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I. Introduction

Despite the fact that the 1936 Robinson-Patman Act amendments to the Clayton Act were enacted in an attempt to curb the ability of large businesses to coerce sellers of products into granting them discriminatory price advantages over smaller purchasers,[1] only one section of the Act, section 2(f)[2] which prohibits the knowing inducement or receipt of discriminatory prices, is aimed at buyers. The remainder of the Act is directed toward sellers. Liability[3] under section 2(f) is generally derivative in nature, being based

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1. See text accompanying notes 21-32 *supra*.

2. Section 2(f) of the Robinson-Patman Act, 15 U.S.C. § 13(f) (1976), provides that "[i]t 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." *See generally* F. Rowe, Price Discrimination Under the Robinson-Patman Act 421-51 (1962); Galanti, *Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances—Caveat Emptor in the 1970's*, 7 Ind. L. Rev. 962 (1974); Note, *The Evolving Duty of an Innocent Buyer to Inquire into His Bargain Under Section 2(f) of the Robinson-Patman Act*, 49 Ind. L.J. 348 (1974).

3. The Federal Trade Commission is authorized to enforce the Robinson-Patman Act and to seek cease and desist orders. 15 U.S.C. § 21 (1976). Because § 2 is an "antitrust law" within the meaning of § 1 of the Clayton Act, 15 U.S.C. § 12(a) (1976), its prohibitions can also be enforced by private plaintiffs seeking treble damages or injunctive relief, 15 U.S.C. §§ 15, 26 (1976).

For a discussion of the possible use of § 3 of the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976), against buyers, see Galanti, *supra* note 2, at 963-64 nn.2&5. The FTC has also used § 5 of the Federal Trade Commission Act to attack the knowing inducement or receipt of discriminatory promotional allowances, services or facilities barred to the seller by 2(d) and 2(e). *See, e.g.*, Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974); R.H. Macy & Co. v. FTC, 326 F.2d 445, 447-48 (2d Cir. 1964); Giant Food Inc. v. FTC, 307 F.2d 184, 185-86 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); American News Co. v. FTC, 300 F.2d 104, 108 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92, 99-100 (2d Cir. 1962); Herbert R. Gibson, Jr. et al, Trade Reg. Rep. (CCH) ¶ 20,844 (FTC 1976) (complaint); Fred Meyer, Inc., Trade Reg. Rep. (CCH) ¶ 21,086 (FTC 1976) (settleon a preliminary finding of seller liability under another section of the Act. Because of this derivative nature of buyer liability and because other sections of the Act define what is and what is not a "discriminatory price," it is important to understand those sections of the Act directed toward sellers.

In the usual case, a finding of buyer liability under section 2(f) will require a preliminary finding of seller liability under section 2(a) of the Robinson-Patman Act[4] which prohibits seller price dis-

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ment of civil penalty case for alleged violation of 1968 FTC order regarding inducement of promotional allowances).

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a) (1976), provides in pertinent part that "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." The courts have adopted the position that a buyer's receipt of discriminatory promotional allowances, services or facilities is *per se* violative of § 5 of the Federal Trade Commission Act and that there is no requirement that injury to competition be established. *See* R.H. Macy & Co. v. FTC, 326 F.2d 445, 450 (2d Cir. 1964); Grand Union Co. v. FTC, 300 F.2d 92, 99-100 (2d Cir. 1962).

4. 15 U.S.C. § 13(a) (1976) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *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: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *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,

crimination in contemporaneous sales of like commodities in interstate commerce[5] to competing buyers when competitive injury may result.

The following elements must generally be established to prove a section 2(a) violation by a seller in commerce: (1) there must be a discrimination in price;[6] (2) the discrimination in price must be between different "purchasers";[7] (3) the involved sales must be of "commodities," a term which includes tangible goods but not services;[8] (4) the involved commodities must be of like grade and quality;[9] (5) at least one of the sales involved must be "in com-

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distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

5. Section 2(a), involving seller liability, has been interpreted to require only that one of the two sales giving rise to the discrimination, the higher or the lower, be in interstate commerce. *See, e.g.*, Moore v. Mead's Fine Bread Co., 348 U.S. 115, 118 (1954); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 677 n.5 (5th Cir. 1965). However, there is an argument that the commerce language of § 2(f) requires that the buyer receive its discriminatory price concession in the course of interstate commerce. Great Atl. & Pac. Tea Co. v. FTC, 557 F.2d 971, 979 (2d Cir. 1977), *rev'd on other grounds*, 440 U.S. 69 (1979). For a discussion of why such reading might be contrary to Congressional intent, see Paceco, Inc. v. Ishikawajima-Harima Heavy Indus. Co., 468 F. Supp. 256, 259-60 n.7 (N.D. Cal. 1979) (domestic manufacturer of steel cranes sues Japanese manufacturers of similar cranes allegedly assembled in United States regarding purchases of steel from Japanese steel producers at allegedly disparate prices). For a full discussion of recent developments affecting interpretation of the jurisdictional scope of §§ 2(a) and 2(f), see Galanti, *It Once Again Takes Two to Tango: Great Atlantic & Pacific Tea Co. v. FTC*, 21 WM. & MARY L. REV. 387, 402-12 (1979).

6. Price means the actual price at which goods are sold. *In re* National Lead Co., 49 FTC 791 (1953). Price can include the terms and conditions of sale. *See* Corn Products Co. v. FTC, 324 U.S. 726 (1945); *see also* Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83 (N.D. Ill. 1965), *aff'd per curiam*, 371 F.2d 428 (7th Cir. 1966). The sales at different prices must be by the same seller. *See, e.g.*, Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957).

7. *See* Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956) (holding Act inapplicable to consignments). In certain situations, purchasers from wholesalers or distributors can be held "indirect purchasers" from the seller-manufacturer. *See* FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977) (limiting scope of indirect purchaser doctrine); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969). With respect to parent-subsidiary relationships, compare Security Tire and Rubber Co. v. The Gates Rubber Co., 598 F.2d 962, 965 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979) with Schaben v. Samuel Moore & Co., 606 F.2d 831, 833 n.3 (8th Cir. 1979).

8. *See, e.g.*, Aviation Specialties, Inc. v. United Technologies Corp., 568 F.2d 1186 (5th Cir. 1978).

9. *See* FTC v. Borden Co., 383 U.S. 637 (1966) (chemically identical milk sold under different brand names held to be of like grade and quality).

merce";[10] and (6) there must be a reasonable likelihood of an adverse effect on competition.[11]

The Supreme Court, in *FTC v. Anheuser-Busch, Inc.*,[12] has interpreted a "price discrimination" under section 2(a) to be synonymous with a "price differentiation."[13] Sections 2(a) and 2(b)[14] provide sellers with certain defenses including savings in costs, changed marketing conditions and the good faith meeting of an equally low price offered by a competitor.

Section 2(c)[15] prohibits the payment of brokerage commissions

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10. *See* Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); note 5 *supra*. *But see* Zenith Radio Corp. v. Matsushita Elec. Inc. Co., 402 F. Supp. 244 (E.D. Pa. 1975) (holding Act inapplicable where one leg of alleged discrimination involved sales in Japan because both sales must be for use, consumption or resale in the United States).

11. The Act's language with respect to competitive effect has been read by the courts to reach price discriminations "in their incipiency" before competition has actually been harmed. Corn Products Ref. Co. v. FTC, 324 U.S. 726, 738 (1945). Showing a reasonable probability or possibility of injury is sufficient. *Id.* at 739, 742. Such anti-competitive effect may occur at either the seller level or buyer level of competition. If the former, it is called primary line; if the latter, it is referred to as secondary line. The Act has been read to protect buyer competition down to the level of customers of customers of customers of the seller. Perkins v. Standard Oil Co., 395 U.S. 642 (1969). Whether a broad reading of the competitive injury requirement, at least at the primary level, fosters competition, however, is subject to question. *Compare* Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967) *with* Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975); Liebeler, *Let's Repeal It*, 45 ANTITRUST L.J. 18, 27-31 (1976). For a more extensive treatment of this subject, see ABA ANTITRUST SECTION, THE ROBINSON-PATMAN ACT: POLICY AND LAW, VOL. I, 72-106 (Monograph No. 4, 1980).

12. 363 U.S. 536 (1960).

13. *Id.* at 549-50.

14. 15 U.S.C. § 13(b) (1976) 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 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. 15 U.S.C. § 13(c) (1976) 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 discounts in lieu of brokerage to a buyer, agent of a buyer or by either the buyer or the seller to an agent of the other. This subsection, not discussed in this article, has no direct relationship to section 2(f). Sections 2(d)[16] and 2(e)[17] prohibit a seller from granting promotional allowances, services or facilities to a customer unless such assistance is made available on proportionally equal terms to all competing customers. Section 2(d) applies when a supplier makes payments for promotional services rendered by the customer and section 2(e) applies when he provides the promotional services or facilities to his customers. Sections 2(c), 2(d) and 2(e) are *per se* provisions. There need be no showing of competitive injury nor does the defense of cost justification apply.[18] Firms charged with violations of 2(d) and 2(e) may, however, assert the meeting-competition defense.[19]

The Supreme Court has twice had occasion to interpret section 2(f). In *Automatic Canteen Co. v. FTC*,[20] the Court set forth the basic standards for enforcement of section 2(f) and allocated the burden of coming forward with evidence. In *Great Atlantic & Pa-*

> 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.

