six of these proceedings resulted in consent orders to cease and desist.<sup>34</sup>

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<sup>29</sup> All but one or two of the proceedings cited in *supra* note 28, terminated with the entry of cease and desist orders. See National Parts Warehouse, *supra* note 28, where a petition for certiorari is pending after the Seventh Circuit affirmed the Commission order. General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir. 1965).

<sup>30</sup> Mid-South Distribs. v. FTC, 287 F.2d 512 (5th Cir. 1961); American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir. 1960); General Auto Supplies, Inc. v. FTC, *supra* note 29.

<sup>31</sup> Alhambra Motor Parts, Inc., 57 F.T.C. 1007, 1022 (1960) (Cease and Desist Order). See also Ark-La-Tex Warehouse Distribs., Inc., Trade Reg. Rep. ¶ 28258 (1959) (Complaint); Automotive Jobbers, Inc., *supra* note 28; Automotive Southwest, Inc., *supra* note 28; Southwestern Warehouse Distribs., Inc., *supra* note 28; March of Toys, Inc., *supra* note 28; Albright's, *supra* note 28; American Motor Specialties Co., *supra* note 28; D & N Auto Parts Co., *supra* note 28; Borden-Aicklen Auto Supply Co., Inc., *supra* note 28; Hunt-Marquardt, Inc., *supra* note 28; Midwest Warehouse Distribs., Inc., *supra* note 28; Warehouse Distribs., Inc., *supra* note 28.

<sup>32</sup> Mid-South Distribs. v. FTC, 287 F.2d 512 (5th Cir. 1961); American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir. 1960). Both courts held that the cooperative exemption of § 4 [49 Stat. 1528 (1936), 15 U.S.C. § 13b (1964)] did not insulate the return of profits on price benefits which the members could not achieve if they purchased individually. In retrospect, this conclusion seems oddly at variance with the intent of the drafters of the Act to encourage the cooperative movement, H.R. Rep. No. 2287, 74th Cong., 2d Sess. (1936), and to guarantee them "the achievement of full economies and price advantages." 80 Cong. Rec. 9415 (1936).

<sup>33</sup> Alhambra Motor Parts, Inc., *supra* note 31; See Ark-La-Tex Warehouse Distribs., Inc., *supra* note 31.

<sup>34</sup> Automotive Southwest, Inc., *supra* note 28; Southwestern Warehouse Distribs., Inc., *supra* note 28; Albright's, *supra* note 28; Hunt-Marquardt, Inc., *supra* note 28; Midwest Warehouse Distribs., Inc., *supra* note 28; Warehouse Distribs., Inc., *supra* note 28.

In these cases important questions have arisen as to what indicates that a member of a group is a "customer" of the manufacturer, and as to what burden of proof the Commission bears on the issues of cost justification and knowledge. Detailed review of the resolution of these issues discloses some of the difficulty which the buyer faces in resolving complex antitrust questions in his day-to-day operations.

### 1. Identity of the Seller's "Customer" in Group Buying Cases Under Section 2(f)

The Robinson-Patman Act only prohibits price discriminations between customers of the same supplier.<sup>35</sup> Moreover, the Act does not prohibit price differentials to customers who are at different *functional* levels. For instance, a wholesaler may lawfully receive a more favorable price than a retailer.<sup>36</sup> The Commission has reasoned that such functional discounts cannot injure competition when wholesalers and retailers do not compete for the same customers. Hence, if members of a group purchase merchandise from a wholesaler at a special price which is not available to non-members buying directly from manufacturers, it seems that no violation of the Robinson-Patman Act occurs. The manufacturer can accord a special price to the wholesaler, which is not available to the retailer because there is no injury to competition.

However, the Federal Trade Commission has been quick to attack plans wherein members of an association set up a wholly-owned and controlled dummy company at a higher functional level for the purpose of receiving functional prices to which the members would not ordinarily be entitled.<sup>37</sup>

At the core of every one of the Commission's proceedings against

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<sup>35</sup> National Lead Co. v. FTC, 227 F.2d 825 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957).

<sup>36</sup> FTC v. Ruberoid Co., 343 U.S. 470, 475 (1952); General Foods Co., 52 F.T.C. 798 (1956); Sherwin-Williams Co., 36 F.T.C. 25 (1943).

<sup>37</sup> This attack has not been limited to cases involving *group* ownership of a dummy corporation. A single purchaser is equally in violation of § 2(f) if he sets up a wholly-owned and controlled wholesaler for the purpose of obtaining wholesale discounts on merchandise which he resells as a retailer. See, e.g., Automotive Supply Co., 56 F.T.C. 192 (1959). Likewise a supplier violates § 2(a) by selling at a wholesale discount to a wholesaler controlled by a retailer, when the controlling retailer ultimately sells the merchandise at retail, in competition with retailers buying at a higher price. Monroe Auto Equip. Co., Trade Reg. Rep. ¶ 70011 (1964), *aff'd*, Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir. 1965). An integrated purchaser is only entitled to a wholesale discount on that percentage of the merchandise which he resells to unaffiliated retailers. See Sherwin-Williams Co., 36 F.T.C. 25 (1943); Van Cise, "How to Quote Functional Prices," Proceedings, N.Y. State Bar Ass'n Section on Antitrust Law, Antitrust Symposium 80, 94 (1957).



automotive cooperatives was the fact that the cooperative was wholly owned and controlled by jobber customers.<sup>38</sup> It thus was felt not to be an independent customer or reseller.<sup>39</sup>

The early cases instituted against these automotive cooperative buying groups attacked members' receipt of retroactive cumulative volume rebates.<sup>40</sup> Later proceedings also challenged the members' receipt of the *functional* compensation usually accorded automotive replacement parts purchasers operating at the higher functional level of "warehouse distributor."<sup>41</sup> The Commission has held that these cooperatives are not classifiable as "warehouse distributors."<sup>42</sup>

In the recent *National Parts Warehouse* case,<sup>43</sup> the Commission found that automotive jobbers could not hold a limited partnership interest in a warehouse distributor when they realized price advantages not available to their independent competitors. NPW argued that limited partnership structure prevented the jobber from maintaining operating control of the warehouse. According to NPW, the warehouse was an independent entity under the operating control of a general partner. However, the Commission held that the jobber partners controlled the prices they received, and that in fact they had exercised a good deal of operational control.<sup>44</sup>

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<sup>38</sup> See cases cited *supra* note 28.

<sup>39</sup> The evidence in these cases showed that jobber members of the cooperative owned all stock in the company, elected its officers and managers, voted on lines to be handled, negotiated directly with suppliers for prices, voted on election of new members that might take advantage of the prices obtained through the cooperative, and forwarded orders to suppliers. Members were fully aware of the day-to-day operation of the cooperative and its financial position. See, e.g., *Alhambra Motor Parts, Inc.*, Trade Reg. Rep. ¶ 17138 (1964) (Supplemental Initial Decision); *American Motor Specialties Co.*, 55 F.T.C. 1430, 1432-34 (1959).

<sup>40</sup> See, e.g., *Mid-South Distribs. v. FTC*, 287 F.2d 512 (5th Cir. 1961); *American Motor Specialties Co., Inc. v. FTC*, 278 F.2d 225 (2d Cir. 1960). These cumulative volume rebates were offered to all customers regardless of the level at which they resold.

<sup>41</sup> There are three traditional levels of independent distribution among purchasers in the automotive replacement parts market. In descending order, they are as follows: (1) Warehouse Distributors who sell only to jobbers; (2) Jobbers who sell only to dealers; (3) Dealers who sell only to consumers. The Commission has attacked jobber cooperatives when they sought to receive warehouse distributor discounts. See complaints in *Automotive Jobbers, Inc.*, 60 F.T.C. 19 (1962); *Alhambra Motor Parts, Inc.*, *supra* note 31; *Ark-La-Tex Warehouse Distribs., Inc.*, *supra* note 31.

<sup>42</sup> See cases cited *supra* note 41.

<sup>43</sup> Note 28 *supra*.

<sup>44</sup> The Commission Opinion in *National Parts Warehouse*, *supra* note 28, suggested in dicta that a violation of § 2(f) can be demonstrated without a showing of jobber "management control." *National Parts Warehouse*, *supra* note 28, at 6-7. Nevertheless, in every automotive case where the Commission has denied a jobber-owned

On May 28, 1965, the Seventh Circuit affirmed the Commission decision in the *National Parts Warehouse* case.<sup>45</sup>

In rejecting the arguments that the limited partnership form precluded jobber control of NPW and that NPW was controlled solely by its general partner and manager, the court stated that it was "convinced that the absoluteness of . . . [the manager's] control is formal but unreal and was meant to be that way."<sup>46</sup>

The original cases brought against buying groups had involved mere buying offices which forwarded members' orders. However, the Commission has recently proceeded against groups which maintain substantial warehouse and delivery facilities and which perform many functions common to independent warehouse distributors. In the *NPW* case, the Commission flatly held that NPW could not be classified as a warehouse distributor even though it performed an actual warehousing function. The critical fact cited by the Commission was that jobber partners of NPW "own it outright" and "control" the flow of its income to their pockets.<sup>47</sup>

On the other hand, in a proceeding against the Southern California Jobbers cooperative, the Ninth Circuit refused to accept this view when it was shown that a cooperative performed substantial warehousing functions.<sup>48</sup> It remanded so that the Commission could take further evidence on the question of whether a cooperative warehouse should be regarded as a purchaser or an agent. On remand, however, the Com-

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entity the status of warehouse distributor, there has been evidence that the jobbers in fact controlled the actual day-to-day operation of the company attempting to claim the warehouse distributor status. See *National Parts Warehouse*, *supra* note 28, at 9-10. The Seventh Circuit Court of Appeals placed an even greater emphasis upon the fact of jobber ownership and control in affirming the Commission order in the *NPW* case. It did not endorse the dicta that a violation of § 2(f) might be established absent jobber management control. After quoting verbatim from the Commission's findings on control, it held that the jobbers had controlled NPW, noting that the absoluteness of the so-called general partner's control was "unreal and was meant to be that way." *General Auto Supplies, Inc. v. FTC*, *infra* note 45, at 315.

<sup>45</sup> *General Auto Supplies, Inc. v. FTC*, 346 F.2d 311, 316 (7th Cir. 1965).

<sup>46</sup> *Id.* at 315.

<sup>47</sup> *Supra* note 28, at 13.

<sup>48</sup> *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962). Of course, the question of performance of warehouse functions would not be relevant if the entity claiming a warehouse distributor status was not owned by jobbers. The fact that a manufacturer makes direct shipments to customers of an independent warehouse distributor does not deprive that warehouse distributor of its functional status. See *Mueller Co. v. FTC*, 323 F.2d 44 (7th Cir. 1963); *Hruby Distrib. Co.*, 61 F.T.C. 1437 (1962); *Whitaker Cable Corp.*, 51 F.T.C. 958, 973 (1955). The respondents in the *Alhambra* case elected not to appeal any issue pertaining to direct shipments. Hence, the court had no occasion to rule on this question in a context of jobber ownership.

mission again concluded that the SCJ cooperative was not entitled to the functional status of an independent purchaser.<sup>49</sup> However, Commissioner Elman filed an extensive dissenting opinion expressing the view that a "wholesale organization owned cooperatively by a group of retailers is no less a *bona fide* wholesaler because of its cooperative ownership."<sup>50</sup> Basing his opinion on the nature of the competition of small jobber groups in the automotive replacement parts market, Commissioner Elman noted:

. . . the economies of distribution and marketing achieved by cooperatives such as SCJ may substantially invigorate competition at the jobber level.<sup>51</sup>

Accordingly, he suggests that section 4 of the Act should be reevaluated to provide immunity for cooperatives which ". . . perform genuine marketing functions that not only are valuable to their members but serve the public interest in promoting efficiency and economies of distribution, thereby enlarging rather than restricting competition."<sup>52</sup>

A second dissenting opinion filed by Commissioner Mary Gardiner Jones found that in fact SCJ competed at the jobber level by virtue of jobber ownership, but at the same time noted a belief that the framers of the Robinson-Patman Act did not intend to discourage or prevent "companies which function on one level of distribution from assuming the functions of companies on another level of distribution and from being compensated for the performance of those functions to the same extent as those companies on the other functional level whose services they have copied and assumed."<sup>53</sup>

Hence, in the *SCJ* case, the Commission has followed its usual ruling that a jobber-owned entity is not entitled to the status of warehouse distributor-purchaser. However, the persuasiveness of the Commission's opinion is in some measure diminished by the searching dissenting opinions of Commissioners Elman and Jones, both of which

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<sup>49</sup> The hearing examiner also concluded that even though SCJ "is substantially performing the functions of a warehouse distributor," Trade Reg. Rep. ¶ 17138 (Dec. 14, 1964) (Supplemental Initial Decision), it "is merely the creature of its members, is wholly controlled by them, and has no purpose other than to serve them." *Ibid.* The Seventh Circuit added confusion to the situation by holding in a 2(c) brokerage proceeding against Central Retailer-Owned Grocers, that a cooperative could be a purchaser even though (1) it was wholly owned and controlled by its members, (2) it was set up to obtain favorable prices for its members, and (3) all of the merchandise purchased by its members was shipped direct from suppliers to these members. *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963).

<sup>50</sup> Dissenting Opinion of Commissioner Elman at 2.

<sup>51</sup> *Id.* at 19.

<sup>52</sup> *Id.* at 20.

<sup>53</sup> Dissenting Opinion of Mary Gardiner Jones at 5.

stress the competitive values of cooperative organizations in the automotive parts market. The effect of these dissents, in the event the *SCJ* respondents appeal to the Ninth Circuit, remains to be seen. Nevertheless, it is fully feasible that the court will undertake an economic reappraisal of the benefits of cooperative competition under section 4 of the Act.

In the meantime, the beleaguered buyer, who is commanded to avoid the receipt of illegal functional compensation when he has knowledge of illegality, is faced with a situation wherein the Commission rulings are subject to doubt in the light of conflicts created by the *SCJ* Ninth Circuit opinion. Apparently, until some final resolution of this problem takes place, the purchaser in the automotive parts market acts at his peril.

## 2. The Burden of Proof on Cost Justification and Knowledge in Group Buying Cases Under 2(f)

Group buying operations can survive under the Act by virtue of section 2(a) which expressly provides that a price differential is permissible if it does not exceed the seller's cost savings in doing business with the favored customers.<sup>54</sup> Although the Commission has minimized this defense in section 2(a) seller cases by establishing stringent criteria for establishing cost justification by proof of the seller's actual costs,<sup>55</sup> it appears that this defense has substantial validity in a 2(f) case.

Seemingly, the Commission is required under *Automatic Canteen* to disprove the possibility of cost justification in a 2(f) case by reference to the same type of evidence which the seller must present in a 2(a) case, *i.e.*, by reference to detailed proof of the seller's actual costs. Under these standards, it would appear that few, if any, 2(f) convictions would be obtained inasmuch as group operations may result in some economies in warehousing, collection, credit, and billing.

The problems involved in carrying the burden of proof on cost justification are illustrated by the recent Commission proceeding against the *Southern California Jobbers* cooperative.<sup>56</sup> That group owned a warehouse, ordered in large quantities, accepted financial responsibility for payment, shipped to its members from the warehouse, and billed them. Direct buying competitors were shipped direct. Although Commission counsel had introduced no evidence to negate cost

<sup>54</sup> 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

<sup>55</sup> In the two 2(a) cases where sellers have attempted to cost justify prices to group members, the defense of cost justification has been rejected on grounds of lack of specific evidence of the seller's costs. *C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1148-49 (1955); See *Champion Spark Plug Co.*, 50 F.T.C. 30, 42-43 (1953).

