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Carl F. LaRue

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Pitfalls for Price Competitors: State and Federal Restrictions on Below Cost or Unreasonably Low Prices

Carl F. LaRue

Although the value of vigorous price competition is a basic tenet of antitrust policy, it is increasingly clear that extremely low prices are not without legal risk, even if freely given to all buyers. In recent years, the United States Supreme Court has twice considered aspects of sales below cost: first under a state statute,¹ and then under the "unreasonably low price" clause of section 3 of the Robinson-Patman Act.² Two or three cases involving sales below cost reach the highest state courts each

year, and activity in the state legislatures, opinions of the attorneys general, and increased enforcement efforts in some jurisdictions³ reflect a continuing pressure for restrictions on sales below cost. Severe federal legislation was proposed

THE AUTHOR (A.B., Harvard College, LL.B., University of Michigan) is a practicing attorney in Toledo, Ohio. He belongs to the Toledo, Ohio and American Bar Associations.

in a recent Congress.⁴ In addition, the spokesmen for small business regularly and vehemently assert that predatory pricing, generally, and selling below cost, in particular, are a major threat to the survival of small enterprises.⁵ Last year the Federal Trade Commission announced an investigation into pricing practices in the milk industry, noting that below cost prices, among other unfair acts, had come to its attention.⁶ Prohibitions on selling below cost continue to appear in trade practice rules,⁷ and restrictions on unreasonably low prices appear from time

1. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334 (1959).

2. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963).

3. In recent years, numerous cases have been filed in Minnesota by the state, two of which reached the state supreme court.

4. H.R. 10235, 86th Cong., 2d Sess. (1960).

5. See, e.g., the hearings on proposed amendments to § 3 of the Robinson-Patman Act (*Hearings on H.R. 10235 Before A Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. (1960)). See also *Hearings on H.R. 3669 Before a Subcommittee of the House Interstate and Foreign Commerce Committee*, 88th Cong., 1st Sess. (1963) (Quality Stabilization Act) (particularly in regard to loss leaders), and the report of that committee, H.R. REP. NO. 566, 88th Cong., 1st Sess. 14-15 (1963).

6. FTC Resolution, 27 Fed. Reg. 6682 (1962). Earlier, the problems of the dairy industry were investigated extensively in various Congressional hearings in which complaints of predatory pricing were frequent. See, e.g., *Hearings Before a Special Subcommittee of the House Select Committee on Small Business*, 85th Cong., 1st Sess. (1957) ("Price Discrimination in Dairy Products").

7. See, e.g., Rules for the Slide Fastener Industry, 16 C.F.R. § 193, 193.3 (1960).

to time in consent decrees.⁸ These and other similar developments⁹ indicate the persistence and vitality of the conviction that selling below cost or at "unreasonably" low prices is a serious problem which requires some sort of governmental action.

At the present time, the state statutes against selling below cost and the unreasonably low price clause of section 3 of the Robinson-Patman Act¹⁰ may not be subjects of frequent consideration, even for the specialist in trade regulation law.¹¹ A general knowledge of present law, however, is important for those counseling businessmen on price decisions. Furthermore, proposals for increased enforcement or new legislation should be watched carefully. The discount revolution in retailing, rapidly changing technology, modern advertising techniques and media, highly mobile shoppers, and the influx of low-priced foreign goods may lead to prices which are dangerously low under present legislation. At the same time, these forces cause further demands for more stringent state and federal laws and more vigorous enforcement. Moreover, defeat of the proposed "quality stabilization" act or its practical ineffectiveness¹² may result in its supporters putting their experience and resources behind such demands.¹³

8. See, e.g., *United States v. Western Newspaper Union*, TRADE REG. REP. (1960 Trade Cas.) ¶ 69709, at 76788 (S.D.N.Y. 1960). Reportedly, a major issue in settling the civil aspect of the electrical equipment cases was the government's effort to obtain an injunction against unreasonably low prices. 19 BNA ANTITRUST & TRADE REG. REP. A-9 (Nov. 21, 1961). Most of the consent decrees contain no such restriction. See, e.g., *United States v. Westinghouse Elec. Corp.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70487, at 76978 (E.D. Pa. 1962); *United States v. General Elec. Co.*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70488, at 76984 (E.D. Pa. 1962). An earlier decree, however, does prohibit unreasonably low prices. *United States v. Foster-Wheeler Corp. (C.H. Wheeler Mfg. Co.)*, TRADE REG. REP. (1961 Trade Cas.) ¶ 70035, at 78121 (E.D. Pa. 1961).

9. In the continual congressional hearings on the problems of small business and related matters in recent years, complaints of selling below cost, use of loss leaders, and predatory practices generally have appeared regularly. In addition to those already cited, see *Hearings Before a Subcommittee of the Senate Select Committee on Small Business*, 85th Cong., 2d Sess. (1958) ("Competitive Impact of Discount-House Operations on Small Business" and "The Role of Private Antitrust Enforcement in Protecting Small Business"). See also *Hearings Before a Subcommittee of the House Select Committee on Small Business*, 88th Cong., 1st Sess. (1963) ("The Impact Upon Small Business of Dual Distribution and Related Vertical Integration").

10. 49 Stat. 1528 (1963), 15 U.S.C. § 13a (1958).

11. This is so particularly in Ohio, where there is no sale below cost act of general application. The original Ohio "Unfair Cigarette Sales Act," OHIO GEN. CODE §§ 6402-11 to 20 (1941), was held unconstitutional in *Serrer v. Cigarette Serv. Co.*, 74 N.E.2d 841 (Ohio C.P. 1946), *aff'd*, 74 N.E.2d 853 (Ohio Ct. App. 1947), *aff'd*, 148 Ohio St. 519, 76 N.E.2d 91 (1947) on the ground that it failed to recognize cost differentials between "service" and "cash and carry" wholesalers. The act was subsequently amended in various particulars, but has not yet been tested constitutionally in its present form (OHIO REV. CODE §§ 1333.11-21). See *State v. Thiemann Bros.*, 91 Ohio L. Abs. 345 (Ohio Ct. App. 1960).

12. Weston, *Fair Trade, Alias "Quality Stabilization": Status, Problems and Prospects*, 22 A.B.A. ANTITRUST SECTION REP. 76 (1963), notes in detail the legal and practical objections to the proposed legislation.

13. Many of the state acts provide statutory markups to cover the cost of doing business

The following review covers the current status of the state laws and the unreasonably low price clause of section 3 of the Robinson-Patman Act in the light of the Supreme Court's opinion in *United States v. National Dairy Products Corp.*¹⁴ Coverage of both state and federal law necessitates a rather general treatment, particularly in regard to the numerous and varied state acts. However, a broad review of the hazards of extremely low prices, apart from questions of discrimination in price — which are covered by other portions of section 3 as well as section 2 of the Robinson-Patman Act and a number of state acts — may be useful to the lawyer faced with a problem in this area.

THE STATE STATUTES

In General

Of the thirty state statutes prohibiting sales below cost, nineteen apply only to such sales by retailers and wholesalers.¹⁵ Similar acts dealing only with particular types of merchandise, chiefly dairy and tobacco products, have been enacted in many of the same states and several other states as well.¹⁶

which must be applied in the absence of proof of a lower cost. In view of the difficulty of proving a lower cost, strict enforcement of these acts could have much the same effect as resale price maintenance legislation.

14. 372 U.S. 29 (1963).

15. ARIZ. REV. STAT. ANN. §§ 44-1461 to -1466 (1956); ARK. STAT. §§ 70-301 to -314 (1947); CAL. BUS. & PROF. CODE §§ 17000-101; COLO. REV. STAT. ANN. §§ 55-2-1 to -17 (1953); CONN. GEN. STAT. REV. §§ 42-111 to -115 (1962); HAWAII REV. LAWS §§ 205-1 to -13 (1955); IDAHO CODE ANN. §§ 48-401 to -413 (1948); KY. REV. STAT. §§ 365.030-070, .990 (1959); LA. REV. STAT. §§ 51:421 to :427 (1950); MASS. ANN. LAWS ch. 93, §§ 14E-K (1954); MD. ANN. CODE art. 83, §§ 111-15 (1957); ME. REV. STAT. ANN. ch. 184, §§ 1-7 (1954); MINN. STAT. ANN. §§ 325.01-07, .48, .49, .52 (1961); MONT. REV. CODES ANN. § 51-101 to -118 (1947); N.D. REV. CODE §§ 51-10-01 to -08 (1960); NEB. REV. STAT. §§ 59-1201 to -1206 (1943); N.H. REV. STAT. ANN. §§ 358:1-5 (1955); N.J. REV. STAT. § 56:4-7 to -14 (1940); OKLA. STAT. tit. 15, §§ 598.1-11 (1951); ORE. REV. STAT. § 646.100-180, 990 (1953); PA. STAT. ANN. tit. 73, §§ 211-17 (1953); R.I. GEN. LAWS ANN. §§ 6-13-1 to -8 (1956); S.C. CODE § 66-65 (1962); TENN. CODE ANN. §§ 69-109 to -110, -301 to -306 (1955); UTAH CODE ANN. §§ 13-5-1 to -18 (1953); VA. CODE ANN. §§ 59-9 to -19-1 (1950); WASH. REV. CODE ANN. § 19.90.010 -.920 (1939); W. VA. CODE §§ 4678(8a)-(8n) (1961); WIS. STAT. ANN. § 100.30 (1961); WYO. STAT. ANN. § 40-24 to -33 (1957). [Hereinafter reference to the acts will be by state name only.] These acts, including recent amendments, are reported in the compilation of state laws in 4 TRADE REG. REP. §§ 30000 -35530. Of the foregoing, only the acts of Arkansas, California, Colorado, Hawaii, Kentucky, Montana, Oregon, South Carolina, Tennessee, Washington, and Wyoming apply to manufacturers. The Utah act originally was applicable to all levels, but was amended in 1955 to apply only to wholesalers and retailers. However, some references to "production" and "manufacturers" remain. The statutes of South Carolina and Tennessee (which has a separate provision applicable only to manufacturers, as well as the usual type of act applicable to wholesalers and retailers) lack many of the details discussed below and are not typical of the class of acts covering manufacturers.

16. Other products covered by special acts are alcoholic beverages, drugs and cosmetics, petroleum products, bakery products, and agricultural products. The number and variety of the special acts precludes full citation and analysis in this article. In general, the analysis below is applicable to the special acts, and cases arising under the special acts are cited wher-

The individual acts within each of the two basic categories of below cost acts (*i.e.*, those applying only to the distributive trades, and those of general application) have many features in common. But there is also a good deal of cross-breeding between the strains, and nearly all of the acts have peculiarities of their own. Thus, while particular phrases, sentences, and sections appear again and again, the individual acts often contain departures from the pattern which may materially affect their coverage, application to particular facts, or constitutional validity. Moreover this crazy-quilt of legislation is constantly changed by amendments and interpretations which reflect the continuing political and legal struggle over the acts. Nonetheless, many similarities remain. A brief summary of the usual features of these statutes will provide a framework for consideration of the discussion which follows.

Generally, the two basic elements of an offense under the state acts are the sale below cost and the intent to injure competition or competitors. In the acts applying only to distributive businesses, proof of the sale below cost is aided by a statutory markup (a percentage of the lower of invoice or replacement cost, less discounts, plus freight) which must be included to cover the cost of doing business unless a lower cost can be shown. The acts of general application usually itemize the elements of cost to be included. A number of states permit proof of effect on competition or competitors in lieu of intent. When intent *is* required, a presumption of illegal intent upon proof of the sale below cost is frequently provided. Several of the acts cover "loss leaders" by describing illegal intent or effect in terms of "inducing the purchase of other merchandise" or the "tendency to deceive" purchasers. Offenders are subject to criminal prosecutions or civil damage actions. Injunction proceedings also usually are available to "any person," often without regard to actual or threatened damage. Treble damages are recoverable in several states.¹⁷

Scope of Coverage

The most important restriction on the coverage of the state laws is the limitation to the distributive trades contained in nearly two-thirds of the acts.¹⁸ Selling at retail is almost always defined as selling to pur-

ever they are pertinent. Where there are both general and special acts, the latter are considered controlling, particularly when subsequently enacted. *Henderson v. Hogue*, TRADE REG. REP. (1956 Trade Cas.) ¶ 68462, at 71933 (Tenn. Ct. App. 1956).

