

Resolving the Conflict Between the Sherman Act and the Robinson-Patman Act: *United States v. United States Gypsum Co.*

Several lower federal court decisions have created a conflict between the Sherman Act¹ and the Robinson-Patman Act² in the context of the exchange of current price information among competitors.³ This conflict has affected competition in at least two undesirable ways. First, it has prohibited the Sherman Act from striking down the anticompetitive practice of exchanging current price information, and second, it has inhibited procompetitive aspects of the Robinson-Patman Act.⁴ These undesirable effects can be readily understood through an examination of the interaction among the Sherman Act, the Robinson-Patman Act, and the practice of exchanging current price information.

The exchange of price information has in many cases been held to violate the Sherman Act, which proscribes agreements that have an undue restraint on trade.⁵ An undue restraint on trade occurs particularly in oligopolistic markets in which the exchange of price information has a stabilizing effect on prices.⁶ Although the exchange of price information, when it has this adverse effect on prices, is prohibited by the Sherman Act, some courts have permitted it (even when prices are stabilized) when undertaken to comply with the Robinson-Patman Act.⁷

Section 2(a) of the Robinson-Patman Act⁸ proscribes price discrimination, which is the practice of charging two purchasers different prices for goods of equal grade and quality, when the likely effect of such discrimination is to lessen competition substantially. Sellers are permitted, however, to discriminate under section 2(b) of the Act if the discriminatory price offered to a particular buyer is made in good faith to meet a competitor's lower price offered to the same buyer.⁹ Good faith under section 2(b) requires a seller, before he lowers his price to a single buyer, to take action to find out if the buyer has in fact been offered a lower price by a

1. 15 U.S.C. § 1 (1976):

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, a conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

2. 15 U.S.C. § 13(a) (1976). See note 64 *infra*.

3. See this Comment, Part I(D) (1) *infra*.

4. See Part I(D)(2) *infra*.

5. See note 1 *supra*.

6. See Part I(B) *infra*.

7. See Part I(D)(1) *infra*.

8. See note 2 *supra*.

9. 15 U.S.C. § 13(b) (1976); see text accompanying note 69 *infra*.

competitor.¹⁰ In the past, sellers had often felt that the appropriate, even necessary, action to verify the price was to ask the competitor if he had actually offered that price to the particular customer.¹¹ Some lower courts have held that this "interseller price verification" was shielded from scrutiny under the Sherman Act.¹²

These lower court decisions thus caused the Sherman Act to lose its effectiveness in stopping the exchange of current price information. Furthermore, the door was opened for sellers to disguise their intent to stabilize prices through the exchange of price information by claiming the exchange was for the purpose of establishing the section 2(b) defense.¹³ Finally, the lower court decisions inhibited the procompetitive force of section 2(b).¹⁴ Section 2(b) is a procompetitive measure because it permits price discrimination, which in turn helps to break up the price floor in oligopolistic markets by causing uncertainty in the prices charged by competitors. If good faith under section 2(b) requires sellers to verify prices with their competitors it becomes burdensome for a seller to establish the defense. A sensible reading of section 2(b) would allow sellers to establish good faith by means short of contacting competitors, thus making it easier for the seller to establish the defense. The easier it is for sellers to establish the section 2(b) defense, the more price discrimination will occur with its resulting downward pressure on prices.¹⁵

The Supreme Court, in *United States v. United States Gypsum Co.*,¹⁶ held that, contrary to the previous lower court decisions, interseller price verification for the purpose of complying with section 2(b) must be scrutinized under the Sherman Act¹⁷ and that sellers no longer have interseller price verification as an available means of establishing section 2(b) good faith.¹⁸ In another section of its opinion the court held that intent is an element of a criminal antitrust offense.¹⁹ This latter facet of the decision may have the effect of allowing interseller price verification to go unpunished in a limited number of criminal cases even though it may have stabilized prices in violation of the Sherman Act.

This Case Comment will consider both *Gypsum's* reconciliation of the conflict between the Sherman Act and the Robinson-Patman Act created by the lower court decisions and *Gypsum's* guidance regarding future price

10. See Part I(C)(1) *infra*.

11. *Id.*

12. See text accompanying notes 97-105 *infra*.

13. See Part I(D)(2) *infra*.

14. *Id.*

15. *Id.*

16. *United States v. United States Gypsum Co.*, 98 S. Ct. 2864 (1978).

17. *Id.* at 2884.

18. See *id.* at 2883.

19. *Id.* at 2876.

exchange cases. It will be argued that the decision will have a procompetitive effect. The procompetitive force of section 2(b) is strengthened because sellers can establish good faith without contacting their competitors. Sellers will thus be increasingly able to reduce their prices to particular buyers in order to meet competition. Furthermore, the Sherman Act can now operate against the anticompetitive effects of interseller price verification without interference from the meeting-competition defense of section 2(b). As to guidance on future price exchange cases, the *Gypsum* case indicates that the stabilizing effect on prices will be presumed in oligopolistic markets. Sellers will thus be forced to show that the exchange in fact had a beneficial effect on competition, or, at least, that it did not adversely effect competition.

I. HISTORICAL REFERENCE POINTS

A. *Analysis Under Section 1 of the Sherman Act*

Section 1 of the Sherman Act proscribes agreements or combinations in restraint of trade.²⁰ The Supreme Court, in *Standard Oil Co. v. United States*,²¹ announced that competition is the rule of trade and that section 1 reaches all unreasonable restraints on competition.²² To determine whether specific conduct is an unreasonable restraint on competition, the courts generally apply a balancing test called the rule of reason.²³ The test can be distilled into three analytical steps.²⁴ First there must be an agreement. Next, the court must evaluate the proffered justification for the agreement. Since the purpose of the Sherman Act is to protect competition the courts will not listen to a justification that will restrict competition on social grounds.²⁵ The final step in the analysis is whether the restriction resulting from the agreement is necessary to reach the goal sought to be achieved through the agreement. Within this step the court will consider a number of factors, such as whether the restriction is overly broad and whether it unduly affects competition. In trying to gauge the effect on competition the court will evaluate the power of the defendants and the overall structure of the market.²⁶ In addition, the purpose or end sought to be achieved by the defendants is an important factor, not because a good intention will save an objectionable regulation, but rather because

20. 15 U.S.C. § 1 (1976) (quoted in pertinent part in note 1 *supra*).

21. 221 U.S. 1 (1911).

22. *Id.* at 58-59.

23. See P. AREEDA & D. TURNER, 2 ANTITRUST LAW ¶ 314b, at 47 (1978).

24. See generally *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Continental T.V. Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

25. The inquiry mandated by the rule of reason is whether the challenged agreement is one that promotes or suppresses competition, not "whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." 435 U.S. at 692.

26. See P. AREEDA & D. TURNER, *supra* note 23, at 49.

knowledge of intent may help to divine the actual nature and effect of the alleged anticompetitive conduct.²⁷ In sum, the inquiry under the rule of reason is whether, on the whole, competition is suppressed or promoted.²⁸

In applying this standard of reasonableness the Supreme Court has labeled certain practices inherently unreasonable. *United States v. Socony Vacuum Oil Co.*²⁹ first used the term "*per se*" unlawful to describe those restraints on trade, such as price fixing agreements among competitors, that will be presumed unreasonable without regard to proof in the particular case of an adverse effect on competition. Thus, in a price fixing case the government need only prove that an agreement among competitors to fix or stabilize prices exists. The *per se* doctrine, however, is simply an application of the rule of reason: when experience has shown that a particular practice has no justification but instead blatantly restricts competition, further analysis is not needed.³⁰

One point should be emphasized. Whether a case is analyzed under the rule of reason or the *per se* doctrine, one can be found to have violated the Sherman Act regardless of intent. Prior to *Gypsum* the foregoing analysis applied both to civil and criminal prosecutions under the Act.³¹ *Gypsum*, however, held that intent is an element of a criminal offense under the Sherman Act and that intent must be proved whether the case is a *per se* or rule of reason type case. This distinction between civil and criminal action must be kept in mind when studying the guidance the *Gypsum* Court gives on future price information exchange cases.