16. 15 U.S.C. § 13(d) (1976) provides:

> It shall be unlawful for any person engaged in commerce to pay or contact 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 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 proportionally equal terms to all other customers competing in the distribution of such products or commodities.

17. 15 U.S.C. § 13(e) (1976) 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.

18. *See, e.g.*, FTC v. Simplicity Pattern Co., 360 U.S. 55, 64-65 (1959); Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 505 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

19. FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 (1959); Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 502-04 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

20. 346 U.S. 61 (1953).

cific Tea Co. v. FTC,[21] decided in 1979, the Court reaffirmed that buyer liability under section 2(f) is dependent on seller liability and held that, if the seller has a valid defense, the buyer cannot be held liable either.

Prior to the *A & P* decision, a limited exception to the notion of derivative liability had been recognized by the Sixth Circuit in *Kroger Co. v.. FTC*.[22] In that case, the buyer falsely alleged to the supplier that a lower price had been offered by a competitor. In good faith reliance on this information, the supplier then offered what it thought was a competing price. The court held that the buyer had violated section 2(f), while the section 2(a) complaint was dismissed as to the seller because it had in good faith granted the discriminatory price to meet competition, a recognized defense.

Whether the *Kroger* doctrine, the so-called "lying buyer" exception survives the Supreme Court's *A & P* decision is presently an open question. The majority in *A & P* distinguished *Kroger* and, by footnote, expressly refused to decide the question.[23] Justice Marshall, dissenting in part, argued that the strong derivative standard apparently adopted by the Court may have written the "lying buyer" exception out of existence.[24] Since the "lying buyer" exception to the notion of derivative liability serves an important role in fostering the policies underlying the Robinson-Patman Act, it is submitted that the *A & P* decision should not be read by courts as eliminating it. Its demise would be an unnecessary and unfortunate consequence of *A & P*.[25]

II. Legislative History

The 1936 Robinson-Patman Act amendments to section 2 of the Clayton Act of 1914 were enacted at a time of economic recession when the power of certain buyers was perceived to be excessive. New types of businesses, utilizing integrated forms of product distribution, had begun to appear, exemplified by the grocery chain

21. 440 U.S. 69 (1979).
22. 438 F.2d 1372, 1376-77 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).
23. 440 U.S. at 81-82 n. 15.
24. 440 U.S. at 88.
25. See text accompanying notes 107-114 *infra*. For an excellent discussion of the *A&P* case and its implications in this regard, see Galanti, *supra* note 5.

and the mail-order house. It was feared that these enterprises might threaten and ruin the small merchants and independent wholesalers and brokers who comprised the traditional channel for distribution of products.[26]

Thus, the Act was intended to curb the various discriminatory advantages large chain and institutional purchasers had been able to extract from their suppliers and, at the same time, protect smaller purchasers lacking such buying power. As the bill's cosponsor, Congressman Wright Patman, stated in the House floor debate:

> What are the objectives of this bill? Mr. Chairman there has grown up in this country a policy in business that a few rich, powerful organizations by reason of their size and their ability to coerce and intimidate manufacturers have forced those manufacturers to give them their goods at a lower price than they give to the independent merchants under the same and similar circumstances and for the same quantities of goods. Is that right or wrong? It is wrong.[27]

The draftsman of the bill also discussed the bill's aim. The seller "must not . . . be permitted to bleed part of his customers for the benefit of the others, and if any of his customers have the power to compel him to do so, that power constitutes the evil against which this bill is directed."[28]

According to Congressman Patman, "buying power is the source of the evil. The seller is merely an innocent victim compelled usually in self-defense to grant the concessions demanded."[29] The chain-store investigation carried on by the FTC at the request of the Senate provided evidence that large buyers did have coercive power.[30] In the same vein, Senator Logan, speaking of brokerage

26. Report of the Attorney General's National Committee to Study the Antitrust Laws, 155 (1955). Hereafter referred to as "Report." *See also* 80 CONG. REC. 9416-19 (1936).

27. 80 CONG. REC. 8111 (1936).

28. *Hearings Before the House Judiciary Comm. to Amend the Clayton Act,* 74th Cong., 1st Sess., ser. 10, at 31 (1935) (remarks of H.B. Teegarden).

29. *Id., quoted in* Grand Union Co., 57 F.T.C. 382, 420 (1960).

30. *See* FTC, FINAL REPORT ON THE CHAIN-STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. 24-26, (1935). Congress was concerned that the lower prices induced through use of this power went not to lower prices for consumers but to higher salaries for the chain-store executives. 80 CONG. REC. 8113 (1936).

fees, stated:

> Do not tell me that any manufacturer willingly and gladly gives such tremendous sums to the purchaser. He is coerced into it by the fact that the purchasing power has become so great that the seller is afraid to antagonize it. He must yield to any demand that may be made by the great purchaser.[31]

Congress was concerned with the effect such power in the hands of buyers could have on the entire framework of competition. As Congressman Utterback, Chairman of the House-Senate Conference Committee, stated in presenting the bill to the House:

> Discriminatory prices and allowances are a millstone around the neck of the manufacturer, large or small; because in granting favors to a selected few of their customers, they give those few a competitive advantage over the rest, and enable them gradually to drive the rest out of business and thereby to destroy them as customers. In granting such discriminations the manufacturer is therefore committing a form of slow suicide. . . .[32]

Despite the fact that the Robinson-Patman Act was enacted to curb discriminatory concessions exacted by powerful buyers, Congress chose to retain the statutory framework of the original section 2 of the Clayton Act, which was directed at sellers. It has been suggested that this approach was taken because the draftsmen were concerned with the constitutionality of an act directed solely at buyers.[33]

Consequently, the bills originally introduced in Congress contained no reference to illegal practices on the part of buyers. As the Attorney General's Report noted, "Discriminatory concessions which allegedly enabled big buyers to menace the economic survival of smaller rivals—the essential evil contemplated by the Act—were thus checked by circuitously fortifying the law's prohibitions on sellers granting the discriminations."[34]

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31. 80 CONG. REC. 6281 (1936).
32. 80 CONG. REC. 9416 (1936). *See also* 80 CONG. REC. 6284 (1936) (indicating that Congress feared increased concentration leading to complete monopoly).
33. Rowe, *supra* note 2, at 423.
34. Report, *supra* note 26, at 193 n.15.

The present section 2(f), directed at buyers, was introduced as an amendment offered in debate on the floor of the Senate. It was passed by the Senate and accepted by the House conferees. As described by the Attorney General's Report, "Section 2(f) represented a last minute afterthought addition to the anti-discrimination law."[35] Thus, there is little legislative history. Comment on the floor of the Senate concerning this provision was to the effect that it seemed "sound in principle."[36]

Congressman Utterback, presenting the report of the conference committee, did discuss the meaning and purpose of section 2(f). He said:

> This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price costs coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.[37]

Despite the addition of section 2(f), an anomaly remained. While the legislative history expressed a primary concern with the power of large buyers, the statute remained directed primarily at sellers.

III. THE *Automatic Canteen* CASE

Since the legislative history provides little guidance as to how section 2(f) is to be applied practically, the first Supreme Court interpretation of section 2(f) is of particular importance. In *Automatic Canteen Co. v. FTC*,[38] Automatic Canteen leased vending machines for candy and was also a large wholesale supplier of candy for the machines and thus a correspondingly large buyer of candy from manufacturers. The FTC alleged that Automatic Canteen pressured manufacturers to give it special price concessions. The company was thought to have negotiated for supplies by quot-

35. *Id.*
36. 80 CONG. REC. 6428 (1936).
37. 80 CONG. REC. 9419 (1936).
38. 346 U.S. 61 (1953).

ing a price which it thought the manufacturers should be able to meet, one substantially below the price other wholesalers were getting. While the manufacturer was told of the savings he might enjoy in supplying large buyers such as Automatic Canteen, the company did not inquire as to whether the manufacturer who accepted its prices would make cost savings to the extent necessary to justify them.