17. The sale below cost acts have generated a substantial body of literature. 1 CALLMANN, UNFAIR COMPETITION AND TRADE MARKS § 27 (2d ed. 1950), and Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105 (1957) consider state laws generally; and Annot., 118 A.L.R. 506 (1939) and Annot., 128 A.L.R. 1126 (1940) review many of the principal cases on the subject. Other studies of particular aspects of the acts are noted below.

18. See note 15 *supra*.

chasers "for consumption or use other than resale or further processing or manufacturing"; and selling at wholesale is defined as selling "for the purpose of resale or further processing or manufacturing" by the buyer.¹⁹ Anyone "in the business of making sales" at retail or wholesale is a "retailer" or "wholesaler."²⁰

Selling at wholesale, if literally construed, is so broadly defined as to cover even a manufacturer's industrial sales or sales to wholesalers. Such an approach would, of course, render the apparent limitation of the acts to wholesalers and retailers meaningless. A better view is that the acts, considered as a whole, contemplate only the traditional forms of distributive businesses, and that the breadth of the definition of selling at wholesale was intended only to prevent evasions and insure that all types of sales by wholesalers were covered. Even in the case of a manufacturer clearly selling as a wholesaler and retailer, this type of act has been held inapplicable due to the lack of cost criteria appropriate for a manufacturer.²¹ However, the acts do specifically cover distribution businesses which sell at both retail and wholesale, providing that the sale in question is to be treated in accordance with the statutory provisions for the level at which it was made.²²

Service trades are expressly covered by most of the acts applying to sales, regardless of functional level.²³ The acts limited to wholesalers and retailers do not include services, and the cost computations and presumptions based on invoice or replacement cost which this type of statute employs would be difficult to adapt to service businesses.

A few of the acts exempt certain types of business.²⁴ The Kansas act

19. Some elaboration or variation is contained in the Minnesota and North Dakota acts. Acts which apply to manufacturers do not define the different levels, although the definitions of cost distinguish distributive businesses from producers. Tennessee defines wholesalers more narrowly. Oregon's definitions apply only to wholesalers and retailers in "food commerce."

20. Of the acts applying only to distribution, all but Utah define retailers or wholesalers in this manner. The Pennsylvania act apparently does not cover a manufacturer selling at retail so long as it is "not operating a retail business or trade . . ." PA. STAT. ANN. tit. 73, § 212(6) (1953). Taken literally, a manufacturer operating a *wholesale* business would not be covered, but the wording of § 212(7) may be inadvertent. Nebraska and Louisiana specifically exempt sales by manufacturers (or processors in Nebraska) from the act entirely.

21. *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 153 Me. 265, 136 A.2d 542 (1957). The Maine statute was, in fact, even more specific, referring in § 1 VIII to "a retailer [who] sells at retail any merchandise which is the product of his or its own manufacture. . . ." ME. REV. STAT. ANN. ch. 184, § 1 VIII (1954).

22. Of the distribution acts, only Minnesota, New Jersey, Utah, and Tennessee lack an express provision to this effect. Cf. Hawaii. Several acts also cover "direct buyers," *i.e.*, retailers who buy from manufacturers but do not sell at wholesale. These acts are discussed below in connection with the problems of cost analysis.

23. Of the acts of general application, only South Carolina, Tennessee, and Wyoming do not cover services. Cf. provisions dealing with services to *personalty* in Hawaii, Montana, Utah, and Wyoming, appearing in their exemption sections.

24. Motion picture licenses and utility rates are exempted in California, Colorado, Hawaii (motion pictures only), Kentucky, and Washington. Fertilizer companies and those buying from them for resale are exempt in Virginia. Connecticut (as amended in 1963) exempts petroleum products; and special provisions for certain products occasionally are included in

recently was held unconstitutional in its entirety because of its "arbitrary" exemption of grain and feed dealers.²⁵ Although there is earlier authority to the contrary, this decision may lead to similar challenges to other acts with such exclusions.²⁶

Nearly all of the acts exempt certain types of transactions, but there is substantial variation from state to state. Sales for charitable purposes; clearance sales; liquidation or close-out sales; sales of damaged, deteriorated, or perishable goods; sales pursuant to court order; and sales to the government or government agencies are the transactions most frequently exempted.²⁷ Accommodation sales, "isolated transactions" not in the ordinary course of business, and a few other exemptions appear in some of the acts.²⁸

The state statutes cover advertisements or offers of sale as well as sales and usually cover conditional sales expressly.²⁹ Gifts also are included in a number of jurisdictions.³⁰ The effect, of course, is to make

the general acts rather than in separate special acts. Minnesota, Oregon, and Rhode Island include such provisions.

25. *State v. Consumers Warehouse Mkt.*, 185 Kan. 363, 343 P.2d 234 (1959). The Kansas act was repealed in 1961. KAN. LAWS 1961, ch. 236, at 573.

26. *Contra*, *State v. Sears*, 4 Wash. 2d 200, 103 P.2d 337 (1940), where the statute exempted the licensing of motion picture films. The court did not consider that the class created was arbitrary or unreasonable and noted the "wide measure of discretion" open to the legislature. The same question may arise in regard to the validity of the special acts. In *San Antonio Retail Grocers, Inc. v. Lafferty*, 156 Tex. 574, 297 S.W.2d 813 (1957), an act limited to sales made by "grocery stores," regardless of the type of goods sold, was found unconstitutional because of lack of relationship between the purpose of the act and the class to which it applied. The Missouri and Louisiana milk acts, however, recently have been upheld in *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. 1962) and *Schwegmann Bros. Giant Super Mkts. v. McCory*, 237 La. 768, 112 So. 2d 606, *appeal dismissed*, 361 U.S. 114 (1959). The New Jersey Gasoline Act was sustained in *Fried v. Kervick*, 34 N.J. 68, 167 A.2d 380 (1961). Where there is a background of severe price wars or other special facts and the act applies to all in the industry, an attack based on unreasonable and discriminatory application may fail. However, the arbitrary exclusion of certain businesses from the general acts presents a stronger case.

27. For example, Connecticut, Maine, Maryland, Nebraska, and others include all these exemptions; and some form of exemption for liquidation or clearance sales and sales of damaged, deteriorated, or perishable goods appears in nearly all. These exemptions usually require that clearance sales and the like be advertised, marked, and sold as such. Occasionally the acts are more elaborate in this respect, see, *e.g.*, California and Oregon. Only the Idaho, and North Dakota acts expressly provide that the burden is upon the defendant to prove such exemptions. Selling below cost to meet competition is included among these exemptions, but is discussed separately below.

28. "Isolated transactions" are exempt in Maine, Massachusetts, New Hampshire, Rhode Island, and Tennessee. Accommodation sales are exempt in Virginia, bona fide auction sales in Oklahoma, and sales of tools to employees in Pennsylvania.

29. Of the acts applying only to wholesalers and retailers, all but Louisiana, Minnesota, and Utah expressly cover conditional sales. The acts applicable to manufacturers do not do so.

30. The acts of general application all cover gifts; also, the Minnesota, North Dakota, and West Virginia acts apply only to distribution. In *United Retail Grocers Ass'n v. Harrison's Sons*, 89 Pa. D.&C. 294 (C.P. 1953), the court held that a gift of 5 lbs. of sugar with purchases of \$7.99 or more was not a violation. Pennsylvania did not prohibit gifts as such, and the use of gifts to stimulate business was not considered a subterfuge to evade the act. Several of the acts specifically cover evasion by means of any scheme of special rebates, col-

gifts illegal if the other requirements of the act are met, since the gift will inevitably be below cost. There also are specific provisions for combination sales, *i.e.*, where more than one item is covered by a combined price or one item is "given" with another. These provisions are rather ambiguous, but have been interpreted as requiring that the price cover the total cost of the items included.³¹ While the requirement of predatory purpose or anticompetitive effect may insulate gifts or promotional deals of small value or those not conditioned on purchases of other goods,³² substantial promotional arrangements directly tied to purchases are more likely to be challenged, particularly under the statutes which do not require proof of predatory intent.³³

Many cases hold that trading stamps do not have to be treated as a price reduction. In *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*,³⁴ the Oklahoma Supreme Court held that the value of the stamps did not have to be deducted from a price which then would have been below cost. Safeway could not meet its competitor's use of stamps by an offsetting price cut equivalent to the value of the stamps.³⁵ On appeal,

lateral contracts, and the like. See, *e.g.*, the California, Minnesota, and Washington acts. Idaho added such a provision in 1963.

31. *State v. Tankar Gas, Inc.*, 250 Wis. 218, 26 N.W.2d 647 (1947); *United Retail Grocers Ass'n v. Harrison's Sons*, *supra* note 30. Of the distribution acts, only Minnesota, New Jersey, South Carolina, and West Virginia lack such provisions. Colorado requires that the price cover the total cost of all items. Utah and Wisconsin (under amendments subsequent to the *Tankar Gas Inc.* case) require separate treatment only if "individually" sold, otherwise requiring that the price cover the aggregate cost. Louisiana requires that the cost of services in connection with the sale of goods to purchasers must be considered a reduction in price.

32. *Miller's Groceteria Co. v. Food Distribs. Ass'n*, 107 Colo. 113, 109 P.2d 637 (1941). In Washington, the Attorney General ruled that "welcome wagon" gifts were not a violation. 55-57 OPS. ATT'Y GEN. 83 (Wash. 1955). See also the following attorneys general opinions: TRADE REG. REP. (1953 Trade Cas.) ¶ 67589, at 68875 (Ky. 1953); TRADE REG. REP. (1940-43 Trade Cas.) ¶ 56213, at 767 (Cal. 1942); *Id.* ¶ 56008, at 31 (Earl Warren). TRADE REG. REP. (1955 Trade Cas.) ¶ 68065, at 70443 (Wash. 1955).

33. In *Robinson v. Hayes*, TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62781, at 64311 (Tenn. Ct. App. 1951), a lottery type of promotion known as a "suit club" was struck down because particular sales were below cost even though the plan as a whole was highly profitable. *Contra*, *Eckdahl v. Hurwitz*, 56 Wyo. 19, 103 P.2d 161 (1940).

Temporary injunctions were granted against give-away promotions of one sort or another under the Minnesota act, but the more stringent standard of effect required in *State v. Applebaum's Food Mkts., Inc.*, 259 Minn. 209, 106 N.W.2d 896 (1960) (which involved prizes and bonus stamps, etc.) may require a different approach in future cases there. The *Applebaum's* case is considered further below.

34. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 322 P.2d 179 (Okla. 1957), *aff'd*, 360 U.S. 334 (1959). See also *Sperry & Hutchinson Co. v. Margetts*, 15 N.J. 203, 104 A.2d 310 (1954); *Trade Comm'n v. Bush*, 123 Utah 302, 259 P.2d 304 (1953); Annot., 70 A.L.R.2d 1080 (1960). *But see* *Hogue v. Kroger Co.*, 210 Tenn. 1, 356 S.W.2d 267 (1962) (where the contrary conclusion was reached under a statute containing more specific language). There is a division of authority on this question under the fair trade acts. *Jantzen v. Korvette, Inc.*, 219 F. Supp. 604 (S.D.N.Y. 1963). See Annot., 22 A.L.R.2d 1212 (1952). The meeting competition and computation of cost aspects of trading stamps are considered *infra*.

