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# The Evolving Duty of an Innocent Buyer to Inquire into His Bargain Under Section 2(F) of the Robinson-Patman Act

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## THE EVOLVING DUTY OF AN INNOCENT BUYER TO INQUIRE INTO HIS BARGAIN UNDER SECTION 2(F) OF THE ROBINSON-PATMAN ACT

When Congress passed the Robinson-Patman Act<sup>1</sup> in 1936, it intended, in part, to prevent large organizations from wielding their enormous buying power to obtain favored prices.<sup>2</sup> To do so, Congress prohibited sellers from charging different prices to different buyers for the same goods except in restricted circumstances.<sup>3</sup> Contained within this seller-directed enactment, § 2(f)<sup>4</sup> was included almost as an "after-thought."<sup>5</sup> This section makes it illegal for a buyer knowingly to induce or receive a discriminatory price.<sup>6</sup> The notoriously vague language

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1. 15 U.S.C. § 13 (1970) [hereinafter referred to as the Act].

2. This statement is an oversimplification since the legislative history of § 2(f) reveals a confused congressional understanding of the evils that the provision was designed to correct. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 24 (1962) [hereinafter cited as ROWE]. It is clear that the Act was prompted by fears of abuse of the "large buying power," specifically retail chains accused of coercing lower prices from suppliers. See 79 CONG. REC. 9078 (1935); FTC, FINAL REPORT ON THE CHAIN-STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. 24-28 (1935) [hereinafter cited as FINAL REPORT]. It is also clear that the victim to be protected was the small, independent retailer, unable to match the buying power of the chains and allegedly on the brink of extinction. ROWE, *supra*, at 12-17; *Hearings Before the House Comm. on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 5-6 (1935). Beyond this, little is certain.

3. These exemptions are contained in 15 U.S.C. § 13(a) (1970).

4. 15 U.S.C. § 13(f) (1970).

5. ROWE, *supra* note 2, at 421. Although § 2(f) was included on the floor of the Senate, there was precious little debate over the measure. The only comment on the floor concerning § 2(f) was that it seemed "sound in principle." 80 CONG. REC. 6428 (1936). Only Representative Utterback, in presenting the report of the conference committee, addressed himself to the merits of the measure. He argued that § 2(f) would enable a seller to "resist the demand for sacrificial price cuts" made by large buyers "since it enables him to charge them with knowledge of the illegality of the discount . . . ." *Id.* at 9419.

This meager record indicates that Congress may have intended to adopt § 2(f) only as a supplement to seller's liability, possibly by enlisting wary buyers as enforcers of the Act. But the fact remains that, while the actions of buyers led to passage of the Act, they were not the principal subject of the legislation itself. The legislative history is replete with references to large predatory buyers. *E.g.*, FINAL REPORT, *supra* note 2, at 25. Buyer's liability is supported by congressional intent, seller's liability by the language of the Act.

6. Section 2(f) is deceptively brief:

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

15 U.S.C. § 13(f) (1970). The prohibited character of the receipt turns on its illegality under the seller's liability provisions. Section 2(a), the basic portion of the Act, forbids any price discrimination by sellers among goods of "like grade and quality" where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or pre-

of this section is a source of confusion for many buyers who may risk liability upon receiving a price discount.<sup>7</sup> Although charged with administering the Act, the Federal Trade Commission has as yet made little effort to define the limits of § 2(f) liability. As a result, most businesses must operate in a perpetual state of uncertainty as to the legality of many trade practices.

This note will discuss conditions under which a buyer has the duty of inquiring into legality of a proffered price. This duty hinges on a proper interpretation of the major elements of a § 2(f) prima facie case—competitive injury and scienter.<sup>8</sup>

### COMPETITIVE INJURY

Section 2(a) of the Robinson-Patman Act prohibits only those price discriminations<sup>9</sup> having competitive impact.<sup>10</sup> Thus, under § 2(f) the buyer who knowingly induces or receives a discriminatory price violates the Act only if that price may tend to lessen competition.<sup>11</sup> In buyer's liability cases, the FTC usually alleges secondary-line competitive injury, that is, injury to competitors of the favored buyer.<sup>12</sup>

vent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . .

15 U.S.C. § 13(a) (1970). Thus, the seller is liable if the result of his price discrimination can be considered injurious to competition, and if his price is not cost justified, that is, if the differential is not the result of savings realized by the seller on the transaction. *Id.* In addition, the seller may defend on the basis of the § 2(b) "meeting competition" defense, which exonerates him upon a showing that his price was "made in good faith to meet an equally low price of a competitor . . . ." *Id.* § 13(b).

7. ROWE, *supra* note 2, at 535.

8. The myriad elements of a § 2(a) or § 2(f) prima facie case are far too numerous to be the subject of discussion here. For example, space prohibits mention of the problems of jurisdictional reach, the requirement of "like grade and quality," and so on. However, competitive injury and buyer's knowledge represent the two most important elements of complaint counsel's prima facie case under § 2(f), and also present the most formidable conceptual difficulties. As one commentator has noted:

Thus, the buyers' prima facie violation arises upon proof that the discriminatory concession in his favor was sizable enough to create competitive injury, and that furthermore the *nature* of the discrimination placed him on notice of its probable illegality.

