Fairfield UNIVERSITY

North East Journal of Legal Studies

Volume 1 *Spring 1993* Article 10

Spring 1993

Incentive Programs by Merchant Sellers in Which Cash and Prizes are Paid to Buyers' Agents: To What Extent Should They be Permitted Under Section 2(c) of the Robinson-Patman Act?

William E. Greenspan

Follow this and additional works at: https://digitalcommons.fairfield.edu/nealsb

Recommended Citation

Greenspan, William E. (1993) "Incentive Programs by Merchant Sellers in Which Cash and Prizes are Paid to Buyers' Agents: To What Extent Should They be Permitted Under Section 2(c) of the Robinson-Patman Act?," *North East Journal of Legal Studies*: Vol. 1 , Article 10.
Available at: https://digitalcommons.fairfield.edu/nealsb/vol1/iss1/10

This item has been accepted for inclusion in DigitalCommons@Fairfield by an authorized administrator of DigitalCommons@Fairfield. It is brought to you by DigitalCommons@Fairfield with permission from the rights-holder(s) and is protected by copyright and/or related rights. You are free to use this item in any way that is permitted by the copyright and related rights legislation that applies to your use. For other uses, you need to obtain permission from the rights-holder(s) directly, unless additional rights are indicated by a Creative Commons license in the record and/or on the work itself. For more information, please contact digitalcommons@fairfield.edu.

INCENTIVE PROGRAMS BY MERCHANT-SELLERS IN WHICH CASH AND PRIZES ARE PAID TO BUYERS' AGENTS: TO WHAT EXTENT SHOULD THEY BE PERMITTED UNDER SECTION 2(c) OF THE ROBINSON-PATMAN ACT?

by

William E. Greenspan*

Imagine a situation whereby American Appliance Company is a large retail dealer selling most major brands of appliances, including washers, dryers, ranges, microwaves, dishwashers, refrigerators and freezers. National Corporation, an appliance manufacturer, sells appliances to American. On one occasion National offers an "incentive" program to American's salespeople. Under the terms of the program, an American salesperson will receive twenty dollars for each National appliance the salesperson sells during the month of January. Payments are mailed by National to the salespersons at their home address. Naturally, any customer entering American's spectacular showroom during January, looking for an appliance, will be greeted by an American salesperson who eagerly points out the advantages of National appliances over other major brands. Some of these customers, relying on the salesperson's recommendation, will buy a National appliance never knowing the salesperson was partially motivated by the incentive plan.

Many neutral observers, looking at this incentive plan, may think it is unethical, while others may approve of it as a widely acceptable way of doing business. Some may think such incentive plans should be illegal. This paper examines to what extent it is wise and feasible to regulate such incentive plans under section 2(c) of the Robinson-Patman Act: Payment or acceptance of commission, brokerage or other compensation.[1]

More specifically this paper will discuss (1) a Robinson-Patman Act overview,[2] (2) F.T.C. v. Henry Broch & Company,[3] the only United States Supreme Court case reviewing section 2(c), (3) recent lower court interpretations of section 2(c), (4) Metrix v. Daimler-Benz Aktiengesellschaft,[4] a " case in point" on incentive programs similar to the American Appliance example stated above, and (5) conclusions and recommendations.

---

* Associate Professor of Law, University of Bridgeport, Bridgeport, CT.

A ROBINSON-PATMAN ACT OVERVIEW

In 1936 Congress amended section 2 of the Clayton Act and enacted the Robinson-Patman Act[5] which deals with illegal price discrimination. Sections 2(a) and 2(b) are the heart of the Act, addressing the primary purpose for which it was passed:

> The legislative history of the Robinson-Patman Act makes it abundantly clear that Congress considered it to be an evil that a large buyer could secure a competitive advantage over a small buyer solely because of the large buyer's quantity purchasing ability. The Robinson-Patman Act was passed to deprive a large buyer of such advantages except to the extent that a lower price could be justified by reason of a seller's diminished costs due to quantity manufacture, delivery or sale, or by reason of the seller's good faith effort to meet a competitor's equally low price.[6]

Section 2(a) prohibits a discrimination in price between competing purchasers of commodities of like grade and quality, where the effect of such discrimination may be substantially to lessen competition. However a seller may grant a price differential which reflects reduced costs due to quantity manufacture, delivery or sale.[7]

Section 2(b) provides another defense to section 2(a), the "meeting not beating" defense. In order to prevail on a section 2(b) "meeting not beating" defense, an accused seller must show that he lowered his price in good faith to meet, but not beat, that of a competitor of the seller.[8]