35. "Cash" discounts, apart from trading stamps, have received little consideration. They, of course, would have to be treated as such on the books and limited to cash transactions. Price tags and advertising would have to reflect the full price. Even if such procedures are

the United States Supreme Court upheld this ruling, concluding that the state could distinguish constitutionally between the use of stamps and price cutting. Since the statute in question was aimed at loss leader practices, and the stamps were given only on total purchases rather than selectively, the Court affirmed its validity. Safeway's only recourse to match its competitor was to give stamps, which it started doing during the course of the litigation.³⁶ However, assuming that other elements of a violation are present, giving large quantities of "bonus" stamps might fall outside the *Safeway* interpretation, particularly if extra stamps are given on particular items.³⁷

Computation of Cost

Under the acts limited to wholesale and retail businesses, the cost base is the lower of invoice or replacement cost, after trade discounts, plus freight and cartage. A certain percentage of this base then must be added to cover the cost of doing business.³⁸ These statutory markups vary from 4% to 12% for retailers (most are around 6%), but are uniformly 2% for wholesalers.³⁹ In Minnesota, however, sales *above* a 15% markup are conclusively legal.

Since there is no comparable cost base for producers, the group of acts which prohibit sales below cost regardless of functional level usually define costs separately for production and distribution. Included in production are raw materials, labor, and overhead; and for distribution, the lower of invoice or replacement cost plus the "cost of doing business" must be taken into account. Both the "cost of doing business" and "overhead" are then further defined as including, without limitation,

carefully observed, adoption of cash discounts by businesses formerly operating on an exclusively cash basis might well be considered a sham, as would discounts in excess of amounts customary in the trade.

36. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 360 U.S. 334, 339 n.3 (1959).

37. Safeway's use of stamps to meet a competitor's use of stamps was limited to 3% by the Oklahoma court. *Id.* at 339. Giving bonus stamps and discount coupons was attacked in *State v. Applebaum's Food Mkts.*, 259 Minn. 209, 106 N.W.2d 896 (1960), but the court found the evidence of intent or effect insufficient. See also TRADE REG. REP. (1955 Trade Cas.) ¶ 68100, at 70569 (Idaho Att'y Gen. Op. 1955); *Trade Comm'n v. Bush*, 123 Utah 302, 259 P.2d 304 (1953).

38. Of the distribution statutes, only New Jersey and North Dakota are without such provisions, but a few other states do not use the presumptions for wholesalers. Cartage also is subject to a presumption, usually .75%. Some of these acts provide that the manufacturer's list, less discount, is prima facie evidence of invoice or replacement cost. See Idaho, Minnesota, and North Dakota acts.

39. As to retailers, Pennsylvania (4%) and Arizona (12%) represent the extremes. Pennsylvania does not permit invoice cost to be reduced by advertising allowances or the like. Cost presumptions have been found invalid on constitutional grounds in some circumstances. See *Cohen v. Frey & Sons*, 197 Md. 586, 80 A.2d 267 (1951); *Serrer v. Cigarette Serv. Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947). *Contra*, *Fredericks v. Burnquist*, 207 Minn. 590, 292 N.W. 420 (1940); *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940). However, the controversy has more often centered on the presumptions of intent. See note 58 *infra*.

a number of specific items, *e.g.*, labor (including executive salaries), rent, depreciation, selling expense, maintenance of equipment, interest on borrowed capital, delivery expense, credit losses, licenses, taxes, insurance, and advertising.⁴⁰ Acts of this type ordinarily do not employ markup percentages,⁴¹ but nearly all such acts include provisions for the admissibility of cost surveys so long as they are "established" and limited to the "locality" of the alleged sale below cost.⁴²

Most of the acts expressly provide that cash discounts on purchases may not be used to reduce the costs to the *buyer*.⁴³ However, a *seller* must include the cost of trading stamps or cash discounts as a cost of doing business.⁴⁴

The limitation to "bona fide" costs has created constitutional problems for some of these acts. In most of the acts, an effort is made to exclude from cost computations the cost of merchandise purchased at forced sales

40. South Carolina and Tennessee do not list the items of cost, and the Oregon act adds some items to the usual list. Otherwise this group of acts is fairly uniform in this respect. The joint definition of "cost of doing business" and "overhead" results in double treatment of labor, since labor already is included as a cost of production independent of "overhead." The listing of cost elements is similar to that of the Trade Practice Rules for the Slide Fastener Industry, 16 C.F.R. § 193, 193.3 (1960). There, however, the cost of borrowing is expressly excluded.

41. Hawaii has a 6% markup for "distributors"; Oregon has a 6% markup for retailers in food commerce. California uses a 6% presumption for the cost of doing business in distribution and also provides presumptions for specific elements of cost, *i.e.*, evidence of published tariffs, prevailing wage rates, and the prevailing market price of raw materials will be presumptive evidence of the cost of those items. Moreover, the cost of wages must be charged at the prevailing rate even if actually lower. A similar provision in the Washington act was held valid in *State v. Sears*, 4 Wash. 2d 200, 103 P.2d 337 (1940).

42. The Tennessee and South Carolina acts, and all acts limited to distribution, except Utah, lack such provisions. Utah expressly provides that such surveys are *prima facie* evidence of cost. It is the only act which does so, though Minnesota formerly had such a provision. It was declared unconstitutional in *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938). See also *Civic Ass'n v. Railway Motor Fuels, Inc.*, 57 Wyo. 213, 116 P.2d 236 (1941), which discusses at length the problem of adequate survey techniques. The price-fixing use of surveys is discussed in Comment, *Sales Below Cost Prohibitions: Private Price Fixing Under State Law*, 57 YALE L.J. 391, 413 (1948). [Hereinafter cited as Comment, 57 YALE L.J. 391 (1948).]

43. The Arkansas, Colorado, Kentucky, Nebraska, Oregon, South Carolina, Washington, and Wyoming acts make no provision with regard to cash discounts. Contrary to the general approach, North Dakota expressly provides that cash discounts are to be used to reduce the buyer's cost, and the same conclusion might be reached in the absence of express provision. *People v. Lucky Stores, Inc.*, TRADE REG. REP. (1950 Trade Cas.) ¶ 62623, at 63814 (Cal. Super. Ct. 1950). The refusal to recognize cash discounts as a reduction of cost may be invalid constitutionally where the effect is discriminatory. *Cohen v. Frey & Sons*, 197 Md. 586, 80 A.2d 267 (1951); *Serrero v. Cigarette Serv. Co.*, 148 Ohio St. 519, 76 N.E.2d 91 (1947).

44. TRADE REG. REP. (1955 Trade Cas.) ¶ 68100, at 70569 (Idaho Att'y Gen. Op. 1955). *Trade Comm'n v. Bush*, 123 Utah 302, 259 P.2d 304 (1953). This approach would make little practical difference, since proof of actual cost is seldom attempted, and trading stamps or cash discounts would be a cost of doing business within the markup fixed by the statute. The Utah act was amended in 1955 to require that cash discounts, including trading stamps, be considered a reduction in selling price, but the act still provides that cash discounts cannot be used to reduce the cost to the buyer.

such as bankruptcy, liquidation sales, closeouts, etc.⁴⁵ Some acts, however, only describe such costs as those "which cannot be justified by prevailing market conditions." This type of wording has been found unconstitutionally vague.⁴⁶

While acts limited to sales at wholesale or retail may be inapplicable to vertically integrated manufacturers,⁴⁷ they do cover concerns combining wholesale and retail functions. Occasionally they also contain express provisions for "direct buyers," *i.e.*, retailers who purchase from manufacturers but do not sell at wholesale. The acts which apply generally, regardless of functional level, would, of course, apply to manufacturers selling at wholesale and retail. Problems of cost computation are presented under either type of act.

If there are *sales* at both wholesale and retail, the distribution acts usually provide that the sale in question is to be treated in accordance with the statutory provisions applicable to the level at which it is made. Thus, only the statutory markup for that functional level would be applied, and a retail sale would carry only the retail markup, even if bought at a wholesaler's price and quantity. However, if proof of actual costs were attempted, it would seem that a retail sale should bear a proportionate part of the cost of wholesale functions performed in connection with the goods sold at retail. Where the acts provide for "direct buyers," statutory markups for retail and wholesale must be aggregated.⁴⁸ Presumably, actual costs for all functions performed in connection with the sale, regardless of whether retail or wholesale in nature, also would be aggregated.

The acts of general application presumably require proof of all costs attributable to the sale in question. Nevertheless, it is often asserted that vertically integrated companies "subsidize" their distribution operations out of profits from manufacturing. Hence, it may be argued that

45. Only Maryland, North Dakota, Pennsylvania, and South Carolina lack some such provision.

46. *State v. Consumers Warehouse Mkt. Inc.*, 183 Kan. 502, 329 P.2d 638 (1958), and cases cited therein; *Englebrecht v. Day*, 208 P.2d 538 (Okla. 1949). The Oklahoma statute was subsequently amended. Connecticut, Idaho, Louisiana, Maine, Massachusetts, Nebraska, New Jersey, Rhode Island, Tennessee, Virginia, and Wisconsin have similar provisions.

47. See note 21 *supra*.

48. This approach is taken in Connecticut, Idaho, Louisiana, Maine, Maryland, New Hampshire, Pennsylvania, Virginia, and Wisconsin. The Ohio Unfair Cigarette Sales Act contains a direct buyer provision of this general type. OHIO REV. CODE § 1333.11 (D). Massachusetts and Rhode Island, and New Jersey have unclear provisions which may be meant to produce the same result, although their wording suggests treating the wholesale operations separately even though there are no sales at wholesale. Maine and New Hampshire expressly refer to *manufacturers* selling at retail. *But see* note 21 *supra*. The acts with provisions covering direct buyers usually contain provisions for those selling at *both* wholesale and retail as well. See note 22 *supra* and text thereto. This is so despite the result of charging a "direct buying" retailer with both markups while charging only the retail markup to the retail sales of a concern which also sells at wholesale.

each functional level should be considered independently.⁴⁹ Where sales to others are made at each level, the prices charged on outside sales might be used as the cost to the next lower level on internal transactions. But to do so would neglect the cost savings in handling, selling, or otherwise afforded by integration of functions.⁵⁰ Internal cost figures on transactions between different functional levels of the same company also may be misleading, since they are likely to be based on standard costs developed over a period of time. Although useful to management, they may not reflect actual costs of particular functions accurately.⁵¹ Full analysis of the costs attributable to the sales of an integrated business may be complex and difficult. However, there is no basis in the statutes for artificially compartmentalizing the costs of individual functions, and such an approach is likely to prove unrealistic and inaccurate in practice.

In any event, taken as a whole, the provisions for computation of costs have been of little practical value. Furthermore, this situation seems likely to continue.⁵² Except in such extreme situations as sales below invoice cost, businessmen are unlikely to have adequate cost information available, even if the statutes precisely defined relevant costs and the time in which they are to be measured.⁵³ Thus, in most situations

49. Utah expressly provides that each activity be regarded as separate and distinct for cost purposes, but gives no guidance as to how the costs are to be determined. Wisconsin provides (in addition to the usual "direct buyer" provision) that manufacturers who themselves retail and also sell to other retailers shall be considered "retailers" under the act, and the price to other retailers shall be used for purposes of computing cost to the manufacturer's retail stores.

50. Nonetheless, some companies engaged in dual distribution charge the same price to their own distribution operations as to outsiders. See *Hearings Before Subcommittee No. 4 of the House Select Committee on Small Business*, 88th Cong., 1st Sess. 89, 310 (1963) (The Impact Upon Small Business of Dual Distribution and Related Vertical Integration).

51. Birrell, *The Integrated Company and The Price Squeeze Under the Sherman Act and Section 2(a) of the Clayton Act, as Amended*, 9 A.B.A. ANTI-TRUST SECTION REP. 50, 57 (1956) discusses the accounting problems which arise. See also note 119 *infra*. The proposed "dual distribution" legislation would require that internal transactions between different "establishments" of the same company be treated as sales and made subject to § 2 of the Robinson-Patman Act. S. 1107, H.R. 3562, 88th Cong., 1st Sess. (1963).