ROWE, *supra* note 2, at 438 (emphasis in original).

9. A discrimination in price is merely a difference in price between two or more purchasers. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

10. 15 U.S.C. § 13(a) (1970).

11. ROWE, *supra* note 2, at 124.

12. 4 J. VON KALINOWSKI, *ANTITRUST LAWS AND TRADE REGULATION* 29-6 (1969). The various components of competitive injury are often difficult to unravel. Essentially, the forms include primary-line (injury among competing sellers), secondary-line (com-

There is substantial, though not unanimous, agreement that the Act is designed to protect overall market competition, and not individual competitors.<sup>13</sup> Therefore, minor price differentials which place one competitor in a slightly better position than another are usually considered a fact of commercial life not worthy of Robinson-Patman scrutiny.<sup>14</sup> For this reason, the FTC was reluctant to move against transactions involving slight differences in prices. Early § 2(a) complaints were dismissed because the differentials did not perceptibly influence resale prices,<sup>15</sup> or because only a small portion of the seller's operation was involved.<sup>16</sup>

The Supreme Court greatly altered this approach in *FTC v. Morton Salt Co.*,<sup>17</sup> where the respondent was charged with granting price differentials on table salt sold to retail grocers for resale. Although the questioned practices involved straight volume discounts theoretically available to all, the Court found that, as a practical matter, only large retail food chains, or others able to pool their buying power, were in an economic position to make sufficient purchases to take full advantage of the discounts. The Court first asserted that the Act protected individual competitors, as well as competition as a whole.<sup>18</sup> It then squarely faced the seller's argument that the injury was insignificant. Since those injured were independent competitors of retail grocery chains, respondent pointed to the minute effect of the receipt of a lower price for table salt, only one item among the entire inventory of a grocery store. Justice Black summarily rejected the argument:

There are many articles in a grocery store that, considered separately, are comparatively small parts of a merchant's stock.

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peting buyers), and third-line (buyer's customers). See generally ROWE, *supra* note 2, at 124.

13. See *Anheuser-Busch, Inc. v. FTC*, 289 F.2d 835, 840 (7th Cir. 1961); ROWE, *supra* note 2, at 129. However, the legislative history is not so clear, see 80 CONG. REC. 9417 (1936), and the competition-competitors dichotomy has proved in practice to be little more than a term of art. One problem is that the distinction is often impossible to make, since injury to competition necessarily implies injury to competitors. As a result, the willingness of courts to uphold findings of competitive injury often turns on the label one chooses to place on the fact situation.

14. See C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 637 (1959).

15. See, e.g., *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537, 544 (1937).

16. See, e.g., *Bird & Son, Inc.*, 25 F.T.C. 548, 553 (1937). See also ROWE, *supra* note 2, at 132.

17. 334 U.S. 37 (1948).

18. The Court stated:

[I]n enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses which were unable to buy in quantities. . . . The new provision, here controlling, was intended to justify a finding of injury to competition by a showing of "injury to the competitor victimized by the discrimination."

*Id.* at 49, quoting S. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936).

Congress intended to protect a merchant from competitive injury attributable to discriminatory prices . . . whether the particular goods constituted a major or minor portion of his stock. Since a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store.<sup>19</sup>

According to this statement, a reduced price for one component of a competitor's business injures the competitor, and therefore competition. The unarticulated assumption behind *Morton Salt* is that any selective decrease in the price of a product must necessarily benefit the favored purchaser to the detriment of his competitors.<sup>20</sup> A failure to find competitive injury in situations like *Morton Salt* would permit deliberate and open price discriminations, as long as only one or a few items were involved at one time. In effect, retailers could mask a price discrimination in a large inventory with impunity. Although there is understandable reluctance to apply § 2(f) where differentials are extremely small, Justice Black's analysis permits a finding of competitive injury only when the differential on an individual item is significant.<sup>21</sup>

The *Morton Salt* approach to secondary-line injury was not enthusiastically accepted by lower courts.<sup>22</sup> Courts were willing to infer competitive injury without a showing of an overall effect on resale prices only when "a producer is selling a homogenous product, . . . where competition is extremely keen among retailers, and where margins of profit or markups are small . . . ."<sup>23</sup>

Three years later, the same issue was presented to the Seventh Circuit in a different factual context in *Minneapolis-Honeywell Regulator Co. v. FTC*.<sup>24</sup> Minneapolis-Honeywell manufactured and sold

19. 334 U.S. at 49.

20. The economic foundations of this assumption have been cogently criticized. See generally Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773, 775-77 (1968). The argument often advanced is that random price differentials positively benefit competition by encouraging buyers to seek lower prices. Yet the Robinson-Patman Act was directed at decidedly nonrandom differentials granted a certain class of buyers—chain stores. See ROWE, *supra* note 2, at 13-16. See generally *Moog Indus., Inc. v. FTC*, 238 F.2d 43, 50 (8th Cir. 1956), *aff'd*, 355 U.S. 411 (1958).