Sections 2(d) and 2(e) are companion sections. A seller is prohibited from making cash payments [2(d)] to a customer for promoting the seller's product, or furnishing services or facilities [2(e)] (advertising, catalogs, demonstrators, display materials, special packaging) to a customer for promoting the seller's product, unless such payments, services or facilities are made available to all competing customers on proportionally equal terms.[9]

> The difference between the two subsections is that in subsection (d) the customer supplies the services or facilities and his vendor pays the bill, and in subsection (e) the wholesale vendor himself supplies the services and facilities for the use of his customer in facilitating resales.[10]

Section 2(f) is the "flip side" of section 2(a). It prohibits a buyer from knowingly inducing or receiving a discrimination in price prohibited by section 2(a).[11] Even though the purpose of the Robinson-Patman Act was to prevent large buyers from using their economic advantage to secure a discrimination in price, section 2(a) makes no mention of any restraint on buyers. Instead it only prevents sellers

from engaging in price discrimination. Therefore, although a buyer could not be held liable under section 2(a) for price discrimination, such buyer could be held liable for violating section 2(f) for having knowingly induced a violation of section 2(a).[12]

Section 2(c), with which this paper is concerned, prohibits a party from paying or receiving a commission, brokerage, or discount in lieu thereof, except for services rendered, to or from the other party or his agent.[13] Stated otherwise, section 2(c) prohibits a seller from paying a commission to a buyer or his agent in connection with the sale of goods, unless actual services are performed in connection with the sale. Likewise a buyer or his agent is prohibited from receiving a commission from the seller in connection with the sale of goods, unless actual services are performed in connection with the sale. Section 2(c) is a "per se" violation. None of the enumerated defenses in sections 2(a) and 2(b) (no lessening of competition, cost justification, "meeting not beating") are available when one is charged with a violation of section 2(c). The only possible defense, the "for services rendered" proviso, has been narrowly interpreted and rarely allowed as a defense. Early interpretations of the "for services rendered" defense indicate that it was only included to make sure that a "bona-fide independent" broker would not be denied compensation:

> The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the phrase, "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling function cannot be combined in one person.[14]

In 1960 the United States Supreme Court reviewed the legislative history of section 2(c) in F.T.C. v. Henry Broch & Company,[15] and gave examples of the type of conduct section 2(c) was intended to prohibit. This was the first and only section 2(c) case to reach the Court.

F.T.C. v. HENRY BROCH & COMPANY

Broch was a broker or sales representative for approximately 25 sellers of food products, including Canada Foods, a processor of apple concentrate and other products. Canada Foods set its price for apple concentrate at $1.30 per gallon in 50-gallon steel drums, including a five per cent commission for Broch. J.M. Smucker Co., a large buyer of apple concentrate for use in its manufacture of apple butter and preserves, offered to purchase 500 steel drums of apple concentrate at $1.25 per gallon. After some negotiations, a sale was arranged at $1.25, with the

condition that Broch reduce its commission from five per cent to three per cent to absorb half of the price reduction. The reduced price of $1.25 was granted to Smucker on subsequent sales, while sales to all other customers continued to be $1.30 with Broch earning his usual five per cent commission.[16]

The Federal Trade Commission found the price reduction granted to Smucker was a discount in lieu of of brokerage in violation of section 2(c).[17] The Seventh Circuit reversed, holding that "[n]either the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c)."[18]

The United States Supreme Court granted certiorari to decide whether section 2(c) is applicable to this conduct.[19] Reviewing the legislative history of the Robinson-Patman Act, the Court stated:

> The Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power . . . . Congress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect price discrimination.[20]

The Court further noted which parties may be included as "any person" in section 2(c):

> The particular evil at which § 2(c) is aimed can be as easily perpetrated by a seller's broker as by the seller himself . . . . The seller's broker is clearly "any person" as the words are used in § 2(c) - as clearly such as a buyer's broker.[21]

Thus the Court supported the position of the Federal Trade Commission:

> We conclude that the statute clearly applies to payments or allowances by a seller's broker to the buyer, whether made directly to the buyer, or indirectly, through the seller. The allowances proscribed by § 2(c) are those made by "any person" which, as we have said, clearly encompasses a seller's broker.[22]

Although there are numerous ways one may abuse the brokerage function to effect a price discrimination in violation of section 2(c), one instructive aspect of Broch is that it identifies three situations which are clearly violations of section 2(c). The first situation describes setting up "dummy" brokers:

> One of the favorite means of obtaining an indirect price concession was by setting up "dummy" brokers who were employed by the buyer and who, in many cases,

> rendered no services. The large buyers demanded that the seller pay "brokerage" to these fictitious brokers who then turned it over to their employer. This practice was one of the chief targets of § 2(c) of the Act.[23]

In a second situation, a large buyer seeks to evade section 2(c) by accepting price reductions equivalent to the seller's normal brokerage payments. The buyer negotiates directly with the seller, instead of through the seller's broker. The buyer insists on and receives a price reduction from the seller equal to the amount of the brokerage or commission the seller would have normally paid to the broker. This is "an allowance in lieu of brokerage under § 2(c) and [is] prohibited even though, in fact, the seller had 'saved' his brokerage expense by dealing directly with the selected buyer."[24]

The third situation is Broch. A large buyer (Smucker) asks for a price reduction from the seller (Canada Foods). The seller normally sells through a broker (Broch). The seller telephones the broker and advises the broker that the seller will make the sale at the reduced price if the broker agrees to yield part of his brokerage fee for sales with that buyer only. The broker agrees, and the sale takes place. This violates section 2(c).

> Congress enacted the Robinson-Patman Act to prevent sellers and sellers' brokers from yielding to the economic pressures of a large buying organization by granting unfair preferences in connection with the sale of the goods. The form in which the buyer pressure is exerted is immaterial . . . . There is no difference in economic effect between the seller's broker splitting his brokerage commission with the buyer and his yielding part of the brokerage to the seller to be passed on to the buyer in the form of a lower price.[25]

In summary, the Court made it clear that section 2(c) is a "per se" statute, absolute in its terms. None of the defenses in section 2(a) (no lessening of competition, cost justification, "meeting not beating") are available when one is charged with a section 2(c) violation. In addition the "services rendered" exception appeared to be limited to situations involving payments by a seller or buyer to his own broker, and that neither party to a transaction nor his broker could perform legitimate services for the other party.

However, in dictum, the Court made one troubling statement:

> There is no evidence [in this case] that [Smucker] rendered any services to [Canada Foods] nor that anything in [Smucker's] method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence . . . .[26]

Does this mean there might be some situation whereby the "services rendered" exception would be used to allow a limited cost justification defense when the seller shows a savings in distribution costs because of a particular buyer's method of dealing? Would it make any difference if allowances in brokerage were made on a nondiscriminatory basis? Broch left these questions unanswered, risking inconsistent applications of Broch in future court decisions.

RECENT LOWER COURT INTERPRETATIONS OF SECTION 2(c) ISSUES

Predictably, recent court opinions dealing with section 2(c) have discussed whether Broch dictum "opened the door" for limited defenses when one is charged with a section 2(c) violation. The results have been inconsistent.

In Federal Paper Bd. Co., Inc. v. Amata,[27] Federal sold wood and paper products, including recycled paperboard and paperboard cartons made from wastepaper. Federal routinely bought wastepaper from several wastepaper suppliers. Amata, who worked for Federal, was responsible for purchasing wastepaper from these competing suppliers at the most advantageous price and delivery terms. Amata demanded and accepted bribes and kickbacks from these suppliers with the result that the majority of Federal's wastepaper came from suppliers making payments to Amata. The cost of the bribes was passed on to Federal in the sales price. When Federal discovered Amata's conduct, Federal fired Amata. Federal was then able to purchase wastepaper from several suppliers at lower prices.[28]

Federal sued Amata and the bribe-paying suppliers claiming, among other things, a violation of section 2(c) of the Robinson-Patman Act. Federal alleged "that the payments received by Amata were not for bona fide services rendered, but were commercial bribes."[29] In defense, the defendants claimed Federal failed to allege anticompetitive injury, which is a prerequisite for a section 2(c) violation.[30]

The court held that the facts of this case were covered by section 2(c), and that anticompetitive injury is not a prerequisite for a section 2(c) violation.