52. Attempts to prove actual costs lower than the statutory markups are rare and have met with little success. See *Dikeou v. Food Distribs. Ass'n*, 107 Colo. 38, 108 P.2d 529 (1940). In *Cohen v. Frey & Son*, 197 Md. 586, 80 A.2d 267 (1951), the defendant's cost analysis was found defective in some particulars, but the court refused to disregard it entirely. The cost justification defense under § 2(a) of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13 (1958), which has been described as "largely illusory in practice" in ATTY GEN. NAT'L COMM. ANTI-TRUST REP. 171 (1955), offers little encouragement to those contemplating litigation over questions of cost.

53. A few statutes do provide a period for the analysis of cost. See the California, Minnesota, Oregon, and Washington acts. In *State v. Fleming Co.*, 184 Kan. 674, 339 P.2d 12 (1959), the absence of such provision was among the features which the court found constitutionally objectionable. The opinion in *Borden v. Thomason*, 353 S.W.2d 735 (Mo. 1962) summarizes the testimony of Borden's manager and Professor Taggart of the University of Michigan as to the impossibility of knowing the exact costs. However, the court concluded that a "reasonable" construction of the act, based upon average costs during a reasonable period, would be possible. They noted that the statute, unlike that involved in the *Fleming* case, was civil in nature. See also note 138 *infra*, regarding the difficulties of proving the cost of small businesses.

counsel is forced to view any questionable price in this area as a below cost price, particularly if markup presumptions are provided by the relevant statute.

Intent and Effect

Outright prohibitions of sales below cost regardless of intent or effect have been held invalid on constitutional grounds.⁵⁴ The courts are divided, however, on the validity of acts which require either intent or effect.⁵⁵ The presumptions designed to facilitate proof of intent or effect⁵⁶ also have run into serious constitutional problems. The reasons given for constitutional invalidity are lack of a rational connection between the fact proved and the fact presumed or the effect of removing the presumption of innocence in criminal cases.⁵⁷ There is, however, a division of authorities on this matter, and the question remains unsettled in many jurisdictions.⁵⁸

54. See *Lief v. Packard-Bamberger & Co.*, 123 N.J.L. 180, 8 A.2d 291 (Sup. Ct. 1959); *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A.2d 67 (1940). The Pennsylvania act was subsequently revised, but the New Jersey act is unchanged. *But see* *May's Drug Stores, Inc. v. State Tax Comm'n*, 242 Iowa 319, 45 N.W.2d 245 (1950) (upholding Iowa Unfair Cigarette Sales Act which required neither intent nor effect, but distinguishing the *Zasloff* and *Packard-Bamberger & Co.* cases as involving *general* acts).

55. *Englebrecht v. Day*, 208 P.2d 538 (Okla. 1949) held that the absence of a requirement of intent rendered the Oklahoma act unconstitutional. However, the act was later amended to require intent. See *Adwon v. Oklahoma Retail Grocers Ass'n*, 228 P.2d 376 (Okla. 1951). The Nebraska act was found invalid when it required only effect. *State ex rel. English v. Ruback*, 135 Neb. 335, 281 N.W. 607 (1938). The Oregon act, which formerly required only effect, never was tested. In 1963, the act was amended to require intent instead of effect. The Nebraska act was later amended to require intent *or* effect, but in *Hill v. Kusy*, 150 Neb. 653, 35 N.W.2d 594 (1949), this language was interpreted as requiring intent in all cases. See also *State v. Walgreen*, 57 Ariz. 308, 113 P.2d 650 (1941). *Contra*, *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940); *Borden v. Thomason*, 353 S.W.2d 735 (Mo. 1962); *McIntire v. Borofsky*, 95 N.H. 174, 59 A.2d 471 (1948).

56. There is considerable variety in approach. In Maryland, Massachusetts, New Hampshire, North Dakota, Oklahoma (for civil actions only), Rhode Island, Virginia, West Virginia, and Wisconsin, the sale below cost alone raises the presumption. The California, Hawaii, Minnesota, and Washington acts require a showing of effect as well. Arizona, Idaho, Louisiana, Pennsylvania, and Tennessee require proof of a sale "in contravention of the policy" of the act to make a prima facie case of violation. In *State v. 20th Century Mkt.*, 236 Wis. 215, 294 N.W. 873 (1940), the court required proof of intent under such a provision. The Wisconsin act later was amended to require only the sale below cost. After presumptions based on the sale alone were declared unconstitutional, Connecticut and Maine now require a showing of *repeated* sales below cost before the presumption arises. California (by amendment in 1961) and Oregon (by amendment in 1963) provide a presumption of intent applicable only to retailers upon proof of a sale below cost and limitation of the quantity offered.

57. *Great Atl. & Pac. Tea Co. v. Ervin*, 23 F. Supp. 70 (D. Minn. 1938); *Mott's Super Mkt., Inc. v. Frassinelli*, 148 Conn. 481, 172 A.2d 381 (1961); *Wiley v. Sampson-Ripley Co.*, 151 Me. 400, 120 A.2d 289 (1956). The Minnesota act later was amended and upheld in *McElhone v. Geror*, 207 Minn. 580, 292 N.W. 414 (1940).

58. Such presumptions were upheld in *People v. Pay Less Drug Store*, 25 Cal. 2d 108, 153 P.2d 9 (1944); *McIntire v. Borofsky*, 95 N.H. 174, 59 A.2d 471 (1948); *State v. Ross*, 259 Wis. 379, 48 N.W.2d 460 (1951). Similar provisions under acts limited to particular products were upheld in *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 237 La. 768, 112 So. 2d 606, *appeal dismissed*, 361 U.S. 114 (1959); *Rocky Mt. Wholesale Co. v. Ponca Wholesale Mercantile Co.*, 68 N.M.2d 228, 360 P.2d 643, *appeal dismissed*, 368 U.S. 31 (1961); *Borden Co. v. Thomason*, 353 S.W.2d 735 (Mo. 1962).

Where presumptions are lacking or when rebuttal evidence is offered, acute problems of interpretation remain because of the difficulty in distinguishing normal competitive intent or effect from conduct made illegal by the statutes. The two most common types of statutes are those which require the intent or purpose of "injuring competitors" and those which require "the intent or effect of inducing the purchase of other merchandise or unfairly diverting trade from a competitor."⁵⁹

An intent to injure competitors or "unfairly" divert trade from them is not readily distinguishable from an intent merely to win increased business. Generally, the cases have held that "specific" intent is required,⁶⁰ but it is not yet clear what this means in practical realities. It may be enough for the defendant to show that his motive was merely to promote his own business⁶¹ or that the sale below cost was simply a mistake;⁶² but his case will be stronger if he can show a background of prior losses of business⁶³ or the presence of a "legitimate commercial objective" apart from the desire to increase business.⁶⁴

The required effect on competitors is equally unclear. A recent Minnesota Supreme Court decision held that affidavits by competitors stating generally their conclusion that they had suffered business losses during the period in question were insufficient to establish illegal effect.⁶⁵ A more stringent approach is reflected in the vigorous dissent by the then Justice Loevinger. He argued that the evidence was ample, particularly since mere threatened injury was sufficient to support a motion for temporary injunction. Moreover, the act required only intent or effect, and the dissent argued that intent could be inferred from the sale below cost.

Where the requirement of effect is described only as "unfairly" to

59. Arizona, Connecticut (as amended in 1963), Idaho, Louisiana, Minnesota, Nebraska, New Hampshire, North Dakota, Pennsylvania, and Tennessee have "intent or effect" laws, most of which include the quoted language. Of the "intent" acts, Oklahoma, Virginia, West Virginia, and Wisconsin employ such wording. See also note 68 *infra*.

60. See, e.g., *Perkins v. King Scoopers*, 122 Colo. 263, 221 P.2d 343 (1950); *Mott's Super Mkts., Inc. v. Frassinelli*, 148 Conn. 481, 172 A.2d 381 (1961); *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957). But see the dissent in *State v. Applebaum's Food Mkts.*, 259 Minn. 209, 106 N.W.2d 896 (1960) and cases cited therein. A background of mere hostility between the parties does not prove illegal intent. *Ellis v. Dallas*, 113 Cal. App. 2d 234, 248 P.2d 63 (1952). See note 109 *infra*.

61. *Trade Comm'n v. Bush*, 123 Utah 302, 259 P.2d 304 (1951); *Ellis v. Dallas*, *supra* note 60; *Mott's Super Mkts., Inc. v. Frassinelli*, *supra* note 60.

62. See *State v. Applebaum's Food Mkts.*, 259 Minn. 209, 106 N.W.2d 896 (1960) (dissenting opinion). The brief of the United States (on re-argument) p. 41 in *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963) states: "If the seller reasonably thinks that he is not incurring a loss on the sales, that is the end of the matter. . . ."

63. *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957).

64. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963). See also note 116 *infra*, where other "legitimate" sales below cost are considered.

65. *State v. Applebaum's Food Mkts.*, 259 Minn. 209, 106 N.W.2d 896 (1960).

divert trade, the vagueness of such standards may be constitutionally objectionable.⁶⁶ Certainly if the word "unfairly" is to have any meaning, it would seem to require some aggravating circumstances beyond mere loss of business and may differ little from an intent to "injure" competitors.⁶⁷

As already noted, some of the acts are aimed specifically at loss leaders. This is accomplished by mentioning them as such or including "inducing the purchase of other merchandise" in the description of illegal intent or effect.⁶⁸ A California court held that intent was a necessary element of a violation despite some vagueness in the act as applied to loss leaders, while other courts have been reluctant to assume the illegality of loss leaders as such.⁶⁹ In the absence of "bait and switch" tactics, increased markups on "other" goods,⁷⁰ or other deliberately misleading methods of advertising or merchandising below cost items, the mere fact that purchase of other merchandise resulted should not amount to a violation.

Meeting Competition

Few of the statutes apply to transactions involving sales below cost to meet competition.⁷¹ In most, the exemption is limited to sales made in "good faith" to meet "legal" prices, but some acts omit the latter requirement.⁷² In construing the limitation of meeting lawful prices, the

66. See Comment, 58 MICH. L. REV. 905, 913 (1960). *But see* Borden Co. v. Thomason, 353 S.W.2d 735 (Mo. 1962), upholding such language where the act did not provide criminal penalties.

67. *Cf.* State v. Walgreen, 57 Ariz. 308, 113 P.2d 650 (1941); Hill v. Kusy, 150 Neb. 653, 35 N.W.2d 594 (1949).

68. California and Washington prohibit loss leaders per se. See also note 59 *supra*. Colorado, Oregon, and Utah aim at bait and switch tactics directly by separately prohibiting the advertising of goods which the advertiser is not prepared to supply.

69. See Ellis v. Dallas, 113 Cal. App. 2d 234, 248 P.2d 63 (1952); Northern Cal. Food Dealers, Inc. v. Farmers Mkt. of No. Cal. Inc., TRADE REG. REP. (1956 Trade Cas.) ¶ 68402, at 71723 (Cal. Super. Ct. 1956); Mott's Super Mkts., Inc. v. Frassinelli, 148 Conn. 481, 172 A.2d 381 (1961); TRADE REG. REP. (1957 Trade Cas.) § 68742, at 73039 (Tex. Att'y Gen. Op. 1957); Henderson v. Hogue, TRADE REG. REP. (1956 Trade Cas.) ¶ 68462, at 71933 (Tenn. Ct. App. 1956).

70. Rust v. Griggs, 172 Tenn. 565, 113 S.W.2d 733 (1938) involved above normal markups on several items sold as "canning season specials" along with the loss items.

71. Only Connecticut, Rhode Island, and South Carolina do not provide this defense. Other types of exempt transactions are considered above. Meeting competition may be a defense due to absence of predatory intent, whether or not an exemption is expressly provided. See p. 49 *infra*.