27. *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918). See A. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST §§ 63-72 (1977); see also *United States v. United States Gypsum Co.*, 98 S. Ct. 2864, 2873 (1978).

28. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. at 691-92.

29. 310 U.S. 150 (1940).

30. P. AREEDA & D. TURNER, *supra* note 23. The policy and effect of the *per se* doctrine is summed up in *United States v. Northern Pacific Ry.*, 356 U.S. 1, 5 (1958):

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977), reaffirmed *Northern Pacific* in regard to the test that must be met for *per se* purposes.

Among the practices that have been determined to be *per se* unreasonable are tying arrangements, *International Salt Co. v. United States*, 332 U.S. 392 (1947); group boycotts, *Fashion Originators' Guild v. FTC*, 312 U.S. 457 (1941); price fixing, *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); division of markets, *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); and certain sales—commission systems for the marketing of tires, batteries, and accessories by service stations affiliated with major oil companies, *FTC v. Texaco Inc.*, 393 U.S. 223 (1968).

31. 98 S. Ct. at 2892 (Stevens, J., concurring in part and dissenting in part).

B. *Section 1 of the Sherman Act Applied to Information Exchange Cases*

The exchange among competitors of information, especially current prices, is dangerous because of its tendency to stabilize prices, to cause uniformity in services, and to eliminate other means of competition. The courts have therefore invoked the Sherman Act to prevent these anticompetitive effects by restricting the exchange of information among competitors. Generally, rule of reason analysis has been used to determine whether agreements to exchange information have unduly restricted trade. This section will explore both the effect of the exchange of information, especially current price information, on competition, and the way in which the Court has applied the rule of reason to agreements among competitors to exchange information.

The legality of the exchange of information among competitors under the Sherman Act may depend on the structure of the market in which the exchange occurs. In an unconcentrated market, when there are a large number of competitors, total market information tends to promote competition.³² Buyers of course prefer the lowest possible market price and one producer produces so little relative to the total market that he has no power to control that market price. He must, therefore, sell his product at the market rate.³³ In a competitive market the more information a seller has available to him the more effectively he will respond to the buyer's preference. In addition, sellers in this type of market have little incentive to agree to fix prices or keep them artificially high. If one seller does cut his prices his competitors are not hurt significantly because the loss of sales to the price cutter is spread among a large number of competitors.³⁴ Also, because there are so many competitors, it would be difficult to get enough of them, with a significant enough aggregate market share, to enter into an agreement that would be effective in stabilizing prices.³⁵

On the other hand, in an oligopolistic market with few competitors³⁶ the exchange of competitive information tends to stifle competition. Competitors in an oligopolistic market are interdependent in the sense that each seller's pricing decisions must take into account the pricing decisions of his competitors.³⁷ A price cut by one seller in this market will substan-

32. See *United States v. Container Corp. of America*, 393 U.S. 333, 342-43 (1969) (Marshall, J., dissenting).

33. See P. AREEDA, *ANTITRUST ANALYSIS* 13 (1974).

34. Turner, *The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 665 (1962) (hereinafter cited as *Conscious Parallelism*).

35. *Id.*

36. See P. AREEDA, *supra* note 33, at 15.

37. *Conscious Parallelism*, *supra* note 34, at 665-66. See also P. AREEDA, *supra* note 33, at 15.

tially hurt a competitor because the loss of sales to the price cutter will be spread over only a few competitors and will cut deeply into the market share of those competitors.³⁸ Thus, any price cut by one seller will be quickly matched by his competitors. The result is that all sellers will end up selling at a lower price without a corresponding increase in sales. Oligopolists are therefore better off if they do not compete through pricing but instead use their combined market strength to keep prices high.³⁹ Rather than encouraging price cuts, the exchange of competitive information can thus help each seller to conform to, and to coordinate his pricing decisions with, his competitors.

It should be noted that the cases to be discussed in this Comment originated in oligopolistic market situations. Price competition was especially important in these cases because the defendants sold identical tangible goods, such as cement or lumber. These goods had no special features to distinguish those sold by one seller from those sold by another. Thus, the only real form of competition was difference in price.⁴⁰ This aspect should be kept in mind when considering the Supreme Court's treatment of price exchange cases.

The Supreme Court has given varying treatment to the exchange of information among competitors. In *American Column & Lumber Co. v. United States*⁴¹ and *United States v. American Linseed Oil Co.*⁴² the Court discussed information exchanges controlled by trade associations. In each case the court held that an agreement to exchange, through a trade association, information regarding stock on hand, production, shipments, names of purchasers, current price lists and schedules, terms of sale, and current prices offered to specific customers was an unreasonable restraint on trade under the Sherman Act. The agreements were coupled with procedures to enforce the agreement and suggestions to participants concerning proper levels of production and prices. In *Maple Flooring Manufacturers Association v. United States*⁴³ the Court held that an agreement to exchange past prices, production information, cost of transportation, and stock on hand did not violate the Sherman Act when there were no enforcement procedures and the participants were free to set their own production and price levels. The Court in the first set of cases found that the enforcement procedures evidenced a purpose to restrain competition, rejecting the defendants' argument that their purpose was to make competition more efficient.⁴⁴ One might generally say either that the Court did

38. See *Conscious Parallelism*, *supra* note 34, at 665.

39. Note, *Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act, Robinson-Patman Act, and the Forces of Competition*, 46 *FORDHAM L. REV.* 824, 839-40 (1978) (hereinafter cited as *Interseller Price Verification*).

40. See note 121 *infra*.

41. 257 U.S. 377 (1921).

42. 262 U.S. 371 (1923).

43. 268 U.S. 563 (1925).

44. 257 U.S. at 392-93; 262 U.S. at 380.

not find a justification for the agreement, or that if it did accept the defendants' justification, the restraint was not tailored narrowly enough to meet the justification.⁴⁵ On the other hand, in *Maple Flooring*, the Court might have been convinced that an exchange of past prices did not produce an unreasonable restraint on competition or that the restraint was narrow enough to meet the defendant's justification.

In *Cement Manufacturers Protective Association v. United States*⁴⁶ the Supreme Court allowed the exchange between competitors of information regarding production, price, and transportation costs. The case concerned a suit under section 1 of the Sherman Act to dissolve a trade association formed by several manufacturers of Portland Cement. Members of the association were required to report to the association, and it disseminated to the membership, detailed information about "specific job contracts." Specific job contracts, used extensively by the manufacturers, obligated the manufacturers to deliver to the purchaser at a minimum named price, payable on delivery, the cement required to complete a specific construction project. The purchaser in this type of contract had the advantage of not being obligated to take the cement contracted for; thus he was able to take advantage of any decline in price before delivery. The purpose of the association and its members in collecting and disseminating the job-contract information was to prevent job contractors from abusing the contract process in the event of a rising market by fraudulently purchasing the cement required for a specific job from several manufacturers. In allowing the exchange of information the Court indicated that there is no unreasonable restraint on competition when competitors provide one another with the kind of information necessary to prevent overreaching by their customers.⁴⁷ That is, the Court found a justification for the agreement narrow enough to accomplish its purpose without unduly restraining competition.