<sup>56</sup> *Alhambra Motor Parts, Inc.*, *supra* note 31.

justification, the Commission held that this operation was illegal and that the members received discounts in violation of 2(a).<sup>57</sup> On appeal, the Ninth Circuit reversed and remanded this case to the Commission with instructions that the Commission produce evidence to demonstrate that prices received by the members were not cost justified by the group operation. After noting that there were differences in the methods by which direct buying jobbers and member jobbers were served, the court held: "The burden [is] on the Commission to show that the cost savings could not be commensurate with the price differential."<sup>58</sup>

The significant question now is what type of proof can the Commission introduce to demonstrate that a price differential cannot be cost justified. One would expect that the Commission should be required to present the same detailed evidence of the manufacturers' *actual costs* which it has required of manufacturers in 2(a) cases.<sup>59</sup>

The hearing examiner held Commission counsel to this stringent burden in the proceedings on remand in the *SCJ* case.<sup>60</sup> Commission counsel did not present a cost study of the manufacturer's *actual costs*, but instead tried to prove that SCJ did not perform the same services as independent warehouse distributors. Treating this as a concession that prices to independent warehouses were cost justified, the examiner found that SCJ had performed substantially the same function and that complaint counsel has failed to negate cost justification.

Where complaint counsel met the real issue, *viz.*, the actual cost of serving SCJ and independent jobbers, the examiner applied a stringent burden of proof. For instance, Commission counsel argued that the SCJ warehouse did not save manufacturers any money because manufacturers maintain their own warehouses. The examiner recognized that this fact might reduce the savings to manufacturers, but that the burden of proving this was on Commission counsel. The examiner, therefore, rejected the argument stating:

. . . complaint counsel have failed to establish that the amount of such reduction is substantial and that it affects the bulk of the lines carried by SCJ.<sup>61</sup>

Again, the impact of the *Automatic Canteen* holding is evident.

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<sup>57</sup> *Ibid.*

<sup>58</sup> *Alhambra Motor Parts v. FTC*, 309 F.2d 213, 219 (9th Cir. 1962). In reaching this conclusion, the court rejected the Commission contention that each member must show that he personally (as opposed to the cooperative warehouse) rendered services which reduced the manufacturers' costs. *Id.* at 217.

<sup>59</sup> See, e.g., *C. E. Niehoff & Co.*, 51 F.T.C. 1114, 1148-49 (1955); *Champion Spark Plug Co.*, 50 F.T.C. 30, 42-43 (1954).

<sup>60</sup> Trade Reg. Rep. ¶ 17138 (Dec. 14, 1964) (Supplemental Initial Decision).

<sup>61</sup> *Id.* at 32.

On appeal from the Examiner's ruling, the Commission held by a 3-2 vote that complaint counsel had carried the burden of disproving cost justification.<sup>62</sup> However, the dissenting opinions of Commissioners Jones and Elman both suggest that the Commission has ignored that previous ruling and has gone too far in putting the burden of proof of cost justification on buying group respondents. According to Commissioner Elman, the majority decision on cost justification is "based on speculation . . . ."<sup>63</sup> Commissioner Jones finds that warehousing, credit, collection, and other functions performed by SCJ and other warehouse distributors reduce the manufacturer's expenses in selling to the jobber-customer.<sup>64</sup> Noting that the warehouse distributor discounts received by SCJ are "reasonably related" to the services performed by independent warehouse distributors and SCJ, she holds that SCJ is entitled to receive such discounts.<sup>65</sup> If appealed, there is no question that the case will raise substantial questions as to the Commission's compliance with the previously enunciated standards of the Ninth Circuit Court of Appeals. For instance, the Commission majority held that SCJ did not relieve suppliers of warehousing expenses by maintaining its own warehouse, because some SCJ suppliers maintained their own local warehouses in the area where SCJ was located.<sup>66</sup> However, the Commission did not consider such facts as the manufacturer's possible additional costs in central or home office warehousing in selling direct buying jobbers, if it had not utilized the facilities of SCJ's warehouse. Similarly, such expenses as centralized billing and credit expense were dismissed out of hand as "relatively insignificant,"<sup>67</sup> although Commissioner Jones comments that "the manufacturers and warehouse distributors who testified rated their centralized billing and credit function high among the cost saving functions performed."<sup>68</sup>

Similarly, in the *National Parts Warehouse* case, the Commission appears to have ignored the ruling of the Ninth Circuit in the *SCJ* case. It ruled flatly that the discounts to favored jobbers could not be justified even though there was no study of manufacturers' *actual costs* introduced in evidence.<sup>69</sup> Indeed, the Commission's opinion is based, in part, on the evidence of NPW's costs, rather than the seller's

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<sup>62</sup> Dkt. No. 6889 (December 17, 1965) (Opinion).

<sup>63</sup> Dissenting Opinion of Commissioner Elman at 10.

<sup>64</sup> Dissenting Opinion of Commissioner Jones at 10-11.

<sup>65</sup> *Id.* at 11.

<sup>66</sup> Opinion at 12.

<sup>67</sup> *Ibid.*

<sup>68</sup> Dissenting Opinion of Commissioner Jones at 9.

<sup>69</sup> *National Parts Warehouse*, Trade Reg. Rep. ¶ 16700 (Dec. 16, 1963).

costs. Of course, no seller has ever been allowed to prove his costs by reference to buyer's costs in a 2(a) proceeding.<sup>70</sup>

The Seventh Circuit affirmation of the Commission decision in the *National Parts Warehouse* case gives little consideration to the cost justification issue. The court quoted the tests set forth in the *Automatic Canteen* case to the effect that the Commission did not have the burden of proof on cost justification where the buyer "is served by the seller in the same manner or with the same amount of exertion as the other buyer."<sup>71</sup> Thus, it was apparently assumed that the methods of serving NPW jobbers and independent jobbers were not sufficiently different to shift the burden of proof on cost justification to the Commission.

Hence, in interpreting the burden of proof requirements set forth in *Automatic Canteen*, the Commission has applied rules which diverge substantially from those followed in seller cases. The result is that the prosecution is placed in a more favorable position than the seller respondent. In doing so, the spirit of the *Automatic Canteen* and *SCJ* cases seems to be violated. Indeed, the Supreme Court noted the Commission's strict requirements of proof of actual costs in seller cases in the *Automatic Canteen* decision<sup>72</sup> and allocated the burden of presenting such evidence to the Commission in buyer cases because it is "on a better footing to obtain this information than the buyer."<sup>73</sup>

The Commission's treatment of the all-important issue of knowledge of illegality in automotive group cases is equally confused. While not adopting any rule of caveat emptor, the Commission has certainly placed great reliance on the fact that the buyer knew he was receiving a lower price than his competitor.

The *National Parts Warehouse* decision<sup>74</sup> seems to attribute sophisticated knowledge of controversial cost justification issues to small

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<sup>70</sup> In *Purolator Prods., Inc.*, Trade Reg. Rep. ¶ 16877 (April 3, 1964), the Commission held that a purchaser's costs were irrelevant in a 2(a) proceeding. See also *Ark-La-Tex Warehouse Distribs., Inc.*, Trade Reg. Rep. ¶ 17205 (Feb. 18, 1965) (Second Initial Decision); *Monroe Auto Equip. Co.*, Trade Reg. Rep. ¶ 70011 (July 18, 1964) (concurring opinion).

<sup>71</sup> *National Parts Warehouse v. FTC*, 346 F.2d 311, 317 (7th Cir. 1965).

<sup>72</sup> *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 68 (1953). The Court commented that

whenever costs have been in issue, the Commission has not been content with accounting estimates; a study seems to be required, involving perhaps stop-watch studies of time spent by some personnel such as salesmen and truck drivers, numerical counts of invoices or bills and in some instances of the number of items or entries on such records, or other such quantitative measurement of the operation of a business.

<sup>73</sup> 346 U.S. 61, 79 (1953).

<sup>74</sup> *National Parts Warehouse*, Trade Reg. Rep. ¶ 16700 (Dec. 16, 1963).

businessmen. Although there was no showing in that case that NPW partners had any detailed knowledge of manufacturers' *actual costs*, the Commission held that knowledge the NPW's cost of operation was only 8 percent of the 20 percent discounts received, that manufacturers paid commissions to their salesmen calling on NPW partners, and that manufacturers rendered so-called extra services to NPW partners, was sufficient to establish the requisite knowledge. Similarly, in the *SCJ* case, the Commission found knowledge of illegality based on a sweeping statement that "from their trade experience generally, SCJ's member jobbers must have been aware of the fact that their suppliers were spending approximately the same effort" selling to them and to direct buying jobbers.<sup>75</sup> However, the validity of this finding is certainly subjected to question by the searching dissents of Commissioners Elman and Jones, both of which hold that SCJ jobbers were entitled to believe in the legality of discounts received when they knew that the SCJ warehouse performed functions not generally performed by competing jobbers.<sup>76</sup> In a similar vein to these dissents, the court in the ninth circuit prescribed a Rule of Reason test for determining the buyers' actual knowledge when it has been shown that the group purchasing program may achieve real economies for the supplier<sup>77</sup> in its earlier *SCJ* opinion.

While the ultimate trend of court rulings on this complex question is not yet clear,<sup>78</sup> it is evident that a caveat emptor ruling that small buyers are to be charged with knowledge of complex cost justifying factors can only curtail that "sturdy bargaining" which *Automatic Canteen* sought to protect. It will compel small group buying jobbers to passively accept the highest prices offered by their suppliers to independent jobbers, regardless of the price stabilizing anti-competitive effects of such a practice.

### C. *Proceedings Against Single Buyers Under Section 2(f)*

Probably the most significant characteristic of the recent FTC program for enforcement of section 2(f) has been its failure to proceed against single buyers with dominant economic power. Since the *Automatic Canteen* decision, the Commission's enforcement of 2(f) has been almost wholly directed toward the groups of small jobbers in the automotive replacement parts industry. Following *Automatic Canteen*,

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<sup>75</sup> Opinion at 15.

<sup>76</sup> See Dissenting Opinion of Commissioner Elman at 10 and Dissenting Opinion of Commissioner Jones at 11.

<sup>77</sup> *Alhambra Motor Parts v. FTC*, 309 F.2d 213 (9th Cir. 1962).

<sup>78</sup> A petition for certiorari filed by the respondents in the *NPW* case has now been withdrawn.



the Commission dismissed all pending proceedings against large single buyers.<sup>79</sup> Only six new 2(f) cases have been instituted against single buyers. One of these resulted in a consent cease and desist order,<sup>80</sup> two proceedings were terminated by dismissals,<sup>81</sup> and three cases are now pending.<sup>82</sup>

In the automotive replacement parts market, the Commission's failure to take the initiative in prosecuting cases against powerful single jobbers, when combined with its diligent prosecution of group buying jobbers, may have fostered drastic competitive inequities.<sup>83</sup> The fact is that the Commission has all but ignored the development of large competitive jobbers in the automotive replacement parts market who have taken advantage of the benefits of integration by opening their own dummy warehouse distributor companies for the purpose of obtaining warehouse distributor compensation which is not available to competitive jobbers. Similarly, warehouse distributors have opened their own affiliated jobbing branches which sell merchandise purchased at warehouse distributor prices in direct competition with jobbers who are unable to obtain such warehouse distributor prices.

The Commission's failure to institute 2(f) proceedings against such integrated jobbers is all the more surprising in view of the fact that the critical economic effect of the practices of such companies was brought to its attention as early as 1958. In that year it originated its only 2(f) proceeding against such a buyer, that being the complaint against Automotive Supply Co. of Altoona, Pennsylvania.<sup>84</sup>

In large part, that proceeding was directed at the use of a dummy warehouse distributor which received warehouse distributor discounts

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<sup>79</sup> See Crown Zellerbach Corp., 51 F.T.C. 733 (1955); Kroger Co., 50 F.T.C. 213 (1953); Safeway Stores, Inc., 50 F.T.C. 125 (1953). See also Sylvania Elec. Prods., Inc., Dkt. No. 5728 (Dec. 9, 1953) (Initial Decision), not appealed by the staff.

<sup>80</sup> Automotive Supply Co., 56 F.T.C. 192 (1958).

<sup>81</sup> Sears, Roebuck & Co., 210 F. Supp. 67 (D.D.C. 1962); American Metal Prods., 60 F.T.C. 1667 (1962).

<sup>82</sup> Suburban Propane Gas Corp., Dkt. No. 8672 (Nov. 26, 1965) (Complaint); Beatrice Foods Co. & Kroger Co., Dkt. No. 8663 (July 30, 1965) (Complaint); Fred Meyer, Inc., Trade Reg. Rep. ¶ 16500 (March 29, 1963). The *Fred Meyer* case, which is pending in the ninth circuit, is particularly significant in that the Commission again found 2(f) liability without introducing any evidence of the supplier's actual costs in the administrative proceeding. Indeed, the Commission refused to analyze whether or not respondent's volume of purchases (vis-à-vis those of the nonfavored buyers named by the examiner) did in fact affect cost savings. Instead, the Commission found that the respondents had every reason to believe that there was not the remotest possibility of cost justification. Thus, the Commission confused the issue of knowledge with the issue of cost justification.

<sup>83</sup> See Barnes, "The Robinson-Patman Challenge to Buyers Competition," 9 *Anti-trust Bull.* 415, 450-52 (1964).

<sup>84</sup> Automotive Supply Co., 56 F.T.C. 192 (1959).

on merchandise which was in fact funneled to jobber branch outlets and sold in competition with independent jobbers. Though the entry of a cease and desist order appeared to foreshadow a Commission drive against jobber-owned warehouses of the Altoona type, the Commission never instituted another 2(f) proceeding against a similar jobber-owned entity.

Nevertheless, the existence of such organizations in the automotive replacement parts market is a matter of public record. Indeed, the Commission's complaint in its recent proceeding against Monroe Auto Equipment Co. charged that Monroe had violated section 2(a) of the Robinson-Patman Act by discriminating in the prices of automotive products which it sold to jobbers who had formed their own dummy warehouse distributor companies.<sup>85</sup> Evidence indicated that Monroe had accorded warehouse distributor discounts to three warehouse distributor corporations that were affiliated with or controlled by jobbers.<sup>86</sup> The Commission viewed the decisive question to be whether there is sufficient identification of the warehouse distributor with the jobber to give rise to the conclusion that a discount given to one will inure to the benefit of the other. The Commission proceeded to examine the factual circumstances of each of the three jobber warehouses involved, concluding that "for all practical purposes these organizations operate as a single unit so that any benefit conferred on one would . . . result in a direct benefit to the other." On review, the Seventh Circuit affirmed the Commission's ruling.<sup>87</sup>

While proceedings against sellers such as Monroe are no doubt useful, the Commission itself has recognized that the purposes of the Act can best be carried out if proceedings are brought against the offending buyers.<sup>88</sup> Thus, one wonders why section 2(f) proceedings have not been instituted against the offending buyers involved in the *Monroe* case and against similar jobber-controlled warehouse distributors.

The extent of the possible competitive inequalities fostered by the Commission's enforcement policy is indicated from a review of the total purchase figures of the alleged buying groups which the commission is presently prosecuting, *viz.*, SCJ, NPW, and Ark-La-Tex,

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<sup>85</sup> Monroe Auto Equip. Co., Trade Reg. Rep. ¶ 16170 (Nov. 5, 1962) (Complaint).

<sup>86</sup> Monroe Auto Equip. Co., Trade Reg. Rep. ¶ 17011 (July 28, 1964) (Opinion).

<sup>87</sup> Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir. 1965). See also Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), holding that extra discounts to jobber owned warehouses violated section 2(a).

<sup>88</sup> Shulton, Inc., Trade Reg. Rep. ¶ 16992 (July 22, 1964).

as compared to the purchase figures of a single large integrated jobber. In the year 1958, the total purchases of jobbers through these so-called groups were:

SCJ	\$ 3,129,446.00 <sup>89</sup>
Ark-La-Tex	1,057,324.60 <sup>90</sup>
NPW	4,664,921.00 <sup>91</sup>

Hence, in the aggregate, the purchases of the jobbers involved in these cases total less than 10,000,000 dollars in the year 1958. On the other hand, Automotive Supply Co. of Altoona apparently made purchases of approximately 10,000,000 dollars in that same year.<sup>92</sup> Arguably, the Commission may have accomplished as much in terms of competitive effect in its one proceeding against the Automotive Supply Co. as it has in the long and costly litigated proceedings against NPW, SCJ, and Ark-La-Tex.