72. The Arizona, Idaho, Maryland, Massachusetts, Nebraska, Pennsylvania, and Wisconsin acts require only good faith. California, Idaho, and Washington limit the meeting competition to competitive sales in the "ordinary channels of trade," which excludes competitive liquidation, clearance, or seasonal sales and the like. Oklahoma achieves the same result with different wording. In Cohen v. Frey & Son, 197 Md. 586, 80 A.2d 267 (1951), the court refused to read "lawful" into the Maryland act, although noting authority to the contrary in interpreting the "good faith" meeting of competition defense in § 2(b) of the Robinson-Patman Act, 49 Stat. 1528 (1936), 15 U.S.C. § 13(b) (1958).

decisions have tended to reject any absolute standard of lawfulness on constitutional grounds. Rather, the courts have looked to the seller's belief in the legality of the competing price and the reasonableness of his reaction to it.⁷³ In such an inquiry, the timing of the defendant's cuts in relation to competitive prices,⁷⁴ the duration and amount of the reduction,⁷⁵ the facts indicating that the illegal nature of the competing price was apparent or readily ascertainable, and other similar considerations have been relevant.⁷⁶

The defense of meeting competition is substantive. Most statutes state that the act "does not apply" to meeting competition and other types of exempt transactions. Furthermore, the absolute nature of the exemptions seems to have been accepted without question by the courts.⁷⁷ Thus, so long as the requirements of the exemptions are met, the statutory elements of violation, such as injurious effects on competitors, do not come into play.⁷⁸ But if the requirements for exemption are *not* met, the statutory elements still must be established. Failure to come within the exemption is not equivalent to violation of the act. A seller might, for example, "meet competition" in a business sense with extremely low prices during a different period of time or on different goods than those sold by his competitor. While such pricing might not come within the "meeting competition" exemption, the sale still would be legal if lack of predatory intent could be shown, *e.g.*, where there had been severe price competition and business losses to the competitor.⁷⁹ However, the relationship between the exemption requirements and the elements of viola-

73. See, *e.g.*, *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957). Acts which require a "lawful" competitive price regardless of good faith have been held unconstitutional. *State v. Fleming*, 184 Kan. 674, 339 P.2d 12 (1959); *Lief v. Packard Bamberger & Co.*, 123 N.J.L. 180, 8 A.2d 291 (Sup. Ct. 1939); *Commonwealth v. Zasloff*, 338 Pa. 457, 13 A.2d 67 (1940). Interpretations of the "good faith" requirement of § 2(b) of the Robinson-Patman Act may be relevant, but many questions remain unresolved under that provision as well. The many issues currently in litigation are reviewed in *Robinson-Patman Act's Meeting Competition Defense*, 96 BNA ANTITRUST & TRADE REG. REP. B-1 (May 14, 1963) and *Current Developments in Meeting Competition*, TRADE REG. REP. § 50171, at 55180 (1963).

74. *Northern Cal. Food Dealers, Inc. v. Farmers' Mkt. of No. Cal., Inc.*, TRADE REG. REP. (1956 Trade Cas.) § 68402, at 71723 (Cal. Super. Ct. 1956).

75. *People v. Pay Less Drug Store*, 25 Cal. 2d 108, 153 P.2d 9 (1944); *Sandler v. Gordon*, 94 Cal. App. 2d 254, 210 P.2d 314 (1949).

76. The necessary proof of good faith is spelled out in more detail in Colorado and Minnesota.

77. See, *e.g.*, *State ex rel. Anderson v. Commercial Candy Co.*, 166 Kan. 432, 201 P.2d 1034 (1949); *Cohen v. Frey & Son*, 197 Md. 586, 80 A.2d 267 (1950).

78. As in the analogous situation under the meeting competition defense of § 2(b) of the Robinson-Patman Act, injury to competition is irrelevant. *Standard Oil Co. v. Federal Trade Comm'n*, 340 U.S. 231 (1951).

79. *State v. Wolkoff*, 250 Minn. 504, 85 N.W.2d 401 (1957). See also *People v. Pay Less Drug Store*, 25 Cal. 2d 108, 153 P.2d 9 (1944); *State v. Ross*, 259 Wis. 379, 48 N.W.2d 460 (1951); TRADE REG. REP. (1952 Trade Cas.) § 67410, at 68709 (Utah Att'y Gen. Op. 1952). The same problem may arise outside the meeting competition area. Thus, a sale below cost to close out an unsatisfactory line without the required advertisements, etc. would fall outside the exemption, but the transaction would lack predatory purpose.

tion has received little consideration, and further litigation of this issue can be anticipated.

The extent to which one can sell merchandise below cost to meet competition from products which differ to some degree in quality, styling, brand name, or otherwise has not been fully developed. In spite of restrictive statutory language, some latitude has been permitted where the question has been raised.⁸⁰ Such an approach seems likely to be accepted to afford the small merchant an opportunity to meet private label competition. Law review comments have suggested that a standard based on cross-elasticity of demand might be used.⁸¹ However, if a test such as cross-elasticity of demand is to be of practical significance for the merchant, it should be used with recognition of the businessman's need to act promptly, often with few facts and only rough business judgment to guide him.

If latitude in competitive products is permitted, difficulties will then arise as to what is "meeting" a price where the products clearly compete but are different in brand name or other material respects.⁸² Perhaps the only practicable approach is to evaluate the good faith of the seller in the light of normal business standards and the reasonableness of his response to a competitor's action in view of the usual price relationship between the products. The vagueness and generality of such an approach is preferable to arbitrary and mechanical tests which ignore market realities or more exact techniques of economic analysis not available to the merchant at the time.

Another problem is the effect of trading stamps on the meeting competition defense. The *Safeway* case⁸³ held that stamps were not a matter of price, and that a competitor could not cut prices in an amount equivalent to the value of the stamps if this put him in violation of the statute. Safeway, however, could have given stamps so long as it did so in approximately the same quantity as its competitor. The result seems unfair to the concern which does not wish to employ trading stamps

80. The Arkansas, California, Colorado, Hawaii, Kentucky, Minnesota, Montana, Oregon, Utah, Washington, West Virginia, and Wyoming statutes limit the defense to competitive prices for the "same" article or product. The Idaho, Oklahoma, New Jersey, and Tennessee statutes permit more latitude, and the remaining acts do not cover the point. In *Northern Cal. Food Dealers, Inc. v. Farmers Mkt. of No. Cal. Inc.*, TRADE REG. REP. (1956 Trade Cas.) ¶ 68402, at 71723 (Cal. Super. Ct. 1956), by interpreting "same" as meaning similar rather than identical, the court included differing brands. See also TRADE REG. REP. (1954 Trade Cas.) ¶ 67830, at 69697 (Wis. Art'y Gen. Op. 1954).

81. See Comment, 58 MICH. L. REV. 905, 918 (1960); Comment, 12 SW. L.J. 482, 495 (1958).

82. For example, must a differential between brand name and private label goods be maintained, as the FTC has held, in cases under § 2(b) of the Robinson-Patman Act? *American Oil Co.*, TRADE REG. REP. Dkt. No. 8183, *rev'd on other grounds*, TRADE REG. REP. ¶ 70948 (7th Cir. 1963).

83. *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n*, 322 P.2d 179, *aff'd*, 360 U.S. 334 (1959). Other cases on the point are collected in Annot., 70 A.L.R.2d 1080 (1960).

and stems from the refusal to recognize stamps as a price reduction. Had the stamps been viewed as a price reduction, however, Safeway still would have been unable to meet the reduction without running the risk of having met an unlawful price.

Constitutional Validity

Constitutional attacks on the sale below cost acts have been made on the grounds of vagueness, lack of due process, lack of relation between the means employed and the purpose expressed, burden on interstate commerce, interference with freedom of contract, and many others.⁸⁴ The most important constitutional questions already have been considered in connection with particular aspects of the statutes and their interpretation.

At best, the constitutional challenges to these acts have had modest success. The decisions are divided on the validity of the various presumptions of intent included in many of the acts.⁸⁵ Claims of unconstitutional vagueness occasionally have been successful, but only in respect to particular portions of the acts in question.⁸⁶ More often, the courts have sustained the statutory language, stating that a reasonable, good faith interpretation will be sufficient, and that the statutes need not define every particular, especially if the proceeding is not penal.⁸⁷ Some success has been achieved by challenges based on unreasonable classification. Legislation containing arbitrary exclusions is more likely to be tested in this respect in light of *State v. Consumer's Warehouse Mkt.*⁸⁸ Objections based on burden on interstate commerce⁸⁹ and alleged conflicts with federal legislation⁹⁰ have been given short shrift.

84. CALLMANN, *THE LAW OF UNFAIR COMPETITION AND TRADE MARKS* § 27.3 (2d ed. 1950) gives a general survey of the constitutional problems, as does Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105, 107 (1957). Careful consideration of cases under the state constitution as well as the federal may be valuable. In *Simonetti Inc. v. State*, 272 Ala. 398, 132 So. 2d 252 (1961), the court interpreted the Alabama cigarette act narrowly, as required under the Alabama constitution, even though they conceded that the federal constitution would permit a less restrictive view. See also *Williams v. Hirsh*, 211 Ga. 534, 87 S.E.2d 70 (1955).

85. See notes 57 and 58 *supra*.

86. See, e.g., *State v. Walgreen Drug Co.*, 57 Ariz. 308, 113 P.2d 650 (1941); *State v. Fleming Co.*, 184 Kan. 674, 339 P.2d 12 (1959); *State v. Consumers Warehouse Mkt. Inc.*, 183 Kan. 502, 329 P.2d 638 (1958); *McIntire v. Borofsky*, 95 N.H. 174, 59 A.2d 471 (1948).

87. See, e.g., *Flank Oil Co. v. Tennessee Gas Transmission Co.*, 141 Colo. 554, 349 P.2d 1005 (1960).

88. *State v. Consumers Warehouse Mkt. Inc.*, 185 Kan. 363, 343 P.2d 234 (1959); see also note 26 *supra*.

89. *People v. Gordon*, 105 Cal. App. 2d 711, 234 P.2d 287 (1951); *Schwegmann Bros. Giant Super Mkts. v. McCrory*, 237 La. 768, 112 So. 2d 606, *appeal dismissed*, 361 U.S. 114 (1959).

90. *People v. Gordon*, *supra* note 89.

While constitutional attacks upon particular features of these acts may be successful from time to time, it appears clear that the general pattern of the acts is not objectionable to the courts. The Supreme Court's decisions in the *National Dairy* and *Safeway* cases are likely to encourage this attitude. Both opinions reflect general acceptance of the ideas upon which the state acts are based, and the *Safeway* case indicates considerable tolerance for state action in this area. On the other hand, there is no indication that the Supreme Court approves of particular features of these acts. The Court may well evaluate the more anticompetitive aspects of the state legislation with greater awareness than some of the state courts of its over-all relationship to antitrust policy. However, recent rulings of state courts restricting or finding unconstitutional the Connecticut, Kansas, Minnesota, and Texas acts may reflect an increasing recognition of the inconsistency between these acts and the policy of the Sherman Act.

Enforcement, Remedies, and Penalties

In most of the statutes, "any" person may bring an action, frequently without regard to whether he has been directly affected by the sale below cost.⁹¹ Since the public interest is involved, the defense that both parties were in *pari delicto* will not lie.⁹² The state also may enforce these statutes, and a few jurisdictions specifically charge a particular agency or official with enforcement responsibility.⁹³ In the majority of jurisdictions, however, it is the attorney general or the local prosecuting attorney who is authorized to proceed. Relatively little state prosecution has resulted.

The remedies under the state statutes usually are criminal as well as civil. Criminal penalties include fines and/or imprisonment.⁹⁴ Civil actions may be for injunctions, damages, or both. In addition, a number of jurisdictions provide for treble damages as well.⁹⁵ Several states ex-

91. Trade associations are expressly permitted to bring actions under several statutes and presumably would be able to do so under the broad language of a number of others. Ironically, a question arose as to whether the state could bring an injunction action under the California act. *People v. Centr-O-Mart*, 34 Cal. 2d 702, 214 P.2d 378 (1950).