*United States v. Container Corporation of America*⁴⁸ is a significant case in the development of a legal rule for price exchange cases. *Container* is similar to *Gypsum* because of the type of price information that was exchanged and the way in which it was exchanged. In *Container* each defendant, upon request by a competitor, would furnish information concerning the most recent price charged or quoted to individual customers, with the expectation of reciprocity. Even though the information was not exchanged on a regular basis the Court found sufficient concerted action to establish an agreement under section 1, the

45. *American Column & Lumber Co. and American Linseed Oil Co.* also suggest that the defendants did actually fix their prices, and that the information exchange was evidence of a price-fixing agreement. See note 126 *infra*.

46. 268 U.S. 588 (1925).

47. [1978] ANTITRUST & TRADE REG. REP. No. 892, at F-15.

48. 393 U.S. 333 (1969).

essence of the agreement being to furnish price information whenever requested.⁴⁹

The Court found the effect of this reciprocal exchange of price information to be a stabilization of prices at a downward trend.⁵⁰ Even though there was a continuation of some competition the Court held that the reduction or limitation of price competition brought the case within the scope of the Sherman Act. Justice Douglas, in his plurality opinion, cited *Socony-Vacuum*⁵¹ and stated that interference with the setting of prices by free market forces is *per se* unlawful.⁵² Although Douglas did use *per se* language, *Container* probably does not stand for the proposition that an agreement among competitors to exchange current price information is *per se* unlawful under the Sherman Act. Justice Fortas, in a concurring opinion,⁵³ said that he did not interpret the Court as holding that such an exchange was a *per se* violation of the Sherman Act. In Fortas' view there was no need to consider the situation as a *per se* violation because there was ample evidence to show an actual effect on prices. Justice Marshall, in a dissenting opinion,⁵⁴ felt the *per se* rule did not apply because the Court had not applied it to similar cases in the past.⁵⁵

The Court finally indicated that the rule of reason will be applied to exchanges of current price information when it decided *United States v. Citizens & Southern National Bank*.⁵⁶ In *Citizens & Southern* the defendant bank formed several banks in suburban areas around Atlanta. Citizens & Southern acquired five percent of the stock of a bank while officers, shareholders, and customers purchased a majority of the remaining shares.⁵⁷ These "de facto" branch banks were established because state laws otherwise restricted branch banking.⁵⁸ Citizens & Southern provided these de facto branch banks with information concerning current interest rates and service charges in effect at Citizens & Southern.⁵⁹

The Court in *Citizens & Southern* held that these exchanges of current price information among competitors did not constitute *per se* violations of the Sherman Act.⁶⁰ In other words, there may be some instances in

49. *Id.* at 335.

50. *Id.* at 336.

51. *United States v. Socony Vacuum Oil Co.*, 370 U.S. 150 (1940).

52. 393 U.S. at 337.

53. *Id.* at 338-40.

54. *Id.* at 340-41.

55. Marshall stated that "[t]his Court has refused to apply a *per se* rule to exchanges of price information in the past." *Id.* at 341. He then cited *American Column & Lumber Co.*, *American Linseed*, *Maple Flooring*, and *Cement Manufacturers*. See text accompanying notes 41-46 *supra*.

56. 422 U.S. 86 (1975).

57. *Id.* at 113.

58. *Id.* at 92.

59. A Georgia statute prohibited bank holding companies from acquiring more than five percent of a bank's stock. GA. CODE ANN. § 13-207(a)(2) (1967 & Supp. 1974) (amended 1976).

60. 422 U.S. at 93.

which an agreement among competitors to exchange current price information may be justified. Here the use of the information among the de facto branch bank system had the effect of stabilizing the interest rates and service charges throughout the de facto system, but the Court found that the overall effect was to promote competition.⁶¹ Because of the statutory restriction on branch banking the residents of suburban and rural areas were a “captive market” for the local banks.⁶² The de facto branch banks competed with the local banks and provided an option to local customers.⁶³ Even though the exchange of interest rates might be thought to stabilize prices, the overall effect of permitting the de facto branch banks to use the rates given to them was good. The Court found a justification for the agreement in the overall purpose of furthering competition, and the alleged restraint was found to be tailored as the minimum necessary inducement to get Citizens & Southern to engage in the procompetitive activity. Without any method of stabilizing interest rates there would have been no incentive to enter the suburban market.

The underlying thrust of the Court’s opinions is that the rule of reason will be applied to cases in which current prices are exchanged among competitors. The normal situation would probably be close to that found in *Container*. In such a situation—an oligopolistic market served by sellers of identical goods—the exchange of current price information would tend to inhibit competition, and as in *Container* the courts could easily find an undue restraint on trade. On the other hand, *Citizens & Southern* entails a peculiar set of facts in which the exchange furthered overall competition. In a situation like this the court must be careful to consider all of the relevant factors, for a summary approach like that used in *Container* (in which, it can be argued, the Court applied the *per se* rule) would produce an inappropriate decision.

C. *The Robinson-Patman Act*

1. *Satisfying Section 2(b) Good Faith Verification Requirement*

Section 2(a) of the Robinson-Patman Act⁶⁴ prohibits price discrimination, which is the practice of charging two purchasers different

61. *Id.* at 117-20.

62. *Id.* at 118.

63. *Id.* at 119.

64. 15 U.S.C. § 13(a) states in pertinent part:

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

prices for goods of equal grade and quality when the likely effect of such discrimination is to substantially lessen competition. Price discrimination can have serious anticompetitive effects. One such effect is "primary line" injury, or injury to the competitors of the seller. Primary line damage occurs when a large seller sells at low prices to some customers in order to gain a greater share of the market over his competitors or drive a smaller competitor out of business. Another serious effect of price discrimination is "secondary line" injury, or injury to the competitors of the buyer. For example, a large buyer may be able to secure price advantages while a small buyer may have to continue to purchase supplies at higher prices.⁶⁵

There are, however, statutory defenses to price discrimination.⁶⁶ The defense that is pertinent to the present discussion is contained in section 2(b)⁶⁷ of the Robinson-Patman Act. That section provides in pertinent part that:

[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities used by a competitor.

*Standard Oil Co. v. FTC*⁶⁸ interpreted section 2(b) as an absolute defense to liability for price discrimination.⁶⁹ Thus, if the seller can establish that the price discrimination was made in good faith to meet the equally low price of a competitor, he will be exonerated from liability under section 2(a). The Court noted that "if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than lose the customer."⁷⁰

Of course, in order for the seller to take advantage of section 2(b) he must meet the good faith requirement established by that section. *FTC v. A.E. Staley Manufacturing Co.*⁷¹ provides the most complete explanation

65. Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1477-78 (1977) (hereinafter cited as *Meeting Competition*).

66. Section 2(a) contains a cost justification defense. After the main liability provision, see note 60 *supra*, the statute provides that "nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered. . . ." 15 U.S.C. § 13(a) (1976). This defense is of little use to a manufacturer, however, because in order for him to be able to use it he must present to the court cost studies of "virtually prohibitive detail." See *Meeting Competition*, *supra* note 65, at 1483.

67. 15 U.S.C. § 13(b) (1976).

68. 340 U.S. 231 (1951).

69. It can be argued that the § 2(b) meeting competition defense was intended only as a rule of evidence that would enable the seller to rebut a prima facie case of price discrimination under § 2(d) by showing that he made his price cut in good faith to meet competition. The burden would then shift to the complainant to prove that the price discrimination resulted in competitive injury or was made in bad faith. Such an interpretation is supported by the fact that the § 2(b) defense is contained in a section apart from § 2(a) which contains affirmative defenses such as cost justification. See *Meeting Competition*, *supra* note 65, at 1483-84.

70. 340 U.S. at 249. See generally *id.* at 244-50.