Some have suggested that 2(f) proceedings may not provide a full answer to the economic problems of the industry.<sup>93</sup> Perhaps industry-wide trade practice rules are the only possible solution to the economic ills of the automotive replacement parts market. Although the Commission has adopted an industry-wide approach to the competitive problems of some industries,<sup>94</sup> it has not done so in the automotive replacement parts market.<sup>95</sup> Having apparently committed itself to a narrow course of enforcement through case-by-case litigation, it appears that the failure to enforce section 2(f) against integrated jobbers may, indeed, further jeopardize the status of healthful competition in the much beleaguered automotive replacement parts market.

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<sup>89</sup> Trade Reg. Rep. ¶ 17138 (Dec. 14, 1964).

<sup>90</sup> Trade Reg. Rep. ¶ 15524 (Oct. 13, 1961) (Initial Decision).

<sup>91</sup> Trade Reg. Rep. ¶ 16700 (Dec. 16, 1963).

<sup>92</sup> Automotive Supply Co., 56 F.T.C. 192, 194 (1958) (Complaint).

<sup>93</sup> See the dissenting opinion of Commissioner Elman in National Parts Warehouse, *supra* note 91, at 21624.

<sup>94</sup> As it perhaps in all fairness must be, "industry-wide enforcement of the law is almost a constitutional imperative as a matter of both fairness and equality before the law. It is clear that we have no right to and could not permit some law violator to go free while prosecuting others." Address by Commissioner Mary Gardiner Jones, Bar Association of the District of Columbia, Feb. 25, 1965. See also *Universal-Rundle Corp. v. FTC*, 352 F.2d 831 (7th Cir. 1965), directing that a 2(a) proceeding be remanded for action against respondent's competitors when respondent showed specific information tending to show similar violations by these competitors.

<sup>95</sup> As early as 1958, the Commission rejected requests for trade practice conferences in the automotive replacement parts market.

## II. BUYER LIABILITY UNDER SECTION 2(c)

While the wording of the brokerage provision in section 2(c)<sup>96</sup> is complex and has not been definitively construed, the section's application is relatively simple. It is directed at the following five types of transactions: (1) the receipt from a buyer of brokerage by a broker who represents the seller, or, conversely, the broker's receipt of brokerage from a seller when he represents the buyer; (2) a broker's receipt of brokerage from the seller when he is controlled by the buyer; (3) a buyer's receipt of brokerage from the seller on purchases which he makes for his own account; (4) a buyer's receipt of discounts in lieu of brokerage on merchandise which he purchases for his own account; (5) a broker's agreement to split with a buyer the commission received from the seller, where the agreement results in a price discrimination to the buyer.

The statute does not apply to brokerage payments in the above situations in the case of "services rendered in connection with the sale or purchase of goods, wares, or merchandise." However, early Federal Trade Commission decisions have construed this clause narrowly. The courts have sustained Commission rulings that a buyer's broker cannot receive commissions from the seller, even though he renders services to the seller,<sup>97</sup> that a buyer cannot receive brokerage through a broker that he controls even though he renders services for the seller,<sup>98</sup> that payments to a broker on purchases for his own account are not allowable even though the purchaser renders services to the seller,<sup>99</sup> and that a purchaser cannot receive discounts in lieu of brokerage

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<sup>96</sup> Section 2(c) of the Robinson-Patman Act, 52 Stat. 446 (1938), 15 U.S.C. § 13(c) (1964), provides:

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

This section applies to sellers and buyers as well as sellers' brokers and buyers' brokers. *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

<sup>97</sup> *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

<sup>98</sup> *Modern Marketing Serv., Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945).

<sup>99</sup> *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

when he performs services of a kind which he normally performs for himself.<sup>100</sup>

Because section 2(c) sets forth a rule of per se illegality, defenses such as lack of injury to competition, meeting competition, and cost justification which ordinarily apply in section 2(a) and 2(f) cases have been held inapplicable.<sup>101</sup> Moreover, early Commission decisions gave little consideration to whether discriminatory treatment is a prerequisite to a section 2(c) violation, or whether the buyer's lack of knowledge of the illegality would constitute a defense in a section 2(c) case. The Commission originally tended to treat prosecutions under section 2(c) as subject to entirely different standards of legality than transactions under sections 2(a) and 2(f).

Inasmuch as section 2(c) applies equally to sellers, buyers, and brokers, it may, drastically affect a buyer's business practices. Clearly covered by section 2(c) are the buyer's receipt from a seller of brokerage or discounts in lieu of brokerage, as well as his receipt from the broker of part of the broker's commission.<sup>102</sup> It is also clear that section 2(c) provides the Commission with an additional weapon for attacking group purchasing programs as a part of which a controlled intermediary receives brokerage from sellers in transactions wherein group members are purchasing.<sup>103</sup>

There is no question that the Commission's enforcement of section 2(c) against buyers, sellers, and brokers has been vigorous. Proceedings have, in large part, been concentrated in the fresh fruit and vegetable and grocery industries.<sup>104</sup> As a result of vigorous investigation and prosecution, the Commission has, since 1960, succeeded in obtaining scores of cease and desist orders against persons in the citrus fruit industry.<sup>105</sup>

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<sup>100</sup> *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960).

<sup>101</sup> *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763, 767 (4th Cir. 1939).

<sup>102</sup> See *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

<sup>103</sup> *Modern Marketing Serv., Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945).

<sup>104</sup> The Commission has tended to ignore the buyer's possible receipt of illegal brokerage on his own purchases in other industries. For instance, one of the most complained of practices in the automotive replacement parts market is the receipt of illegal brokerage by warehouse distributors. Nevertheless the Commission has only attacked this practice in a limited number of instances. See *O.E.M. Prods. Co.*, 60 F.T.C. 914 (1962); *Lannin Sales Co.*, 59 F.T.C. 1446 (1961); *Atlas Supply Co.*, 48 F.T.C. 53 (1951).

<sup>105</sup> Orders were issued against *sellers* for granting "brokerage" to customers buying for their own account. See, e.g., *Valley Fruit & Vegetable Co.*, 61 F.T.C. 1389 (1962); *Warren Fruit Co.*, 61 F.T.C. 980 (1962); *Pure Gold, Inc.*, 61 F.T.C. 976 (1962); *Spada Fruit Sales Agency, Inc.*, 61 F.T.C. 908 (1962); *Larry Lightner, Inc.*, 61 F.T.C. 575

Unfortunately, the Commission's decisions do not clearly define the prerequisites to buyers' liability under section 2(c). Indeed, its past decisions have clouded such vital questions as the meaning of the statutory terms "in lieu of brokerage," and "purchase or sale," as well as the legal status of group purchasing intermediaries. As a practical matter, the buyer may be unable to make a reasonable guess as to the practical application of section 2(c) to his day-to-day operations.

In part, some of these problems are clarified in the Federal Trade Commission's Trade Practice Rules for the Fresh Fruit and Vegetable Industry which were promulgated on April 15, 1965.<sup>106</sup> However, in other cases these rules amount to nothing more than a cursory re-statement of the statute or the Commission's earliest interpretations of 2(c). In many areas the rules fail to detail important current developments wherein both the courts and the Commission have followed the Supreme Court's *Automatic Canteen* analysis in rejecting a caveat emptor approach to buyer's liability under 2(c). Hence, the current scope of the brokerage clause as applied to buyers can best be evaluated by reference to recent decisions concerning the types of transactions which violate section 2(c) and the defenses which have been particularly noted. A consideration of these matters follows.

#### A. Buyer's Liability for Receipt of Discounts in Lieu of Brokerage

Section 2(c) forbids the buyer's receipt of price concessions which actually represent a reduction in commissions normally paid brokers by the supplier. The prohibition was incorporated into the Robinson-Patman Act in response to the Commission's chain store investigation. Congress' purpose was to prevent large buyers from taking an unfair advantage of their greater purchasing power to coerce their suppliers into granting discriminatory price concessions not granted to smaller competitors.<sup>107</sup>

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(1962); Charles A. Rogers & Sons, 61 F.T.C. 565 (1962); Alamo Fruit Distribs., Ltd., 61 F.T.C. 515 (1962); Mission Fruit & Vegetable Co., 61 F.T.C. 419 (1962); Walter Holding Co., 61 F.T.C. 413 (1962); Minute Maid Corp., 60 F.T.C. 475 (1962); Lake Region Packing Ass'n, 60 F.T.C. 273 (1962); Lake Charm Fruit Co., 60 F.T.C. 270 (1962); Mission Citrus Growers, Inc., 60 F.T.C. 244 (1962); Alamo Fruit & Vegetable Co., 60 F.T.C. 208 (1962); Eustis Fruit Co., 60 F.T.C. 206 (1962); Pride O'Texas Citrus Ass'n, 59 F.T.C. 1439 (1961); Kimbriel & Co., 59 F.T.C. 1428 (1961).

Corresponding orders were issued against buyer recipients. See, e.g., Dan A. LaPanta Co., Trade Reg. Rep. ¶ 16386 (April 22, 1963); Wayne L. Bowman Co., 61 F.T.C. 1294 (1962); Tom Lange Co., 61 F.T.C. 263 (1962); Brown and Loe, Inc., 60 F.T.C. 1264 (1962); George C. Palmer Co., 60 F.T.C. 169 (1962). For similar buyer proceedings, see also Dixie-Central Produce Co., 61 F.T.C. 67 (1962).

<sup>106</sup> 30 Fed. Reg. 5331 (1965). Rule 2 covers prohibited brokerage.

<sup>107</sup> The Commission's Final Report on the Chain-Store Investigation, S. Dkt. No. 4, 74th Cong., 1st Sess. 62-63 (1935), stated the problem as follows:

Section 2(c)'s prohibition on discounts in lieu of brokerage is aimed at factual situations containing the following elements:

- (1) A large buyer knowingly negotiates for favored prices not accorded his competitors;
- (2) The seller normally sells to this buyer through brokers who receive a certain commission on each transaction;
- (3) Pursuant to the buyer's proposal, the seller dispenses with the services of the broker in this particular transaction and accords the buyer a price reduction which accords with the broker's usual commission;
- (4) There are no reasons for the price reduction other than elimination of brokerage; the reduction serves no other purpose than favoring a predatory buyer, and the buyer performs no new services for the seller that he does not usually perform;
- (5) Competing buyers are not accorded similar favored treatment.

Although this outline of the necessary factual elements appears simple enough, in some transactions it may be particularly difficult to ascertain whether a particular price reduction or allowance is in fact a "discount in lieu of brokerage." However, it is clear that a buyer who receives a new discount or allowance after a seller has dispensed with the services of a previously retained broker should not be the target for attack if the discount he receives is routed in causal factors

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Allowances for brokerage.—A number of the manufacturers in the grocery group stated that they give allowances in lieu of brokerage to certain chain customers. Some of these give this allowance only when the customer has a buyer at the producing center or shipping point, the amount of such allowance being equal to regular brokerage. Other manufacturers stated that they limit the payment of such allowance to a few large chain customers and then only in response to a demand. Such allowances are not uniform as between chains. Where brokerage allowance is granted, some of the manufacturers allow co-operative chains 2-½ per cent, while they allow corporate chains a brokerage fee of 5 per cent. The reason for this discrimination is that it is necessary to grant the larger discount to the corporate chains to obtain their business.

Some manufacturers who distribute through brokers stated that they were required to pay brokerage not only to their brokers, but also to the chain purchasers. One manufacturer, however, stated that where it pays brokerage to one of the large chain-store purchasers, no brokerage is paid to its own broker. The chain involved has established a buying agency which holds itself out to be a merchandise broker. When the chain, through this buying agency, orders a car of the products of the manufacturer for delivery to one destination, the buying agency receives brokerage. If the manufacturer has a broker located in the territory to which the products are shipped, the broker receives no brokerage. However, when the buying agency of the chain orders a car of the products of the manufacturer for delivery to more than one destination, a mixed shipment, the brokerage is divided, the agency for the chain receiving one half and the broker into whose territory the shipment is destined receiving the other half of the brokerage fee.

other than eliminated brokerage. Despite the Commission's frequent references in its proceedings to a mathematical similarity between eliminated brokerage and challenged discounts,<sup>108</sup> the cases indicate that a full economic analysis of the discount in question and the intent of the parties is necessary to resolve the question of whether any discount is "in lieu of brokerage." Indeed, such a rule of reason analysis was unqualifiedly directed in the Supreme Court's first interpretation of section 2(c) in *FTC v. Henry Broch & Co.*<sup>109</sup>

In that case, the Court affirmed a Commission ruling that a broker could not reduce his own commission to allow the supplier to pass along a discriminatory discount to a particular large buyer.<sup>110</sup> However, the Court rejected any mechanical test of mathematical similarity for purposes of determining whether a particular allowance is in lieu of brokerage. Following the same Rule of Reason economic analysis espoused in *Automatic Canteen*, the Supreme Court said that a price reduction to a buyer violates section 2(c) as an allowance or discount "in lieu of brokerage" *only* when it is equivalent in purpose and effect to the payment of a broker's fee to the buyer. "[W]hether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case."<sup>111</sup>

This same point was made recently by the First Circuit in *Robinson v. Stanley Home Prods., Inc.*<sup>112</sup> and by the Ninth Circuit in its *Whitney* decision.<sup>113</sup> In *Whitney* the court said:

If it [a discount] serves the same purpose, has the same effect, and enjoys no economic justification which entitles it to be distinguished, a so-called "interpacker" discount ought to be regarded as an allowance in lieu of a commission or brokerage—but not otherwise.<sup>114</sup>

The *Whitney*, *Robinson*, and *Broch* cases indicate circumstances in which an allowance may be in lieu of brokerage and thus in violation of section 2(c). On the other hand, a lower price is not an allow-

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<sup>108</sup> See, e.g., *Venus Foods, Inc.*, 57 F.T.C. 1025 (1960); *Kodiak Fisheries Co.*, 57 F.T.C. 107 (1960); *Emard Packing Co.*, 55 F.T.C. 1235 (1959); *Ward's Cove Packing Co.*, 55 F.T.C. 49 (1958); *Riviera Packing Co.*, 54 F.T.C. 731 (1957); *Haskins Canning Corp.*, 53 F.T.C. 1160 (1957); *Bonner Packing Co.*, 47 F.T.C. 557 (1950); *George A. Bounds & Co.*, 33 F.T.C. 235 (1941); *Union Sardine Co.*, 32 F.T.C. 1194 (1941); *Ramsdell Packing Co.*, 32 F.T.C. 1187 (1941).

<sup>109</sup> 363 U.S. 166 (1960).

<sup>110</sup> The Commission action in *Broch* was brought against the broker rather than against the supplier or buyer.

<sup>111</sup> 363 U.S. at 175-76.

<sup>112</sup> 272 F.2d 601 (1st Cir. 1959).

<sup>113</sup> *In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959).

<sup>114</sup> *Id.* at 215.



ance in lieu of brokerage if it is causally conceived in considerations other than a saved commission or brokerage fee. The *actual purpose* of the allowances as shown by *all* of the evidence was stressed in each of the three cases.