> Payments were made to Amata, an agent of the buyer Federal, that were not for services rendered. To require Federal to make additional allegations of anticompetitive effect in order to establish a prima facie violation of section 2(c) would be to impose a common law limitation on the broad language enacted by Congress. At least a few courts appear to have held that in order for payments to constitute a violation of

section 2(c) the payments must have an anticompetitive effect . . . . This court finds, however, that long-standing Second Circuit precedent and Supreme Court dicta refute any claim that anticompetitive injury is an element of a violation of section 2(c) of the Robinson-Patman Act.[31]

In Seaboard Supply Co. v. Congoleum,[32] Congoleum Corporation, a felt manufacturer, sold products to Seaboard and others who engaged in the wholesale distribution of roofing felt. Jack Berk, a sales manager for Congoleum, recommended to Congoleum that Manufacturers Reps Company (MRC) become a commissioned sales agent for Congoleum. Congoleum agreed. Unknown to Congoleum, Berk and MRC had a secret arrangement whereby MRC paid bribes (consulting services) to Berk. Since Berk had the ability to cause orders to be cancelled or delayed and could steer customers to another distributor or agent, Seaboard lost several customers who transferred their business to MRC. When Congoleum's management found out about Berk's conduct, it discharged Berk. Meanwhile, Seaboard sued Congoleum, Berk and MRC alleging, among other things, a violation of section 2(c) of the Robinson-Patman Act.[33]

The district court recognized that section 2(c) "prohibits unearned payments to the other party to a transaction or to an agent who is subject to the control of a person other than the one making the payment." Considering the statute, case precedents and legislative history, the district court concluded that section 2(c) "applies only to unlawful payments which pass between sellers and purchasers." In this case MRC was not a purchaser from Congoleum; instead MRC was an agent of Congoleum. Therefore the payments made from MRC to Berk did not violate section 2(c).[34]

The court of appeals agreed with the district court, noting concern "whether Congress intended to sweep commercial bribery within the ambit of section 2(c)."[35] While the court recognized that at least three circuits (6th Cir., 7th Cir., 9th Cir.) held commercial bribery came within the terms of section 2(c), and that these decisions have been generally accepted and supported by the statutory language, the court was not convinced the scope of 2(c) covers the conduct here.

> In the appellate decisions which have found commercial bribery within the ambit of section 2(c) the common thread has been the passing of illegal payments from seller to buyer or vice versa. Adherence to the requirement that payments cross this seller-buyer line is consistent with the interpretation of 2(c) in nonbribery cases . . . . Here, that line has not been crossed. MRC, a sales agent of the seller Congoleum, bribed Berk, the seller's employee. MRC was not a purchaser, and consequently, the statutory requisites have not been met.[36]

In Gregoris Motors v. Nissan Motor Corp. in USA [37] Gregoris is a Datsun dealership, while Nissan is the American branch of the Japanese manufacturer of Datsun vehicles. Richard Hungerford is Nissan's Regional Sales Manager. Gregoris alleges, among other things, a violation of section 2(c) when Hungerford sought and received bribes from Datsun dealers competing with Gregoris. Any dealer paying bribes would receive a favorable allocation of cars, including receiving early delivery and desirable models. Since Gregoris did not give bribes, its allocations of new cars was substantially reduced to the point of threatening to destroy its business.[38]

One of the defenses raised by Hungerford and the bribe-paying dealers was that there can be no violation of section 2(c) without anticompetitive injury. The district court held:

> While several courts have required anticompetitive injury for a section 2(c) claim . . . this Court is persuaded that anticompetitive injury is not necessary for maintaining a claim under § 2(c) . . . . Such a requirement is unduly restrictive and is not part of the plain language of the statute.[39]

Another defense was that the "plaintiff must have suffered the injury of price discrimination as a result of bribery." The district court rejected this defense.

> Although the Robinson-Patman Act is directed mainly at price discrimination, § 2(c) does not specifically mention price discrimination as the forbidden goal of the bribery. Increasingly the case law supports the conclusion that a violation of § 2(c) can be based on indirect price discrimination. In fact, business practices other than price discrimination can give rise to a § 2(c) violation.[40]

It is interesting to note that although the court in Seaboard expressed doubts whether Congress intended to sweep commercial bribery within the ambit of section 2(c), Gregoris expressly declared that section 2(c) "forbids commercial bribery in connection with the sale or purchase of goods or services."[41]