71. 324 U.S. 746 (1945).

prior to *Gypsum* of the kind of showing that a seller must make in order to satisfy the good faith requirement:

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's. . . . We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.⁷²

In *Staley* it was held that the section 2(b) defense had not been established because the price discriminations were made in response to verbal information received from salesmen, brokers, or purchasers without any effort to "investigate or verify" these reports or the character and reliability of the informants.⁷³ In a companion case, *Corn Products Refining Co. v. FTC*,⁷⁴ the section 2(b) defense was not allowed because "[t]he only evidence said to rebut the prima facie case made by proof of the price discriminations was given by witnesses who had no personal knowledge of the transactions, and was limited to statements of each witness's [*sic*] assumption or conclusion that the price discriminations were justified by competition."⁷⁵

The language of both *Staley* and *Corn Products* indicated that the seller cannot satisfy the section 2(b) good faith requirement by relying simply on his customer's statements that they have been offered lower prices by the seller's competitors.⁷⁶ The seller must make some sort of effort to verify the customer's reports. He must base his decision to offer a discriminatory price to a certain purchaser upon facts that would lead him reasonably to believe he is in fact meeting the equally low price of a competitor.⁷⁷

There are several ways in which sellers have met the verification requirement imposed upon them by *Staley*.⁷⁸ For instance, in *Beatrice Foods Co.*⁷⁹ the Federal Trade Commission held that the seller's appraisal of market conditions to determine the reliability of a buyer's report of a

72. *Id.* at 759-60.

73. *Id.* at 758.

74. 324 U.S. 726 (1945).

75. *Id.* at 741.

76. See *Viviano Macaroni Co. v. FTC*, 411 F.2d 255 (3d Cir. 1969). The Third Circuit Court in the *Gypsum* case read their decision in *Viviano* as meaning that a seller could not meet the § 2(b) good faith requirement by merely accepting the purchaser's word with respect to competitors' offers. Instead the seller would have to attempt to corroborate the report as well as the reliability of the purchaser or other reporter. *United States v. United States Gypsum Co.*, 550 F.2d 115, 121 (1977). The Supreme Court read *Viviano* as reaffirming *Staley*, but as not to require interseller verification to satisfy the good faith requirement, even in the particular circumstances identified by the court of appeals. 98 S. Ct. at 2881. See text accompanying notes 112-13, 164 *infra*.

77. See text accompanying note 72 *supra*.

78. See generally *Interseller Price Verification*, *supra* note 39, at 836-39.

79. 76 F.T.C. 719 (1969), *aff'd sub nom.* *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir. 1971).

competing price satisfied the section 2(b) good faith requirement. Other cases have held that the meeting competition defense has been established when the seller has cut his prices after he has first lost sales because of a refusal to cut prices on the basis of a customer report.⁸⁰ In addition, a seller may be able to meet the *Staley* verification requirement when he has received similar reports from more than one buyer about the lower price offered by a competitor.⁸¹

The most controversial way in which some sellers have been able to satisfy the section 2(b) requirement has been to verify customer reports with their competitors to see if the competitors have in fact offered the customer a lower price. Such interseller price verification may fall within the proscription of section 1 of the Sherman Act, as in *Container*.⁸²

2. Section 2(b)—A Procompetitive Force

Even though, in theory, the Robinson-Patman Act is designed to combat the primary and secondary line harm of price discrimination,⁸³ commentators have argued that section 2(a) of the Robinson-Patman Act is actually anticompetitive. These commentators argue that price discrimination can be profitable only in a concentrated market (one that is already a monopoly or oligopoly).⁸⁴ As discussed before,⁸⁵ a seller in an unconcentrated market does not have the power to control the market price and is thus forced to sell his entire output at the competitively determined market price.⁸⁶ The seller in a competitive market cannot, therefore, offer the same goods to two different buyers at two different prices. On the other hand, an oligopolist may have the power to price discriminate with success by segregating his customers into groups having different marginal intensities of demand.⁸⁷ He can then set his own prices for each group without a significant risk of being undercut.⁸⁸ Thus, successful price discrimination presupposes highly concentrated markets, the development of which the Robinson-Patman Act cannot forestall.⁸⁹

As this Comment noted earlier,⁹⁰ oligopolistic markets tend toward

80. See, e.g., *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

81. See *Jones v. Borden Co.*, 430 F.2d 568 (5th Cir. 1970), and *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332 (S.D. Ala. 1972), aff'd mem. sub nom. *Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973).

82. See text accompanying notes 48-53 *supra*.

83. See text accompanying notes 64-65 *supra*.

84. *Meeting Competition*, *supra* note 65, at 1480.

85. See text accompanying notes 32-39 *supra*.

86. *Meeting Competition*, *supra* note 65, at 1480.

87. Marginal intensity of demand refers to what a buyer is willing to pay for each additional unit of product which he buys. Each buyer has a different marginal intensity of demand because each has a unique combination of forces (demand for the product in a particular locale, cost of overhead, overall efficiency in his operation, etc.) bearing upon him. Thus certain buyers may be willing or able to pay more for the seller's product than other buyers would be willing or able to pay.

88. *Meeting Competition*, *supra* note 65, at 1480.

89. *Id.*

90. See notes 32-40 *supra* and accompanying text.

price uniformity because a concession in price by one seller can be expected to be followed by a concession by other sellers. Thus, a seller's advantage is short-lived unless he can keep his price concession secret.⁹¹ If the secret leaks out it will cause an undisciplined market and a downward pressure on prices. Such "sporadic" price discrimination has only negligible primary and secondary line effects.⁹² But section 2(a) of the Robinson-Patman Act blindly prohibits such sporadic price discrimination and its resulting procompetitive effects.

Section 2(b), however, can be viewed as a procompetitive measure because it allows oligopolistic sellers to discriminate in price to meet a competitor's lower price, and thus may help to break up the market discipline. The procompetitive effect of section 2(b) is limited, though, by the "meet-not-beat" rule in section 2(b), which allows a seller to match, but not undercut, his competitor's price.⁹³ Thus, the competitor whose price the seller is trying to match does not have to be concerned about his price being undercut, and the effect of section 2(b) on market certainty is cut short.⁹⁴

The "meet-not-beat" rule, however, does not require that a seller in fact meet the competitor's lower price, for the requirement under section 2(b) is good faith. If the seller exhibits good faith he is allowed the defense even if he actually undercuts his competitor's price.⁹⁵ Therefore, the extent to which the "meet-not-beat" requirement is anticompetitive depends upon how much a seller must do to meet the good faith verification requirement.⁹⁶ If the seller is required, or even permitted, to verify the report of a lower price with his competitor, the standard of good faith will be higher and the seller will be expected to more closely match his competitor's price.

D. *Conflict Between the Sherman Act and Section 2(b) of the Robinson-Patman Act*

1. *Section 2(b) as a Controlling Circumstance*

In order for a seller to establish the section 2(b) meeting-competition defense he must satisfy the good faith requirement. Recall that *Staley* and *Corn Products* require a seller to verify in some way customer reports of lower prices offered by competitors.⁹⁷ Often sellers have felt obligated, because of uncertainty in the law and the unreliability of customer's reports, to verify customer reports with competitors to ensure their

91. See P. AREEDA, *supra* note 33.

92. *Meeting Competition*, *supra* note 65, at 1482.

93. *Id.* at 1485. See text accompanying notes 66-67 *supra*.

94. *Id.* at 1486.