21. *FTC v. Morton Salt Co.*, 334 U.S. 37, 50 (1948).

22. ROWE, *supra* note 2, at 133-36.

23. *Sun Oil Co.*, 55 F.T.C. 955, 962 (1959), *rev'd on other grounds*, 294 F.2d 465 (5th Cir. 1961); *accord*, *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).

24. 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

heating control units to other manufacturers who incorporated them into oil burners. The burners were then resold to customers. Although the price of the controls was the largest single item in the finished burners, it appeared from the record that some of the disfavored purchasers were able to sell their completed burners at lower prices than favored purchasers. On this basis, the Seventh Circuit found no competitive injury.<sup>25</sup> The court noted that Minneapolis-Honeywell's prices were generally higher than those of competitors, and that some of Minneapolis-Honeywell's customers also purchased competitive controls.<sup>26</sup> However, for the court, the most important question was causation. It stated:

[T]here is little, if any, relationship between the prices of the controls and the prices of the burners into which the controls are built . . . .

. . . .  
[W]here the controls were used in the manufacture of burners, the cost of which was determined by many other factors—cost of other materials and parts, service, advertising, to mention only a few—it cannot be said that discriminatory price differentials substantially injure competition or that there is any reasonable probability or even possibility that they will do so.<sup>27</sup>

In short, the court held that price differentials become insignificant in products destined for manufacture when they are too difficult to trace to the finished product because of intervening variables. Therefore, a price differential bears no relation to competitive injury unless it is reflected in the resale price and can be clearly identified. Since prices of manufactured products are always subject to numerous cost variables, the price of even the single most expensive item will not determine the resale price of the product. Thus, *Minneapolis-Honeywell* exempts most sales to manufacturers from Robinson-Patman scrutiny under the guise of lack of causal relation between price and injury.<sup>28</sup>

The current judicial state of affairs regarding competitive injury reflects the tension between the potentially conflicting holdings of

25. *Id.* at 792.

26. *Id.* at 790.

27. *Id.* at 791-92.

28. The Supreme Court dismissed the petition for certiorari for late filing. Only Justice Black dissented. On the merits, he argued that the Seventh Circuit had failed to apply the *Morton Salt* doctrine. *FTC v. Minneapolis-Honeywell Regulator Co.*, 344 U.S. 206, 213 (1952).

*Minneapolis-Honeywell* and *Morton Salt*. One line of cases holds that where goods are sold for resale, the mere existence of a price differential is usually sufficient to permit far-reaching inferences of competitive injury.<sup>29</sup> A second line of cases, more closely allied with *Minneapolis-Honeywell*, exists where the price-differentiated product is not so easily traceable.<sup>30</sup>

These two lines of cases leave courts which are trying to interpret the competitive injury requirement with little direction, especially where the issue of causality is injected. It is widely assumed that *Morton Salt* and *Minneapolis-Honeywell* stand for different but compatible propositions.<sup>31</sup> On closer examination, however, factual distinctions melt away. It is submitted that the two cases are irreconcilable, that *Morton Salt* represents the sounder position, and that a failure to recognize this is partly responsible for the current confusion. While the manufacturer-reseller distinction exists, it is without practical significance. Compare the grocer who receives a price differential on one item in his inventory

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29. In *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965), the court upheld a finding of competitive injury with some of the strongest language to date:

[I]t seems well-established that where the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged. It is unnecessary that there be evidence that the favored customer actually undersold his rivals; a substantial price advantage can afford a favored buyer a material capital advantage by enlarging his profit margin in a highly competitive field. . . .

We think that the tone set by the Supreme Court in the *Morton Salt* case requires that we affirm the FTC's inference of a probable injury to competition in the circumstances . . . .  
*Id.* at 680-81 (footnote omitted).

In *United Biscuit Co. v. FTC*, 350 F.2d 615 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966), the court adhered to Justice Black's rationale, with a proviso. The court said that the Commission must not apply a per se test of competitive injury but must instead be sure to draw its inferences "upon the basis of all the attendant facts and circumstances with particular reference to the type of business under investigation." *Id.* at 622. *But see* *National Dairy Prods. v. FTC*, 395 F.2d 517 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968) (sustained price differential is prima facie injurious). *See also* *General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir. 1965); *Mid-South Distrib. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *American Motor Specialties v. FTC*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

30. For example, the FTC adopted the *Minneapolis-Honeywell* rationale in *Quaker Oats Co.*, 66 F.T.C. 1131 (1964), where price discrimination was alleged in the sale of oat flour used in the manufacture of various food products. The Commission used a simple input-output analysis. Lacking a showing that the price of the oat flour (input) was a significant factor in the price of the finished product (output), competitive injury could not be inferred. *Id.* at 1191-92.