The Fifth Circuit also considered such circumstances in *Thomasville Chair Co. v. FTC.*<sup>115</sup> There the Commission had held that the Thomasville Chair Company had violated section 2(c) by granting a price reduction to certain of its customers while at the same time giving its representatives only one-half of the ordinary commission on sales to such customers. The Commission had found that the reduced commission payment to the representatives was the basis for the reduced price to the favored customers. The company contended that the reduced price was justified on a basis other than the reduced sales commission because the salesmen's efforts to secure sales to the favored customers were not nearly so great as those involved in the sales to those customers paying the higher price.<sup>116</sup> The court held that a violation of section 2(c) occurs only when a discount or allowance is given which is not justified on some basis other than a saving in brokerage or commission payments. Moreover, the court indicated that even if the discount gave "effect to reduced commissions paid by the seller,"<sup>117</sup> the discrimination would not be a violation of 2(c) if it could be cost justified under section 2(a).<sup>118</sup>

Likewise, in *Central Retailer-Owned Grocers, Inc. v. FTC.*<sup>119</sup> the Seventh Circuit disapproved the Commission's "mathematical simi-

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<sup>115</sup> 306 F.2d 541 (5th Cir. 1962). One of the interesting factors in the *Thomasville Chair* case was the implication in the Commission's decision that commissions to employees (salesmen), as well as to independent brokers were subject to section 2(c). Thomasville argued strenuously that its representatives were in fact "employees" and that it could reduce compensation to its employees in order to "cost justify" a discount without running afoul of section 2(c). Commission counsel on the other hand argued that these representatives were "independent contractors" of the type that are normally subject to section 2(c). The Commission decision is ambiguous as to whether Thomasville's salesmen were held to be actual brokers or employees. However, the court of appeals apparently concluded that these representatives were brokers of the same type involved in the *Broch* case.

<sup>116</sup> Thomasville's defense was predicated on an elaborate cost study showing savings upon which it based its claim of a cost justification of these discounts. The Commission held that they had the burden of proving that factors other than brokerage accounted for the *whole* price reduction. It ruled that Thomasville had not carried this burden of proof.

<sup>117</sup> *Thomasville Chair Co. v. FTC*, *supra* note 115, at 545.

<sup>118</sup> The court remanded the case to the Commission for the taking of further evidence to allow Thomasville to put in a full defense of cost justification. The Commission subsequently dismissed the proceeding.

<sup>119</sup> 319 F.2d 410 (7th Cir. 1963).

larity" test for the determination of whether a discount in lieu of brokerage exists. The Commission had held that receipt of allowances by a purchaser-owned group constituted discounts "in lieu" of brokerage where the allowances were mathematically similar to those paid brokers.<sup>120</sup> After alluding to the valuable economic services performed by the group, the court rejected the Commission's approach noting the lack of "substantial evidence" to support the inference drawn by the Commission to the effect that Central received or accepted price concessions "in lieu of brokerage." Referring to the mathematical similarity approach, the court expressed "doubt whether this synthetic method of proving a violation of § 2(c) is warranted."<sup>121</sup>

Similarly, in its *Hruby Distrib. Co.* decision,<sup>122</sup> the Commission refused to follow the terms or labels which the parties attached to the transaction or to base its decision on mathematical computation. The complaint therein charged that Hruby, a purchaser of foodstuffs, had received brokerage or allowances in lieu of brokerage on its own purchases.<sup>123</sup> The hearing examiner found that Hruby had received discounts in lieu of brokerage, noting that the net prices which Hruby received "reflected a discount exactly equal to the standard brokerage in question" and that the general manager of a supplier had testified "that these net prices reflected a discount equal to and in lieu of the standard brokerage payments. . . ."<sup>124</sup> On appeal, the Commission reversed, holding that in fact Hruby had received functional discounts for his services in selling to wholesalers. The opinion of Commissioner Elman noted the economic fact that Hruby competed at a higher functional level than wholesalers and he dismissed mathematical formulas and verbal characterizations as a basis for decision. Commenting on the parties' descriptions of the discounts as "brokerage," he noted "the not surprising fact that businessmen, in describing their actions, do not talk like lawyers expert in the niceties of the Robinson-Patman Act."<sup>125</sup>

Thus, in the *Hruby* decision the Commission clearly brought itself

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<sup>120</sup> National Retail-Owned Grocers, Inc., 60 F.T.C. 1208, 1232 (1962). Indeed, the Commission noted that it was unnecessary to show an exact correlation between the two amounts.

<sup>121</sup> Central Retailer-Owned Grocers, Inc. v. FTC, *supra* note 119, at 415.

<sup>122</sup> 61 F.T.C. 1429 (1962).

<sup>123</sup> *Hruby Distrib. Co.*, 61 F.T.C. 1429 (1962) (Complaint).

<sup>124</sup> *Hruby Distrib. Co.*, 61 F.T.C. 1429 (1962) (Initial Decision).

<sup>125</sup> *Id.* at 1449. Commissioner Dixon joined in this opinion, but Commissioner MacIntyre dissented vigorously stressing the tests of mathematical precision and verbal characterization. Commissioners Higginbotham and Anderson did not participate in the decision.

into accord with judicial authority. However, in *Flotill Products, Inc.*<sup>126</sup> the Commission in finding a violation of section 2(c) interjected confusion by stressing mathematical computations along with a fleeting reference to "brokerage" by one witness. One of the principal issues in *Flotill* was a 2½ percent promotional allowance granted by Flotill to a wholesale grocer on its private brand merchandise. In holding that this allowance was a discount in lieu of brokerage, the Commission stressed "the mathematical identity of the allowance and the brokerage paid on sales to many other customers,"<sup>127</sup> and the fragmentary testimony of one witness that he thought that "the fact we were buying directly represented economies to them, a convenience to them, and a sure outlet for their goods . . ."<sup>128</sup> But the record in *Flotill* did not indicate that a uniform rate of brokerage was paid to seller's brokers,<sup>129</sup> and the witness whose testimony the Commission quoted had unqualifiedly testified that all discussions between Flotill and the wholesaler had related only to promotional allowances. Indeed, the Commission itself recognized that the credit memoranda were designated "special promotional allowances," that the funds were placed in the wholesaler's promotional account, and that from time to time advertising tear sheets were sent to Flotill and promotional programs were discussed with them.<sup>130</sup> The Commission further agreed that the great number of Flotill sales to the wholesaler both before and after the challenged transaction had been made directly and without the services of a broker.<sup>131</sup>

It is difficult to reconcile *Flotill* with the *Hruby* decision decided by the same three Commissioners, viz., Dixon, MacIntyre and Elman. In *Hruby*, a two to one majority made up of Commissioners Elman and Dixon ruled that sporadic references to brokerage in the testimony were not sufficient to demonstrate a discount in lieu of brokerage. However, in *Flotill*, Commissioners Dixon and MacIntyre joined in holding such testimony indicative of illegality.<sup>132</sup>

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<sup>126</sup> Trade Reg. Rep. ¶ 16970 (June 26, 1964).

<sup>127</sup> *Id.* at 22039.

<sup>128</sup> *Id.* at 22040.

<sup>129</sup> The record in the *Flotill* case established that brokerage in the canned food industry and indeed in transactions wherein Flotill sold varied from 1 percent to 5 percent. Record, pp. 155, 270, 370, 434, 494, 1222.

<sup>130</sup> Flotill Prods., Inc., *supra* note 126.

<sup>131</sup> *Id.* at 22038.

<sup>132</sup> Commissioner Elman dissented saying:

In the present case, the elimination of brokerage was not even simultaneous with the granting of a concession, and both the elimination of brokerage and the granting of a promotional allowance to Nash-Finch are explicable without any reference to price discrimination—the first because it was economical for the

Clarification may be derived from the Commission's new Trade Practice Rules for the Fresh Fruit and Vegetable Industry.<sup>133</sup> Title 16, section 74.2(e) states:

V. A discount or allowance by an industry member is in *lieu of brokerage* if it is attributable to a reduction or elimination of brokerage fees in connection with the sales transaction involved.

(1) A discount or allowance granted by an industry member to some but not all customers would not under ordinary circumstances be considered in lieu of brokerage if—

(i) The industry member granting same makes no sales through brokers to any of his customers, or

(ii) The industry member makes all of his sales through brokers at the same brokerage rate.

(2) The actual basis for a discount or allowance *at the time it was granted* will indicate whether or not such was in lieu of brokerage.

The rule deals primarily with extreme and infrequent cases (*e.g.*, where the seller makes *no* sales through brokers or makes *all* sales through brokers). But it does recognize that the "actual basis for the discount or allowance at the time it was granted will indicate whether or not such was in lieu of brokerage." Seemingly, this provision recognizes that all facts surrounding the discount, including its economic justification and the intent of the parties, must be reviewed in accordance with the rule of reason type of analysis directed in the *Broch* case.

### B. *Broker's Receipt of Brokerage on His Own Purchases*

As interpreted by the Federal Trade Commission, section 2(c) prohibits a broker from becoming a purchaser and receiving his broker's fee in connection with a transaction wherein he purchases for his own account. However, in the past five years, the Commission's proceedings under section 2(c) have clouded rather than clarified the law with respect to the all-important question of whether a "purchase of goods" has in fact taken place. As in 2(f) proceedings, the Commission decisions leave undefined vital questions pertaining to the meaning of the term "purchase" in section 2(c). The net result is that scores of persons engaged in the distribution of produce and groceries are left

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parties to do without a broker's services, the second because the seller received a *quid pro quo* (i.e., promotional efforts on behalf of its products) for granting the allowance.

Flotill Prods., Inc., *supra* note 126, at 22049. The diversity of opinion among Commissioners is heightened by Commissioner MacIntyre's dissent in the *Hruby* case. Hruby Distrib. Co., *supra* note 122, at 1449.

<sup>133</sup> Trade Practice Rules for the Fresh Fruit and Vegetable Indus., *supra* note 106, at 5333. (Emphasis added.)

in a constant state of doubt as to whether in fact they fall in the classification of purchaser or broker in any particular transaction. Assuming that all such persons are aware of the command that they may not receive brokerage on their own purchases, they are forced to operate in a legal vacuum as to whether in fact they are purchasing in particular transactions where they receive brokerage. Hence, the Commission's rulings have created unique problems in regard to the application of a caveat emptor doctrine under 2(c).

To add to this confusion, the Federal Trade Commission's newly promulgated Rules for the Fresh Fruit and Vegetable Industry do not define the term "purchase of goods" in section 2(c).

Hence, the person operating in the chain of distribution is thrown back on previously adjudicated cases for guidelines.

In the late 1930's, and during the 1940's, the Federal Trade Commission attempted in a number of proceedings to indicate what constitutes a "purchase" by a broker.<sup>134</sup> Typically, these cases involved companies that speculated upon the possible future sales of food-stuffs and who thus assumed the purchaser's risk of loss or gain. The transactions involved merchandise shipped in less than carload lots, and the brokers nominally acted as seller's representatives in them. Where the broker was able to sell a substantial part of a pool car, he would take title to the unsold portion in the pool car and resell it. This was done as an alternative to waiting to direct shipment of the pool car until orders for the entire carload had been received. In other cases, these brokers would store merchandise, guarantee the credit of buyers, buy insurance and pay taxes on goods, file claims for damage to goods in their own names, and resell merchandise to persons unknown to the original seller at prices negotiated by buyer and broker-seller alone.<sup>135</sup>

During the past five years, the Federal Trade Commission has considered similar arrangements in the food and vegetable industry. For instance, in the *Florida Citrus Exch.* case,<sup>136</sup> the Commission held that the seller had granted brokerage to a purchaser (called a consignee), noting that

The fruit was treated by these consignees as their own property, sometimes stored in their own warehouses, insured at their own expense, included in their inventories for tax purposes, and sold to persons whose names were unknown to respondent, under conditions

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<sup>134</sup> See, e.g., *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir. 1945); *Ketchikan Packing Co.*, 44 F.T.C. 158 (1947); *Columbia River Packers Ass'n, Inc.*, 44 F.T.C. 118 (1947); *Fruit & Produce Exch.*, 30 F.T.C. 224 (1939).

<sup>135</sup> See *Edwards, The Price Discrimination Law* 140-47 (1959).

<sup>136</sup> 53 F.T.C. 493 (1956).

of sale also unknown. These consignees made sales at varying prices and treated resulting profits and losses as their own.<sup>137</sup>

In the *Haines City Citrus Growers Ass'n* case,<sup>138</sup> the examiner stressed the intent and understanding of the parties in his holding that Haines had paid brokerage to two brokers who bought for their own account. In holding that one of the brokers was a "purchaser," the examiner emphasized that he had:

. . . testified that he represented ten to fifteen packers on a strictly brokerage basis, but that all his transactions with Respondent Haines were strictly on an f.o.b.-market-price basis, and that he re-sold the fruit . . . purchased from Respondent Haines to jobbers and commission houses at prices determined by himself, which were based on his costs plus freight plus mark-up.<sup>139</sup>

In the case of the other, the examiner emphasized that he had transported the goods in his own trucks, insured them for his own benefit, and defrayed all expenses involved in repacking and handling the citrus fruit.<sup>140</sup>

In holding that a purchaser cannot speculate on the rise and fall of the market and receive brokerage in connection with such transactions, the *Haines City* decision appears to conform with early precedents. However, the examiner's decision created widespread controversy in the produce industry in dictum which suggested that the broker became a purchaser when fruit was invoiced to him for re-billing in connection with pool-car shipments which were to be divided between a number of different ultimate customers. Haines labeled this practice an economic necessity to avoid multi-billing to ultimate customers. However, the examiner stated:

We believe that when a seller sells a so-called "pool-car" shipment, ostensibly through a broker to a number of persons unknown to the seller, and in every respect concerning that shipment, deals with the broker as though the broker were himself the true purchaser, the transaction is ambiguous, and therefore imposes upon the seller the duty of determining the true facts as to who is his real customer. The ambiguity of such a transaction arises from the comparatively recent practice among sellers in the citrus-fruit industry, when making pool-car sales, of billing the broker and receiving payment from the broker, instead of the old, immemorial practice of billing the actual purchasers direct, receiving payment from them for the merchandise, and thereafter paying the broker his fee. In this recent

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<sup>137</sup> *Id.* at 505.

<sup>138</sup> 58 F.T.C. 815 (1961).

<sup>139</sup> *Id.* at 818.

<sup>140</sup> *Id.* at 820. Subsequently, the appeal of Haines was dismissed, and the examiner's decision became final.

practice, as employed by Respondents herein, a pool-car transaction has all the appearance, from the seller's standpoint, of a sale to a broker for his own account, on which the payment of brokerage is prohibited by law.<sup>141</sup>

Needless to say, this broad dictum causes needless doubt as to whether the Commission had adopted tests which vary substantially from normal criteria of purchase and sale. However, subsequent Commission complaints against some 75 respondents in the citrus fruit industry did not result in a single holding expressing acceptance of the examiner's unorthodox dictum.<sup>142</sup>

The citrus fruit investigation produced one Commission proceeding which reached the courts, *viz.*, *Western Fruit Growers Sales Co.*<sup>143</sup> In that case, the Commission held the seller had violated section 2(c) of the Robinson-Patman Act by allowing brokerage on purchases which so-called brokers made from their own account. The Ninth Circuit subsequently affirmed on the ground that the administrative findings were supported by substantial evidence.<sup>144</sup> Although the buying brokers in that case did re-invoice their customers, the court did not sanction any broad rule that would label as a buyer any person who re-invoiced. Instead, it carefully based its decision upon the overall factual panoply detailed in the administrative proceeding. Significant facts proven by complaint counsel were: (1) the buying brokers invoiced their customers at prices substantially above the seller's invoice and kept the profit, (2) the broker did not bill petitioner for losses when goods were sold at a lower price than the seller's invoice, (3) the sellers did not check the invoice prices by the broker to see that the broker was billing at the seller's price, (4) standard brokers' memoranda of sale were not issued in the majority of transactions, (5) the seller conceded that he never had any interest in the transaction after the merchandise was shipped and "that it was a completed transaction" at the time the merchandise was shipped and the billing was sent, (6) merchandise

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<sup>141</sup> *Id.* at 821-22.