95. See *Continental Baking Co.*, 63 F.T.C. 2071, 2163 (1963).

96. See text accompanying notes 76-77 *supra*.

97. *Id.*

satisfaction of the section 2(b) good faith requirement.⁹⁸ If a seller verifies the price offered to a customer by directly contacting his competitor and discussing current price information, both he and his competitor may be violating section 1 of the Sherman Act.⁹⁹

Two important exchange cases have, however, provided the lower courts with an avenue of escape from this dilemma. In *Cement Manufacturers* the Supreme Court allowed the exchange among competitors of information concerning production, price, and transportation costs when the purpose of the exchange was to enable the defendants to prevent the perpetration of fraud against them by their customers.¹⁰⁰ The Court in *Container* subsequently held that the exchange of information concerning specific sales to identified customers violated the Sherman Act, and apparently distinguished that case from *Cement Manufacturers* by recognizing an exception which would make an otherwise invalid restraint on trade justifiable:¹⁰¹

While there was present here, as in *Cement Mfrs. Protective Assn. v. United States*, 268 U.S. 588, an exchange of prices to specific customers, there was absent the *controlling circumstances*, viz., that cement manufacturers, to protect themselves from delivering to contractors more than was needed for a specific job and thus receiving a lower price, exchanged price information as a means of protecting their legal rights from fraudulent inducements to deliver more cement than needed for a specific job.¹⁰²

Many courts inferred from the use of the phrase "controlling circumstances" that the exception to Sherman Act liability for the exchange of competitive information was not limited to the special circumstances of *Cement Manufacturers*.

After *Container*, several lower courts had held that the controlling circumstance exception encompasses exchanges of price information undertaken for the purpose of establishing a meeting-competition defense under section 2(b) of the Robinson-Patman Act. In *Wall Products Co. v. National Gypsum Co.*¹⁰³ competitors telephoned each other to verify customers' reports that a competitor had offered the customers a lower price on gypsum board. The district court found that interseller price verification was used only when the defendants were unable to satisfy themselves of the accuracy of the customer-reported deviations in price by other means. The court noted this restricted use of the practice of interseller price verification and stated that if practiced within these limits

98. See text accompanying notes 127-28 *infra*.

99. See text accompanying notes 48-54 *supra*.

100. See text accompanying note 46 *supra*.

101. One could argue that *Container* is an abrupt departure from *Cement Manufacturers* because it does not focus on purpose as did *Cement Manufacturers*. See *Interseller Price Verification*, *supra* note 39, at 842-43. On the other hand, it could be said that the Court focused on purpose in *Cement Manufacturers* because there was a justification for the agreement in that case.

102. 393 U.S. at 335 (emphasis added).

103. 326 F. Supp. 295 (N.D. Cal. 1971).

it would be tolerated. The passage from *Container* quoted above¹⁰⁴ was cited and the court stated that the defendants' duty to establish good faith adherence to the Robinson-Patman Act constituted a circumstance equally as compelling and controlling as that found in *Cement Manufacturers*.¹⁰⁵

Three other lower court cases have followed *Wall Products* in characterizing compliance with section 2(b) of the Robinson-Patman Act as a controlling circumstance for Sherman Act purposes. In each of the three cases a major oil company conferred with its competitors during a gasoline price war in order to verify its competitor's prices before granting temporary allowances to its own retailers. Both *Webster v. Sinclair Refining Co.*¹⁰⁶ and *Belliston v. Texaco, Inc.*¹⁰⁷ cited *Wall Products* for the controlling circumstance proposition. The third case, *Gray v. Shell Oil Co.*,¹⁰⁸ held that the jury had to decide whether the purpose of Shell's communications with its competitors was to comply with the Robinson-Patman Act; because the jury in *Gray* found that purpose, the court upheld a verdict of no Sherman Act liability. These three gasoline price war cases significantly expanded upon *Wall Products* because none of them required that alternative means of corroboration be exhausted before using direct verification with a competitor.

The Third Circuit Court of Appeals, in *United States v. United States Gypsum Co.*,¹⁰⁹ recognized the inherent dangers in the gasoline price war decisions. The court felt that the decisions would undermine *Container* by giving competitors a free license to exchange price information. Such a license might be used to camouflage illegitimate agreements. Furthermore, according to *Automatic Canteen Co. of America v. FTC*,¹¹⁰ the Sherman Act is supposed to take precedence over the Robinson-Patman Act.¹¹¹ The gasoline cases, however, had given the Robinson-Patman Act precedent over the Sherman Act. In order to guard against these dangers the court strictly limited the circumstances in which competitors could comply with the section 2(b) good faith requirement by exchanging price information. The interseller verifier must have engaged in the practice solely to comply with the Robinson-Patman Act; he must have first resorted to all other reasonable means of corroboration, without success; he must have had good, independent reasons to doubt the buyer's truthfulness; and the communication with his competitor must have been strictly limited to the

104. See text accompanying note 102 *supra*.

105. 326 F. Supp. at 313.

106. 338 F. Supp. 248, 251-52 (S.D. Ala. 1971).

107. 455 F.2d 175, 182 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972).

108. 469 F.2d 742, 746-47 (9th Cir. 1972), *cert. denied*, 412 U.S. 943 (1973).

109. 550 F.2d 115 (1977).

110. 346 U.S. 61 (1953).

111. See *United States v. United States Gypsum Co.*, 550 F.2d at 125.

one price and one buyer at issue.¹¹² Thus, the Third Circuit recognized section 2(b) compliance as a controlling circumstance, but tried to limit its encroachment on the Sherman Act.

2. *Dangers in a Section 2(b) Controlling Circumstance*

Section 2(b) of the Robinson-Patman Act should not be permitted to be a justification for interseller price verification under the Sherman Act. The meeting-competition defense is a procompetitive measure that can help break up an oligopolistic market discipline and should, therefore, be liberally construed. To permit section 2(b) to allow the exchange of price information, however, has the unintended result of interfering with section 1 of the Sherman Act while not advancing the procompetitive nature of section 2(b).

This conflict between the two acts not only results in stabilized prices but it also thwarts the use of the Sherman Act in policing hardcore anti-competitive arrangements such as price-fixing agreements.¹¹³ In a report on the Robinson-Patman Act the United States Department of Justice explained that in some industries there are extensive exchanges of information for the alleged purpose of complying with the Robinson-Patman Act. The report noted the ease with which such an exchange of information can evolve into an agreement for the reciprocal exchange of price information and even into a full-fledged price-fixing agreement.¹¹⁴

In an oligopolistic market the exchange of price information may be a definite sign of an agreement of some sort between sellers, for the exchange will take place only if benefits accrue to the participants. It will be recalled that in an oligopolistic market¹¹⁵ a seller can gain an advantage over his competitors by granting a secret price concession to attract customers.¹¹⁶ If his competitors were to learn of the concession they would, of course, lower their prices in order to preserve their market share. The resulting downward trend in prices will cause the original price cutter and every

112. *Id.* at 126.

113. This concern was one of the reasons why the Third Circuit in *Gypsum* strictly limited the use of interseller price verification to comply with the § 2(b) meeting-competition defense. See text accompanying notes 109-11 *supra*.

114. UNITED STATES DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 58-61 (1977).

[Y]ou find in some industries relatively extensive exchanges of price information for the purpose, at least the stated purpose, of complying with the Robinson-Patman Act

Now, the mere exchange of price information itself may tend to stabilize prices. But I think it is also relatively common that once the exchange process begins, certain understandings go along with it—that we will exchange prices, but it will be understood, for example, you will not undercut my prices.

And from there it is a rather easy step into a full-fledged price-fixing agreement. I think we have seen that from time to time, and I suspect we will continue to see it as long as there continues to be a need to justify particular price discrimination in the terms of the Robinson-Patman Act.”

Id. at 60 (quoting testimony of Thomas E. Kauper).