In proceedings before the FTC, it was demonstrated that Automatic Canteen had secured prices as much as one third below those obtained by rivals. Based on this evidence, the Commission held that the buyer had knowingly received a favorable concession sufficiently sizeable to cause injurious market effects, thus establishing a *prima facie* 2(f) violation. The buyer was then obligated to prove the violation as either non-injurious or otherwise justified.[39] Holding that the company had not met this burden, the FTC found it to have violated section 2(f). The decision was affirmed by the Court of Appeals for the Seventh Circuit,[40] which held that the FTC need establish only that the buyer knowingly received a price substantially different from that given his competitors in order to shift the burden of proving that such price was cost-justified to the buyer. Noting several problems with this holding, the Supreme Court reversed.[41]

The issue which the Supreme Court considered to be before it was procedural in nature and concerned "simply the burden of coming forward with evidence under section 2(f) of the Act."[42] As a "necessary preliminary" to deciding the "precise issue,"[43] the Court analyzed the substantive prohibition of section 2(f) against the knowing receipt of an illegal discrimination in price.

The majority opinion, written by Mr. Justice Frankfurter, holds that standards for substantive violation of section 2(f) incorporate those of 2(a) and 2(b), which define price discrimination by a seller. Thus, price differences are not illegal under section 2(f) if they can be justified by the seller's cost savings, his good faith

39. 46 F.T.C. 861, 896 (1950).
40. 194 F.2d 433 (7th Cir. 1952), *rev'd*, 346 U.S. 61 (1953).
41. 346 U.S. 61 (1953).
42. *Id.* at 65.
43. *Id.* at 74.

meeting of competition or a lack of competitive injury. The word "knowingly" was held to require that the buyer know that the prices he received were not justified by one of the seller's defenses. The opinion points out that if the buyer could be held to violate the Act without knowing that the price was not cost-justified, price bargaining could take place only where the seller's costs were laid open on the bargaining table, a step the Court did not intend to require.[44]

The Court held that the buyer must not only be shown to have obtained an illegal concession, but also to have had actual knowledge or reason to believe it was illegal. The FTC had never required this element of culpable knowledge.

The construction applied by the FTC and Seventh Circuit, rejected by the Court, would have required the buyer to prove the legality of the price obtained. In contrast, the Court held that the obligation of going forward with the evidence should be measured under a more flexible standard of fairness and convenience.[45] By this standard, the burden of going forward with evidence relating to costs was the obligation of the FTC. Commenting on the Court's reasoning, the Attorney General's Report stated:

> But the Court realized that a buyer charged with accepting a favorable differential could not ordinarily be expected to possess information of the seller's cost data adequate to negativing possible illegality through a "cost justification" of the seller's price. Rather, the Court coined a rule of "convenience" and fairness by which the production of evidence as to cost savings, wherever appropriate as an element in the buyer's illegality, became the task of the Commission which was obviously better equipped than the buyer for investigating his supplier's book of account.[46]

By so allocating the burden of coming forward with evidence, the Court did not intend to make a "dead letter" of section 2(f) enforcement though, at the time, the opinion was interpreted as doing just that.[47] The opinion indicates that a buyer's knowledge of a

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44. *Id.* at 69.
45. *Id.* at 79.
46. Report, *supra* note 26, at 194-95.
47. The initial interpretation of *Automatic Canteen* was that it put an onerous burden of

lack of cost justification may be inferred from the fact that other buyers made identical purchases at a higher price or that the proven cost savings were much too small to justify the price differential. The Court suggested that culpable knowledge will be found if the buyer should have known that there would not be cost savings. The Court suggested that the FTC could discharge this burden by submitting "trade experience" evidence.[48]

Mr. Justice Frankfurter did not think the Court had placed an undue administrative burden on the FTC. In his view, section 2(f) enforcement would still reach a buyer who, "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices."[49]

The Court did not rule conclusively on the burden of producing evidence with respect to the meeting-competition defense. However, the court suggested that evidence as to competitive offers might be more readily available to the buyer than to the Commission.[50]

The Court also expressed concern with the effect of its decision on the marketplace. The Court pointed out that it would not read the Robinson-Patman Act

> as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on that sturdy bargaining between buyer and seller for which scope was presumably left in the areas of our economy not otherwise regulated.[51]

The Court was also vitally concerned with reconciling the Robinson-Patman Act "with broader antitrust policies."[52]

In approving the antitrust rationale of the decision, the Attorney General's Report recognized that price bargaining by aggressive

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proof on the FTC, which it did not. As a result, several pending cases against buyers were dropped. See Rowe, *supra* note 2, at 441-42.

48. 346 U.S. at 79-80.

49. *Id.* at 79.

50. *Id.*.

51. *Id.* at 73-74.

52. *Id.* at 74.

buyers can sometimes have a beneficial effect on the market and that to condemn it out of hand might well "deprive the public of gains that under effective competition it has a right to expect."[53] Such an effect can occur in an oligopoly-type market where sellers exercise control over prices. To the extent that competition among buyers exists, a price reduction to a buyer with bargaining power will result in lower prices to the public. Further reductions are likely to spread to other buyers once it becomes known that some sellers are cutting prices. To disallow such price bargaining is to enable the sellers to maintain their oligopolistic structure and high prices. Were the Robinson-Patman Act to reach so far, it would serve to police and maintain oligopolistic behavior.

IV. What Must Be Shown by Plaintiff

The Supreme Court stated in *Automatic Canteen* that a *prima facie* case may readily be established under section 2(f) against a buyer who knows "that the methods by which he was served and quantities in which he purchased were the same as in the case of his competitor."[54] However, when the buyer alters his methods of purchase or quantities bought, more must be shown. The plaintiff must then show "that such differences could not give rise to sufficient savings in the cost of manufacture, sale or delivery to justify the price differential, and that the buyer, knowing these were the only differences, should have known that they could not give rise to sufficient cost savings."[55]

Thus, when a buyer purchases in a different manner or amount than his competitors, the FTC or treble damage plaintiff is faced with the double burden of showing (1) that the lower price was not in fact cost-justified and (2) that the buyer "should have known" this fact.

A. *Lack of Cost Justification*

The Court did not establish how much the party plaintiff need show to meet its first burden, that the price was not in fact cost-

53. Report, *supra* note 26, at 196.
54. 346 U.S. at 80.
55. *Id.*

justified. If the FTC or treble damage plaintiff need produce, in each suit, a cost study proving that the price received was *not* cost-justified, the burden might well render the section ineffective and a "dead letter."

In a 1966 case,[56] the Ninth Circuit ruled that, at least where the buyer continued to purchase in the usual methods and on usual terms, the Commission was not required to submit detailed cost surveys on seller's costs, stating that to require cost studies or cost surveys in all 2(f) proceedings would "often be an exercise in futility."[57]

Similarly, in a 1968 interlocutory opinion,[58] the FTC addressed itself to this issue declaring that it need come forward only with a *prima facie* showing that the buyer should have known that his lower price could not be cost-justified, and that it need not introduce evidence as to the actual absence of cost justification. Accepting the initial burden of coming forward, the Commission shifts the burden to the buyer once the Commission has introduced evidence that the buyer should have known of the absence of cost justification.[59]

The Commission's resolution of this issue seems consistent with the *Automatic Canteen* standard of convenience and fairness. A negative fact is difficult to prove and this fact is particularly elu-

56. Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds*, 390 U.S. 341 (1968).

57. *Id.* at 364.

58. Suburban Propane Gas Corp., 73 F.T.C. 1269 (1968) (interlocutory ruling). This standard was approved by the Commission in Beatrice Foods Co., [1967-70 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,045 (FTC 1970).

59. The buyer may attempt to meet this burden by procuring a *pro forma* assurance letter from its seller in an attempt to justify price breaks. In Colonial Stores, Inc. v. FTC, 450 F.2d 733 (5th Cir. 1971), a § 5 case involving charges that a chain had induced discriminatory advertising allowances, suppliers had signed forms indicating that similar advertising allowances were offered to competitors. The court held that the forms were not entitled to evidentiary weight because they were signed a month after the promotion began and the buyer already had good reason to suspect that the payments were discriminatory.

The same reasoning can be applied to written assurances by the seller that prices obtained are cost-justified. The assurances should be entitled to little weight if the buyer has good reason to suspect that the prices are *not* cost-justified. Though not deciding the issue, the Supreme Court in *Automatic Canteen* indicated that together with other circumstances, the furnishing of such an assurance might indicate an absence of arms-length bargaining sufficient to raise doubts as to the weight to be given to it. 346 U.S. at 80-81 n.24.

sive. As Mr. Justice Frankfurter said, "[p]roof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."[60]

B. *Buyer Knowledge and Trade Experience*

Mr. Justice Frankfurter went on to say in *Automatic Canteen* that "trade experience in a particular situation can afford a sufficient degree of knowledge to provide a basis for prosecution."[61] Just what degree of knowledge is sufficient to prove a violation and the circumstances from which it can be inferred have been central issues in all subsequent 2(f) cases.

The standard for establishing culpable knowledge was discussed in a series of cases involving group buying in the automotive parts industry. Although section 2(f) of the Act is specifically addressed to the Act's central purpose, curbing the power of large chain buyers, it was used in the 1960's to attack small jobbers in the automotive parts industry who had banded together for the purpose of group buying.