31. For analysis which cites both *Minneapolis-Honeywell* and *Morton Salt* with approval, see ROWE, *supra* note 2, at 182, 186-87. *But cf. id.* at 133.

with the manufacturer who obtains a similar differential on one of the component parts which will comprise his finished product. Although the grocer receives his price break on a discrete item which may be resold separately, at the end of the year his income statement will show a lower cost of goods sold than it would have if no differential had been received. Since the manufacturer is in the same position, the result to both is increased income. Therefore, the assumption that price differences on raw materials are unmeasurable is invalid. The total effect is measurable, and this is all that competitive injury requires.<sup>32</sup> It is true that the grocer's differential is measured more easily. Even then, however, the resale price may not be reduced by the amount of the differential received. Indeed, courts following the *Morton Salt* rationale have consistently agreed that competitive injury may exist even if the resale price is not lowered at all, since increased profits due to prohibited price discounts injure competition just as effectively.<sup>33</sup>

It requires no great leap of faith to see that price differentials affect the competitive position of the manufacturer in the same way as the grocer. By refusing to recognize competitive injury when a discriminatory price on a component part has been hidden and cannot itself be measured, the court blinds itself to economic reality. *Minneapolis-Honeywell* is squarely inconsistent with *Morton Salt* and should be overruled.

Perhaps not intending the result, *Minneapolis-Honeywell* and its progeny have created a blanket exception to § 2(f) for the manufacturer who transforms raw materials into a finished product. The nonmanufacturer who resells a product, however, is not immune from § 2(f) liability, no matter how trivial a part the item plays in his total inventory. However, in light of the irrationality of the manufacturer-reseller distinction, the prudent manufacturer should not rely on the protection of *Minneapolis-Honeywell*, and should analyze his liability as a buyer as if the distinction did not exist.

#### SCIENTER—BUYER'S KNOWLEDGE OF THE PROHIBITED NATURE OF THE TRANSACTION

Section 2(f) applies only to the buyer who knowingly induces or

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32. The teaching of *Morton Salt* is that small price differentials on individual products may support a finding of competitive injury. This doctrine was not challenged by *Minneapolis-Honeywell*; the disagreement between the two cases involves the identification, not the significance, of the competitive impact.

33. See, e.g., *E. Edelmann & Co. v. FTC*, 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958). See also *Sun Oil Co.*, 55 F.T.C. 955 (1959), rev'd on other grounds, 294 F.2d 465 (5th Cir. 1961).



knowingly receives an illegal price discrimination.<sup>34</sup> In theory, the range of culpable buyers is wide since both the buyer who seeks the illegal discount and the buyer who possesses sufficient facts to lead him to suspect illegality could be liable. If the provision swept this widely, it would be the rare purchaser who was not guilty of a § 2(f) violation. If the provisions of this Act are to be realistically enforced and obeyed, buyers must have a reliable indication of what transactions are permissible under § 2(f).

### *Automatic Canteen*

The Supreme Court has dealt with the § 2(f) scienter requirement only once in *Automatic Canteen Co. v. FTC*.<sup>35</sup> The Court rejected the Commission's contention that the buyer need have knowledge only that his price was lower than that of his competitors. Instead, it held that the FTC must show that the buyer received a price which he knew to be illegal to the seller under § 2(a).<sup>36</sup>

Since many § 2(f) cases involve the buyer's assertion of the seller's defense that the price was cost justified,<sup>37</sup> the Court appeared to place a seemingly insurmountable burden on the Commission to produce evidence that the buyer knew his seller's price was not cost justified.<sup>38</sup> In the case where a buyer purchases in the same quantities and is serviced in the same manner as competitors, Justice Frankfurter suggested that the FTC could meet its burden and scienter could be inferred from a showing that the buyer knew that he received the same goods and services for a lower price.<sup>39</sup> In the more difficult cases where goods or services differ, the inference is permissible upon a showing that the buyer was aware of the nature of the differences and could not reasonably have believed that these differences warranted a lower price.<sup>40</sup>

After an hiatus of several years, the FTC began new proceedings in

34. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 73 (1953).

35. *Id.*

36. *Id.* at 71.

37. 15 U.S.C. § 13(a) (1970). In addition, the buyer may interpose his seller's § 2(b) meeting competition defense, or any other defense which the seller could have introduced in a seller's liability action. See *Rowe*, *supra* note 2, at 445.

38. At worst, the Commission would be required to compile cost studies for each litigation, a time-consuming process. *But see* *Suburban Propane Gas Corp.*, 73 F.T.C. 1269 (1968) (Commission need come forward with a showing only that buyer should have known that his differential could not have been cost justified, regardless of cost justification in fact).

39. *Automatic Canteen Co. v. FTC*, 346 U.S. 61, 80 (1953).