115. See text accompanying notes 32-39 *supra*.

116. See P. AREEDA, *supra* note 33, at 15.

other seller to be in a worse position than when he originally offered his price concession, for he must now sell at a lower price without a corresponding increase in volume. Thus, if a seller were asked by a competitor to verify a report that the seller had offered a discount to a particular buyer it would be against the economic interests of the seller to reveal the discount: a seller would never reveal his price discounts to his competitors unless they had previously agreed to reveal their prices to him. Such an agreement could be used to police industry prices in order to keep them artificially high. If there were no such agreement sellers would not benefit by revealing their price concessions to competitors.¹¹⁷

This analysis points to another fallacy concerning the use of interseller price verification. Sellers have argued that they must verify customer reports with their competitors because their customers are inherently unreliable.¹¹⁸ The customer will bargain for the best price possible and cannot be expected to give the seller an accurate report concerning offers of lower prices given to them by the seller's competitors.¹¹⁹ The foregoing analysis shows that absent an agreement to verify or fix prices competitors are also unreliable and should not be contacted to establish good faith under section 2(b) of the Robinson-Patman Act.

Interseller price verification also fails to promote the procompetitive nature of section 2(b). If sellers were allowed to establish good faith by means short of contacting competitors they could be much more flexible in granting price concessions which would, in turn, better enable section 2(b) to break up the oligopolistic market discipline. Good faith under section 2(b) does not require interseller price verification. There are other ways of establishing good faith, one of the best of which is to assess market data to determine the reasonableness of a customer's report.¹²⁰

II. THE Gypsum DECISION

A. Facts and Issues

In 1973, the Justice Department and the Federal Trade Commission filed an indictment in federal court charging six major gypsum board¹²¹

117. See *United States v. United States Gypsum Co.*, 98 S. Ct. at 2883-84; *Meeting Competition*, *supra* note 65, at 1492-93.

118. See text accompanying note 98 *supra*. See also *Interseller Price Verification*, *supra* note 39, at 834-36.

119. *Interseller Price Verification*, *supra* note 39, at 825-26.

120. See text accompanying notes 78-81 *supra*.

121. Gypsum board is a type of laminated wall board. The gypsum industry has many of the characteristics of an oligopoly. See text accompanying notes 32-39 *supra*. The gypsum board industry is highly concentrated and during the period in question (1960-1973) eight companies accounted for 94% of national sales. Gypsum board is a tangible product and the purchaser's choice between competing suppliers depends upon differences in price, credit terms, and delivery services. Overall demand for the product is a function of the level of construction activity; a price decrease throughout the industry would not cause industry sales to rise and a price decrease by one or two manufacturers would only gain them a temporary increase in market share, until other manufacturers followed suit. 98 S. Ct. at 2868. Because of this the industry manufacturers have a strong incentive to stay out of a price war and keep industry prices high. Complete market information facilitates this interest.

manufacturers and their corporate officials¹²² with engaging in a combination and conspiracy in restraint of trade and commerce in violation of section 1 of the Sherman Act.¹²³ At trial the Government focused its case on its allegation that the gypsum board manufacturers participated in a "continuing agreement understanding and concert of action to (a) raise, fix, maintain and stabilize the prices of gypsum board."¹²⁴ The Government's case on this price fixing charge centered on the defendants' practice of interseller price verification. An officer of one gypsum board manufacturer would telephone a competing firm's officer to determine the price at which the competitor was offering gypsum board to a specific customer.¹²⁵

The Government maintained that the price exchanges were part of an agreement among the defendants, that the exchanges had the effect of stabilizing prices, that they were used to police agreed upon price increases, and that they were undertaken on a frequent basis.¹²⁶ Defendants disputed the scope and duration of the verification activities and contended that the exchanges of price information that did occur were for the purpose of complying with the Robinson-Patman Act.¹²⁷ The verification practice, defendants said, was designed to comply with the dictates of *Staley* and *Viviano*,¹²⁸ which required verification of customers' reports. Defendants asserted that all discounting off list prices was not reflected in invoices; they could not, therefore, verify the customers' reports by checking the competitor's invoices.¹²⁹ In addition, purchasers of the gypsum board were notoriously unreliable and had often lied about a competitor's offer in order to "whipsaw" a price cut. Therefore, the defendants argued, they had

122. The corporation defendants named in the indictment were United States Gypsum Company, National Gypsum Company, Georgia Pacific Corporation, Kaiser-Gypsum Company, Inc., the Celotex Corporation, and the Flintkote Company. The individual defendants included the Chairman of the Board and the Executive Vice-President for sales of National Gypsum, the President of Georgia Pacific, the President and the Vice-President and General Manager of Kaiser-Gypsum, the President of Celotex, and the Chairman of the Board and the President of Flintkote. The Gypsum Association was named as an unindicted co-conspirator as were two other gypsum board producers—Johns-Manville Corporation and Fibreboard Corporation. 98 S.Ct. at 2868.

Nine of the defendants pleaded *nolo contendere* and were sentenced. *Id.* at 2869. The remaining corporate defendants were United States Gypsum, National Gypsum, Georgia Pacific, and Celotex, and the remaining individual defendants were the chairman of the Board and the Vice-President of sales of National Gypsum and the Executive Vice-President of United States Gypsum. *Id.* at 2869 n.3.

123. *Id.* at 2868-69.

124. *Id.*

125. 550 F.2d at 120.

126. *Id.* It is difficult to tell exactly what theory of liability the Government was arguing in this case. At least two theories have been advanced. The first theory is that the exchange of price information is evidence of a price fixing agreement, which is *per se* unlawful under the Sherman Act. See text accompanying notes 29-30 *supra*. The other theory is that an agreement to exchange prices simply facilitates anticompetitive action which is too dangerous to be allowed. See [1978] ANTITRUST & TRADE REG. REP. No. 892, at F-4. See generally text accompanying notes 115-117 *supra*.

127. 550 F.2d at 120. Defendants also contended that they used interseller price verification to prevent customer fraud in order to come under the *Cement Manufacturers* exception to Sherman Act liability, but the court rejected this argument. 98 S. Ct. at 2879 n.24.

128. See note 71 and accompanying text.

129. 550 F.2d at 121.

three choices: (1) forego the price cut and risk losing the sale; (2) offer the reduced price on the basis of the purchaser's unconfirmed report and risk Robinson-Patman liability; or (3) call the competitor to verify his offer, and establish a section 2(b) defense to any Robinson-Patman charge concerning the price cut.¹³⁰ They chose the third alternative. The defendants contended such conduct was within the "controlling circumstances" exception to Sherman Act liability,¹³¹ and should have one of two effects. At the extreme the purpose to comply with section 2(b) of the Robinson-Patman Act should preclude, "as a matter of law, consideration of the defendants' guilt on the price fixing charge, and at the minimum make defendants' purpose in engaging in such communication a threshold factual question."¹³² In other words, if the court were to find that the defendants' purpose was to comply with the Robinson-Patman defense, their conduct should not be scrutinized under the Sherman Act at all. If this approach was not accepted, the court should at least determine the defendants' purpose in order to determine whether they could be held criminally liable.

The instructions to the jury provided that if the exchange of price information was found to have been undertaken in a good faith effort to comply with the Robinson-Patman Act, verification standing alone would not be sufficient to establish an illegal price fixing agreement.¹³³ The next part of the instruction, though, seemed to indicate that purpose was irrelevant if the jury found that the effect of verification was to fix, maintain, or stabilize prices: "However, if you decide that the effect of these exchanges was to raise, fix, maintain, and stabilize the price of gypsum wallboard, then you may consider these exchanges as evidence of a mutual agreement or understanding alleged in the indictment to raise, fix, maintain and stabilize list prices."¹³⁴ The instructions on verification closed with the following:

[t]he law presumes that a person intends the necessary and natural consequences of his acts. Therefore, if the effect of the exchanges of pricing information was to raise, fix, maintain and stabilize prices, then the parties to them are presumed, as a matter of law, to have intended that result.¹³⁵

The jury returned guilty verdicts against each of the defendants and the case was sent to the appellate court with the price fixing issue in the following terms: Should the purpose of complying with the Robinson-Patman Act be a justification for interseller price verification activities that would withdraw those activities from Sherman Act scrutiny? The Third

130. *Id.* at 122.