92. *Kofsky v. Smart & Final Iris Co.*, 131 Cal. App. 2d 530, 281 P.2d 5 (1955); *Dooley's Hardware Mart v. Does 1-10*, TRADE REG. REP. (1962 Trade Cas.) ¶ 70227 (Cal. Super. Ct. 1962). The latter, however, reserved the question of right to damages.

93. Montana and Utah have state "Trade Commissions," and Connecticut recently changed its act to establish administrative proceedings before the Commissioner of Food and Drugs. This resulted in the act being considered penal, and the presumption of intent was held unconstitutional. See note 57 *supra* and accompanying text. Minnesota places investigative responsibility with the Department of Business Development.

94. The fines are \$1000 or less per violation and the imprisonment is for 6 months or less, except in Massachusetts and Rhode Island, which permits sentences up to a year. Maryland and Nebraska have purely civil statutes. Arizona, Maine, and Oklahoma use fines only.

95. Arkansas, California (by amendment in 1959), Colorado, Hawaii, Kentucky, Maine, Montana, Oregon, Utah, and West Virginia provide for treble damages.

pressly provide that any contract made in violation of the law is unenforceable, and a few of the acts provide that corporate defendants may lose their charter.⁹⁶

In several cases, over-enthusiastic enforcement of the acts brought charges of federal antitrust violation because of the concerted nature of the arrangement.⁹⁷ These proceedings may have dampened interest in the acts, since trade association enforcement based on their statistical cost figures faces real dangers under the federal acts. Presumably, individual firms do not wish to undertake enforcement litigation alone.

On the whole, the statutes have received relatively little use. However, uncertainty over their validity and the decisions which refuse to permit concerted enforcement may in large part have been responsible for this lack of activity. Furthermore, the hope for a more direct solution by means of fair trade acts undoubtedly diverted attention from the sale below cost statutes.

As they stand, the acts create a dangerous situation whenever severe competitive conditions result in little or no profit to the seller. Should increased state antitrust enforcement result in reconsideration of the possibilities of the state acts, it seems quite possible that state authorities will be under pressure to put them to greater use where severe price competition exists. The Supreme Court's comments with regard to sales below cost also may arouse renewed interest in the state statutes, and, together with interpretations in other jurisdictions, suggest revised or new legislation more effective than past attempts.

THE UNREASONABLY LOW PRICE CLAUSE OF SECTION 3 OF THE ROBINSON-PATMAN ACT

Although the unreasonably low price clause of section 3 of the Robinson-Patman Act, as interpreted in the *National Dairy* case, reaches much the same target as the state acts, the approach taken is radically different. Unlike the detailed state statutes, it simply prohibits sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor. . . ."⁹⁸ The generality of this clause presents formidable problems of interpretation, but it also permits develop-

96. Washington, Wyoming, and the states listed in note 95 *supra* (except Maine) expressly provide that contracts in violation of the act are unenforceable. Presumably the same result might follow as a matter of general principle. Cf. *Kelly v. Kosuga*, 358 U.S. 516 (1959). Charter forfeiture or similar provisions are contained in the Arkansas, Hawaii, Louisiana (wholesale or retail licenses may be revoked), Montana, South Carolina, West Virginia, and Wyoming acts, but usually only upon a third violation.

97. The early cases and the background of the acts generally are covered at length in Comment, 57 *YALE L.J.* 391 (1948). See also *United States v. San Diego Grocers Ass'n*, *TRADE REG. REP.* (1962 Trade Cas.) ¶ 70432 (S.D. Cal. 1962), *injunction denied*, *TRADE REG. REP.* (1963 Trade Cas.) ¶ 70777 (S.D. Cal. 1963).

98. Robinson-Patman Act § 3, 49 Stat. 1528 (1936), 15 U.S.C. § 13a (1958).

ment of interpretations more consonant with general antitrust policy than the specific restrictions and statutory presumptions of the state laws.

The relationship of section 3 to the other federal antitrust and fair competition laws is somewhat anomalous. It is doubtful whether section 3 adds anything to the prohibition against attempts to monopolize in the Sherman Act,⁹⁹ and the commerce requirement of section 3 is more restrictive.¹⁰⁰ There is no civil provision in section 2 of the Robinson-Patman Act parallel to the unreasonably low price clause of section 3.¹⁰¹ Moreover, the prohibitions against discrimination in the other clauses overlap those of section 2 in some respects, but are by no means co-extensive.¹⁰²

Virtually all of the decisions under section 3 are treble damage cases.¹⁰³ This use of the section was ended in 1958 by the Supreme Court's decision in *Nashville Milk Co. v. Carnation Co.*¹⁰⁴ The lack of government prosecutions and doubts as to constitutionality of this admittedly "vague provision"¹⁰⁵ then led to some feeling that the statute was a dead letter. Now, however, the Supreme Court's ruling in the *National Dairy* case may lead to re-appraisal of section 3 and renewed interest in its potential by enforcement authorities.

99. A former chief of the antitrust division so testified in *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on the Role of Antitrust Enforcement in Protecting Small Business*, 85th Cong., 2d Sess. 135-36 (1958). See also the testimony of the former FTC Chairman Gwynne at p. 175 of the above *Hearings*.

100. *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951); cf. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943 (6th Cir. 1962), *cert. denied*, TRADE REG. REP. (1963 Trade Cas.) § 70796 (1963) (Justice Black dissenting).

101. However, the FTC could proceed under section 5 of the FTC Act, 38 Stat. 717 (1914), 15 U.S.C. § 41 (1958). See *Hunt Foods & Industries, Inc. v. Federal Trade Comm'n*, 178 F. Supp. 448, 454, *aff'd*, 286 F.2d 803 (9th Cir. 1960), *cert. denied*, 365 U.S. 877 (1961). See also the comments of former FTC Chairman Gwynne on the scope of § 5 in *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on the Role of Antitrust Enforcement in Protecting Small Business*, 85th Cong., 2d Sess. 175 (1958), and the views expressed in *Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 3, 11, 30, 79 (1960) (Sales Below Cost).

102. See comparison in *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir.), *cert. denied*, 363 U.S. 843 (1960), and the analysis in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 459-68 (1962). Particularly noteworthy is the absence of buyer liability under § 3.

103. The only government case under the unreasonably low price clause, other than *National Dairy*, is *United States v. Fairmont Foods Co.*, TRADE REG. REP. (1958 Trade Cas.) ¶ 45058, at 66368 (W.D. Mich. 1959). A plea of guilty was entered, but sentence was suspended, fines having been levied on Sherman Act counts based on the same conduct. There have been only a few government prosecutions under the other clauses of § 3. See ROWE, *op. cit. supra* note 102, at 468-69.

104. *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373, *rehearing denied*, 355 U.S. 967 (1958). The Supreme Court held that § 3 was not one of the "antitrust laws" within the meaning of § 4 of the Clayton Act providing the right to private recovery. Proposals to provide a private cause of action under § 3 have been made several times since the *Nashville Milk Co.* case, the latest of which are S. 1815 and S. 1935, 88th Cong., 1st Sess. (1963).

105. *Nashville Milk Co. v. Carnation Co.*, *supra* note 104.

The treble damage cases under the unreasonably low price clause of section 3 did much to make the vague statutory language more meaningful. Faced with the problem of distinguishing predatory conduct from normal competitive vigor, the courts employed a rule-of-reason approach based upon the "economic facts of life." Judge Yankwich enumerated some of the facts bearing on the question, as follows:

"elements . . . such as cost, usual profits and the like, would be available for consideration. [Other elements to consider] might be . . . the suddenness of the price change, its relation to previous prices charged by the merchant or by others in the field in the particular locality or elsewhere, the existence or non-existence of new economic factors relating to cost of production, demand for the article, seasonal or other, the consequent need for expansion or contraction of the field for the particular merchandise and other factors, financial or economic, which might or might not warrant a precipitate reduction in price . . ."¹⁰⁶

Subsequently, in *Balian Ice Cream Co. v. Arden Farms Co.*¹⁰⁷ and *Ben Hur Coal Co. v. Wells*,¹⁰⁸ no illegal intent was found despite evidence of hostility between the parties and outspoken expectation by the defendants that their prices would cause injurious effects to their competitors.¹⁰⁹

The National Dairy Case

The Supreme Court held that the phrase "unreasonably low price" was not unconstitutionally vague, since the indictment specifically charged selling below cost with predatory purpose, rather than relying on the more general statutory language. Such sales, by normal standards of the business community, were said to be clearly unreasonable, and the court concluded that difficulty of application in the case of "marginal offenses" need not invalidate the application of the statute in clearer situations. Legislative history disclosed a congressional intent to prohibit sales below cost unless "mitigated by some acceptable business exigency." The additional element of intent to produce the *result* of destroying

106. *F. & A. Ice Cream Co. v. Arden Farms Co.*, 98 F. Supp. 180, 190 (S.D. Cal. 1951). See also *Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc.*, 111 F. Supp. 732 (N.D. Cal. 1953), *motion to dismiss denied*, 119 F. Supp. 603 (1954).

107. *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991, *rehearing denied*, 351 U.S. 928 (1956). The § 3 aspects of the case were not considered by the court of appeals.

108. *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957).

109. The district court opinion in *Balian Ice Cream Co. v. Arden Farms Co.*, 104 F. Supp. 796, 803 (S.D. Cal. 1952), quotes testimony on the point, including the following statements allegedly made by representatives of the defendant:

"Guy, we are going to take all the profits out of ice cream."

"Well, Guy, we've got \$8,000,000.00 to spend and some of you fellows are going to get hurt."

In the *Ben Hur Coal Co.* case, *supra* note 108, at 484, there was a background of hostility between the parties over a period of time, and the defendant was quoted as saying that the price cut was made "to teach him [the plaintiff] a lesson. . ."

competition was cited as aiding the weakness of the description of the prohibited *act*. Taken together, these elements were found to provide the necessary "specificity of warning."

In a dissenting opinion of only a single paragraph, Justice Black, speaking for Justices Stewart and Goldberg, asserted that the act was unconstitutionally vague and that only Congress could repair its inadequacies.

Little purpose is served by detailed scrutiny of the majority's reasoning, analysis of authorities, or the accuracy of its interpretation of the legislative history of section 3. The phrase "unreasonably low" does not seem strikingly vague in an area of law where phrases of great breadth and equally great ambiguity are basic.¹¹⁰ However, application of the standard of reasonableness to *price*, as opposed to other types of business conduct, is disturbing because of the regulatory overtones implicit in the concept of a "reasonable" price. In any event, the decision revitalizes an area of law which had become virtually dormant and compels reconsideration of the dangers under section 3 for clients unlucky enough to sell at a loss or negligible profit.

The following discussion considers the elements of unreasonably low price and predatory intent independently. The two are so closely related, however, that the same facts often will be relevant to both. Thus, proof of reasonable pricing may go far to disprove predatory intent and vice versa. Nonetheless, separate analysis will indicate that there are significant distinctions between the two elements despite the overlap and will emphasize that both elements must be established beyond a reasonable doubt.

Unreasonably Low Prices

The state acts describe in detail the level of price which is forbidden if coupled with the other elements of a violation. Under section 3, however, reasonableness is the sole guideline as to how low a price must be to come within the statute.

The reasoning of the Supreme Court in the *National Dairy* opinion, like that underlying the state enactments, is that the objective of business is to produce profits. Hence, sales without profit are unreasonable unless a "legitimate commercial objective," a "justifying business reason," or an "acceptable business exigency"¹¹¹ is shown. The application of this rationale to everyday business raises great difficulties. Businessmen do not have exact knowledge of the costs attributable to particular items, and the relationship between cost and price, particularly in highly competitive markets, prevails only over the longer term.¹¹² Except in extreme

110. The rule of reason is part of § 3, whereas it had to be read into the Sherman Act.

111. *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963). See p. 65 *infra*, at * for current developments.

cases or over a substantial period of time, the Supreme Court's assertion that selling below cost has a "meaningful referant in business practice," may be doubted. Apart from selling below cost, the Supreme Court opinion gives us no guidance as to the application of section 3 or the indicia of unreasonableness generally.