40. *Id.* It should be noted that in both of these situations, the Commission need not always show that the buyer was aware of every element of § 2(a) and § 2(f) illegality. See, e.g., *Mid-South Distrib. v. FTC*, 287 F.2d 512, 517 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961). *But cf. Rowe*, *supra* note 2, at 444 n.115.

the late 1950's to test § 2(f) requirements in the light of *Automatic Canteen*. Subsequent litigation has shown additional circumstances in which the buyer may be charged with notice of the illegality of the transaction.

*Buyer's Actions Extrinsic to the Transaction*

When buyers attempt to organize into groups primarily for the purpose of obtaining quantity discounts, such activity may support inferences of scienter by a trier of fact. For example, after *Automatic Canteen*, the FTC brought complaints against confederations of automobile parts jobbers formed for the purpose of using their pooled buying power to obtain volume discounts.<sup>41</sup> The groups usually passed on the discounts to members in the form of year-end rebates.

Where the buying groups served merely as a conduit for the processing of members' orders and disbursement of rebates, the FTC and the courts had little trouble finding liability. In *American Motor Specialties v. FTC*,<sup>42</sup> for example, a buying group which existed only as a name on a letterhead was held by the Second Circuit Court of Appeals to create no cost savings for sellers, and knowledge of this fact was charged to members.<sup>43</sup>

After a series of reversals, buying groups began to develop more sophisticated operations, such as providing warehousing and brokerage services. In *Alhambra Motor Parts*<sup>44</sup> the Commission held that complaint counsel had met its § 2(a) burden by a showing that savings realized by the seller, including those resulting from the warehousing service, did not justify the lower price. Scienter could be inferred, according to the majority, from the fact that certain jobbers had made

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41. *E.g.*, *General Auto Supplies, Inc. v. FTC*, 346 F.2d 311 (7th Cir. 1965); *Mid-South Distrib. v. FTC*, 287 F.2d 512 (5th Cir.), *cert. denied*, 368 U.S. 838 (1961); *American Motor Specialties v. FTC*, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960). Buying group litigation has been well covered in: Kintner, Romano & Filippini, *Cooperative Buying and Antitrust Policy: The Search for Competitive Equality*, 41 GEO. WASH. L. REV. 971, 973-98 (1973) [hereinafter cited as *Cooperative Buying*]; Mezines, *Group Buying—When is it Permitted Under the Robinson-Patman Act?*, 44 N.Y.U.L. REV. 729 (1969); Steele, *Caveat Emptor Under the Robinson-Patman Act—A Reappraisal of Current Developments in Buyer's Liability*, 27 OHIO ST. L.J. 19 (1966). It should be noted that buying groups may serve more than this function. See *Cooperative Buying, supra*, at 972.

42. 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

43. *Id.* at 228.

44. 68 F.T.C. 1039 (1965). Here, the group made its own purchases on a quantity basis, stored the goods in its warehouse, and resold them to members who received an annual rebate in proportion to purchases. Members were free to buy elsewhere, but few did so. In essence, all the members had done was to buy, using another name nominally entitled to the discount. Sellers were able to sell more to a single "buyer" (the group) but sold no more than if the group had never existed.

purchases from the same suppliers before joining the buying group, and therefore could easily compare their bargains.<sup>45</sup> The inference of knowledge was also supported by the members' general trade experience.<sup>46</sup> This was held to meet the requirements of *Automatic Canteen* in the absence of a formal cost study.<sup>47</sup>

It can be concluded from this line of cases that buyers who join or create an artificial organization for the purpose of obtaining a lower price will likely be held to possess the requisite scienter for § 2(f) liability.

#### *Inducement of Price Discounts*

*Fred Meyers, Inc. v. FTC*<sup>48</sup> was the Commission's first attempt to enforce § 2(f) against an individual buyer since *Automatic Canteen*. In *Fred Meyer*, petitioner, a grocery chain in Oregon, had for many years conducted an annual promotion sale. Coupon books were printed, containing discount offers for goods in Meyer's stores, and Meyer actively solicited suppliers to place advertisements in the books at the rate of 350 dollars per page. These payments in the aggregate covered the total cost of the promotion, including the discounts to the customers. Faced with an FTC claim that the cash payments constituted a prohibited price discrimination, Meyer argued that because of differing quantities purchased by competitors<sup>49</sup> it had no reason to know of the illegality of the suppliers' payments.

In rejecting Meyer's claim, the Ninth Circuit noted three prominent findings of the Commission: (1) none of Meyer's suppliers granted quantity discounts to anyone else; (2) Meyer received the discount only one month of the year;<sup>50</sup> (3) many of the rebates resulted in prices substantially less than normal. These facts were held sufficient to satisfy the Commission's burden as to buyer's knowledge that the discounts could not be cost justified, even without a formal cost study.<sup>51</sup> Here, scienter was a function of trade experience, but the court was careful

45. *Id.* at 1083.

46. *Id.* *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953), permits use of evidence of "trade experience" only with reference to facts of the particular case. *Id.* at 79-80. Here, the Commission was willing to recite the phrase, without support or qualification.

47. Justice Frankfurter had stated: "A showing that the cost differences are very small compared with the price differential and could not reasonably have been thought to justify the price difference should be sufficient." *Id.* at 80.