In Stephen Jay Photography, Ltd. v. Olan Mills, Inc.,[42] Stephen Jay and Olan Mills are competing commercial photographers in the Norfolk, Virginia, area. Through competitive negotiation Olan Mills and one other commercial photographer contracted with all 22 high schools in the Norfolk area whereby Olan would be the official photographer for high school yearbook pictures. It was also agreed that Olan would pay the schools a percentage of the profits

earned from sales of optional portrait photographs of students. Letters to the students disclosed that Olan was the official photographer and that part of the optional portrait photograph price would be given to the school to support various school activities. Although students were not obligated to use the official photographer, this marketing plan of coordinating the yearbook pictures and portraits, coupled with the endorsement of the school, gave Olan a competitive advantage over competing photographers, such as Stephen Jay, in selling portraits. Stephen Jay sued Olan claiming, among other things, that Olan engaged in commercial bribery in violation of section 2(c) of the Robinson-Patman Act.[43]

One of the defenses raised by Olan was that commercial bribery does not constitute a violation of section 2(c). The court indicated that this circuit (4th Cir.) had not yet addressed the issue. Nevertheless four circuits (3d, 6th, 7th, 9th) have applied a commercial bribery analysis in section 2(c) cases.[44] Also the legislative history of section 2(c), as stated in Broch, supports the proposition that Congress intended to bring commercial bribery within the ambit of section 2(c).[45] Therefore the court assumed, without deciding, that section 2(c) proscribes commercial bribery.

Another defense raised by Olan was that the schools were not "agents . . . acting in fact for . . . any party to such transaction." The court recognized that commercial bribery cases must involve the corruption of an agency relationship. Any alleged bribes must cross the seller-buyer line. In this case, according to the court, there was no agency relationship between the schools and the students because "the schools did not have authority to bind the students to purchase portraits. Instead the students were free to purchase portraits from [Olan] or from a photographer of their choice, or to purchase no portraits from anyone."

> Therefore, even assuming section 2(c) proscribes commercial bribery, we conclude that no violation occurred here. Unquestionably, the schools and the students enjoy a special relationship of trust. And it is true that the schools arranged to have yearbook photographs taken by [Olan] and encouraged students to purchase portraits from them. However, letters encouraging the students to purchase these photographs . . . indicated that their decision to purchase portraits was optional. From this correspondence it is abundantly clear that the schools did not assume a position resembling that of a portrait purchasing agent for the students.[46]

Another recent case questioning whether an agency relationship existed is Harris v. Duty Free Shoppers Ltd. Partnership.[47] Harris and Duty Free Shoppers operate competing duty free stores in downtown San Francisco, catering especially to Japanese tourists. Duty Free paid lump sum amounts and commissions to tour companies and to tour guides to promote Duty Free's downtown shop by scheduling stops of tour buses at the store. The tourists are not required to buy from Duty Free. They can and do purchase goods from other stores . The tourists do not know that Duty Free is making these payments. Apparently, hotels, airlines, and other businesses make similar payments to travel companies. Harris, who does not make payments, sued Duty Free claiming, among other things, a violation of section 2(c) of the Robinson-Patman Act. More specifically Harris claimed that the tour guides owe a fiduciary duty to the tourists, and that duty was breached by accepting payments from Duty Free.[48]

The court held that the "tour guides and tour operators are not in an agency or fiduciary relationship with their passengers, nor do they serve as intermediaries 'subject to the direct or indirect control' of those passengers, with regard to the transactions in question - the purchase of Duty Free's retail goods." The reasons given by the court were that there was no employment relationship between the tour guides and the tourists, the tour guides were not "experts" on whose advice the tourists relied, the tour guides were not "at all times subject to the control" of the tourists, and the tourists were free to purchase their souvenirs anywhere, or, in fact, not at all. Therefore there was no violation of section 2(c).[49]

The court underscored the issue by stating it made no difference "whether the tour guides' services were available to competitors of Duty Free on like terms or conditions, . . . whether the value of the tour guides services correspond to the payments, and whether the payments were secret." The crucial issue here was "whether the tour guides are agents of the tourists such that they owe a fiduciary duty."[50] Since there was no fiduciary duty between the tour guides and the tourists, there could be no violation of section 2(c).

Although these recent lower court interpretations of section 2(c) are sometimes inconsistent with each other, the following principles can be gleaned:

(1) Section 2(c) is a "per se" violation.

(2) The "for services rendered" defense in section 2(c) is very narrowly applied. It has only been included to make sure a "bona fide" independent broker will not be denied compensation for rendering services to his own principal.

(3) Although some courts question whether anticompetitive injury is a necessary element for a section 2(c) violation, there is strong support in section 2(c), its legislative history, Broch, and court opinions, that anticompetitive injury is not a prerequisite for a section 2(c) violation.

(4) Section 2(c) applies only to unlawful payments (or other discriminatory business practices) that pass between sellers and purchasers. There must be corruption of an agency relationship.