In view of the subjective standard of purpose which is required by the statute, the word "unreasonably" should refer to an objective standard of rationality,¹¹³ *i.e.*, the good faith exercise of ordinary business judgment on the basis of the facts as they were or could reasonably have been known at the time the price was set. Such an approach avoids the unfairness and restrictive effect on price competition which would result if the question of reasonableness turned solely on hindsight analysis of the cost-price relationship. Costs may well be an important consideration in the evaluation of reasonableness so long as other factors also are taken into account. It should be clear that the costs must be actual costs of the seller, rather than a survey or what a competitor claims to be standard or irreducible costs of the business.¹¹⁴ A businessman is sure to view his competitor's pricing as unreasonable!

As the Supreme Court indicates, the standard of reasonableness clearly would permit sales below cost "such as the liquidation of excess, obsolete or perishable merchandise, or the need to meet a lawful, equally low price of a competitor . . ."¹¹⁵ More difficult problems which will have to be considered in future cases are those involving loss operations during start-up periods for new units or sales below cost for promotional purposes, such as loss leaders, two-for-one sales, and heavy promotions of new products.¹¹⁶ The determination of reasonableness should be based

112. See *Borden Co. v. Thomason*, 353 S.W.2d 735, 747 (Mo. 1962). Studies of pricing practices indicate that costs are only one consideration, and then only over the long term. See BACKMAN, *PRICING: POLICIES AND PRACTICES* (1961) (summarizes the findings of a number of other studies); HAYNES, *PRICING DECISIONS IN SMALL BUSINESS* (1962). The peculiar results of a strict cost approach to pricing are illustrated in Comment, 57 *YALE L.J.* 391, 396-98 (1948), and Comment, 58 *MICH. L. REV.*, 905, 914 (1960).

113. This means rationality in terms of "legitimate commercial objectives," rather than the elimination of competition. An irrational price due to bad judgment or inaccurate cost computation might be unreasonably low, but would be lacking in predatory intent. See note 62 *supra* and note 116 *infra*.

114. Although several state acts specifically provide that cost surveys are "competent evidence," there is no such provision in § 3, and federal authorities appear to oppose such an approach. Surveys are expressly excluded in the Trade Practice Rules for the Slide Fastener Industry, 16 C.F.R. § 193 (1960), and use of surveys often has been a basic part of the concerted enforcement efforts which have been held illegal under the Sherman Act. See note 97 *supra*.

115. These categories clearly are not exclusive of others. Compare the exemptions provided by the state acts, p. 40 *supra*. The reference to meeting a "lawful" price is considered further below.

116. Lawful sales below cost were considered in the briefs of the United States and of National Dairy on re-argument in *United States v. National Dairy Prods. Corp.*, 372 U.S. 29 (1963). The Brief for United States on Reargument, pp. 41-42 commented: "To be sure, there are special situations in which sales below cost have a legitimate commercial justification.

upon analysis of the duration and timing of promotional sales below cost; whether a new product is being promoted or entry into a new market attempted; the amount of loss in relation to reasonable expectations of future volume; profitability; and the like.¹¹⁷

If, as the *National Dairy* case suggests, profitless prices are unreasonable (absent "legitimate commercial objectives"), then, conversely, profitable prices are reasonable and there should be little occasion for the use of section 3 outside the area of sales below cost. A merchant's decision to accept a slim profit should not be tampered with in anything but a most unusual and extreme case. Even if the seller's motives are predatory, the use of low but somewhat profitable prices should not be considered unreasonable, except where the price is so low as to make the profit absurd in relation to the investment and obviously unacceptable in the long term. Such prices also may be timed to particularly disadvantage a competitor or applied to a product of great importance to him, but of less significance to the originator of the price. Perhaps in such cases section 3 should apply and the price should be found unreasonable despite the nominal profit. But as more profit is involved, application of section 3 will involve the courts in determining the reasonableness of profits rather than in punishing predatory conduct.

Application of section 3 to vertically integrated companies may create difficulty, particularly where the computation and allocation of

The price fixed by competition in the sale of the product may be below the costs of the particular firm. Sales below cost may dispose of excess inventory, of obsolete or spoiling merchandise, or of merchandise in a line which the seller no longer wishes to produce or distribute; they may be made to introduce a new product or to break into a new market; or they may be designed to retain a customer by meeting in good faith the equally low price of a competitor. Under certain conditions a business firm might reasonably drop its price below its unit costs at the current volume of sales in the belief that the volume of sales could be so greatly increased as to reduce the unit price and secure a larger total profit. A firm might sell a by-product or carry a minor line priced at less than its fully distributed costs where this would increase its net income from all sales. *Other explanations may be rational in the circumstances of a particular case. . . .*" (Emphasis added).

National Dairy quarreled with the government's characterization of these instances as "special situations" and also added sales below cost due to overestimates of volume or unanticipated increases in cost, sales for the convenience of customers who chiefly buy other products, promotional sales generally, sales below cost due to lack of knowledge of unit cost, and some variations on sales below cost to meet competition. Brief for Appellees on Reargument, pp. 35-36, *United States v. National Dairy Prods. Corp.*, *supra*.

117. Although something of a cause celebre for small business from the testimony offered before Congressional committees (see, e.g., *Hearings on H.R. 10235 Before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 47, 66, 75 (1960), and H.R. REP. NO. 566, 88th Cong., 1st Sess. 15 (1963) (quality stabilization)), the courts have been reluctant to find loss leaders illegal even under the state acts which specifically apply to them. See note 69 *supra*. Since loss leaders are selective, they would seem to be an effective form of competition tailored for small concerns. "Bait and switch" tactics and other deceptive uses of loss leaders are covered, of course, by § 5 of the FTC Act. See the FTC's "Guides Against Bait Advertising," 24 Fed. Reg. 9755 (1959).

costs are concerned.¹¹⁸ It may be argued that reasonableness should be judged in the context of the particular functional level at which the challenged sale occurred. The wording of section 3, however, affords no basis for such an interpretation. Aggregating *all* costs attributable to the sale seems preferable from a policy viewpoint, so that a seller's willingness to accept a lower overall return on investment and pass on cost savings resulting from integration will not be denied to the consumer. Such an approach need not prevent application of section 3 to predatory pricing aimed at competitors at one level, but rather requires full evaluation of the setting as opposed to giving undue weight to the particular level of operation.¹¹⁹

If section 3 is to be employed in harmony with overall antitrust policy, full recognition must be given to the many factors which bear on the reasonableness or unreasonableness of a price. Unreasonableness is an independent and essential element of violation;¹²⁰ and even though cost may have an important bearing on the question of unreasonableness, it must be considered along with the many other influences on prices. In highly competitive markets, sales below cost may not be unusual or avoidable.¹²¹ Evaluation of reasonableness under such conditions should take into account the stress and strain of vigorous competition and the uncontrollable downward pressure on prices which normal competitive forces generate from time to time.

Intent to Destroy Competition or Eliminate a Competitor

Although the element of intent already had been explored in the treble damage cases, the Supreme Court's citation of the *Ben Hur* case, and its recognition that the required intent is "*specific*" and "*predatory*"

118. See p. 49 *supra*, regarding the treatment of integrated businesses under the state acts.

119. Where goods are sold at different levels, the possibility of a "squeeze" arises. For example, a wholesaler who buys from an integrated company which also sells at wholesale in competition with the customer is "squeezed" if the integrated company cuts prices to retailers but not to wholesalers. The economics of this theory have been challenged. Bork, *Vertical Integration and the Sherman Act: The Legal History of an Economic Misconception*, 22 U. CHI. L. REV. 157 (1954); Hale, *Vertical Integration: Impact of the Antitrust Laws Upon Combinations of Successive Stages of Production and Distribution*, 49 COLUM. L. REV. 921 (1949). See also note 51 *supra*. Nonetheless, small business clearly views the "squeeze" as a major problem. See *Hearings Before Subcommittee No. 4 of the House Select Committee on Small Business on The Impact Upon Small Business of Dual Distribution and Related Vertical Integration*, 88th Cong., 1st Sess. (1963). While the effect on competitors in such cases may bear on the reasonableness and the purpose of the price change, it should not be assumed that integrated companies control prices at any level or are happy to invest in distribution functions with little or no compensation, although that is precisely the accusation!

120. The relationship between the requirements of unreasonableness and predatory intent is considered at pp. 60-61 *infra*.

121. Predatory purpose may be lacking where low prices are due to competitive forces. As noted below, however, the heat of the moment may lead to extreme statements by employees which are difficult to explain at a later time.

and that the conduct must be "designed to destroy competition"¹²² lends weight to the earlier interpretations.

Some confusion is created, however, by the Court's reference to meeting "lawful" competitive prices. The Court notes that a price set to meet such competition would be neither unreasonable nor made with predatory intent. It is difficult, however, to see how a purely defensive price can be unreasonable even if the competitive price is *unlawful*.¹²³ It is even more artificial to claim that such a defensive price is indicative of an intent to destroy competition or eliminate a competitor. Unlike the state acts¹²⁴ and section 2(b) of the Robinson-Patman Act, meeting competition is not an affirmative defense or a specific exemption under the statute. Under section 3, meeting competition is relevant only to show the absence of the statutory elements of unreasonable price and predatory purpose. There is no basis in the statute for bringing in the restrictions contained in section 2(b)¹²⁵ or those considered implicit in it; and to do so would lead to extreme difficulties of interpretation.¹²⁶ Would "lawful" refer to section 3 alone, or also to section 2? Under section 3, the reasonableness of the competitive price turns on considerations of cost and the overall circumstances of the competitor. The seller is unlikely to have adequate knowledge of these factors, but even if the competitor's price is clearly unreasonable, how is the seller to ascertain the intent behind it?

Despite the comments in the *National Dairy* case and the more detailed analysis in the earlier treble damage cases, the nature of the intent required by section 3 has not been defined in specific terms. The line between normal competitive hostility and predatory purpose is more a question of degree than of basic difference. Mere overstatements of a participant in a vigorous competitive struggle may be difficult to explain at a later time, especially when the employee or executive may no longer be available. In weighing colorful statements by overzealous employees, courts should consider the extent of their pricing authority, the

122. Except when reciting the full language of the statute, the Supreme Court referred to "destroying competition." However, even under § 2(a) (which lacks the phrase "eliminating a competitor" and refers only to "competition") it is recognized that predatory prices to eliminate individual concerns are illegal. See, e.g., *Moore v. Mead's Fine Breads Co.*, 348 U.S. 115 (1954), and the review of predatory price cases under § 2(a) in *Keck, Lawful Price Discrimination: "Where There Is No Unlawful Effect on Competition,"* 8 ANTITRUST BULL. 381, 400-01 (1963).

123. "One who reduces his prices in defense of his economic life cannot be guilty of eliminating competition or his competitors." *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 486 (10th Cir. 1957).

124. See p. 48 *supra*, regarding meeting competition under the state acts; see also pp. 49-50 *supra* for discussion of the relationship of the specific exemptions provided by the state acts to the elements of intent or effect required by them.

125. The legislative history of § 3 in this respect is summarized in ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 456-57 (1962).

126. See note 73 *supra* in regard to the problems under § 2(b).

timing and circumstances of their comments in relation to the price change, and the likelihood that their words were to be taken literally.¹²⁷ The *Ben Hur* and *Balian Ice Cream Co.* cases indicate that this approach will be taken, but counsel should not rely upon freedom from predatory intent too readily. Although the burden to show anticompetitive motives lies with the government, the possibility that improper comments by employees, documentary or verbal, may come to light should not be underestimated. However unwarranted, evidence of this type will be difficult to meet in the absence of contemporary documents providing a positive explanation of the true background and motivation for the price move, particularly when there is a considerable lapse of time before the claim of a section 3 violation.