<sup>142</sup> On March 8, 1960, the Commission adopted a resolution titled "Resolution Directing Investigation of the Payment of Brokerage or Commissions or Allowances In Lieu Thereof by Corporations Engaged in the Sale and Shipment of Fresh Citrus Fruit." Pursuant thereto, many citrus fruit suppliers, brokers, and distributors dealing in Florida, Texas, and California citrus fruit were ordered to file special reports pertaining to their activities. Complaints were issued against a number of these companies charging substantially the same violations of law set forth in the *Haines City Citrus Growers Ass'n* case. Some 75 companies entered into cease and desist orders. See, *e.g.*, cases cited *supra* note 105.

<sup>143</sup> 61 F.T.C. 586, 587-88 (1962) (Complaint).

<sup>144</sup> *Western Fruit Growers Sales Co. v. FTC*, 322 F.2d 67 (9th Cir. 1963), *cert. denied*, 376 U.S. 907 (1964).

was shipped directly to the broker rather than the customer, and (7) the seller did not know the customer's name and made no attempt to find the customer's name.<sup>145</sup>

A good deal of the confusion arising from the proceedings against the citrus fruit shippers, including the *Haines City* and *Western Fruit Growers* cases, has now been dispelled by the Commission's decision in *Flotill Prods., Inc.*<sup>146</sup> As previously discussed, the *Flotill* case involved the question of whether Flotill had allowed discounts in lieu of brokerage to a buyer. However, that proceeding also involved the question of whether certain field brokers purporting to act as representatives of Flotill were in fact purchasing for their own account and receiving brokerage on these purchases. After a full trial, the Commission held that Flotill had not violated section 2(c) by paying brokerage to field brokers on purchases for their own account. The opinion of Commissioner Dixon distinguishes the field broker relationship from such a case as *Western Fruit Growers* by stating that "these field brokers do not purchase for their own account but function as [sales] intermediaries on behalf of Flotill."<sup>147</sup>

In reaching this conclusion, Commissioner Dixon stressed the following factors in the operation of Flotill's field brokers: (a) purchasers are generally located at considerable distances from suppliers; (b) the field broker is in the area of the purchaser and is able to make potential purchasers aware of information concerning production capabilities and stock availability; (c) the field broker splits up orders between several small carriers and organizes the shipping of each canner's share to purchasers; (d) the field broker receives a commission usually at the rate of 4 or 5 percent; (e) the field broker usually bills at the price set by the seller; (f) goods are shipped directly to the ultimate purchasers, never to the field broker; and (g) the purchaser may borrow money on the goods after they are shipped, but the field broker may not.

One of the most important aspects of the *Flotill* decision is the holding that a broker does become a purchaser if he is invoiced by the

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<sup>145</sup> However, beyond these facts, it should be emphasized that the Western Fruit Growers Sales Co. stipulated on the record that "sales were made to the brokers on account" but that "while such purchases were in the broker's name, they were for customers of such brokers on a pool basis." See *Western Fruit Growers Sales Co.*, 61 F.T.C. 586, 590 (1962). This and respondent's concession that they regarded the transaction as completed at the time of billing and delivery constituted strong evidence of purchase and sale. Record, pp. 10, 11, 25-27, 113-14.

<sup>146</sup> *Supra* note 126.

<sup>147</sup> *Supra* note 126, at 22037.



seller and re-invoices for the accommodation of the seller.<sup>148</sup> This clarifies doubt created by the *Haines City* dictum.

Additionally, the Commission realistically appraises the billing functions of the broker when it holds that the broker might in some instances re-invoice at a higher price than that set by the seller without forfeiting his broker status. While a few instances were disclosed in which field brokers billed the purchaser at slightly higher prices than the *Flotill* billing, such instances were held to be not typical, and insufficient to demonstrate that the field broker purchased for his own account.<sup>149</sup>

The decision in the *Flotill* case in effect recognizes the legislative intent that arbitrary rules are not to be invoked to convert a broker into a purchaser for purposes of imposing liability under section 2(c).<sup>150</sup> The intent of the parties is determinative of whether a purchase has taken place.<sup>151</sup> In future cases, it is to be hoped that the

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<sup>148</sup> The propriety of brokers' invoicing is also confirmed by the new trade rules for the fresh fruit and vegetable industry. Section VII of rule 2 states:

A broker negotiates a valid and binding contract for the sale to several buyers of fresh fruits or vegetables on behalf of his seller-principal at a price established by the seller. The seller delivers an invoice and/or manifest to the broker showing the name of the broker as "broker" and itemizing the list of the merchandise together with the price of each item. The names of the buyers are not listed. As a service to his seller-principal, the broker bills and collects from the buyers the amount charged by the seller, remitting the total amount collected, less brokerage, together with a memorandum of sale identifying the buyers. There is no violation of Section I of Rule 2 in this example. In such a situation wherein the names of the buyers are not initially disclosed by the broker to his seller-principal it is the broker's responsibility to provide confirmation and memoranda as will clearly establish his role as a broker, and it is the seller's responsibility to ascertain that the broker is not the buyer.

<sup>149</sup> However, it was also noted that, if the evidence established that "a field broker customarily bills purchasers at a price higher than he pays *Flotill*," such fact might well support the finding that the field broker was purchaser for his own account.

<sup>150</sup> "[T]he bill does not affect legitimate brokerage either directly or indirectly. Where the broker renders service to the buyer or to the seller the bill does not prohibit the payment of brokerage. It is not aimed at the legitimate practice of brokerage, because brokerage is necessary. The broker has a field all his own and he should not be interfered with." 80 Cong. Rec. 6281 (1936) (Remarks by Senator Logan). See *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955), cert. denied, 350 U.S. 988 (1956); *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, Civil No. 58C 229 (memorandum opinion April 16, 1965, N.D. Ill.). Both held that, in a Robinson-Patman case, the general law of sales is applicable to determine whether the relationship of the parties was that of "buyer and seller" or "principal and agent."

<sup>151</sup> One of the elements universally recognized as essential to a sale is the intention of the parties thereto that a sale, as distinguished from any other transaction, shall result. See, e.g., *Adams v. Herman*, 106 Cal. App. 2d 92, 234 P.2d 695 (1951); *Borlund*

Commission will continue to follow this rule of reason approach which recognizes that single factors such as the broker's setting his own price,<sup>152</sup> possession of the merchandise,<sup>153</sup> and invoicing<sup>154</sup> are not in themselves determinative of the issue of passage of title.

### C. *Cooperative and Other Group Purchasing Programs Under Section 2(c)*

The Federal Trade Commission has been quick to attack cooperative purchasing ventures under section 2(c) of the Robinson-Patman Act as well as under section 2(f).

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v. Nevada Bank, 99 Cal. 89, 33 Pac. 737 (1893); Boden v. Hunter, 240 Ky. 138, 41 S.W.2d 920 (1931); Allison v. Whitcomb, 289 Mich. 80, 286 N.W. 165, 167 (1939); Pettoway v. Commercial Automotive Serv., 49 Wash. 2d 650, 306 P.2d 219 (1957); City and County v. United States, 106 F.2d 569 (9th Cir. 1939).

<sup>152</sup> The fact that the agent was allowed to set his own price after receipt of the invoice and keep the profit which he realized is not necessarily indicative of a purchase and sale transaction. Indeed, in commercial law, consignments wherein the consignee had the right to set his own price had been recognized for many years. For instance, in Ludvigh v. American Woolen Co., 231 U.S. 522 (1913), the contract involved provided that the so-called consignee's compensation was to be "the difference between the invoice prices and the selling prices of the goods . . ." The consignee had power to sell the goods at such prices as he could obtain "and to immediately pay over to the said party of the first part any amount collected as aforesaid, immediately upon its collection . . ." The Supreme Court found this to be a valid agency arrangement. *Id.* at 523-24. Indeed, the *Restatement of Agency* states in regard to the factor of the agent's right to sell as his own set price:

[T]his factor is not determinative, since an agent may be allowed to fix the selling price and keep the difference as compensation. *Restatement (Second), Agency* § 14J, comment b(3) (1958).

See *In re Klein*, 3 F.2d 375 (2d Cir. 1924); Waysey v. Whitcomb, 167 Mich. 58, 132 N.W. 572 (1911). See also *Edgewood Shoe Factories v. Stewart*, 107 F.2d 123, 125 n.2 (1939), where the consignment agreement fixed the value of the shoes at the invoice price and the commissions of the consignee at the amounts he received over and above that price. An ancient and respected authority on this question is *Ex parte Bright*, 10 Ch. D. 566 (1879), in which the master of the rolls held that an agreement to remunerate an agent by a commission varying according to the amount of the profit obtained by the agent in selling the goods did not make the agent a purchaser of the goods.

<sup>153</sup> The fact that the seller's distribution pattern involves his taking possession of the merchandise does not by itself establish a sale. At common law the courts have long recognized that a consignment is purely an agency transaction although the agent has possession of the merchandise. Indeed, such agency arrangements have been recognized for antitrust purposes. *United States v. General Elec. Co.*, 272 U.S. 476 (1926); *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956).

<sup>154</sup> Consignments have long been recognized as valid agency arrangements even though the consignee is invoiced by the consignor. See, e.g., *Sturm v. Boker*, 150 U.S. 312 (1893); *Edgewood Shoe Factories v. Stewart*, 107 F.2d 123 (5th Cir. 1939); *Waysey v. Whitcomb*, 167 Mich. 58, 132 N.W. 572 (1911).

As in the case of proceedings under 2(f), the Commission's early decisions held that purchaser-owned entities had no functional independence or status under the Robinson-Patman Act. When such purchaser-controlled entities received brokerage or discounts in lieu of brokerage from suppliers and refunded such brokerage to their purchasing owners, the Commission held that a violation of section 2(c) was established.<sup>155</sup> The courts upheld the Commission's initial attack upon purchaser-controlled brokerage organizations. In 1940 the First Circuit condemned the payment of commission to a cooperative buying and service corporation whose stock was owned by wholesale bakers.<sup>156</sup> The Seventh Circuit followed with decisions against purchaser-controlled membership organizations in 1945 in the *Modern Marketing Serv.* case,<sup>157</sup> and in 1953 in the *Independent Grocers Alliance* case.<sup>158</sup>

As in the section 2(f) cases, the critical factor in the Commission's eyes was the ownership and control exercised by the group members over the intermediaries which they created. Under such circumstances, a seller's payment of brokerage to the intermediary was deemed by the Commission to be illegal.<sup>159</sup>

The Commission and court decisions were rendered without reference to the nature of the services performed by buying cooperatives and other groups in the food industry. They ignored the basic economic fact that buying groups of small purchasers, through the use of private label merchandise, constituted an effective countervailing power against the development of the chain stores. The development of private labels by small independent purchasers provided a ready market for smaller suppliers' products. Group advertising programs and the wide distribution of the products by the participating stores gave such labels a nationally accepted name, and they were an undoubted service to the suppliers. Apart from alleviating small buyers of expense of individually maintaining brokers throughout the country, the group programs further benefited the supplier by guaranteeing credit and eliminating collection expense. Moreover, the proliferation of such group buying organizations diminished the dependence of each private label producer on any particular distributive organization, whether cooperative, voluntary, or corporate.<sup>160</sup>

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<sup>155</sup> *Independent Grocers Alliance Distrib. Co.*, 48 F.T.C. 894 (1952); *National Modes, Inc.*, 46 F.T.C. 404 (1950); *Modern Marketing Serv., Inc.*, 37 F.T.C. 386 (1943); *Quality Bakers of America*, 28 F.T.C. 1507 (1939).

<sup>156</sup> *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940).

<sup>157</sup> *Modern Marketing Serv., Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945).

<sup>158</sup> *Independent Grocers Alliance Distrib. Co. v. FTC*, 203 F.2d 941, 945 (7th Cir. 1953).

<sup>159</sup> See, e.g., *Quality Bakers of America*, *supra* note 155, at 1523.

<sup>160</sup> See Edwards, *The Price Discrimination Law* 115-17 (1959).

Such policy considerations would seem to be relevant to the services rendered exemption in section 2(c). However, the Commission and the courts uniformly refused to apply this exemption in group buying cases. Representative of these is the First Circuit decision in the *Quality Bakers* case, where the services rendered exemption was rejected. The court said, "even if the service company here renders services to the sellers . . . , it cannot lawfully collect brokerage fees from the sellers since it is acting as agent for the purchasers."<sup>161</sup>

Thus, the three early circuit court opinions, plus Commission decisions that did not reach the courts, seemed to preclude taking advantage of the benefits of group purchasing programs.

However, in 1959 in the *Broch* case the Supreme Court cast doubt on the validity of these interpretations.<sup>162</sup> Indeed, the Court intimated that brokerage to a group organization could be justified if "its methods of dealing justified its getting a discriminatory price by means of a reduced brokerage charge."<sup>163</sup>

The harvest of the *Broch* Court language was not long in coming. It is typified by the result in a proceeding which the Federal Trade Commission instituted in 1958 against Central Retailer-Owned Grocers,<sup>164</sup> a membership organization made up of retailer-owned wholesale grocers which obtained for them so-called allowances and discounts from suppliers.

When instituted, the *Central Retailer-Owned Grocers* case did not seem on its face to present any novel or unique problems under prior decisional law. The facts fell into the traditional mold: the cooperative group purchasing organization received and transmitted to its purchaser owners allowances on the purchases which these owners had made. Thirty-five wholesale grocers organized Central to act as an intermediary in bargaining with suppliers in connection with the purchase of private brand food and grocery products. The following facts are pertinent: (1) Central was wholly-owned by its customers, *i.e.*, the wholesale grocer members; (2) Profits of Central after the deduction of operation expenses, were distributed as patronage dividends to its customers in accordance with their purchases; (3) Each customer contributed a deposit to Central to enable it to finance its operation; (4) Central dealt only in private label merchandise (the private labels were owned by a sister corporation) which it sold only to its stock-

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<sup>161</sup> *Quality Bakers of America*, *supra* note 156, at 399.

<sup>162</sup> *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

<sup>163</sup> 363 U.S. at 173.

<sup>164</sup> *National Retailer-Owned Grocers, Inc.*, 60 F.T.C. 1208 (1962) (Complaint).

holder-members; (5) Central's articles of incorporation showed that its sole purpose was to be a "purchasing organization for the member retail grocers . . ." and that it was to "effect such savings by bulk purchasing and distribute such savings to the member retail grocers, on a patronage basis of purchases"; (6) Each stockholder was a director of Central; (7) At the beginning of each season, the members submitted to Central estimates of how much private label merchandise they would need during the ensuing year. The advance estimates were prepared on forms distributed by Central to its members; (8) Central negotiated directly with suppliers on behalf of its members and entered into long-term purchase contracts with them; (9) All merchandise was drop-shipped by the suppliers direct to the members of Central; and (10) Suppliers were informed that they would realize savings from Central's advance commitments from members.

The Commission found that the member wholesalers had utilized the cooperative buying organization as agent to secure private label goods for the members.<sup>165</sup> Using the mathematical similarity test, the Commission treated the discount received as being "in lieu of brokerage,"<sup>166</sup> and held each of the members liable for the receipt of the brokerage through the purchaser-controlled entity.<sup>167</sup>

In the proceeding before the Commission, Central had raised the defense that it was in fact a purchaser, taking title to merchandise and reselling to its stockholder owners. The Commission ruled that Central was nothing but a buyer-controlled intermediary.<sup>168</sup> On appeal, the Seventh Circuit reversed, overturning the Commission's finding that Central was the buying agent for its members and *flatly* holding that Central was not a broker but was a purchaser purchasing on its own account and reselling to its stockholder-owners.<sup>169</sup> The court said:

The record convincingly shows that the payments made by Central to its suppliers were for merchandise which it bought upon its own credit and not on orders of its members transmitted to its suppliers. The fact that Central, because of its strong purchasing power, was able to buy at favorable prices or on discounts and allowances by its suppliers, is not proof that Central was rendering a broker service.<sup>170</sup>

The holding that a purchaser-owned entity involved in obtaining merchandise which is 100 percent drop-shipped to its owners is itself

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<sup>165</sup> *Ibid.*

<sup>166</sup> *Id.* at 1238.