(5) Several federal court decisions indicate that Congress intended to sweep commercial bribery cases within the ambit of section 2(c).

(6) Section 2(c) can be based on indirect price discrimination. Business practices other than price discrimination can give rise to a section 2(c) violation.

(7) It is irrelevant in defense of a section 2(c) charge whether alleged illegal payments are equally available to all purchasers, whether payments correspond to the value of services rendered, or whether payments were secret.

Having reviewed the provisions of the Robinson-Patman Act, especially section 2(c); the Broch decision, including its discussion of the legislative history of section 2(c); and recent lower court opinions interpreting section 2(c); the question still remains to what extent incentive programs by merchant-sellers, in which cash and prizes are paid to buyers' agents, should be permitted under section 2(c) of the Robinson-Patman Act. A "case in point" (similar to the American Appliance example introducing this paper) is Metrix v. Daimler-Benz Aktiengesellschaft.[51]

METRIX v. DAIMLER-BENZ AKTIENGESELLSCHAFT

Metrix Warehouse, Inc. (Metrix) and Mercedes-Benz of North America (MBNA) are competitors in the sale of automobile parts to approximately 400 Mercedes-Benz dealers in the United States. Metrix has an incentive program whereby it makes payments to parts managers of Mercedes-Benz dealerships based on the number of Metrix products purchased by the parts managers' employers.

More specifically the incentive program involves the awarding of points redeemable for either cash or merchandise or the payment of cash directly to the parts managers of the Mercedes-Benz dealers. These payments are based on a percentage of total parts purchased from Metrix. As consideration for the payments, the parts managers perform no services other than placing their employers purchase orders with Metrix.

During a six-year period, Metrix paid at least $119,980 in cash and $394,551 in cash and/or merchandise to parts managers of Mercedes-Benz dealers for the placement of approximately $13,000,000 in spare parts orders with Metrix. Payments are mailed monthly by Metrix to the parts managers at their home address. The value of the points is approximately 3½ percent of the purchase price.[52]

When Metrix was charged with a violation of section 2(c), Metrix argued there could be no violation since the incentive program increased, rather than decreased, competition. Therefore there was no adverse effect on competition. The district court agreed with Metrix finding "that questions of fact remain whether the incentive program decreases competition." Stated otherwise, the district court agreed with Metrix that a finding of an adverse effect on competition is necessary for there to be a violation of section 2(c).[53]

The court of appeals reversed, holding that section 2(c) is a "per se" violation, and that Metrix violated section 2(c).

> Nothing in the language of section 2(c) . . . requires proof of an adverse effect on competition before a violation may be found where there is an admitted payment of a commission or other compensation to an agent of the purchaser . . . . Any change in the law to address the competitive effect of such compensation must be made by Congress . . . .[54]

Using the language of section 2(c), Metrix is "any person" who "pay(s) . . . anything of value as . . . compensation" to "an agent" (parts managers) of the "other party" (Mercedes-Benz dealers), where such agent (parts managers) is "subject to the direct control" of any party (Mercedes-Benz dealers) "other than the person (Metrix) by whom such compensation is paid."[55]

Comparing Metrix to the American Appliance example introducing this paper, there appears to be no difference between the two. Both are "per se" violations of section 2(c). National is "any person" who "pay(s) . . . anything of value as . . . compensation" to "an agent" (American's salespeople) of the "other party" (American), where such agent (American's salespeople) is "subject to the direct control" of any party (American) "other than the person (National) by whom such compensation is paid."

To what extent it wise and feasible to regulate such incentive plans under section 2(c)?

CONCLUSIONS AND RECOMMENDATIONS

Incentive programs by merchant-sellers in which cash and prizes are paid to buyers' agents should be strictly prohibited under section 2(c). It is well settled that section 2(c) is a "per se" violation. The weight of authority is that anticompetitive injury is not a prerequisite for a section 2(c) violation. It is irrelevant whether payments correspond to the value of services rendered or whether the payments were secret. Section 2(c) covers commercial bribery. As long as there is corruption of an agency relationship (i.e. the payments pass between sellers and buyers) the conduct should be subject to scrutiny under section 2(c).

The purpose of section 2(c) is to cover all means by which brokerage could be used to effect price discrimination. Since there is always the problem of antitrust standing when an individual alleges a section 2(c) violation,[56] the Federal Trade Commission should take responsibility for vigorous enforcement of section 2(c). Any dissatisfaction with the anticompetitive effects of 2(c) should be addressed by Congress and not by the courts.