48. 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

49. *Fred Meyer, Inc.*, was the second largest seller of all goods in the area. *Id.* at 355.

50. The court labeled an inference as "fair" that Meyer's larger sales during the month generated no appreciable cost savings. *Id.* at 364.

51. *Id.* at 367.

to point to specific facts which Meyer had particular reason to know, including profit margins of various wholesalers and retailers, and pricing theory in the retail market. Meyer also possessed a "vigorous intelligence network" which supplied it with current information about prevailing prices and practices of competitors.<sup>52</sup> On this basis, the court concluded that Meyer had reason to know of the probable effects of its promotional activities.<sup>53</sup>

*Fred Meyer* presented an easy fact situation for the Commission. Meyer solicited special, localized, annual price differentials from suppliers who did not otherwise grant them. Meyer's trade experience was genuinely substantial, which should have enabled the firm to detect threshold illegality. At a minimum, this justified the Commission in shifting the burden to Meyer on the issue of knowledge of cost justification, a burden Meyer failed to discharge.<sup>54</sup> This indicates that extensive buyer's knowledge will considerably ease the Commission's burden of producing evidence, and might in itself support a judgement.

*Fred Meyer* demonstrates that both a buyer who *knowingly* induces an illegal price and a knowledgeable buyer who receives a suspicious price will be found to possess the requisite scienter. As in tort law, the exceptional individual will often be held to a higher standard of care.<sup>55</sup> In *Fred Meyer*, both inducement and specialized knowledge were present, making the Commission's case particularly strong.

#### *Misrepresentation*

*Beatrice Foods Co.*<sup>56</sup> presented the Commission with an especially complex fact situation. The Kroger Company, a multistate grocery store chain, sought bids from private dairies for a supply of milk and other dairy products to be marketed under the Kroger label. During the course of negotiations with Beatrice, the Kroger bargaining agent, Mr. Francis X. Casserly, rejected an offer of an across-the-board fifteen percent discount on the milk alone, stating that a competitor (Broughton) had already submitted a similar bid containing a twenty percent discount.

52. Meyer carefully monitored the advertising of competitors, engaged in comparison shopping at competitive stores and tested the quality of goods sold elsewhere. *Id.*

53. *Id.*

54. The court stated:

Meyer suggests but failed to prove that its sales during the balance of the year were significantly lower. Such a failure to introduce evidence within its possession probably strengthens and certainly cannot weaken the Commission's conclusion.

*Id.* at 364 n.14.

55. W. PROSSER, HANDBOOK OF THE LAW OF TORTS § 32 (4th ed. 1971).

56. [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045 (FTC 1969), *aff'd sub nom.* Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

The Commission found that Broughton's bid was not as Casserly described, although comparisons were admittedly difficult to make due to differences in the manner of calculating bids. Beatrice's bid was based on an average price for all locations to be served; other bids, such as Broughton's, were broken down on a location-by-location basis.<sup>57</sup> Further negotiations led to an offer by Beatrice containing a discount slightly greater than the twenty percent figure quoted by Casserly. This was accepted on a "stripped service" basis: Kroger, not Beatrice, would actually stock the shelves at the times of delivery.

On the basis of precedent, Kroger's position seemed strong. First, Kroger was served in a different manner than its competitors; second, Beatrice had a potentially successful § 2(b) meeting competition defense;<sup>58</sup> and third, the bids were not directly comparable. Thus the Commission was faced with a dilemma. It seemed unfair to hold Beatrice liable for § 2(a) violation, since it had relied on Casserly's statement of competitive bids. On the other hand, if Beatrice were absolved, Kroger would seemingly be absolved from § 2(f) liability, since the price received would no longer be prohibited by § 2(a).

The Commission resolved this conflict in unprecedented fashion. Casserly knew the Beatrice bid was substantially below others, and testified to this effect.<sup>59</sup> He was portrayed as a shrewd negotiator, experienced in private label operations, and determined to obtain the best possible price. Most important, he failed to keep the bidders properly informed, and actually misrepresented Broughton's bid as lower than it actually was.<sup>60</sup>

The Commission therefore exonerated Beatrice by virtue of the meeting competition defense.<sup>61</sup> Even though Beatrice's bid was lower than competitors and thus did more than meet competition, the majority held that the difficulty in comparing the various bids, and Beatrice's justified doubt as to whether its final bid was sufficiently low were enough to give it a successful defense. For Kroger, however, the majority added that Beatrice's success "does not mean . . . that everyone is to be excused."<sup>62</sup> The opinion then addressed the issue of "whether Kroger

57. *Id.* at 21,299. Since the bids were not precisely comparable, there is some question whether Casserly was actually aware of the misrepresentation. Scher, *New Directions in Buyer's Liability Under the Robinson-Patman Act*, 39 ANTITRUST L.J. 884, 891 (1970).

58. [1967-1970 Transfer Binder] TRADE REG. REP. at 21,299. The meeting competition defense is explained in note 6 *supra*.