<sup>167</sup> *Id.* at 1240.

<sup>168</sup> *Id.* at 1233-35.

<sup>169</sup> *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410 (7th Cir. 1963).

<sup>170</sup> *Id.* at 414.

a purchaser seems contrary to all the early Commission precedents under both section 2(c) and section 2(f). Apparently, without express elaboration, the Seventh Circuit took belated notice of the policy behind the statute and the economic implications of the services rendered clause. Indeed, the court resoundingly affirmed the principle that small buyers may combine their purchasing power for their own protection. The court recognized that

Central was able to secure favorable prices from its suppliers, because of (1) their assured volume of business, (2) their lack of any credit risk, (3) a reduction in their billing work, and (4) Central's advance commitments for later requirements. . . . Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers . . . , which made them stronger in their competition with large chain stores.<sup>171</sup>

What the future holds for purchaser-controlled groups, however, remains a subject for speculation. In spite of its recognition of the services performed by such groups, the Seventh Circuit has now added further confusion to an already complex picture by holding in the *National Parts Warehouse* case that an automotive jobber-controlled entity was not to be accorded the independent functional status of a warehouse distributor purchaser.<sup>172</sup> In that case, the respondents had vehemently argued that the *Central* precedent required classifying the customer-owned entity as a "purchaser" in its own right for section 2(a) and 2(f) purposes. However, this argument was rejected with a statement that the *Central* case had been submitted to the court only on the theory that "sums Central received and accepted from certain of its suppliers constituted brokerage or allowances in lieu of brokerage . . . ." <sup>173</sup>

Seemingly, the public policy behind the services rendered exemption in section 2(c) has been recognized in the *Central Retailer-Owned Grocers* case, and this exemption will provide protection to group buying ventures under that per se section which is not available under section 2(f).

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<sup>171</sup> *Id.* at 414-15. Moreover, the court strongly commended a dissenting opinion, at the Commission level, by Commissioner Elman, and criticized the Commission's majority opinion, stating that the majority would "drive such groups out of existence." *Id.* at 415.

<sup>172</sup> *General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir. 1965).

<sup>173</sup> 346 F.2d at 317. See also *Monroe Auto Equip. Co. v. FTC*, 347 F.2d 401 (7th Cir. 1965), where the court made the same comment in rejecting the argument that a jobber-owned warehouse distributor was entitled to the status of a "purchaser" in its own right in a § 2(a) case.

D. *Defenses in Proceedings Against Buyers Under Section 2 (c)*

## 1. Services Rendered

As previously stated, the early Commission decisions virtually wrote the "services rendered" clause out of section 2(c) as a defense.<sup>174</sup> However, contemporary authorities demonstrate a radical change in the judicial climate and a realistic reappraisal of the "services rendered" clause in the context of marketing conditions in the food industry wherein the Commission has concentrated its 2(c) enforcement efforts.

In particular, the Commission and the courts have been forced to reappraise the effect of the "services rendered" exemption in the light of the Supreme Court decision in *FTC v. Henry Broch & Co.*<sup>175</sup> In *Broch*, the Court found the "services rendered" exception inapplicable because there was no evidence that the buyer rendered any services to the seller. However, the Court expressly noted, "we would have quite a different case if there were such evidence . . ."<sup>176</sup>

Confirming the vitality of the "services rendered" provision, the Supreme Court's second *Broch* decision noted pointedly: "We made it clear in our prior opinion that the order need not be read as prohibiting transactions to which the statutory exception [for services rendered] applies."<sup>177</sup>

While the favorable decisions in *Hruby Distrib. Co.*,<sup>178</sup> and *Central Retailer-Owned Grocers, Inc. v. FTC*,<sup>179</sup> were both based on the fact that the respondent was a purchaser, the opinions in both cases emphasize the fact that the challenged parties performed valuable economic services for their suppliers.<sup>180</sup> Moreover, while the *Flotill Prods., Inc.* decision seems predicated on the determination of whether field brokers were purchasers, certain language in the Dixon opinion points to a recognition that the substantial services rendered by the field broker might have been sufficient to exempt the transactions from 2(c) liability even if a purchase had been made by these brokers.<sup>181</sup>

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<sup>174</sup> Southgate Brokerage Co., 39 F.T.C. 166 (1944); Modern Marketing Serv., Inc., 37 F.T.C. 386 (1943); see Biddle Purchasing Co., 25 F.T.C. 564 (1937).

<sup>175</sup> 363 U.S. 166 (1960).

<sup>176</sup> *Id.* at 173-74.

<sup>177</sup> *FTC v. Henry Broch & Co.*, 368 U.S. 360, 367 n.8 (1962).

<sup>178</sup> 61 F.T.C. 1437 (1962).

<sup>179</sup> 319 F.2d 410 (7th Cir. 1963).

<sup>180</sup> As one commentator has recently noted: "Owing to *Broch*, therefore, the 'for services rendered' issue may be reopened for fresh scrutiny of the validity of prior interpretations . . ." Rowe, Price Discrimination Under the Robinson-Patman Act 351 (1962).

<sup>181</sup> Commissioner Dixon stated:

Commissioner Elman's separate opinion, on the other hand, squarely ruled that even a controlled intermediary or purchaser may receive brokerage if he in fact renders substantial services for the seller.<sup>182</sup>

In *Garrett-Holmes Co.*,<sup>183</sup> the hearing examiner noted the revitalization of the "services rendered" clause, quoting *Brock* extensively. However, the examiner held that the services performed were not "characteristically those of a broker, but are rather characteristically those of any intermediary in the line of distribution."<sup>184</sup> In such circumstances, the examiner refused to recognize the "services rendered" exemption, stating that "to allow such 'services' to constitute justification for brokerage would negate 2(c) completely."<sup>185</sup> However, he did state that, if the services rendered had been "above and beyond those rendered by efficient wholesalers in the chain of distribution," the brokerage paid to the buyer might have been justified.<sup>186</sup> The final order of the Commission confirmed this analysis by quoting *Brock* to the effect that "there is no evidence that the buyer rendered any services to the sellers . . . nor that anything in its method of dealing justified its getting a discriminatory price as brokerage."<sup>187</sup>

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Viewed as a part of the entire transaction from the time of the placing of the order by the ultimate purchaser until delivery of the goods to him, we find that technical title passage, if such be the case, would not be conclusive but would be merely incidental to the services performed by the field broker for the canner.

Flotill Prods., Inc., *supra* note 126, at 22037.

<sup>182</sup> Citing *Brock*, *Hruby*, and *Central Retailer-Owned Grocers*, Commissioner Elman stated:

The effect of these decisions has been to restore Section 2(c) to its proper role in the scheme of the Robinson-Patman Act. Section 2(c) prohibits only three general types of transaction. The first is the payment of unearned brokerage to a dummy who renders no services and is controlled by the other party to the transaction. A variation of this would be where the dummy, in an attempt to mask a violation of the statute, performs only slight or nominal services which do not entitle him to brokerage. In the second type of transaction to which 2(c) applies, the dummy is dispensed with entirely. The seller grants directly to the buyer an allowance or discount for, on account of, or in lieu of, brokerage, and no services are rendered by the buyer to the seller justifying the allowance, and no savings in distribution costs are effected.

Flotill Prods., Inc., *supra* note 126, at 22047 (separate opinion).

<sup>183</sup> Trade Reg. Rep. ¶ 17209 (Feb. 26, 1965).

<sup>184</sup> *Id.* at 22280.

<sup>185</sup> *Ibid.*

<sup>186</sup> *Ibid.*

<sup>187</sup> *Ibid.* This statement provoked an objection by Commissioner MacIntyre, who wrote a separate opinion to the effect that the majority's reference to services rendered is "wholly unnecessary and unwarranted."



As a final judicial step in recognition of the "services rendered" clause, the *Empire Rayon Yarn Co. v. American Viscose Corp.* case<sup>188</sup> flatly recognizes that a buyer may receive brokerage for services that he performs. The court emphasized that, even if the defendants were buyers, the fact that they brought other buyers and sellers together for a commission and sold at the manufacturer's stipulated price was a service which negated a violation of section 2(c). However, the Court of Appeals for the Second Circuit reversed, finding that "reselling at American's list price is not a service" and that in fact there was no evidence that the favored customers brought "buyer and seller together."<sup>189</sup> Significantly, the Court of Appeals did not disagree with the District Court's ruling that the services rendered clause provides an absolute defense for a buyer's receipt of brokerage. Instead, it based its ruling on a factual determination that no additional services had actually been rendered by the buyer.<sup>190</sup>

The one note which adds considerable confusion to this favorable and logical development in litigated cases was the promulgation of the Federal Trade Commission's new Trade Practice Rules for the Fresh Fruit and Vegetable Industry. Unfortunately, those rules omit any reference to "service rendered" in dealing with the liability of buyers for receipt of brokerage and discounts in lieu of brokerage. However, the Federal Trade Commission at the time of the promulgation of these rules said that they are "consistent in all respects with the pertinent court decisions . . . ."<sup>191</sup> Since the recent court decisions have given increasing recognition to the "services rendered" clause, it is arguable that the Commission will not return to its previous narrow position.<sup>192</sup>

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<sup>188</sup> 238 F. Supp. 566 (S.D.N.Y. 1965).

<sup>189</sup> *Empire Rayon Yarn Co. v. American Viscose Corp.*, CCH 1965 Trade Cas. ¶ 71632, at 81841 (2d Cir. 1965). Circuit Judge Moore dissented on the ground that the discriminatory discounts involved did not reflect a reduction in brokerage, and hence were beyond the scope of section 2(c) because they were proximately caused by "the performance of legitimate distribution functions and services." *Id.* at 81845.

<sup>190</sup> *Cf. Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, CCH 1965 Trade Cas. ¶ 71583 (9th Cir. 1965), recognizing the renewed vitality of the services rendered exemption, but holding that services performed by a buyer's agent which were against the buyer's interest would not provide the seller a defense when he was charged with bribing the buyer's agent.

<sup>191</sup> "F.T.C. Promulgates Trade Practice Rules for the Fresh Fruit and Vegetable Industry," at 2.

<sup>192</sup> But see the statement of Commissioner MacIntyre approving the new rules on the ground that they "are substantially improved and differ in a number of important and significant respects from the rules to which . . . [he] objected as originally proposed." The originally proposed rules had contained a reference to "services rendered" in the clause dealing with brokerage.

## 2. Absence of Discrimination

The decision of the Fourth Circuit in the *Southgate* case interjected early confusion to the law of section 2(c) by stating that a showing of "discrimination . . . is not necessary to a violation . . ." <sup>193</sup> Hence, subsequent decisions emphasized the fact that, while a showing of a favored and disfavored customer was a prerequisite to a violation of section 2(a) or 2(f), no such showing was necessary where a buyer was charged with receiving brokerage or discounts in lieu of brokerage. <sup>194</sup>

In part, the *Southgate* rationale appears to arise from a misunderstanding of the statutory purport of section 2(c). Admittedly, section 2(c) does not require a showing of injury to competition. However, this is not to say that the legislative scheme can be carried out without the showing of discrimination between two buyers. It is interesting to note that the *Southgate* decision relies primarily on an earlier decision in the *Oliver* case <sup>195</sup> for the proposition that a showing of discrimination is not necessary. In fact the court in that earlier case held simply that the brokerage ban under subsection 2(c) stood apart from the price discrimination ban under 2(a) and that there was no reason to read into 2(c) the competitive injury requirement of 2(a). Yet, that court recognized that subsection 2(c), like subsections 2(d) and 2(e), enacted as a supplement to subsection 2(a), aimed at schemes whereby buyers received disguised price discriminations. The court pointed out that a buyer receiving sham brokerage obtains a "concealed advantage" over a buyer not accorded such payment. The court said, "it was this sort of discrimination, we think, which was the purpose of this section of the act to forbid." <sup>196</sup>

However, the Supreme Court's *Broch* decision recognized that section 2(c) was directed at all means "by which brokerage could be used to effect price discrimination." <sup>197</sup> As one commentator states, the *Broch* case superimposed the criterion of "discrimination" on section 2(c). <sup>198</sup> In reaching this conclusion, the Supreme Court emphasized the legislative history of the Act, stating: "The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large

<sup>193</sup> *Southgate Brokerage Co. v. FTC*, 150 F.2d 607, 609 (4th Cir. 1945).

<sup>194</sup> See, e.g., *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39, 44 (9th Cir. 1959); *Venus Foods, Inc.*, 57 F.T.C. 1025 (1960).

<sup>195</sup> *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939).

<sup>196</sup> *Id.* at 771. See also *Biddle Purchasing Co. v. FTC*, 96 F.2d 687, 692 (2d Cir. 1938).

<sup>197</sup> *FTC v. Henry Broch & Co.*, 363 U.S. 166, 170 (1960).

<sup>198</sup> See Rowe, *Price Discrimination Under the Robinson-Patman Act* 344 (1962). See also Comment, "Beleaguered Brokers," 77 Harv. L. Rev. 1308, 1318 (1964).

buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power."<sup>199</sup>

The effect of the Court's emphasis on discrimination as a prerequisite to a violation of 2(c) upon the Federal Trade Commission has yet to be fully assessed. However, in the *Hruby* case the majority opinion stressed the absence of discrimination, noting that the respondent Hruby was a purchaser at a higher level than disfavored wholesalers and that his receipt of functional compensation involved "no potential anti-competitive effect" inasmuch as he "did not compete at the wholesale level."<sup>200</sup> Similarly, in the *Garrett-Holmes* case, the hearing examiner's initial decision stressed the fact that the buyer respondent competed with wholesalers for the trade of retail customers and emphasized the "higher cost incurred by respondent's wholesaler-competitors in receiving the ten cent brokerage."<sup>201</sup>

On balance, it appears that the recent proceedings again recognize the important economic reality that rigid enforcement of section 2(c) accomplishes no justifiable end in the absence of discriminatory conduct.

### 3. Knowledge

The early Commission decisions under section 2(c) substantially predate the Supreme Court's landmark decision in the *Automatic Canteen* case. Little consideration is given to the aspect of the buyer's knowledge of receipt of prohibited brokerage or discounts in lieu of brokerage.<sup>202</sup> However, the Supreme Court's decision in *Broch* strongly indicated the relevance of knowledge in the case of a buyer charged with violation of section 2(c), although holding that such knowledge

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<sup>199</sup> *FTC v. Henry Broch & Co.*, *supra* note 197, at 168. See also statement by Senator Logan, chairman of the Subcommittee of the Senate Judiciary Committee considering the proposed drafts of § 2(c), to the effect "that the purposes sought to be accomplished by this bill shall be carried out, which are that false brokerage as a means of price discrimination must be ended." 80 Cong. Rec. 6287 (1936).

<sup>200</sup> *Hruby Distrib. Co.*, 61 F.T.C. 1429, 1448 (1962).

<sup>201</sup> *Garrett-Holmes Co.*, *supra* note 183, at 22168. See also *Empire Rayon Yarn Co. v. American Viscose Corp.*, CCH 1965 Trade Cas. ¶ 71632, at 81842, holding that section 2(c) is aimed at "brokerage devices for the concealment of price discriminations." *Cf. Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, CCH 1965 Trade Cas. ¶ 71583 (9th Cir. 1965), stating that "although discrimination would appear now to be relevant in reduced commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage."