The jobbers, representing small businesses which operated in a very competitive market, formed themselves into cooperatives in order to strengthen their bargaining positions and better enable them to compete with the large chain stores, oil companies and auto dealers who also sold parts.

Many of these attempts were characterized as mere "bookkeeping devices" through which cumulative volume discounts were offered to favored buyers who ordered supplies through such groups. Such groups were held to be cooperatives in name only[62] and were found to have violated section 2(f) on the ground that they should have known that competitive retailers whose operatives were con-

60. 346 U.S. at 79.

61. *Id.* at 79-80.

62. *See* Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir.), *cert. denied,* 368 U.S. 838 (1961) (Orders were sent through group but goods were shipped directly to individual members from seller. The court concluded that individual jobbers knew their method of purchase represented no cost savings for the seller.). *See also* American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960) (Members sent their orders either directly to the seller or through the buying group. Orders were handled individually and parts were shipped directly to the individual members.).

ducted on a similar scale were not receiving discounts similar to the wholesaler's discounts received by the groups.[63]

Subsequent to these cases, the groups became more sophisticated and began performing warehousing services. The Commission, nonetheless, continued to find violations. In *In re National Parts Warehouses*,[64] the buying group consisted of more than fifty members. It purchased for its own account, warehoused goods, billed its jobber-member customers and settled its accounts with suppliers on a monthly basis. The Commission found the individual jobber members to have violated section 2(f).

The Seventh Circuit upheld the Commission, relying upon the "substantial evidence" rule. The court found that the group received a twenty percent discount as a warehouse distributor but did not perform a significant selling function. Only six percent of its volume was accounted for by sales to nonmember jobbers. Further, it did not perform a complete distribution function for its members since approximately twenty percent of its dollar volume was accounted for by direct shipments from suppliers to members.[65]In *American Motor Specialties Co. v. FTC*,[65.1] volume dis-

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63. *See, e.g.*, Alhambra Motor Parts v. FTC, 309 F.2d 213 (9th Cir. 1962); Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir. 1961), *cert. denied*, 368 U.S. 838 (1961); American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960); *In re* National Parts Warehouse, 63 F.T.C. 1692 (1963), *aff'd sub nom.* General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir.), *cert. dismissed*, 382 U.S. 923 (1965). *See generally* Kintner, Romano and Filippini, *Cooperative Buying and Antitrust: The Search for Competitive Equality*, 41 GEO. WASH. L. REV. 971, 973-98 (1972-73).

64. 63 F.T.C. 1692 (1963).

65. General Auto Supplies, Inc. v. FTC, 346 F.2d 311 (7th Cir.) *cert. dismissed*, 382 U.S. 923 (1965).

To impose Robinson-Patman Act liability on individual members in these cases, the Commission resorts to the "buyer corollary" of the "indirect purchaser" doctrine. In *In re National Parts Warehouse* the Commission explained that it felt application of this doctrine was necessary to carry out the purposes of the Act.

> The buyer corollary of this rule is that the seller-purchaser relationship is similarly established if a purported middleman, instead of being under the "control" of the seller, is "controlled" by the *buyer* himself. Since the very purpose of the statute is "to protect *buyers'* competitors," . . . there is even more reason for its application where it is the buyer, rather than the seller, that controls the intermediary. It would be a strange result indeed to hold that seller-controlled intermediaries must be pierced in order to protect buyer's competitors, but refuse to permit such piercing where it is the favored purchaser himself who has devised a "middleman" to procure for him discriminatory advantages over his competitors.

63 F.T.C. 1692 at 1717-18.

counts were granted to groups of distributors who pooled the individual purchases of their members to receive prices lower than those received by their competitors. Discussing the buyers' position, the Second Circuit said:

> Petitioners of course knew that they, as individual firms, were receiving goods in the same quantities and were served by sellers in the same manner as their competitors, and hence organized themselves into a buying group in order to obtain lower prices than their unorganized competitors. Hence, by the very fact of having combined into a group and having obtained thereby a favorable price differential, they each, under Automatic Canteen were charged with

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Dissenting in *In re National Parts Warehouse*, Commissioner Elman criticized the majority test as failing to reach the question of whether the group actually performed the same purchasing and distribution functions as other warehousing distributors who received the same functional discount. He saw the Commission's decisions in this area as leading the demise of the cooperative buying group. 63 F.T.C. at 1739-44.

The Act requires that sellers not discriminate in price between different purchasers. In the early cases, it is easy to support the Commission's characterization of the members as indirect purchasers. Where the intermediate group performs no services and is a mere shell, fairness to other buyers requires that the substance of the transaction and not the form control.

Where the group performs services, however, care must be taken that the formalism of the indirect buyer theory not prevent recognition that the buying group does exist and does incur expenses which might save the supplier costs. Commissioner Jones, dissenting in *Alhambra Motor Parts v. FTC* [1965-1967 Binder] TRADE REG. REP. (CCH) ¶17,410, at 22,636 -40 advocated that a buying group which performs a warehousing function, permits centralized billing by the seller on its own credit and otherwise provides savings for the seller may be entitled to accept a functional discount where it has a reasonable basis for believing that the seller has a cost justification. In her view, the fact that the buying groups incur these distribution costs permitted it to assume equal cost savings accrue to the seller.

To adhere too rigidly to a notion of piercing the intermediary is to impede the achievement of economics through vertical integration. Where the buying group does more in the distribution process than the ordinary retailer and there is no direct commercial contract between the original seller and the ultimate retailer, the group should be viewed to occupy a higher rung on the functional ladder. To the extent that it is recognized as an entity, its competitors are other distributors at the same level and the prices it receives should be compared on that basis.

Further, enforcement of the Act against real cooperatives may violate Congressional intent. As Mr. Rowe has noted, Congress expressed an "intention to preserve the benefits enjoyed by co-op members through favorable buying arrangements." Rowe, *supra* note 2 at 425-28, 451. *See also* 80 CONG. REC. 9415 (1936). Indeed, the bill was intended to give the co-ops the same advantages enjoyed by chain's in this regard. As Congressman Patman stated, "[i]t is a very foolish co-op that would be against this bill." 80 CONG. REC. 8114 (1936). For a thorough discussion of problems in this area *see* Austern, *"Presumption and Percipience About Competitive Effect,"* 81 HARV. L. REV. 773, 799-807 (1968).

65.1. 278 F.2d 225 (2d Cir.), *cert. denied*, 364 U.S. 884 (1960).

> notice that this price differential they each enjoyed could not be justified. And this knowledge of each of the seventeen individual firms is imputable to the organization of which they were all members.[66]

In *Mid-South Distributors v. FTC*,[67] a presumption that the buyer knew that the seller's price could not be justified was held established by facts showing that the buyer knew, as to any purchase order, that the price he was obtaining through the co-op was substantially lower than his competitors were required to pay and secondly that for all practical purposes the order and shipment were handled exactly the same way.[68]

In *Fred Meyer, Inc. v. FTC*,[69] the Ninth Circuit found that the buyer had induced discriminatory prices from suppliers in violation of section 2(f).[70] Fred Meyer, Inc., an Oregon grocery chain, had regularly conducted an annual promotion sale, printed discount coupon books and solicited suppliers to place advertisements in the books at a rate of $350 per page. These payments covered the cost of the promotion, including discounts to customers. The FTC attacked the scheme on the ground that the cash payments were an illegal price discrimination. Fred Meyer argued that, due to the differing quantities purchased by competitors, it had no reason to know of the illegality.

In affirming the Commission's finding of illegality, the Ninth Circuit noted three findings of the Commission: first, none of Meyer's suppliers granted quantity discounts to anyone else; second, Meyer received the discount only one month of the year; and third, many of the rebates resulted in prices substantially below normal. The court held that these facts were sufficient to meet the Commission's burden that the buyer knew or should have known

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66. *Id.* at 228.

67. 287 F.2d 512 (5th Cir.), *cert. denied,* 368 U.S. 838 (1961). Similarly in *Alhambra Motor Parts,* 68 FTC 1039 (1965), the FTC held it sufficient to show that savings realized by the seller, including those resulting from a warehousing service, did not justify the lower price received by members. The Commission inferred culpable knowledge from the fact that certain jobbers had made purchases from the same suppliers before joining the buying group and could compare their bargains. *Id.* at 1083. The Commission held that the inference of knowledge was also supported by the general trade experience of the members.

68. 287 F.2d at 518.

69. 359 F.2d 351 (9th Cir. 1966), *rev'd on other grounds,* 390 U.S. 341 (1968).

70. Certiorari requested from this portion of the decision was denied. 386 U.S. 907 (1967).

that the prices received were not cost-justified. Meyer's knowledge was a function of trade experience and the court pointed to specific facts which Meyer had reason to know, including profit margins of various wholesalers and pricing theory in the retail market. Meyer had a "vigorous intelligence network" which supplied it with information about prevailing prices and practices of competitors.