59. *Id.* at 21,301.

60. *Id.* at 21,307-08.

61. *Id.* at 21,309.

62. *Id.* at 21,311.

stepped over the bounds of proper negotiation."<sup>63</sup> Emphasizing the element of inducement in § 2(f), the Commission found that:

Kroger bargained too hard . . . Normally the seller must bear the responsibility for seeing that Robinson-Patman requirements are complied with. At some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. And this is so even though the seller has lived up to his Robinson-Patman obligations by maintaining the good faith required for a Section 2(b) defense.<sup>64</sup>

When Casserly, as representative of a powerful buyer, made misrepresentations of fact concerning competitive bids without first checking his assumptions for their accuracy, Kroger took on the risk of liability. A contrary holding, said the Commission, would render § 2(f) meaningless.<sup>65</sup>

The cost justification issue was resolved adversely to Kroger largely on the basis of Casserly's trade experience. Casserly had thorough knowledge of the industry and the subject matter of the negotiation. Although warned by other bidders of cost justification problems, he nonetheless accepted Beatrice's bid. This, said the Commission, was sufficient to place him on notice that this unusual bid, clearly unrelated to delivery costs, could not be cost justified in fact.<sup>66</sup>

The Sixth Circuit affirmed in *Kroger Co. v. FTC*.<sup>67</sup> It concluded:

To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices . . . . [and] would violate the purposes of the Act, and frustrate the intent of the Congress.<sup>68</sup>

There can be no denying that the Sixth Circuit has judicially rewritten the language of the Robinson-Patman Act, at least as it has been

63. *Id.*

64. *Id.* at 21,312. The "stripped service" portion of the contract was held to give Beatrice negligible cost savings. *Id.* at 21,307.

It is unclear to what extent the holding rested on the standards set forth in the Commission's interlocutory holding in *Suburban Propane Gas Corp.*, 73 F.T.C. 1269 (1968). If that decision was correct (that the Commission need not show absence of cost justification in fact, only that buyer should have known there probably was none), then the decision in *Beatrice* fits easily into that mold. *Suburban Propane Gas Corp.* was cited in the *Beatrice* majority opinion. [1967-1970 Transfer Binder] TRADE REG. REP. at 21,312.

65. *Id.*

66. *Id.* at 21,313.

67. 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

68. *Id.* at 1377.

interpreted since *Automatic Canteen*.<sup>69</sup> But the Act has undergone judicial surgery before,<sup>70</sup> and the result in the *Kroger* case seems quite defensible, especially since Justice Clark limited liability to active misrepresentation. He stated:

The use by the Commission of the "hard bargaining" language . . . is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the[" "]price levels" but the *misrepresentation* of the Broughton bid, in order to induce a discriminatory price.<sup>71</sup>

If one of the goals of statutory construction is to furnish parties with comprehensible terms explaining the requirements of the law, then Justice Clark is surely correct.

More recent actions by the FTC appear to enlarge buyer's liability along the lines of *Beatrice-Kroger*. The proposed complaint in *The Great Atlantic & Pacific Tea Co.*<sup>72</sup> would extend the *Beatrice-Kroger* doctrine of misrepresentation to situations where the buyer remains silent upon receipt of an offer known to be too far below other competitive bids to be meeting competition. The Commission in that case issued its complaint because "A & P accepted Borden's offer knowing that Borden had granted a substantially lower price than the only other competitive bidder and without notifying Borden of this fact."<sup>73</sup> This view of § 2(f) would go far toward creating a buyer's requirement of disclosure.

In the recent case of *United Fruit Co.*,<sup>74</sup> respondent, an importer-seller, furnished Harbor banana distributors with direct deliveries to Harbor's processing plant, rather than from United's regular discharge point. This benefit resulted in a savings to Harbor in trucking costs, and constituted the alleged discrimination. On the basis of the meeting competition defense, the hearing examiner found no § 2(a) liability on

69. This was vigorously asserted in Kroger's unsuccessful petition for certiorari. Petitioner's Brief for Certiorari at 17, *Kroger Co. v. FTC*, 404 U.S. 871 (1971). *But see* Brief for the Federal Trade Commission in Opposition at 13-14, *Kroger Co. v. FTC*, 404 U.S. 871 (1971) which argued:

The language of Section 2(f) supports this conclusion. . . . from Kroger's point of view the price it sought was in fact unlawful, even though the person offering that price did not thereby violate the Act.

*Id.*

70. Borowitz, *Beatrice Foods: Meeting Competition and Buyer Liability*, 22 CASE W. RES. L. REV. 54, 61-62 (1970).

71. 438 F.2d at 1378 (emphasis in original).

72. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 19,639 (FTC 1971).

73. *Id.* at 21,685. For an opinion that this case may represent a shift in enforcement, see Rowe, *Pricing and the Robinson-Patman Act*, 41 ANTITRUST L.J. 98, 103-04 (1971).