131. *See* Part I(D) *supra*.

132. 98 S. Ct. at 2869.

133. *Id.*

134. *Id.*

135. *Id.*

Circuit held that such a justification does exist but only in the very limited scope set out previously.¹³⁶ Defendants were entitled to an instruction that their verification practices would not violate the Sherman Act if the jury found that the defendants' purpose was to comply with the Robinson-Patman Act and that they stayed within the scope set out by the appellate court.¹³⁷ The appellate court in effect limited the consideration of purpose to the question of intention to comply with the Robinson-Patman Act (and other possible "controlling circumstances").

The Supreme Court affirmed the circuit court's decision, but for a much different reason. The Court held both that intent is an element of a criminal antitrust offense and that the purpose of complying with section 2(b) of the Robinson-Patman Act does not exclude one from Sherman Act scrutiny.¹³⁸

B. *The Supreme Court Decision*

1. *Intent as an Element of a Criminal Antitrust Offense*

The Supreme Court did not base its conclusion on the intent issue upon an apparent conflict between the Sherman Act and the Robinson-Patman Act as did the court of appeals, but upon general principles of criminal liability.¹³⁹

[W]e hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices.¹⁴⁰

Thus, the Government must prove beyond a reasonable doubt that the defendants intended, by their verification practices, to fix, maintain, or stabilize prices.

The Court enumerated two culpable states of mind that will satisfy the intent requirement under the Sherman Act. First, if one undertakes the conduct with the "conscious object" of producing anticompetitive effects, one possesses the requisite intent.¹⁴¹ Second, if the conduct is shown to have been undertaken with the knowledge that the proscribed effects would most likely occur, the actor possesses the requisite state of mind.¹⁴² In order for knowledge to suffice, though, the proscribed anticompetitive effects must also be demonstrated.¹⁴³ In effect, when the anticompetitive

136. See text accompanying note 112 *supra*.

137. 98 S. Ct. at 2872.

138. *Id.*

139. The court relied on the principle that intent is generally an indispensable element of a criminal offense. 98 S. Ct. at 2872-76. See *Morissette v. United States*, 342 U.S. 246 (1952).

140. 98 S. Ct. at 2872.

141. *Id.* at 2877.

142. *Id.*

143. *Id.*

effects (e.g., stabilization of prices through interseller price verification) have been shown, the Government need not establish the defendant's subjective purpose to bring about the anticompetitive results. Instead, the Government is put to the lesser burden of showing the defendants' knowledge of the probable consequences.¹⁴⁴

2. *Section 2(b) of the Robinson-Patman Act—
Not a Shield from Sherman Act Scrutiny*

The Court held that exchanges of price information, even though for the purpose of complying with the Robinson-Patman Act, remain subject to close scrutiny under the Sherman Act.¹⁴⁵ In other words, if a seller verifies prices with a competitor in order to establish the Robinson-Patman meeting competition defense, he is not automatically relieved from Sherman Act liability, even if he remains within the limitation set forth by the court of appeals.¹⁴⁶ Thus, Robinson-Patman compliance is not a so-called "controlling circumstance."¹⁴⁷

The Court, rejecting the *Wall Products* court's and the appellate court's reading of *Staley*,¹⁴⁸ held that the section 2(b) good faith standard can be satisfied without the use of interseller price verification.¹⁴⁹ A seller may acquire his good faith, commercially reasonable belief that his price concession is necessary to meet an equally low price of a competitor, by doing everything reasonably feasible to determine the truthfulness of a customer's statement that the customer has been offered a lower price as long as he does not violate another statute. "If, after making reasonable, lawful, [*sic*] inquiries, the seller cannot ascertain the buyer is lying, the seller is entitled to make the sale."¹⁵⁰

The Court noted a number of factors that the Federal Trade Commission or a court should consider in appraising a seller's good faith in meeting a competing offer. Such factors include evidence that the seller had received reports of similar discounts from other customers, that he had been threatened with a termination of purchases if the discounts were not met, and that he had made efforts to corroborate the reported discount by seeking documentary evidence or by appraising its reasonableness in terms of available market data. All these ways of complying with the verification structure of *Staley* and section 2(b) good faith have been used successfully in the past, as discussed before.¹⁵¹

144. *Id.* n.21.

145. *Id.* at 2884. The Court did not address the more general issue concerning the existence and proper scope of the controlling circumstances exception to Sherman Act liability. *Id.* at 2880.

146. See text accompanying note 112 *supra*.

147. 98 S. Ct. at 2884.

148. See text accompanying notes 103-09 *supra*.

149. See text accompanying note 17 *supra*.

150. 98 S. Ct. at 2882 n.29.

151. See text accompanying notes 78-81 *supra*. In *A & P v. FTC*, 47 U.S.L.W. 4167 (1979), Borden, the long-time supplier of milk to A & P, lowered its bid on the price of milk to A & P in order to

In any event, the Court seems to say that the *Staley* verification requirement applies only when there are grounds for disbelieving the customer.¹⁵² When there are grounds for disbelieving the customer the seller need only take reasonable steps to investigate and, as stated above, if he "cannot ascertain that the buyer is lying," the meeting-competition defense is available to him.¹⁵³ Therefore, the seller who acts with the honest belief that he is meeting competition, even though he may be mistaken, is greatly benefited.¹⁵⁴ The Court states, however, that in a limited number of cases the section 2(b) defense to price discrimination may be unavailable. A seller may have substantial reasons to doubt the accuracy of reports of a competing offer and may be unable to corroborate such reports in any of the accepted ways. Unanswered questions about the reliability of a buyer's representation may be inconsistent with a good faith belief that a competing offer had been made, rendering the section 2(b) defense unavailable.¹⁵⁵ In such a case interseller verification as a means of checking the buyer's reliability seems like a possible solution to the seller's dilemma. But the Court stated it would still not permit interseller verification because the seller's competitor, who is also an unreliable source of information, cannot be relied upon to establish good faith under section 2(b).¹⁵⁶ Therefore, the section 2(b) defense to price discrimination will simply remain unavailable in such a situation.¹⁵⁷ Even so, the Court seems to encourage the seller to make the sale. In a footnote¹⁵⁸ the Court hints that it wants to make section 2(b) an economically meaningful defense to price discrimination and that a seller's honest reliance on his customer's reports will in most cases allow him to make a legitimate price concession.¹⁵⁹ The Court cites section 2(f)¹⁶⁰ of the Robinson-Patman Act, which makes it unlawful for a buyer to receive knowingly an unlawful discriminatory price. In *Beatrice Foods Co.*¹⁶¹ the FTC permitted the seller the section 2(b) defense because he acted in good faith, while it held the buyer liable under section 2(f). It would seem that the Court is indicating

meet a lower price offered to A & P by a competitor. Borden simply lowered its bid in reliance on A & P's report that Borden's bid was "not even in the ball park" and that Borden was in danger of losing the A & P account. *Id.* at 4171. A & P offered to let Borden submit another bid, contrary to A & P's practice. The court held that Borden, in light of its business relationship with A & P, had satisfied § 2(b) good faith. *Id.* at 4171.