The case can be seen as an easy one for the Commission on the issue of knowledge due to the suddenness, depth and exclusivity of the price reduction. Fred Meyer had purchased in large quantities during the entire year and thus the reviewing court was justified in declaring that the buyer should have known "something was amiss"[71] when prices were suddenly reduced thirty-three percent by a supplier to coincide with Fred Meyer's thirty day coupon sale. The court agreed that the Commission could properly infer, without a cost study, that the buyer was not an unsuspecting recipient of prohibited discriminations.

The *Beatrice-Kroger* case[72] also indicates that a buyer can be held to a high standard of knowledge with respect to prevailing competitive costs. The procurement scheme in that case, unlike that in *Fred Meyer,* was difficult to compare. It involved a "stripped services" contract that may well have been designed to avoid Robinson-Patman Act liability. The FTC majority found that Kroger, the purchaser, had reason to know the Beatrice offer was not cost-justified, pointing out that the evidence complied with *Automatic Canteen's* reference to trade experience as a source of proof of a buyer's knowledge. Kroger's negotiator had thorough knowledge of the dairy industry, had experience with private label arrangements and had investigated conditions in the area involved in the negotiations.[73] Further, one of the dairies participating in the bidding expressly premised its withdrawal from the bidding on the lack of cost justification for further cuts.[74] This element of the case is consistent with the purpose of section 2(f) as

71. 359 F.2d at 364.

72. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶19,045 (FTC 1969), *aff'd sub nom in* Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971). For discussion of other aspects of this case, see text accompanying notes 85-101, *infra.*

73. *See also* The Great Atl. & Pac. Tea Co., v. FTC, 557 F.2d 971, 981 (2d Cir. 1977), *rev'd on other grounds,* 440 U.S. 69 (1979) ("A&P was no novice in the dairy industry").

74. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,045 at 21,293.

explained in the legislative history. According to Congressman Utterback, the provision was designed to allow the pressured seller to resist the aggressive buyer by pointing out the illegality of his price demands.[75] The use of a warning like that given in *Beatrice-Kroger* to constitute an element of buyer knowledge gives effect to this legislative purpose.

V. THE *A & P* CASE

In February 1979, the Supreme Court issued only its second interpretation of section 2(f) in the history of the Act, *Great Atlantic & Pacific Tea Co. v. FTC.*[76] The facts, as discussed by the Court, are that A & P sought to achieve cost savings at more than 200 stores in the Chicago area (including portions of Illinois and Indiana) by shifting from sale of milk sold under the brand name of the supplying dairy to the sale of milk sold under the A & P label. In furtherance of this plan, A & P asked Borden Co., a long-time supplier of A & P, to submit an offer to supply milk and dairy products for resale on a "private-label" basis. Borden submitted an offer which it claimed would save A & P $410,000 per year compared to prior practice. A & P then solicited from one of Borden's competitors an offer which allegedly would have produced annual savings for A & P of approximately $737,000.

A & P's buyer then contacted Borden's sales manager, stating that Borden's bid was "not even in the ball park." The buyer refused to give further details when asked, except to note that a $50,000 improvement in Borden's bid "would not be a drop in the bucket."

Borden, faced with the prospect of substantial underutilization of a new plant if it lost the A & P account, ultimately submitted a second bid which would result in annual savings to A & P of $820,000. In presenting the offer, Borden emphasized that the offer was made to meet the competitor's bid and that it needed to keep A & P's business. A & P accepted this offer.

The FTC filed a complaint against A & P, charging it with viola-

75. 80 CONG. REC. 9419 (1936).

76. 440 U.S. 69 (1979). For a thorough treatment of this case and its possible implications, see Galanti, *supra* note 5.

tions of section 5 of the Federal Trade Commission Act and section 2(f) of the Robinson-Patman Act. The essence of the section 5 complaint was that A & P had failed to inform Borden that its second offer was better than the competitor's bid. In effect, this failure to disclose was also at the heart of the section 2(f) charge. The Commission, reversing the Administrative Law Judge, dismissed the charge on the grounds that imposing a duty of affirmative disclosure would be contrary to normal business practice and contrary to the public interest.[77] The Commission upheld the Administrative Law Judge's finding that Borden had discriminated in price between A & P and its competitors, that the discrimination had been injurious to competition, and that A & P knew or should have known it was the beneficiary of unlawful price discrimination. The Commission rejected the defenses made by A & P that Borden's bid had been made to meet competition and had been cost-justified.

On review, the Court of Appeals for the Second Circuit upheld the decision of the Commission.[78]

The Supreme Court, in a majority opinion by Mr. Justice Stewart, reversed. The Court focused on the derivative nature of liability under section 2(f). The FTC had argued to the Court that, since A & P knew that the final Borden bid undercut the competitive bid, it should not be entitled to assert the defense of meeting competition even though Borden may have honestly believed it was simply meeting competition. Rejecting this argument, the Court noted that "[t]he clear language of §2(f) states that a buyer can be liable only if he receives a price discrimination 'prohibited by this section'. If a seller has a valid meeting competition defense, there is simply no prohibited price discrimination."[79]

The Court also looked to the effect on the marketplace of imposing section 2(f) liability in the case before it, determining that such a holding could result in "price uniformity and rigidity."[80] In the Court's view, a duty of affirmative disclosure would likely frustrate competitive bidding and quite easily lead to price matching and

77. 440 U.S. at 74.
78. 557 F.2d 971 (2d Cir. 1977), *rev'd*, 440 U.S. 69 (1979).
79. 440 U.S. at 78.
80. *Id.* at 80.

other anti-competitive behavior.[81]

Since the Commission and Court of Appeals held that the buyer could be liable under section 2(f) even if the seller had a meeting competition defense, they made no specific finding that Borden had such a defense. Reviewing the evidence for itself, the Court determined that Borden "quite clearly" did have such a defense and held that "a buyer who has done no more than accept the lower of two prices competitively offered does not violate §2(f), provided the seller has a meeting competition defense."[82]

Mr. Justice Marshall, dissenting in part, would have remanded the case to the Commission on the meeting-competition issue.[83] He also took issue with the language used by the majority with respect to the derivative nature of section 2(f).[84]

VI. *Beatrice-Kroger*: The Lying Buyer Exception

An issue expressly left open by the *A & P* majority opinion is whether there exists an exception to the general rule of derivative liability where the buyer induces receipt of a discriminatory price by misrepresenting the nature of competing bids to a seller who escapes liability by utilization of the good faith meeting-competition defense.[85] This exception, referred to as the *Beatrice-Kroger* doctrine or the "lying buyer" exception, arose from protracted litigation before the FTC culminating in an opinion by the Court of Appeals for the Sixth Circuit.[86]

In late 1961, the Kroger Company, a large grocery store chain, decided to enter the private label milk business and sought bids for the supply of milk and other dairy products. Initially, Kroger sought bids from four suppliers: Broughton, Valley Bell, Fairmont, and Borden. Subsequently, Beatrice joined the bidding.

81. *Id.*

82. *Id.* at 81.

83. *Id.* at 85-92.

84. *Id.* For further discussion of this point, see text accompanying notes 107-14 *infra*.

85. As the court stated, "Because A&P was not a 'lying buyer' we need not decide whether such a buyer could be liable under § 2(f) even if the seller has a meeting-competition defense." 440 U.S. at 82 n.15.

86. Beatrice Foods Co. [1967-1970 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 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).

In the course of negotiations, Mr. Casserly, the Kroger negotiator, rejected Beatrice's initial offer of 71 cents per gallon of milk, a fifteen percent discount, and stated that Broughton had already offered a twenty percent discount. The Commission found that Broughton's bid was not as represented by Casserly but was a lesser discount.[87] In a later bid Beatrice offered to reduce its price to 68 cents per gallon to meet the alleged twenty percent Broughton discount. Mr. Casserly rejected this bid on the grounds that he had received a better offer from Fairmont. Beatrice then reduced its price to 66 cents per gallon and Mr. Casserly accepted, declaring the bid to be "competitive."[88] The bid was, according to the Commission, "significantly below the competition."[89]

Both Beatrice and Kroger were charged with violations of the Robinson-Patman Act; Beatrice for violating section 2(a) and Kroger for violating section 2(f). The 2(a) complaint against Beatrice was dismissed even though its bid "beat" competition. Commissioner Jones referred to Beatrice's belief that its offer was "no lower than was required under the circumstances," stressing that its negotiators had no reason to know that their final offer "was in fact significantly below the competition."[90]

The majority was impressed with the difficulties which Beatrice faced in determining the terms of the competitive offers in view of Mr. Casserly's untruthfulness. Further, the various offers of the dairies were not easily comparable. They covered a different variety of products and were based on different formulas. The good faith defense was available because Beatrice did everything in its power through investigation and testing of rumors to find the right price level.[91]

The Commission decided, three to two, that Kroger had violated section 2(f). The groupings of the Commissioners show the difficulties they had in resolving the case. Commissioners Jones, Elman and Nicholson formed the majority dismissing the complaint

87. [1967-1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 19,045 at 21,291, 21,294 (FTC 1969).