Footnotes

1 15 U.S.C. § 13(c) (1988).
2 15 U.S.C. § 13(a)-(f) (1988).
3 363 U.S. 166 (1960).
4 716 F.2d 245 (4th Cir. 1983), appeal after remand, 828 F.2d 1033 (4th Cir. 1987), cert. denied, 486 U.S. 1017 (1988).
5 15 U.S.C. § 13(a)-(f) (1988).
6 Federal Trade Commission v. Morton Salt Co., 334 U.S. 37, 43 (1948).
7 Section 2(a) provides:
It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between purchasers of commodities of like grade and quality, where such commodities are sold for use, consumption, or resale . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly . . . Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to

changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned. 15 U.S.C. § 13(a) (1988). See, e.g., Texaco Inc. v. Ricky Hasbrouck, 110 S.Ct. 2535 (1990); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); F.T.C. v. Borden Company, 383 U.S. 637 (1966); Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973).
8 Section 2(b) provides:
Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the [Federal Trade] Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor. 15 U.S.C. § 13(b) (1988). See, e.g., Falls City Industries, Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983); F.T.C. v. Sun Oil Company, 371 U.S. 505 (1963); Standard Oil Company v. F.T.C., 342 U.S. 231 (1951).
9 Section 2(d) provides:
It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the the processing, handling, sale, or offering for sale, of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionately equal terms to all other customers competing in the distribution of such products or commodities. 15 U.S.C. § 13(d) (1988).
Section 2(e) provides:
It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms. 15 U.S.C. § 13(e) (1988).
10 Exquisite Form Brassiere, Inc. v. FTC,

301 F.2d 499, 500 (D.C. Cir. 1961). See also, F.T.C. v. Fred Meyer, Inc., 390 U.S. 341 (1968); Federal Trade Com. v. Simplicity Pattern Co., Inc., 360 U.S. 55 (1959); L & L Oil Co., Inc. v. Murphy Oil Corp., 674 F.2d 1113 (5th Cir. 1982); R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964).

11 Section 2(f) provides:
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) (1988).

12 See, Great Atlantic & Pacific Tea Co., Inc. v. F.T.C. 440 U.S. 69 (1979); Automatic Canteen Co. v. Federal Trade Commission, 346 U.S. 61 (1953).

13 Section 2(c) provides:
It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control of any party to such transaction other than the person by whom such compensation is so granted or paid. 15 U.S.C. § 13(c) (1988).

14 Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 674-75 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940). See also, Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945); Quality Bakers of America v. FTC, 114 F.2d 393 (1st Cir. 1940); Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir.), cert. denied, 310 U.S. 638 (1940); Oliver Bros., Inc. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).

15 363 U.S. 166 (1960).
16 Id. at 167-68.
17 54 F.T.C. 673 (1957).
18 261 F.2d 725, 728 (7th Cir. 1958).
19 360 U.S. 908 (1959).
20 363 U.S. at 168-69.
21 Id. at 170.
22 Id. at 175.
23 Id. at 169.
24 Id. at 172. See, Great Atlantic & Pacific Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940).
25 Broch, 363 U.S. at 174-75.
26 Id. at 173.
27 693 F.Supp. 1376 (D. Conn. 1988).
28 Id. at 1379-80.
29 Id. at 1380.
30 Id. at 1385.

31 Id. at 1385-86. Although there was antitrust injury, the court held there was no antitrust standing for treble damages and attorney fees by reason of § 4 of the Clayton Act: "[A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and the cost of the suit, including a reasonable attorney's fee. . . ." 15 U.S.C. § 15(a). See also, Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). (To recover treble damages . . . a plaintiff must make some showing of actual injury attributable to something the antitrust laws were designed to prevent. 429 U.S. at 486.) Nevertheless, In Federal, the court implied that Federal would have a claim in a civil action for damages for a commercial tort. 639 F.Supp. at 1389. Also this conduct would be subject to scrutiny by the Federal Trade Commission, the federal administrative agency responsible for enforcing the antitrust laws. 15 U.S.C. § 45(a) (1988).
32 770 F.2d 367 (3d Cir. 1985).
33 Id. at 368-69.
34 Id. at 370-71.
35 Id. at 372.
36 Id. The court noted that "although the activity was reprehensible and probably violated state civil [tort law - tortious interference with contractual relationships and prospective economic advantage] and criminal law [embezzlement and theft by deception], we agree that the scheme did not come within the scope of the antitrust laws [which has the attraction of treble damages and attorney fees, rather than the simple compensatory damages available under state law]. 770 F.2d at 368-72.
37 630 F.Supp. 902 (E.D.N.Y. 1986).
38 Id. at 905-906.
39 Id. at 910.
40 Id.
41 Id. at 909.
42 903 F.2d 988 (4th Cir. 1990)
43 Id. at 990.
44 Id. at 992, n. 6.
45 Id. at 992-93.
46 Id. at 993.
47 940 F.2d 1272 (9th Cir. 1991)
48 Id. at 1274.
49 Id. at 1275.
50 Id. at 1276.
51 716 F.2d 245 (4th Cir. 1983), appeal after remand, 828 F.2d 1033 (4th Cir. 1987), cert. denied, 486 U.S. 1017 (1988).
52 716 F.2d at 246-47.
53 Id. at 247.
54 Id.
55 Upon review, the federal court of appeals reversed in part its previous decision. Although affirming that