Although section 3 provides no presumptions of intent, such as those in the state acts, it is inevitable that severe price reductions will be more difficult to explain. However, the relationship between predatory intent and unreasonable prices has received little attention in the cases. The opinion in *National Dairy* notes the absence of *both* elements in the examples of lawful sales below cost, but that should not obscure the fact that absence of *either* is a complete defense. The language of the act expressly requires proof of both anticompetitive purpose and unreasonable prices, and the Supreme Court relied heavily upon the element of intent as relieving the vagueness of the phrase "unreasonably low prices." The earlier treble damage cases also make it clear that an extremely low price, even if below cost, does not establish a violation in the absence of an unlawful purpose.¹²⁸ Conversely, ruthless and aggressive competitors are not in violation of the act if their pricing is reasonable, regardless of their motive. Care should be exercised to prevent unpleasant motives or personal antagonisms from influencing the analysis of reasonableness and vice versa.

In the debates over section 3, Congressman Patman argued that the requirement of intent would be difficult to meet,¹²⁹ but it remained in the statute. The *National Dairy* opinion makes it clear that the express requirement of intent cannot be ignored or satisfied with less than a showing of deliberate anticompetitive motives. As a policy matter, the requirement of intent is important, since a defense based on the fact that the price was reasonable is difficult and uncertain whenever prices enter

127. Examples of the problems of ensuring that employees adhere to company policy in such matters are illustrated in *United States v. New York Great Atl. & Pac. Tea Co.*, 67 F. Supp. 626, 667-68 (E.D. Ill. 1946), *aff'd*, 173 F.2d 79 (7th Cir. 1949).

128. "And, to recover under this provision of Section 3, prices must not only be unreasonably low, but they must also have been established with the design and purpose to destroy competition." *Ben Hur Coal Co. v. Wells*, 242 F.2d 481, 483 (10th Cir. 1957). "Cutting prices is not *per se* unlawful and will not supply the *intent* which this court must find . . ." *Hershel Cal. Fruit Prods. Co. v. Hunt Foods, Inc.*, 111 F. Supp. 732, 734 (N.D. Cal. 1953).

129. 80 CONG. REC. 8227 (1936) (remarks of Rep. Patman).

the area in which full cost coverage is doubtful. Businessmen would be required to enter this no-man's land under the peril of criminal penalties if not for the requirement of predatory purpose.

THE STATE ACTS AND SECTION 3 IN RELATION TO ANTITRUST POLICY

Both section 3 and the state sale-below-cost acts have been vigorously criticized for their vagueness and impracticality in terms of business realities and, more basically, for their conflict with antitrust policy.¹³⁰ Analysis of the policy considerations, however, is hampered by lack of adequate factual information concerning many of the alleged evils to which this legislation is directed. Much is said of "loss leaders" and "selling below cost" in the congressional hearings, but little factual detail emerges. It is apparent that the witnesses are often making assumptions based on their own costs or do not really mean that a loss is involved. If more data were available on such areas as: (1) the frequency with which intentional selling at a loss occurs; (2) who uses such pricing techniques and why; and (3) whether or not consumers are misled by such practices, a more rational evaluation of the need for state or federal legislation could be attempted.¹³¹ At present, however, the issue is clouded by general denunciations of "bad bigness," with little concrete supporting evidence.¹³²

Three policy objectives are said to be served by restricting low prices: (1) protection of the consumer against misrepresentation and deception; (2) protection of the vigor of competition by limiting the use of size and strength as such to eliminate the small; and (3) protection of the plane of competition by outlawing unfair tactics. The latter two, of course, are virtually inseparable, but independent consideration of them may help to clarify the issues.

The deception of consumers through the use of loss leaders is often said to arise from the shopper assuming that the advertised bargain is

130. As to the state acts, see, e.g., Clark, *Statutory Restrictions on Selling Below Cost*, 11 VAND. L. REV. 105 (1957); Comment, 57 YALE L.J. 391 (1948); cf. 1 CALLMANN, UNFAIR COMPETITION AND TRADE MARKS § 27 (2d ed. 1950). As to § 3, see EDWARDS, THE PRICE DISCRIMINATION LAW 645 (1959); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 452 (1962); Comment, 49 NW. U.L. REV. 285 (1954); cf. Rose, *The Right of a Businessman to Lower the Price of His Goods*, 4 VAND. L. REV. 221 (1951).

131. Earlier studies of the use of loss leaders are summarized in Comment, 57 YALE L.J. 391, 394 n.12 & 398 n.26 (1948). See also note 139 *infra*.

132. See, e.g., Dixon, *Significant New Commission Developments*, 21 A.B.A. ANTITRUST SECTION REP. 247, 253 (1962); *The Federal Trade Commission in 1962*, 1963 N.Y.S.B.A. ANTITRUST LAW SYMPOSIUM 31, where Chairman Dixon refers to use of ". . . the brute power of a long purse to take another man's economic life." Claims of predatory pricing appear regularly in testimony before Congressional committees, such as the hearings cited elsewhere in this article.

representative of the prices on other merchandise in the store.¹³³ The loss leader, however, is likely to be featured as a "special," available for a limited time only, and as such, set apart from the normal prices on other merchandise in the store. Whether shoppers assume that the store offers other values comparable to that of the "leader" does not seem to have been tested or studied. In any event, there still will be low priced specials, even though at or above cost. Elimination of selling below cost can, at best, only narrow the price difference between "specials" and other goods at normal prices.

It is argued that a more general deception is practiced upon the public — that the consumer is deceived as to quality and deprived of service by the discount operator. If such is the case, and such merchandisers continue to flourish notwithstanding their abuse of the public, the problem goes beyond the use of loss leaders and sales below cost. If, over a substantial period, the majority of consumers can be so misled, it is difficult to conceive of any adequate protective legislation which is consistent with free marketing and pricing. However, the recent failure or financial distress of some of the discount chains may indicate that the public is becoming somewhat disenchanted with discount operations after experience with them.

There are, of course, clearly objectionable techniques, such as advertising brand name products and then switching the customers brought in by this lure to other goods. Conduct of this nature is amenable to direct action upon the misrepresentation itself,¹³⁴ rather than limiting price freedom generally and eliminating or restricting the "bargain" which the alert shopper can obtain by purchasing loss leaders which are offered more freely. More subtle variations of the "bait and switch" may present an enforcement problem, as do any of the more astute forms of misrepresentation. There seems little reason, however, to assume that limitation on the use of sales below cost will be a better weapon against the sophisticated operator than a more direct approach; whereas the loss to the consumer and the policy objections against any limitation on price freedom obviously are far greater.

Restrictions on selling below cost or at unreasonably low prices seem of questionable value as a protection against loss of competitive vigor through the elimination of competitors. Here again, other more direct approaches are available. Predatory price cutting in particular areas is within the scope of the other provisions of section 3 as well as sec-

133. See, e.g., *Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 99 (1960). But see Comment, 58 MICH. L. REV. 905, 913 (1960).

134. See the FTC's "Guides Against Bait Advertising," 24 Fed. Reg. 9755 (1959).

tion 2(a). Beyond that, deliberately anticompetitive pricing tactics are subject to the Sherman and the Federal Trade Commission Acts.¹³⁵

The assumption that predatory price cutting is a widespread and effective method to eliminate competition also seems questionable. On analysis, it seems obvious that local price cutting can only be successful where there are no other strong competitors¹³⁶ — a situation which must be somewhat unusual in an era of highly mobile shoppers responsive to advertising media covering wide areas. In most cases, the real problem may be that the vigor of competition among the larger concerns results in adverse effects on the independents. It seems probable that the large merchandisers often may buy at better prices and enjoy economies of distribution, promotional and advertising know-how, and other advantages which independent distributors are likely to have difficulty meeting. Nonetheless, the rumors of the imminent death of small business seem exaggerated,¹³⁷ and the vigor of competition in distribution businesses in general would seem to be greater today than ever.

But whether or not the vigorous struggle between chain, "discount," and department stores, indicates that the vitality of competition is not endangered, it is scarcely surprising that independent businesses, many of them substantial, long established, and well regarded, view the situation as an "unfair" threat to their survival. However, the elimination of selling below cost or at unreasonably low prices does not seem to offer a solution to the difficulty of the independents in the present merchandising struggle. The unfairness, if it is such, appears to be far more basic than the use of loss leaders or local price cutting. It lies in the public's acceptance, knowledgeable or otherwise, of volume, self-service merchandising in exchange for lower prices. Whether independents can meet this demand is not clear. But the elimination of sales below cost does not seem to offer much hope as a solution so long as the public moves away from the traditional channels of distribution and the complex of values other than price offered by traditional merchandising techniques.

135. See notes 99 and 101 *supra* in regard to the relationship between § 3 and the Sherman and FTC Acts. The need for criminal penalties in this area has been questioned, and in any event the provisions of § 3 should be made consistent with § 2. See EDWARDS, *THE PRICE DISCRIMINATION LAW* 645-46 (1959). A number of states also have price discrimination acts and general antitrust acts which might be used against predatory pricing tactics.

136. See Adelman, *Geographical Price Differentials, An Economic Commentary*, 48 ILL. B.J. 514, 518-19 (1960). The unreasonably low price clause of § 3 and the state acts are not, of course, limited to discriminatory local price cutting. However, the argument that profits from other areas can be used to subsidize price cutting to eliminate local competitors is also adapted to vertically integrated companies, *i.e.*, manufacturing profits may be used to subsidize the distribution operations of integrated concerns. The economics of this view have been criticized. See Adelman, *Integration and the Antitrust Laws*, 63 HARV. L. REV. 27 (1949). See also note 119 *supra* on the related "squeeze" theory.

137. See *Report of the White House Committee on Small Business* (1962), reprinted in 7 ANTITRUST BULL. 645, 662 (1962).

Even if the desirability of some form of legislation is assumed, the practical objections to the method employed are great. The assumptions that businessmen have detailed knowledge of the costs of particular items and that they use such cost data as a controlling basis for setting prices has little basis in fact.¹³⁸ And the effect of strict enforcement of both state and federal acts based on such assumptions is likely to be a substantial restriction upon price freedom. Lacking knowledge of exact costs, businessmen faced with criminal penalties will be reluctant to reduce prices into the area of doubtful cost coverage. Obviously the loss of price freedom may become more serious under acts which apply to manufacturers as well as distributors, employ presumptions of illegal intent and the cost of doing business, define effects in terms of diverting trade, and restrict meeting-competition and other exemptions.

When all is said and done, the fact is that a great deal of legislation restricting low prices is already on the books and there is little hope that it will be repealed or substantially modified. There are many unresolved questions of interpretation, however, particularly under the unreasonably low price clause of section 3. It is hoped that the courts will approach these issues with full awareness of the delicate judicial surgery required to locate and excise the malignancy of predatory prices without killing or crippling price competition itself.¹³⁹

138. See note 112 *supra*. Small businesses would be ill equipped to prove their costs and unable to afford expert analysis and testimony. In the *Hearings on H.R. 10235 Before a Subcommittee of the House Committee on Interstate and Foreign Commerce*, 86th Cong., 2d Sess. 57 (1960), a spokesman for the National Small Business Association testified that the proposed federal legislation, which would have utilized the cost definitions contained in the state acts, was particularly unworkable for small businesses because the owners of such businesses simply take whatever salary they can and thus have a fluctuating cost.

139. A new study of the problem of price warfare concludes that "peace at any price may be just as unacceptable in the market place as it is in international relations." CASSADY, *PRICE WARFARE IN BUSINESS COMPETITION: A STUDY OF ABNORMAL COMPETITIVE BEHAVIOR* 75 (1963).

* National Dairy subsequently was convicted by a jury in the District Court for Western Missouri, 110 B.N.A. ANITRUST & TRADE REG. REP. A-17 (Aug. 20, 1963). There is no report, as yet, of the penalties assessed. Earlier, the court ruled that evidence of the size and financial resources of National Dairy was admissible, though imposing some limitations upon the government's reference to such matter in argument. *United States v. National Dairy Prods. Corp.*, TRADE REG. REP. ¶ 70869, at 78508 (W.D. Mo. 1963).