88. *Id.* at 21,296-97.

89. *Id.* at 21,308.

90. *Id.*

91. *Id.* at 21,307.

against Beatrice. Commissioners Dixon, McIntyre and Jones formed the majority ruling against Kroger. Thus, only Commissioner Jones was on the majority side of both determinations and each of the other four Commissioners dissented at least to one of the two determinations.

The absolution of Beatrice did not exonerate Kroger, toward whom Commissioner Jones took a much less charitable view, stating that

> the burden of not exceeding Robinson-Patman bounds should, at some point, fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried by every proper means to feel out the opposition.[92]

Kroger conveyed false information as to competitive offers, and by this deception was held to have induced a discriminatory price in violation of section 2(f). Under these circumstances, Kroger could not avail itself of the section 2(b) defense accorded to Beatrice.[93]

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92. *Id.* at 21,308.
In the words of Commissioner Jones:

> Here, Kroger was in a very powerful bargaining position because of its size and importance to the dairies in the Charleston Division. This being so, Mr. Casserly went beyond the bounds of permissible bargaining when he falsely gave the impression that the original Broughton offer amounted to a 20 per cent discount; when he told the Beatrice representatives that their 71 cent offer was too high on that specific ground; when he first rejected their 68 cent offer and then indicated that their 66 cent offer was "competitive" without having made any comparison of the bids, and when he *failed* to convey any *correct* information about the price levels being quoted by others. It is by reason of this conduct that Kroger took on the risk of liability under the Robinson-Patman Act.
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> . . . .
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> Kroger asserts that this means it cannot be liable if Beatrice is found to have acted in good faith. We disagree. There may be instances in which a buyer is insulated from liability by the seller's good faith but *Automatic Canteen* does not hold that the buyer is always entitled to avail himself of such a defense, nor does it compel such a result in the present situation. Undoubtedly a buyer can accept an offer made to meet competition which in fact does beat a competing offer if the buyer has done nothing to initiate the price break in the first place, but to hold that a buyer can escape liability merely by inducing and accepting a second discriminatory offer which meets an offer *previously induced by the buyer* would make a mockery of section 2(f).

93. *Id.* at 21,312.

The cost justification issue was resolved adversely to Kroger, primarily on the trade experience of Casserly. The circumstances were held to be sufficient to place him on notice that Beatrice's bid could not be justified.[94]

Commissioner Elman, in dissent, complained that the portion of the opinion dealing with Casserly's giving false information as to competing offers and his failure to provide any correct information about them would turn the statute into a truth-in-bargaining law requiring affirmative disclosure.[95] The opinion, however, does not clearly establish an affirmative duty to disclose where the buyer has not misled the seller. Further, Kroger's "powerful bargaining position" was linked to Commissioner Jones' discussion of Casserly's untruthfulness[96] and perhaps such nexus is required to make untruthfulness unlawful.

The Court of Appeals for the Sixth Circuit affirmed the cease and desist order of the FTC in *Kroger Co.* v. *FTC.*[97] In an opinion by former Supreme Court Justice Clark, sitting by designation, the court stated:

> Kroger seizes upon this circumstance contending that as a matter of law the discharge of Beatrice requires the acquittal of Kroger because there cannot be a violation of section 2(f) without there being one under section 2(a). While ordinarily this may be true—a matter we need not and do not pass upon—it is not true under the peculiar circumstances here, where Kroger was found by the Commission to have given "false price information" to Beatrice as to Broughton's competing bid which induced Beatrice in perfect good faith to meet Broughton's equally low price.
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> . . . .
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> *Automatic Canteen, supra,* holds only that buyers may avail themselves of discriminatory prices that a seller may lawfully grant or "those that are not known by him [the buyer] not to be within one of those defenses."
>
> To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. In or-

94. *Id.* at 21,313. *See* text accompanying notes 72-75 *supra* for further discussion of the knowledge issue.
95. *Id.* at 21,316.
96. *Id.* at 21,312.
97. 438 F.2d 1372 (6th Cir.), *cert. denied,* 404 U.S. 871 (1971).

> der for the buyer to be sheltered through exoneration of the seller *under* section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view, but also from that of the buyer.[98]

The Court's denial of the seller's good faith defense to the buyer was expressly based on the conveyance of false information and was not intended to restrict honest bargaining.[99]

The *Beatrice-Kroger* case established, for the first time, that a transaction can be illegal for the buyer though lawful for the seller. On the surface, such a holding seems inconsistent with both the language of section 2(f) and the Supreme Court's *Automatic Canteen* opinion interpreting 2(f) as a provision which derivatively premises buyer liability on the provision defining pricing legality for the seller. As the Court stated in *Automatic Canteen,* "at the least, we can be confident in reading the words in § 2(f), a discrimination in price which is prohibited by this section, as a reference to the substantive prohibitions against discrimination by sellers defined elsewhere in the Act."[100] The Court went on to say that "a buyer is not liable under § 2(f) if the lower prices he induces are . . . within one of the seller's defenses. . . ."[101] In *Kroger* the prices induced were held to be within one of the seller's defenses, that of good faith meeting of competition.

To adhere too rigidly to a notion of derivative illegality in a situation like *Beatrice-Kroger,* is, however, as Mr. Justice Clark recognized, to sanction circumvention of section 2(f). Kroger's misrepresentation made necessary an exception to the rule. Perhaps the most effective way to analyze the problem is to consider it from the perspective of the seller who is faced with a dilemma. On the one

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98. *Id.* at 1374, 1377 (emphasis added) (citations omitted).

99. As Justice Clark noted:

> Moreover, we find no support for the charge that the Commission's holding places the buyer at his peril whenever he engages in price bargaining. The use by the Commission of the "hard-bargaining" language as well as the failure of Kroger "to convey any correct information about the price levels being quoted by others" 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. . . .

Id. at 1378.

100. 346 U.S. at 70.

101. *Id.* at 74.

hand he is faced with an obligation under the Robinson-Patman Act to ensure that his price is not illegally discriminatory. With respect to the section 2(b) good faith meeting-competition defense, this entails some obligation to find the price level at which his competitors will sell.

On the other hand he is faced with an obligation to avoid any form of price-fixing, a *per se* violation of the Sherman Act.[102] An exchange of price information with competitors may well tend to stabilize prices and *United States v. Container Corp.*[103] stands as a warning that such an exchange can violate the Sherman Act.

As beween the two obligations, one must yield. Price fixing is a *per se* offense, but the meeting-competition defense is available on a subjective good faith basis. For these reasons, the Supreme Court, in 1978, in *United States v. United States Gypsum Co.*[104] held that a seller is permitted to establish good faith under the meeting competition defense of the Robinson-Patman Act by actions falling short of actual interseller price verification. Thus, the major reason the seller is not held liable in the *Beatrice-Kroger* situation is the necessity of reconciling Robinson-Patman Act enforcement with broader antitrust policy. To require the seller to check the accuracy of the buyer's representations by contacting other sellers could lead to stabilization of industry prices or concerted price fixing. There is, however, no such similar policy reason for absolving the misrepresenting buyer from liability.

While there may be a semantic problem in construing the statute to permit buyer liability where the seller is exonerated, there remains a sound policy basis for allowing such a result where the seller's good faith defense is based on the buyer's affirmative misrepresentation. Mr. Justice Clark appears to have dealt with the problem in *Kroger* by holding that the section 2(b) requirement of good faith must be met, not only by the seller, but also by a buyer intending to rely on such defense.[105] Where the seller is allowed to escape liability because of his conflicting antitrust duties, there is

102. United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).
103. 393 U.S. 333 (1969).
104. 438 U.S. 422 (1978).
105. 438 F.2d at 1377. Mr. Justice Marshall apparently agrees. *See* 440 U.S. 69, 88 (Marshall, J., dissenting in part.)

no sound reason in the Act to extend this exception to the buyer, particularly where the buyer is the cause of the dilemma and apparently did not act in good faith.

Under these conditions the seller does not have the opportunity to warn the buyer of possible violations of the Act since the buyer controls information relevant to the defense. In such circumstances the primary purpose of section 2(f) is frustrated. Furthermore, to adhere to an overly strict concept of derivative liability enables a buyer to totally evade the Act by misrepresentation. In effect, the buyer could create its own defense by misrepresenting to a seller the bid needed to meet the bid of a competitor and then allow the seller to rely on this erroneous information in good faith.[106]

While it may be argued that the *Beatrice-Kroger* exception did not survive *A&P*,[107] it is submitted that this result is neither compelled nor necessarily indicated by the Court's decision in that case. First, the Court expressly stated that it was not reaching the question of whether a "lying buyer" could be liable under section 2(f) where the seller had a meeting-competition defense.[108]

Second, the cases are distinguishable on their facts. As the Court explicitly recognized, *A&P* did "not involve a 'lying buyer' situation."[109] In reality, *A&P* represented an attempt by the FTC and the Second Circuit to expand the scope of the *Beatrice-Kroger* doctrine to encompass misrepresentation by silence.[110] The *Kroger*

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106. See opinion of Justice Marshall, dissenting in part, 440 U.S. at 88-89.