<sup>202</sup> However, in several decisions courts of appeals have stressed both the seller's and buyer's knowledge that payments made by the sellers to purported intermediaries were in fact handed back to the buyer in an effort to evade the statute. See, *e.g.*, *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938).

was not necessary in the case of the seller's broker charged with rebating part of his commission to a buyer. The Court said that "the buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2(c)."<sup>203</sup>

The Commission's decisions have not discussed in great length the all-important requirement of knowledge. For instance, in *Thomasville Chair*, the Commission acknowledged that in a seller case under section 2(c), "evidence with respect to the intent of such person may be relevant in a proceeding under the subsection," but stated that there was no requirement that the complaint counsel demonstrate knowledge.<sup>204</sup>

In the *Eidson Produce Co.* case, the hearing examiner held that "scienter of the buyer is not an essential element of proof in the Commission's case under 2(c)."<sup>205</sup> However, on appeal the Commission recognized the application of *Automatic Canteen* to section 2(c) by directing that this language be stricken from the initial decision and by entering findings that the respondent buyers "either knew or should have known that they were receiving a discount or allowance in lieu of brokerage."<sup>206</sup>

The knowledge issue was directly raised by the briefs in the *Hruby* case,<sup>207</sup> but the Commission's decision that Hruby was a purchaser who received functional discounts rather than brokerage made it unnecessary to deal with the question of knowledge. However, the result in *Hruby* may be a tacit recognition of an intermediary's good faith in a confused marketing and legal situation.

Any caveat emptor rule that knowledge is not required for a *buyer* liability under 2(c) would offend not only ordinary standards of due process and fairness, but would also offend basic antitrust principles and would in no way advance the objectives of the Robinson-Patman Act. Admittedly, the buyer may face substantial difficulties in determining whether a discount is "in lieu of brokerage," when a purchase has taken place, and whether he can belong to a buying group. Failure to take these facts into consideration can only result in a radical curtailment of beneficial competition.

Moreover, the failure to include "knowledge" expressly within the language of 2(c) is hardly determinative in a statute where "precision

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<sup>203</sup> FTC v. Henry Broch & Co., *supra* note 197, at 174.

<sup>204</sup> Thomasville Chair Co., Trade Reg. Rep. ¶ 29510, at 37811 (March 15, 1961).

<sup>205</sup> Eidson Produce Co., 60 F.T.C. 1, 7 (1962).

<sup>206</sup> *Id.* at 9.

<sup>207</sup> Respondent's Exceptions to Initial Decision and Supporting Brief, pp. 24-30, Hruby Distrib. Co., FTC Dkt. No. 8068, Dec. 26, 1962.

of expression is not an outstanding characteristic,<sup>208</sup> and where the Commission has elsewhere found "inadvertent" omissions.<sup>209</sup>

### III. BUYER LIABILITY UNDER SECTION 5 OF THE FEDERAL TRADE COMMISSION ACT

While sections 2(d) and 2(e) of the Robinson-Patman Act expressly apply only to sellers, the Federal Trade Commission has expanded the "unfair practices" prohibitions of section 5<sup>210</sup> of the Federal Trade Commission Act to encompass the buyer's receipt of benefits which he knew would violate Robinson-Patman sections 2(d) and (e).<sup>211</sup> Indeed, in some nine cases during the 1960's, the Commission has held that the knowing receipt of such promotional benefits constitutes a violation of section 5.<sup>212</sup>

While the issue has not been finally settled by the Supreme Court, several courts of appeals have affirmed this extension of section 5. For instance, in a proceeding under section 5 attacking the receipt by a buyer of promotional allowances in violation of section 2(d), the Second Circuit affirmed a Commission order.<sup>213</sup> In finding that section 5 covered the knowing receipt of discriminatory promotional allowances, the court noted:

There seems to be no specific reason why Congress omitted buyers from the coverage of Section 2(d) while including them under Sections 2(c) and (f); the omission was more inadvertent than studious. Certainly buyers were not let out because Congress favored them or wished to permit them to engage in activity proscribed to sellers.<sup>214</sup>

More importantly, the court held that the Commission was not required to prove injury to competition as an element of a section 5

<sup>208</sup> Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

<sup>209</sup> See, e.g., Grand Union Co., 57 F.T.C. 382 (1960).

<sup>210</sup> 38 Stat. 719 (1914), as amended, 15 U.S.C. § 45(a) (1964).

<sup>211</sup> 38 Stat. 73 (1914), as amended, 15 U.S.C. §§ 13(d) & (e) (1964).

<sup>212</sup> See R.H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964); Giant Food, Inc. v. FTC, 307 F.2d 184, 187 (D.C. Cir.), *cert. denied*, 372 U.S. 910 (1962); American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union v. FTC, 300 F.2d 92 (2d Cir. 1962); Santa's Playthings, Inc., Trade Reg. Rep. ¶ 16873 (April 3, 1964); Individualized Catalogs, Inc., Trade Reg. Rep. ¶ 16873 (April 3, 1964); ATD Catalogs, Inc., Trade Reg. Rep. ¶ 16874 (April 3, 1964); Billy and Ruth Promotion, Inc., Trade Reg. Rep. ¶ 16875 (April 3, 1964); Fred Meyer, Inc., Trade Reg. Rep. ¶ 16500 (July 9, 1963).

<sup>213</sup> Grand Union v. FTC, 300 F.2d 92 (2d Cir. 1962). One of the sellers involved in the Grand Union promotion was held to have violated § 2(d) in Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961).

<sup>214</sup> *Id.* at 96. See also R.H. Macy & Co. v. FTC, *supra* note 212; Giant Food, Inc. v. FTC, *supra* note 212; American News Co. v. FTC, *supra* note 212.

violation because section 2(d) provided a per se test of illegal conduct by the seller.<sup>215</sup> Thus, the Commission was allowed to avoid the usual requirement that it prove competitive impact in a section 5 proceeding brought with respect to acts which are not made per se illegal by statute, or acts which have not previously been held illegal because they are characterized by deception, bad faith, fraud, or oppression.<sup>216</sup> Possibly encouraged by this ruling, the Commission seems to have accelerated its efforts in attacking buyers under section 5. Unlike the current proceedings under 2(f) and 2(c), which have been largely confined to the automotive replacement and food industries, the Commission has not limited its section 5 enforcement efforts to any particular industry. Rather, section 5 has been used in proceedings brought with respect to the activities of buyers in such diverse fields as supermarkets,<sup>217</sup> retail newsstands,<sup>218</sup> retail department stores,<sup>219</sup> and toy jobber distributors.<sup>220</sup> In contrast with the Commission's reluctance to enforce section 2(f) against single buyers, it has recently made a concentrated attack against such buyers under section 5.<sup>221</sup>

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<sup>215</sup> *Grand Union v. FTC*, 300 F.2d 92, 99 (2d Cir. 1962).

<sup>216</sup> The scope of § 5's prohibition against "unfair methods of competition" was first enunciated by the Supreme Court in *FTC v. Gratz*, 253 U.S. 421, 427-28 (1920):

The words "unfair method[s] of competition" are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine as matter of law what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy *because of their dangerous tendency unduly to hinder competition or create monopoly*. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade.

(Emphasis added.)

The basic requirement of proof of actual or probable injury to competition in § 5 cases was again asserted by the Supreme Court in *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953). There, the Court held that under § 5 the primary issue was "the impact of the particular practice on competition, not the label that it carries." *Id.* at 397. (Emphasis added.)

<sup>217</sup> See, e.g., *Grand Union v. FTC*, *supra* note 212.

<sup>218</sup> See, e.g., *American News Co. v. FTC*, *supra* note 212.

<sup>219</sup> See, e.g., *R.H. Macy & Co. v. FTC*, *supra* note 212.

<sup>220</sup> See, e.g., *Santa's Playthings, Inc.*, *supra* note 212.

<sup>221</sup> Nevertheless, the Commission has not ignored group activity under § 5. It has instituted three proceedings attacking toy jobbers who own stock in catalog companies receiving promotional benefits which are allegedly in violation of § 2(d), on the theory that such benefits are not available on proportionally equal terms to jobbers who are not stockholders. See *ATD Catalogs, Inc.*, Trade Reg. Rep. ¶ 16874 (April 3, 1964); *Individualized Catalogs, Inc.*, Trade Reg. Rep. ¶ 16873 (April 3, 1964); *Santa's Playthings, Inc.*, Trade Reg. Rep. ¶ 16873 (April 3, 1964).

In *J. Weingarten, Inc.*,<sup>222</sup> a proceeding involving promotions associated with special and anniversary sales, the Commission set out the "basic factual elements" required to establish a violation of section 5 through knowingly inducing payments violative of section 2(d) of the Robinson-Patman Act. These elements are:

(1) The buyer solicited and received in commerce payments for promotional services in connection with the resale of a supplier's product;

(2) That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality;

(3) The payments received by respondents were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms;

(4) Respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms.<sup>223</sup>

In enunciating these tests, the Commission rejected the notion that section 5 can be utilized to impose a rigid rule of caveat emptor on the buyer's receipt of promotional benefits. Indeed, the Commission emphasized that each of the above elements must be established with a meticulous attention to details. Noting in *Weingarten* the Commission counsel had failed to introduce evidence showing that "other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods," the Commission held that the evidence failed to establish a violation of section 5.<sup>224</sup>

While the *Weingarten* case clearly and concisely outlines the proof required by the Commission in a section 5 proceeding, other Commission decisions seem to have obscured it again. Apart from the always confusing question of "proportional equality," current decisions raise questions as to (1) when an allowance is to be treated as being given "for promotional services in connection with the resale of a supplier's goods," (2) when customers are to be treated as "competing," and

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<sup>222</sup> Trade Reg. Rep. ¶ 16349 (March 25, 1963).

<sup>223</sup> *Id.* at 21180.

<sup>224</sup> The Commission remanded the *Weingarten* case to the hearing examiner for further proceedings. Thereupon, the respondent Weingarten brought an action to enjoin the Commission from further proceedings, alleging a failure to comply with § 6(a) of the Administrative Procedure Act, which requires that the proceeding be completed with reasonable dispatch. The court enjoined the remand, but allowed the Commission ninety days in which to enter a final order. *J. Weingarten, Inc.*, 1963 Trade Cas. ¶ 70845. The Commission subsequently dismissed the action while an appeal was pending in the Fifth Circuit.

(3) when a respondent will be treated as having the requisite knowledge to establish a violation of section 5. These questions will be considered in order.

A. *Nature of Allowances Given for Promotional Services in Connection with the Resale of a Supplier's Product*

The Commission's early decisions emphasized that a violation of section 2(d) can only be established when the challenged allowance is given in consideration for services and facilities furnished by the buyer in connection with the resale of the seller's product.<sup>225</sup> However, a result of a Commission proceeding against *R. H. Macy & Co.* subjects the practical application of this rule to doubt.<sup>226</sup>

In *Macy*, the Commission attacked allowances which were to be used for institutional advertising of Macy's 100th Anniversary and not for promoting the specific supplier's products. Complaint counsel did not contend that these allowances violated section 2(d). The hearing examiner held that the practice challenged was not oppressive or coercive and hence it was not per se illegal under previous precedents, and noting that no injury to competition had been proved, he found for the respondent. On appeal, the Commission reversed, finding that the exaction of these allowances had been coercive and that in fact the record showed a reasonable likelihood of substantial injury to competition of the type protected by the Robinson-Patman Act.<sup>227</sup>

However, the Second Circuit Court of Appeals did not follow either the reasoning of the Commission or the examiner. Instead, it held that the challenged payments were violative of per se prohibitions of section 2(d) and that the buyer's knowing receipt of the allowances was a violation of section 5 without proof of injury to competition. The court stated:

Macy's used the payments for institutional advertising and promotions to get more people into its store to buy the goods of all its vendors. The payments by the contributing vendors were thus in consideration for services or facilities furnished by Macy's in connection with the offering for sale of the vendor's goods.<sup>228</sup>

Thus, the factual issue of whether allowances have been offered in connection with promotion of the goods of the vendor may be subject to new tests. However, since the court in *Macy* went off on grounds not

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<sup>225</sup> *Yakima Fruit & Cold Storage Co.*, 59 F.T.C. 693 (1961).

<sup>226</sup> *R.H. Macy & Co.*, 60 F.T.C. 1249 (1962).

<sup>227</sup> 60 F.T.C. at 1258-60.

<sup>228</sup> *R. H. Macy & Co. v. FTC*, 326 F.2d 445, 450 (2d Cir. 1964). See also *Furr's Inc.*, Dkt. No. 8581 (opinion Oct. 20, 1965) at 3-4.



raised or briefed by the parties, the value of the decision as a precedent is somewhat clouded. Likewise, the exact effect of the Commission's ruling in future cases involving allowances for institutional advertising is unclear. However, it still seems clear that proof of a per se violation of section 5 requires the Commission to prove that the challenged allowance was used in some way to promote the goods of the vendor in question.

### B. Identity of "Competing" Customers

The question of whether particular customers of a vendor "compete" at the same functional level has received the close attention of the Commission in 2(a) and 2(f) proceedings. Indeed, the *National Parts Warehouse* case reaffirms numerous Commission 2(a) and 2(f) cases, holding that a wholesaler may receive a better price than a retailer simply because a price benefit to one customer cannot injure the other when they do not compete for the same class of trade.

The question of whether particular customers are at the same functional level takes on added significance in a 2(d) proceeding, for 2(d) by its own terms bans only allowances which are not available to "competing" customers. No such express requirement of "competition" between favored and disfavored customers appears in section 2(a). Indeed, section 2(a) theoretically could permit a proceeding based on discriminations between customers at different functional levels; for it prohibits price discriminations between "purchasers"<sup>229</sup> where the effect may be to prevent competition with (a) the person granting the discrimination, (b) the person knowingly receiving the benefit of the discrimination, or (c) customers of either of them.<sup>230</sup>

Heretofore, it has been considered well settled under section 2(d) that companies which sell to different classes of customers, e.g., consumers and retailers, obviously perform different distributional functions and therefore cannot be deemed "competitors" in the distribution and sale of the products involved. Thus, in the *Liggett & Myers* case,<sup>231</sup> the Commission held that vending machine operators selling to the consumer were not competing with wholesalers because they "sell to

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<sup>229</sup> The terms "purchaser" and "customer" as used in various sections of the Robinson-Patman Act are synonymous. See generally Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* (2d ed. 1959).

<sup>230</sup> In a proceeding under 2(a), a seller who discriminates in price against a wholesale customer and in favor of a direct retail customer may be found to be in violation of the law where the discrimination adversely affects the ability of the wholesaler's customers to compete with the favored retailer. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948).

<sup>231</sup> *Liggett & Myers Tobacco Co.*, 56 F.T.C. 221 (1959).

different classes of customers.”<sup>232</sup> Moreover, under the standards previously enunciated by the Commission and courts, a customer is “someone who buys directly from the seller or his agent or broker.”<sup>233</sup> The one recognized exception to these rulings has arisen in cases involving so-called “indirect customers,” *i.e.*, where the supplier dealt directly with retailers and controlled the prices or terms at which wholesalers sold to retailers. However, in *Fred Meyer, Inc.*, the Commission expressly interpreted section 2(d) to mean that a seller who offers promotional payments to its retail customers must offer proportionally equal payments to its wholesale customers when those wholesalers sell to disfavored competitive retailers.<sup>234</sup> In reaching this conclusion the Commission noted that any other construction of the statute would leave independent retailers purchasing from wholesalers completely outside the pale of section 2(d) of the amended Clayton Act insofar as their competition with the direct buying chain is concerned. The Commission argued that only direct buying “chains” would be entitled to payments under section 2(d) if it did not expand the meaning of the term “competing” to encompass wholesalers.

Moreover, the Commission noted that section 2(a) may prohibit special prices to retailers not accorded to wholesalers because the statutory language of section 2(a) prohibits price discriminations

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<sup>232</sup> *Id.* at 251. See also *Atalanta Trading Corp.*, 53 F.T.C. 565, 566, 573 (1956). Similarly, in *Chicago Sugar Co. v. American Sugar Ref. Co.*, 176 F.2d 1 (7th Cir. 1949), the court held that distributors of sugar and industrial users who bought directly from the refiner could not be deemed to be “customers competing in the distribution of the commodity.” By contrast, a district court held that “Congress intended by Section 2(d) . . . to prevent circumvention of the prohibitions of Section 2(a) by the employment of alternatives for price concessions” and indicated that “violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customer competes with the retailer.” *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956). This decision was the basis of a dissenting opinion by Commissioner Kern in the *Liggett & Myers* case.