152. See [1978] ANTITRUST & TRADE REG. REP. No. 892, at F-17.

153. *Id.*

154. *Id.*

155. 98 S. Ct. at 2883.

156. 98 S. Ct. at 2883-84. See text accompanying note 115 *supra*.

157. See 98 S. Ct. at 2890 (Powell, J., concurring in part).

158. 98 S. Ct. at 2882 n.30.

159. See [1978] ANTITRUST & TRADE REG. REP. No. 892, at F-16-17.

160. 15 U.S.C. § 13(f): "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." The Court noted that its conclusions regarding the proper interpretation of § 2(f) may affect subsequent application of § 2(b). 98 S. Ct. at 2883 n.31.

161. *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir. 1971), *aff'g* *Beatrice Foods Co.*, 76 F.T.C. 719 (1969).

that increased buyer liability may make it easier for the seller to rely on the buyer's reports.¹⁶² Also, in the recent decision of *A & P v. FTC*¹⁶³ the Court continued in its effort to make section 2(b) a meaningful defense by holding that the seller satisfied section 2(b) good faith by simply communicating with the buyer.¹⁶⁴

In sum, the seller need not verify prices with a competitor in order to satisfy the good faith requirement of section 2(b) of the Robinson-Patman Act. In fact, under the above analysis the section 2(b) defense will never be available through the use of interseller price verification. Furthermore, the seller must not verify prices with a competitor if he wants to stay clear of possible Sherman Act liability.

III. EFFECT OF THE *Gypsum* DECISION

Gypsum strengthens the policies both of section 1 of the Sherman Act and Section 2(b) of the Robinson-Patman Act. The decision is procompetitive because it eliminates the apparent conflict between section 1 and section 2(b) that had developed in the lower courts before *Gypsum*. By abolishing section 2(b) as a controlling circumstance the Court has taken a significant step forward to ensure that the two Acts serve their procompetitive purposes. Section 2(b) can now better serve its function of breaking up the oligopolistic market discipline by allowing sellers to discriminate in price. The policy behind the section will not be defeated by interseller verification and its stabilizing effect on prices. Furthermore, buyers can now be certain that they need not verify prices directly with their competitors to establish the meeting-competition defense.¹⁶⁵ Because interseller verification cannot be used, sellers cannot be expected to match the competitor's lower price to comply with the meet-not-beat rule.¹⁶⁶ This relaxed good faith requirement, not requiring perfect knowledge, helps to take the floor out of the price concessions allowed by section 2(b), resulting in a little more uncertainty in the market.¹⁶⁷ Recall that in an oligopolistic market uncertainty helps to cause a downward pressure on prices.¹⁶⁸

Section 1 of the Sherman Act is now freed from the shackles of section 2(b). All information exchange cases, including the exchange of current price information, will be scrutinized under the Sherman Act. Although the *Gypsum* Court does not specifically state how the exchange of current

162. In the recent decision of *A & P v. FTC*, 47 U.S.L.W. 4167 (1979), the Court held that a buyer cannot be held to have violated § 2(f) if the seller has established the meeting-competition defense. "Accordingly, we hold that a buyer who had done no more than accept the lower of two prices competitively offered does not violate § 2(f) provided the seller has a meeting competition defense." *Id.* at 4171. But this decision does not mean that the seller cannot claim the meeting-competition defense if the buyer has violated § 2(f).

163. 47 U.S.L.W. 4167 (1979).

164. See note 151 *supra*.

165. See text accompanying note 98 *supra*.

166. See text accompanying notes 95-96 *supra*.

167. *Id.*

168. See text accompanying notes 92-93 *supra*.

price information should be treated in the future, it gives the lower courts a strong hint. The Court indicates that the stabilizing effect on price should be presumed¹⁶⁹ in oligopolistic markets when it says that it recognizes the "tendency for price discussions between competitors to contribute to the stability of oligopolistic prices and open the way for growth of prohibited anticompetitive activity,"¹⁷⁰ and that the exchange of price information will remain subject to "close scrutiny" under the Sherman Act.¹⁷¹ Under such a presumption it would be up to the seller to show that the exchange did not have an adverse impact on competition. This approach is desirable because it would allow the exchange of price information in cases like *Citizens & Southern*. Thus the Court seems to support the employment of the rule of reason in a way that will both make short work of harmful price exchanges in the majority of cases, and leave room for beneficial price exchanges.

One must also be aware that cases will now be treated differently when there is a criminal prosecution under the Sherman Act.¹⁷² The prosecution has the burden of proving criminal intent whether the rule of reason or the *per se* doctrine is applied. In a *Container*-type situation, when there is an oligopolistic market, the prosecutor will easily be able to prove a stabilization of prices as a result of the exchange of current price information.¹⁷³ In a civil case the court may then find an undue restraint on trade under the Sherman Act. In a criminal case, however, the prosecutor must prove that the defendants entered into the agreement to exchange price information with the conscious object of producing the stabilization of prices, or that the defendants knew that stabilization of prices would most likely occur.¹⁷⁴ It would not be difficult for the fact finder to infer that sellers operating in an oligopolistic market would know that the exchange of price information would most likely stabilize industry prices. The prosecutor will have a more difficult time, however, in peculiar cases such as *Citizens & Southern*. In such cases there are more legal motives possible for competitors to exchange price information.¹⁷⁵

Finally, the *Gypsum* decision reduces the possibility of sellers using the Robinson-Patman Act to cover hard-core price fixing agreements.¹⁷⁶ Prior to *Gypsum* the Government might have tried to prove a price fixing agreement by using the interseller exchange of current prices as

169. A presumption may not be permitted in a criminal prosecution under the Sherman Act, however, because the Government must prove every element of the offense. See *Patterson v. New York*, 432 U.S. 197 (1977).

170. 98 S. Ct. at 2884.

171. *Id.*

172. See text accompanying note 31 *supra*.

173. Recall that if the *per se* doctrine is applied the prosecutor need only prove an agreement to exchange prices. See text accompanying notes 29-30 *supra*.

174. See text accompanying note 142 *supra*.

175. See [1978] ANTITRUST & TRADE REG. REP. NO. 892, at F-13.

176. See text accompanying notes 113-14 *supra*.

evidence of such an agreement. Defendants would use section 2(b) of the Robinson-Patman Act as a defense, which could shield their conduct from Sherman Act scrutiny. Now the conduct must be scrutinized under the Sherman Act and the courts can use it to enjoin such price fixing agreements.

IV. CONCLUSION

The exchange of information among competitors can be dangerous in oligopolistic markets because of its tendency to stabilize prices and other factors of competition. In a few cases, such as *Citizens & Southern and Cement Manufacturers*, the Supreme Court permitted the exchange of competitive information, including price information. Even so, these exchanges were scrutinized under the Sherman Act.

Some lower courts, beginning with *Wall Products*, allowed the exchange of current price information among competitors without scrutinizing the conduct under the Sherman Act. If sellers verified prices with their competitors for the purpose of establishing good faith under section 2(b) of the Robinson-Patman Act their conduct was shielded from Sherman Act liability. The lower courts had thus created a conflict between the Sherman Act and the Robinson-Patman Act that inhibited the use of the Sherman Act in striking down undue restraints on trade. At the same time the lower court decisions did not enhance the procompetitive nature of section 2(b), which could help break the price floor in oligopolistic markets.

The *Gypsum* decision reconciles the conflict between the two Acts created by the lower courts by allowing the establishment of good faith under section 2(b) by means short of interseller price verification and by requiring that all information exchange cases be subjected to Sherman Act scrutiny. Both Acts can now work independently and be used in procompetitive ways. Meanwhile, the Court indicates that the exchange among competitors of current price information will be closely scrutinized under the Sherman Act.

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