107. As Mr. Justice Marshall stated:

> The Court purports to reserve this "lying buyer" issue, *ante*, at 81-82, n.15, but the derivative standard it adopts today belies the reservation. If "prohibited by this section" means that a buyer's liability depends on that of the seller, then absent seller liability, the buyer's conduct and bad faith are necessarily irrelevant.

Id. at 88 (citation omitted).

108. *Id.* at 81-82 n.15.

109. *Id.*

110. The Second Circuit explicitly recognized that it was extending its holding beyond the "lying buyer" situation. "While *Kroger* did indeed involve a 'lying buyer,' we do not regard the Sixth Circuit's ruling as strictly limited to the situation where the charged buyer affirmatively lied to the seller." 557 F.2d at 983.

Prior to the *A&P* decision, private plaintiffs had attempted to extend *Beatrice-Kroger* as well. In Kapiolani Motors, Ltd. v. General Motors Corp., 337 F. Supp. 102 (D.C. Hawaii 1972), it was alleged that a dealer-buyer of automobiles filed false warranty claims with its supplier so that the net amount paid by the buyer to the supplier was less than that paid by a competing dealer-buyer. The plaintiff alleged that, like Kroger, the buyer used fraud to decision, by contrast, involved an affirmative act of misrepresentation.

In *Kroger*, the buyer's negotiator, in rejecting a fifteen percent discount expressly stated that a competitor had offered a twenty percent discount. This was not true. The buyer's negotiator then rejected a second bid from seller designed to meet the alleged twenty percent discount on the grounds that it had received a better offer from yet another competitor. Buyer finally accepted a third and yet lower offer from seller declaring it to be "competitive" where such bid was significantly below competition.[111]

By contrast, the heart of the FTC case in *A&P* was that: (1) Borden, the seller, informed A&P that its offer was being made to meet offers then in A&P's hands; and (2) A&P accepted the offer without informing Borden that its offer was substantially below those of other bidders.[112] Thus, *A&P* involved an attempt to extend the *Beatrice-Kroger* doctrine to misrepresentation by silence. Silence can be a violation, however, only if there is a duty to disclose. Merely because the Court chose not to require affirmative disclosure in *A&P*, a requirement which, if extended too far, could easily interfere with price competition in a free market,[113] does not mean a buyer should not be liable in the *Beatrice-Kroger* situation where it makes affirmative misrepresentations.[114]

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procure a lower net price.

The court held that fraud alone was not sufficient to hold the buyer liable under § 2(f), stating that *Kroger* "does not stand for the bald proposition that any fraud upon a supplier which may put money into a buyer's pocket constitutes an inducement of a price discrimination condemned by § 2(f)." 337 F. Supp. at 104. The court held that the fraud did not constitute a price discrimination.

111. *See* text accompanying notes 87-89 *supra*.

112. Proposed FTC complaint in The Great Atl. and Pac. Tea Co., [1970-73 Transfer Binder] TRADE REG. REP. (CCH) §19,639 (FTC 1971).

113. In *A&P*, the Court noted that to require the buyer to make affirmative disclosure "would almost inevitably frustrate competitive bidding and, by reducing uncertainty, lead to price matching and anticompetitive cooperation among sellers." 440 U.S. at 80.

114. The *Beatrice-Kroger* doctrine, at least prior to *A&P*, has received recognition in other courts. *See* Cadigan v. Texaco, Inc., 492 F.2d 383, 386 n.2 (9th Cir. 1974) (buyer entitled to rely on seller's 2(b) defense except when "it knowingly manipulated the competitive bidding through false or disingenuous reporting of competitor's bids to induce lower bids."). *Compare* Harbor Banana Distributors, Inc. v. FTC, 499 F.2d 395, 399 (5th Cir. 1974) ("A prohibited discrimination is a condition precedent to a finding of unlawful conduct under section 2(f)."). (This case did not, however, involve misrepresentation of type found in *Beatrice-Kroger*.).

VII. PRIVATE SUITS UNDER SECTION 2(f)

A section 2(f) violation is subject to a private suit for treble damages, but there have been few litigated decisions. Perhaps this is due to the fact that it is often easier and more convenient to sue the seller. Suits against a seller do not involve the often difficult proof of knowledge that suits against the buyer require.

One issue with respect to the private suit is whether a private plaintiff under section 2(f) has the same burden of going forward with evidence as to the buyer's knowledge that must be met by the Commission. In *Texas Gulf Sulphur Co. v. Simplot Co.,*[115] the Fifth Circuit held that Texas Gulf, the plaintiff, had knowingly induced a discrimination in price. Texas Gulf's 2(f) claim was asserted not for treble damages, but in defense to a suit by the buyer on a contract. The Fifth Circuit affirmed a finding that the buyer had not induced an illegal discrimination.

In discussing its standard of fairness and convenience in *Automatic Canteen,* the Supreme Court noted that the Commission, "with its broad power of investigation and subpoena . . . is on a better footing to obtain this information than the buyer."[116] The private plaintiff lacks such resources. The Court also declared that "the buyer does not have the required information, and for good reason should not be required to obtain it . . . ."[117] as the controlling reason for striking the balance as it did. The private plaintiff also lacks the information.

Lower courts dealing with private suits have assumed that the burden is on the plaintiff to show that the defendant induced discriminatory prices knowing they were not cost-justified,[118] and that the discrimination could not be justified.[119]

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115. 418 F.2d 793 (5th Cir. 1969).

116. 346 U.S. at 79.

117. 346 U.S. at 78.

118. Rutledge v. Electric Hose & Rubber Co., 327 F. Supp. 1267 (C.D. Cal. 1971), *aff'd,* 511 F.2d 668 (9th Cir. 1975). The district court declared that plaintiff had the burden of showing "by a meticulous attention to details" that discriminatory prices were induced with knowledge that they were not cost justified. The court relied on an FTC enforcement case and did not discuss any difference between private plaintiffs and the FTC. 327 F. Supp. at 1276, 1277. *See also* Holleb & Co. v. Produce Terminal Cold Storage Co., 532 F.2d 29, 33-34 (7th Cir. 1976).

119. Big Value Stamp Co. v. Sperry & Hutchinson Co., 1967 Trade Cases, ¶ 71, 978 (S.D.

Perhaps fairness requires that the initial burden be on the private plaintiff since it is he who seeks to gain by the lawsuit. Bargaining considerations still dictate that sellers not be required to put all their costs on the table when dealing with buyers. By the same standard of fairness, however, the private plaintiff should not be required to rigorously prove lack of cost justification. Coming forward with evidence that the buyer should have known of the absence of cost justification should be sufficient.[120]

Finding that the buyer's knowledge had not been established, the court in *Texas Gulf* did not reach the issue of whether a seller may charge its own buyer with a violation of section 2(f). It has been suggested[121] that this issue should be resolved not by focusing on the language of section 2(f) but rather by looking to the language of section 4 of the Clayton Act[122] which provides that any person injured in his business or on his property as a result of a violation of the antitrust laws may sue for treble damages.

Since an unlawful discrimination by the seller is usually a prerequisite for a suit against a buyer, the buyer might raise an *in pari delicto* defense. It has been suggested,[123] however, that the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*[124] would tend to make this defense unavailable.

Mark Plastic Products, Inc. v. Exxon Corp.[125] involved a seller charging its own buyer with a violation of section 2(f). Originally, Mark Plastic sued Exxon under 2(a) alleging that Exxon sold it a film resin at a price higher than that given a favored customer, Mobil Oil Company. Exxon, the seller, filed a counterclaim alleging that Mark Plastic, the buyer, had itself induced Exxon to sell the product to it at a discriminatory price, thus violating section 2(f). The president of Mark Plastic was joined in the counterclaim.

Though not specifically addressing the question of whether a

Ohio 1967).

120. *See* note 48 *supra* and accompanying text.

121. Applebaum, *Fundamentals of Buyer's Violation Under Robinson-Patman Act*, 39 ANTITRUST L.J. 869, 880-81 (1970).

122. 15 U.S.C. § 4 (1973).

123. Applebaum, *supra* note 121, at 881.

124. 392 U.S. 134 (1968).

125. 1973-2 Trade Cases, ¶ 74,784 (E.D. Mich. 1973).

seller can sue its own buyer, the district court refused to dismiss the counterclaim. The court noted that section 4 of the Clayton Act does not restrict "persons" entitled to sue and held that Exxon had stated a claim on which relief could be granted.