74. [1970-1973 Transfer Binder] TRADE REG. REP. ¶ 20,209 (FTC 1973).

the part of United, and therefore exonerated Harbor from § 2(f) liability. The Commission reversed,<sup>75</sup> arguing that Harbor, like Casserly, was a knowledgeable buyer, that it knew its own trucking costs, and that its competitors were not benefited by similar direct delivery. The only reference to misrepresentation was the allegation that Harbor had threatened to take its business elsewhere unless granted direct delivery, a threat it did not intend to keep.<sup>76</sup>

This analysis stretches the *Kroger* holding to its limits by extending the concept of misrepresentation beyond Justice Clark's framework.<sup>77</sup> In *Kroger* it was an actual misstatement of a previously quoted price that caused Beatrice to make its lower offer. The misrepresentation in *United Fruit* involved merely an application of pressure in the course of bargaining. This holding would make any falsehood a sufficient ground for a § 2(f) violation if the subsequent price discrimination is in any way related.

As should be clear, the consequence of misrepresentation are being increasingly borne by the buyer. The real issue, though, is the definition of misrepresentation. Under *Beatrice-Kroger* and *United Fruit*, any misstatement made during the course of negotiations which results in the granting of a price differential may subject the buyer to § 2(f) liability, regardless of the liability of the seller under § 2(a). The sweep of the term is broad, but its message is clear: refrain from falsehoods in communications with potential suppliers. Further, *A & P* may require the buyer to reject bids which are too low, and affirmatively notify the seller of the reasons for the action. Under this interpretation, it appears that the FTC has ignored the admonitions of Justice Clark in *Kroger*, instead adhering to its earlier *Beatrice* rationale of hard bargaining.

#### *The Buyer's Course of Action*

Various factual circumstances surrounding the transaction may place even the innocent buyer on notice of probable § 2(f) illegality. In the group buying cases, it was the artifice of the buying instrumentality; in *Fred Meyer*, trade experience and inducement; in *Beatrice-Kroger* and subsequent cases, some variant of misrepresentation.

But notice of illegality is only half the buyer's problem. Once his suspicions are aroused, what steps can he take to avoid liability? One possible tactic is to tailor the contract of the sale to give an appearance

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75. *Id.* at 22,196.

76. *Id.* at 22,197.

77. See text accompanying note 70 *supra*.



of diligent inquiry. An example of this would be the insertion of a simple statement by the seller that the price he offers is cost justified. A more sophisticated approach was taken in *Beatrice-Kroger*, where the terms of sale were actually altered from the norm by the insertion of the "stripped service" provision, which did in fact alter costs somewhat, though not enough to support the differentials. Neither method would shield the buyer from a charge of knowing receipt. In both cases, the inquiry is the same: did facts exist which would put a person with the buyer's skill and knowledge on notice of probable illegality? In both cases, the Commission could find that the buyer had reason to know, in spite of the printed statement.<sup>78</sup> In fact, such a provision might serve only to draw attention to the arrangement. Surely this sort of whistling in the dark cannot alter the outcome as long as the issue remains what the buyer had reason to know.

The alternative open to the buyer is to make affirmative inquiry into the sources of his seller's price quotations whenever the circumstances arouse his suspicions. It is unclear how comprehensive the inquiry must be. Consistent with so much in the Robinson-Patman Act, the adequacy of the inquiry must turn on subjective factors such as diligence, good faith and knowledge.

If buyers adopted inquiry as a business practice, the initial impact on purchaser-supplier relationships might be profound. There would be a justified fear of seller impatience with any buyer who objects to a bargain offer. Sales might be lost as a result. But if sellers could be convinced to supply reasonably detailed information with their offers, the effect on the business community could be minimized. It may be that absolute truth in bargaining, as Commissioner Elman warned in his dissent in *Beatrice*,<sup>79</sup> is the only way in which buyers may avoid Robinson-Patman prohibitions.

#### CONCLUSION

Section 2(f) weighs increasingly upon the knowledgeable buyer. To avoid violating the Act the buyer must carefully scrutinize his transaction. While standards regarding competitive injury remain an all-or-nothing categorization,<sup>80</sup> scienter contains a morass of hazards which

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78. For suggestions as to when the buyer may fairly be charged with constructive knowledge, and a generally excellent analysis of the problems of buyer's liability, see Frey, *The Evidentiary Burden on Affirmative Defenses Under Section 2(f) of the Robinson-Patman Act: Automatic Canteen Revisited*, 36 GEO. WASH. L. REV. 347, 368 (1967). See also Comment, *Buyers' Responsibility Under the Robinson-Patman Act*, 49 Nw. U.L. REV. 273, 276 n.17 (1954).

79. [1967-1970 Transfer Binder] TRADE REG. REP. at 21,316.

80. See text accompanying notes 29-33 *supra*.

can be avoided only by diligent attention to business practice and the requirements of the Act. Where the buyer acts reasonably and in good faith to determine the legality of his transaction there is little likelihood, even if he errs, that § 2(f) could be applied to his conduct.

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