<sup>233</sup> FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 1 Trade Reg. Rep. ¶ 3980, at 6073 (1960). See, *e.g.*, *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694, 709 (9th Cir. 1964); *American News Co. v. FTC*, 300 F.2d 104, 109 (2d Cir. 1962); *K.S. Corp. v. Chemstrand Corp.*, 198 F. Supp. 310 (D.N.Y. 1961); *Dayton Rubber Co.*, Trade Reg. Rep. ¶ 17029 (Aug 5, 1964); *Champion Spark Plug Co.*, 50 F.T.C. 30 (1953); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). Indeed, even in the *Krug* case, where a district court indicated that wholesalers and retailers were entitled to proportionally equal treatment under Section 2(d), there was a showing that the wholesalers' dealings were controlled by the manufacturers. In *Krug*, the wholesalers were only authorized by the manufacturer to sell in certain areas and to “franchised retailers.” This placed the manufacturer in a position of controlling his distributor's resales.

<sup>234</sup> *Fred Meyer, Inc.*, Trade Reg. Rep. ¶ 16500 (July 9, 1963).

which may injure competition with customers of disfavored purchasers.<sup>235</sup> The Commission concluded that, if 2(d) was not thus construed to protect wholesalers, it would be possible for suppliers to evade section 2(a) by making promotional payments which would have the same effect as price discrimination.

If affirmed, the Commission's novel interpretation of section 2(d) will impose new and harsh burdens upon manufacturers who attempt to offer promotional allowances to retailers and will increase the buyer's burden in ascertaining the legality of allowances. At a minimum, it appears that the holding would require a seller to ascertain the number of wholesalers in any given area who may have customers that compete with retailers. Obviously, the holding not only encourages, but requires manufacturers to assume the burden of scrutinizing their wholesalers' arrangements with retailers.

However, the primary criticism of the Commission's ruling is its apparent concern with the language of competition rather than competitive realities. The fact is that the Commission has no authority to compel the granting of promotional allowances to retailers purchasing from wholesalers inasmuch as such retailers are not customers of the manufacturer.<sup>236</sup> Moreover, it is unlikely that many manufacturers will voluntarily undertake to dictate that wholesalers pass on promotional benefits to their retailers; for there is a substantial question as to whether such a policy would make the retailer the "indirect customer" of the manufacturer.<sup>237</sup> Indeed, such a policy of requiring the passing on of promotional benefits would seem to be considered a form of resale price maintenance in direct violation of the Sherman Act.<sup>238</sup> Hence, the Commission's ruling in *Fred Meyer* provides no real guarantee that retailers who compete with favored chains will ever receive any actual promotional benefits from their wholesale suppliers.

Finally, the beleaguered buyer is now apparently faced with the dilemma of trying to ascertain whether his retail competitors purchase from wholesalers and whether these wholesalers have been offered

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<sup>235</sup> See *FTC v. Morton Salt Co.*, 334 U.S. 37, 55 (1948).

<sup>236</sup> Possibly because of this fact, the Commission order merely requires the buyer to desist from receiving allowances not available to wholesalers. Commissioner Elman dissented on the ground that "nothing in the order would require the wholesalers to pass these allowances on, directly or indirectly, to the retailers who compete with Meyer and who are the victims of the discrimination." *Fred Meyer, Inc.*, *supra* note 234.

<sup>237</sup> *Cf. American News Co. v. FTC*, 300 F.2d 104, 109 (2d Cir. 1962).

<sup>238</sup> *Cf. Dayton Rubber Co.*, Trade Reg. Rep. ¶ 17029 (Aug. 5, 1964), where the Commission concluded that contracts between warehouse distributors and a manufacturer creating an indirect customer relationship by price fixing provisions also constituted a conspiracy in violation of § 5 of the Federal Trade Commission Act.

proportionally equal treatment. Hence, the effect of the *Fred Meyer* decision is to place a difficult if not impossible burden on the buyer without guaranteeing any additional promotional benefits to competing retailers.

### C. *Knowledge*

Although the statutory language of section 5 of the Federal Trade Commission Act makes no reference to the buyer's knowledge, the Federal Trade Commission has required some showing of knowledge of illegality by analogy to subsection 2(f).<sup>239</sup> However, while the Commission decisions purport to follow *Automatic Canteen*, its recent decisions have raised substantial questions as to the right of a buyer to initiate promotional requests.

In the Commission's earliest section 5 precedents, the emphasis was properly placed on a showing that buyers were actually informed of the illegality of promotions requested. No rule of caveat emptor was adopted. For instance, in the *Grand Union* case, the Commission cited *Automatic Canteen* as guiding precedent and carefully reviewed the record evidence in concluding that the respondent had received advertising allowances which it knew or should have known violated section 2(d). It emphasized that the discriminatory payments resulted from a plan originated and implemented by the respondent, and that the payments were actively solicited by the respondent, who sometimes used *pressure* to encourage participation.<sup>240</sup> The amounts of the payments were unilaterally determined by the respondent and were not designed for easy proportionalization. The payments were not negotiated as part of current cooperative advertising plans and were generally outside such plans. In some instances, the respondent continued to receive from the supplier an allowance under the announced advertising program in addition to the special payments. In particular, the Commission stressed that the respondents were informed that the suppliers were not making payments on a proportionally equal basis to competitors.<sup>241</sup>

Again, in the *American News Co.* and *Giant Food* decisions, the Commission emphasized coercive exaction of allowances and seller's statements to the buyer that they could not proportionalize such promotional payments in finding knowledge of illegality.<sup>242</sup>

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<sup>239</sup> See, e.g., *Grand Union Co.*, 57 F.T.C. 382 (1960).

<sup>240</sup> 57 F.T.C. at 424.

<sup>241</sup> 57 F.T.C. at 425.

<sup>242</sup> *Giant Food, Inc.*, 58 F.T.C. 977, 993, 1009 (1961); *American News Co.*, 58 F.T.C. 10, 26 (1961).

However, in the *Fred Meyer* case,<sup>243</sup> the Commission enunciated a radically different test of knowledge, which on its face seems at variance with these earlier precedents. There, the Commission noted that merely by initiating a promotional scheme the buyer has sufficient information to impose a duty upon him to inquire whether such payments are available on proportionally equal terms to its competitors. Perhaps the most revealing passage in the whole opinion is a broad expression of the view that "a powerful buyer does not go to seller with hat in hand asking to be given something that is 'proportionately equal' to what the smaller buyers are getting . . . ."<sup>244</sup> Of course, *Automatic Canteen* expressly recognized the buyer's right to bargain for such benefits without prejudgment of the question of knowledge.<sup>245</sup>

Perhaps a more realistic approach to the question of knowledge and the *Automatic Canteen* ruling is found in the decision of Hearing Examiner Walter Johnson in the *Furr's* case.<sup>246</sup> Although recognizing that the ruling was contrary to *Automatic Canteen*, that Examiner followed the *Fred Meyer* doctrine that the buyer initiating a special promotion automatically possesses himself of information which requires him to affirmatively inquire of his sellers whether such payments were being made available on proportionately equal terms to competitors.<sup>247</sup> Under such circumstances, he held that the respondent knew or should have known that institutional payments it received from suppliers in connection with a 1962 circus promotion were not being made available to its competitors, because it had not discharged its

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<sup>243</sup> *Fred Meyer, Inc.*, Trade Reg. Rep. ¶ 16500 (July 9, 1963).

<sup>244</sup> *Ibid.*

<sup>245</sup> In *Automatic Canteen*, the record showed that the respondent had solicited prices which it "knew were as much as 33% lower than prices quoted other purchasers," and did so "without inquiry of the seller, or assurance from the seller" of legality. 346 U.S. at 62-63. In both the Seventh Circuit and the Supreme Court, the Commission strenuously urged that under these facts Canteen had a duty of affirmative inquiry and, indeed, the Seventh Circuit agreed and so held. 194 F.2d at 439. In the Supreme Court, the Commission urged over and over that since Canteen initiated and affirmatively induced lower prices it was automatically guilty. Its principal argument, as stated by the Court, was that "buyers who *through their own activities* obtain a special price" can be charged "with responsibility for whatever unlawful prices result." 346 U.S. at 71-72. (Emphasis added.) However phrased by the Commission, said the Court, this argument must be rejected as it would render the "knowingly" requirement meaningless; "would comprehend any buyer who engages in bargaining over price"; would put "the buyer at his peril whenever he engages in price bargaining"; and would adversely affect "that sturdy bargaining between buyer and seller" and be inconsistent "with the broader antitrust policies that have been laid down by Congress." *Id.* at 71-74.

<sup>246</sup> *Furr's Inc.*, Trade Reg. Rep. ¶ 17141 (November 27, 1964).

<sup>247</sup> *Id.* at 22220.

duty to investigate.<sup>248</sup> However, the Examiner refused to enter a cease and desist order against the respondent, noting that respondent had acted under the advice of counsel given prior to the 1962 promotion, that counsel had advised that respondent did not have an affirmative duty to make inquiry as to the legality of promotional allowances, that counsel had advised "that if any seller suggested that it could not proportionalize its allowances" that respondent was to tell the supplier that "we didn't want for them to participate at all." The Examiner stressed:

Although this advice may be considered unsound judged by the latest precedents of the Commission, it certainly cannot be said that it was unsound as of the date that it was given or that it was other than completely consistent and in accordance with *Automatic Canteen*. In this connection, it should be noted that *Giant Food, Inc. v. Federal Trade Commission, supra*, which probably goes farthest in the direction of adoption of the Commission's holdings in these types of cases, was not decided until June 14, 1962, more than two months after respondent's promotion in issue and long after the advice of counsel was given to respondent in late 1961 and early 1962.<sup>249</sup>

Noting this showing of good faith, the Examiner concluded that "if respondent was in fact in violation, such violation was inadvertent without culpability and absent *scienter*."<sup>250</sup> Thus, the Examiner's ruling was fully in accord with *Automatic Canteen*.

On appeal, the Commission closed the proceeding without the issuance of a cease and desist order, expressing its conviction that "respondent will not again engage in the practice which is the subject of the instant complaint . . ." <sup>251</sup> While no disposition of the knowledge issue was necessary under this ruling, the Commission did indicate its view, in broad and somewhat puzzling dicta, that respondent "knew or should have known" that it was receiving allowances not available to its competitors on proportionally equal terms. However, the most interesting facet of the *Furr's* dicta is the fact that the Commission did not adopt any broad rule that would require a buyer initiating a special promotion to inquire into the proportionalization of payments. Instead, the Commission cited *Automatic Canteen* favorably and indicated that knowledge had been established by facts which were "strikingly similar" to those proved in such earlier cases as *Grand Union*, *American News*, and *Giant*. For instance, it noted that

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<sup>248</sup> *Ibid.*

<sup>249</sup> *Ibid.*

<sup>250</sup> *Ibid.*

<sup>251</sup> Commission Opinion at 12 (October 20, 1965).

some suppliers declined to participate [in the promotion] and questioned the legality of the plan.<sup>252</sup>

Arguably, the Commission's dicta on the factual aspects of the absence of scienter may be subject to question in light of the Examiner's findings and in light of the fact that the allowances at issue were institutional in nature and had not been declared violative of section 2(d) at the time they were granted.<sup>253</sup> Nevertheless, the Commission seems to have taken a step forward in recognizing the necessity for a realistic appraisal of actual knowledge by disavowing a test that imputes guilty knowledge by the mere initiation of a special promotion.

#### CONCLUSION

Over a period of 26 years, the Federal Trade Commission's enforcement of the Robinson-Patman Act against buyers has created a strange and checkered picture of prohibited acts and prohibited economic consequences. There can be no question that the administrative and judicial rulings in seller cases do not lay down concise rules of seller liability which are readily understandable by the buyer in his day-to-day operations. Questions pertaining to the status of integrated purchasers and cooperatives continue to plague the buyer under section 2(f). Questions pertaining to the meaning of such terms as "discounts in lieu of brokerage," "purchase or sale," "services rendered," and the necessity for a showing of discriminatory treatment continue to exist under section 2(c). Likewise, the status of institutional allowances and the resolution of the question of what purchasers actually compete at a given functional level continue to pose problems in the enforcement of section 5 of the Federal Trade Commission Act.

Faced with the question of evaluating the buyer's knowledge in this complex legal and marketing context, the Supreme Court directed in the *Automatic Canteen* case that a realistic appraisal of the buyer's actual knowledge must be made in order to preserve the competitive benefit of the inherent right to bargain. The subsequent decisions of the

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<sup>252</sup> *Id.* at 10.

<sup>253</sup> In broad and puzzling dicta, the Commission commented that "the proof need not show that the buyer knew that the suppliers were violating Section 2(d) under applicable law when they made the payments, but need only show that the buyer knew or should have known the facts upon which the subsequent findings of illegality are predicated—*i.e.*, that the payments were not being offered or otherwise made available to competitors on proportionally equal terms." Opinion at 11. While this dicta has no precedential significance, it appears to be contrary to the *Automatic Canteen* requirement that the buyer must be shown to know that a preferential discount is "not within" one of the seller's defenses. 346 U.S. at 74.

Commission and of the courts appear to accord varying degrees of recognition to the Supreme Court direction.

However, in large part, these decisions have failed to discuss the heart of the dilemma created by the application of rigid standards of knowledge to the buyer's activities, *i.e.*, the competitive impact that a rule of caveat emptor must have on the day-to-day activities of buyers. The extent to which the courts and the Commission will consider that impact is at best conjectural. It is sufficient to say that the standards of knowledge, viewed against the fabric of viable competition, have been a source of disagreement at both the administrative and judicial level. Perhaps the recent *SCJ* decision of the Federal Trade Commission best emphasizes the diversity of opinion. In resolving the issue of knowledge, Commissioner MacIntyre, writing for the majority, stressed the following factors:

The respondents organized *SCJ* for the purpose of securing price concessions from their suppliers and their records show that they knew they were getting a lower price than other jobbers not so favorably situated.<sup>254</sup>

On the other hand, the dissenting opinion of Commissioner Elman, who finds that a showing of knowledge of illegality was not made, emphasizes that

Competition, in the antitrust sense, may be truly injured by a policy of law enforcement which preserves intact an inefficient, uneconomical and stratified system of distribution, and prevents the elimination of unnecessary middlemen costs . . . .<sup>255</sup>

A review of the Commission's enforcement patterns over the past 26 years does not afford a truly reliable indication of which of these diverse views of competition will ultimately be followed. It is certainly questionable whether the Commission's group cases in the automotive replacement parts market have accomplished the promotion of competition, inasmuch as they have tended to attribute sophisticated knowledge to small buyers who do not deal face to face with manufacturers when they are buying through a group. Again, the suggestion in section 5 cases that a buyer who initiates a special promotional program is automatically charged with knowledge of illegality certainly poses substantial questions from the standpoint of buyer competition. On the other hand, it seems clear that neither the Commission nor the courts have committed themselves to any rigid rule of caveat emptor.

For instance, the Commission's enforcement of section 2(c) and the court decisions interpreting 2(c) show a realistic appraisal of the

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<sup>254</sup> Opinion at 15.

<sup>255</sup> Dissenting Opinion at 15.



practices which Congress sought to prohibit in 1963, *i.e.*, the coercive exaction of discriminatory prices by large buyers, which actually injure competition. In 2(c), the courts in particular have given additional thought to the economic benefits of group buying, and the services that particular individual buyers may render as grounds for justifying so-called brokerage. This rejuvenation of section 2(c), as a viable statute aimed at competitive inequality, is probably the most helpful development in the pattern of enforcement of buyer's liability in recent years. Hopefully such standards will also be applied in other buyer cases.