Whether a seller can sue his buyer or not is an unsettling question. On the one hand is the clear language of section 4 of the Clayton Act which states that "any person" may sue. The Robinson-Patman Act is, however, imperfect in many ways.[126] It well may be that the draftsmen did not intend, or at least did not contemplate, the possibility of section 2(f) suits by a seller against his own buyer. As has been mentioned, the purpose of section 2(f) was to make it easier for the seller to abide by the law and resist buyer pressure.[127] This was to be accomplished by informing the buyer that the demand for a price cut was not cost justified, thus charging the buyer with "knowledge of the illegality of the discount, and equal liability for it."[128] The primary focus remained, in the eyes of the draftsmen, on the seller. If the seller can sue his own buyer he can charge him with more than knowledge and *equal* liability.

Perhaps the question will not be of great importance generally due to the possible consequences of instituting such a suit. The standard of fairness and convenience puts the burden of producing evidence that the price was not cost justified on the plaintiff. In this case, the burden is easily met by the seller who alone possesses such information.

By producing the information, though, the seller makes out a section 2(a) case against himself for some treble damage plaintiff waiting in the wings and deprives himself of the cost justification defense. At the very least, he is vulnerable to attack by the FTC. If the case is one of standard section 2(f) derivative liability, the seller must prove that he violated 2(a) to hold the buyer liable under 2(f). Perhaps only in the *Beatrice-Kroger* type situation, if

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126. *See* FTC v. Fred Meyer, 390 U.S. 341, 349 (1968) ("the Robinson-Patman amendments by no means represent an exemplar of legislative clarity"); Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953) ("precision of expression is not an outstanding characteristic of the Robinson-Patman Act").

127. 80 CONG. REC. 9419 (1936).

128. *Id.*

the exception to derivative liability survives,[129] will the question of seller suits under 2(f) be important.

VIII. Section 5 of the FTCA

The FTC and the courts have held that a buyer's knowing inducement and receipt of a discriminatory allowance is an unfair method of competition under section 5 of the Federal Trade Commission Act on the rationale that such action was necessary to close a loophole in the Robinson-Patman Act.[130] The FTC decided that Congress had intended to make the knowing inducement or receipt of disproportionate allowances a violation of section 2(f) but failed to do so as a result of legislative oversight.[131]

While a broad discussion of the cases arising under the Federal Trade Commission Act is beyond the scope of this article, use of section 5 in place of section 2(f) raises a number of questions directly relating to section 2(f). The first is whether it is necessary to use section 5 or, whether inducement and receipt of discriminatory allowances and services, barred to the seller by section 2(d) and section 2(e), can be reached by section 2(f).

Earlier FTC and court decisions hold that a purchaser who induces and receives a discriminatory advertising allowance violates section 2(f).[132] The Supreme Court in *Automatic Canteen* explicitly declined to pass on the question of whether section 2(f) embraces the prohibitions of 2(d) and 2(e).[133]

Looking to the words of the provision itself, establishment of a 2(f) violation requires proof of a "discrimination in price which is prohibited by this section." If one focuses on the words "this section" an argument can be made that 2(f) is intended to apply

129. *See* text accompanying notes 85-114 *supra*.

130. *See, e.g.*, Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), *cert. denied* on this issue, 386 U.S. 907 (1967); Alterman Foods, Inc. v. FTC, 497 F.2d 993 (5th Cir. 1974).

131. Grand Union Co., 57 FTC 382 (1960), *modified*, 300 F.2d 92 (2d Cir. 1962).

132. *See* Hartley & Parker, Inc. v. Florida Beverage Corp., 307 F.2d 916, 922 (5th Cir. 1962); Miami Wholesale Drug Corp., 28 F.T.C. 485, 491-92 (1939).

133. 346 U.S. 61 at 73 n. 14; *accord*, American News Co. v. FTC, 300 F.2d 104, 111 (2d Cir.), *cert. denied*, 371 U.S. 824 (1962); Grand Union Co. v. FTC, 300 F.2d 92, 95 (2d Cir. 1962).

equally to subsections (a), (d) and (e) of section 2. If one reads the words "discrimination in price" literally, however, one might conclude that only 2(a) violations are reached. Section 2(a) is the only subdivision explicitly prohibiting price discrimination. Sections 2(d) and 2(e) prohibit specific practices without regard to whether they amount to a discrimination in price. The legislative history of 2(f) seems to support this latter approach. Congressman Utterback stated with respect to section 2(f) that "this paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment."[134] The first paragraph of the amendment is 2(a).[135]

Such analysis should not end the inquiry, however. Inducement and receipt of allowances can violate 2(f) if the granting of such allowances violates 2(a). Section 2(a) makes both direct and indirect price discriminations unlawful. Therefore the mere label attached to a discriminatory allowance should not preclude attack under section 2(a) if it can be translated into a price advantage having the prohibited effect.[136]

Referring to section 2(f) and its scope, Congressman Utterback said:

> That applies both to direct and indirect discrimination; and where, for example, there is discrimination in terms of sale or in allowances connected or related to the contract of sale, of such a character as to constitute or effect an indirect discrimination in price, the liability for knowingly inducing or receiving such discrimination or allowance is clearly provided for under the latter paragraph above referred to.[137]

Thus, section 2(f) extends to include allowances "connected or related to the contract of sale" where the effect is that of a discrimination in price.

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134. 80 CONG. REC. 9419 (1936).

135. In 1961, Representative Patman introduced H.R. 124, 87th Cong., 1st Sess. (1961), to amend § 2(f) to cover all violations of § 2(a), § 2(d), or § 2(e). 107 CONG. REC. 102 (1961). The proposed amendment did not become law.

136. *See generally* Rowe, *supra* note 1, at 425, 528-30.

137. 80 CONG. REC. 9419 (1936).

The Ninth Circuit in *Fred Meyer*,[138] while choosing not to decide the question, noted that there is support for the proposition that 2(a) and 2(d) are not mutually exclusive but can overlap to bring certain payments under both. As the court stated, "Even a successfully completed proceeding against a supplier for a 2(d) violation would not necessarily foreclose a contemporaneous or subsequent action against an inducing buyer for a 2(a)-2(f) violation where the payments involved violate both sections."[139]

The decision to use section 5 has resulted in an apparent anomaly. Discrimination by a seller in granting promotional allowances is subject to treble damage challenge. However, the unlawful inducement of such allowances is immune from a treble damage attack since section 5 is not considered one of the antitrust laws and is therefore not available to private litigants.[140] For this reason, the possible overlap of 2(a) and 2(d) is important. If a private litigant can show the court that a disproportionate allowance has the effect of a discrimination in price and therefore violates 2(a) as well as 2(d), he should not be denied a right of action against the buyer under 2(f).

Such a resolution is consistent with the legislative history which viewed all discriminatory allowances and services as forms of price discrimination. Section 2(d) was aimed at "the grant of discriminations under the guise of payments for advertising and promotional services. . . ."[141] The terms of the provision were made intentionally broad to prevent evasion.[142] As Mr. Rowe put it, the Commission "waived application of section 2(f) to the receipt of promotional benefits and instead invoked the general prohibitions of 'unfair methods of competition' . . . ."[143] The FTC, however, had much to gain from such a "waiver," for its task was simplified by resort to section 5. Under section 5 the FTC must show only that the buyer knowingly induced a seller to violate 2(d) or 2(e).[144] The

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138. 359 F.2d 351 (9th Cir. 1966).

139. *Id.* at 362.

140. *See* General Beverage Sales Co.-Oshkosh v. East Side Winery, 396 F.Supp. 590 (E.D. Wis. 1975).

141. 80 CONG. REC. 9418 (1936) (remarks of Congressman Utterback).

142. *Id.*

143. Rowe, *supra* note 1, at 433.

144. *See, e.g.,* Grand Union Co. v. FTC, 300 F.2d 92, 100 (2d Cir. 1962), *modifying* 57

section 2(f) requirement of buyer knowledge is thus blended with the proportional equality criteria of 2(d) and 2(e) to produce a hybrid violation.

It should be noted that whereas a charge under 2(f) requires proof of unlawful price discrimination, which includes proof of the requisite adverse competitive effect, a section 5 violation by a buyer involves showing only the inducement of an allowance or service that was not available on proportionally equal terms. A showing of competitive injury is not required. It would be unfair for this "waiver" to cause private plaintiffs to lose their right of action. Their rights should not be sacrificed for the administrative convenience of the FTC.

IX. Conclusion

Today, many years after passage of the Robinson-Patman Act, the needs of small retailers and wholesalers are no longer the public's primary concern. They have been supplanted in the public mind by the needs of consumers. The Act, however, remains law.

Despite the passage of time, the main paradox of the statute survives. Though aimed at the power of large buyers, the burden of the Act seems to fall more heavily on sellers. *Beatrice-Kroger* indicates that, in some respects at least, buyers can bear equal responsibility for the conduct of negotiations if they abuse their power. If a buyer chooses to disclose information as to competing bids, it must not misrepresent them. For this reason, the survival of the *Beatrice-Kroger* doctrine is necessary for accomplishment of the central purpose of the Act, curbing the abuse of power by large buyers.

F.T.C. 382, 410 (1960).

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