Metrix committed a violation of § 2(c), the court found that MBNA had not proven by a preponderance of the evidence that it had standing to sue, i.e., that Metrix's incentive program caused MBNA to suffer actual injury of a type that § 2(c) was designed to prevent. 828 F.2d at 1046. *See, Brunswick, supra,* note 31.

56 Section 4 of the Clayton Act provides:"[A]ny person who shall be injured in his business or property *by reason of* anything forbidden in the antitrust laws may sue *therefor* . . . and shall recover threefold the damages by him sustained. . . ." 15 U.S.C. § 15(a). Even if a defendant has committed a violation of the antitrust laws (i.e. antitrust *injury*,), it does not necessarily follow that a plaintiff *has antitrust standing*. To recover treble damages . . . a plaintiff *must make* some showing of actual injury attributable to something the antitrust laws were designed to prevent. Brunswick v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977). The United States Supreme Court has enumerated several factors it will consider on a case-by-case basis to determine whether a plaintiff has antitrust standing: the nature of the plaintiff's alleged injury [i.e. does it fall squarely within the area of congressional concern], the relationship between the alleged antitrust violation and the plaintiff's alleged injury [i.e. is it tenuous and speculative?], the directness or indirectness of the alleged injury, the potential for duplicative recovery or complex apportionment of damages, and the existence of more direct victims. Assoc. Gen. Contractors of Cal. v. Cal. St. Council, 459 U.S. 519 (1983). *See also,* Sharp v. United Airlines, Inc., 967 F.2d 404 (10th Cir. 1992). (Employees of Frontier Airlines lacked standing to sue United Airlines, even if United engaged in violations of the antitrust laws causing Frontier to fail.)

BARGAINING WITH STAKEHOLDERS: CORPORATE CODES OF CONDUCT AND SHAREHOLDER WEALTH

by

Julianne Nelson*

Corporate codes of conduct or ethics have become increasingly popular in recent years. Of the 264 companies responding to a recent Conference Board survey, more than 75% had some form of ethics code; almost half of the firms with codes in place had adopted them since 1987.[1] Nor is the adoption of codes merely a recent phenomenon: a 1980 study by White and Montgomery found that almost 100% of the largest US corporations had codes in place.[2]

When, if ever, would a self-interested shareholder support a corporate code of conduct? Do such codes ever increase shareholder wealth? If one relies on instincts honed by the study of competitive markets, one is likely to assume that benefits for customers, suppliers, employees and the local community necessarily come at the expense of corporate shareholders. The very structure of the much-publicized Johnson and Johnson (J&J) Credo (reprinted in the Appendix) appears to support this hypothesis. When detailing corporate responsibilities, the Credo mentions the interests of corporate shareholders *last*, only after it enumerates the duties owed to a variety of other stakeholders. In effect, the J&J Credo seems to implement a plural purpose view of the firm that asks managers to serve a number of constituencies. It remains to be seen whether or not this approach could also benefit a strictly self-interested shareholder.

Recent results from applied bargaining theory suggest that the J&J Credo may actually increase shareholder wealth in some circumstances. Institutional theorists have recently turned to "cooperative" solution concepts to determine the efficiency implications of different corporate ownership structures. In general, research in this area starts from the assumption that

---

* Assistant Professor, Economics Area, Stern School of Business, New York University, 44 West 4th Street, New York, NY 10003. I would like to thank Robert Lindsay for his most helpful comments on an earlier version of this work.