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A Survey and Commentary on the Good Faith Meeting of Competition Defense in the Robinson-Patman Act

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The good faith meeting of competition defense contained in the Robinson-Patman Act can, in Mr. Blackford's opinion, be the means of bringing economic rationality to the act. However, to do so the courts and the Federal Trade Commission must be cognizant of the economic realities of the market place. After placing the defense in historical perspective, the author discusses the different facets of the defense and the often varying interpretations given them by the courts and the Commission. Mr. Blackford concludes by critically evaluating the whole of the Robinson-Patman Act and suggesting guidelines for the application of the defense until remedial legislation can be enacted.

THE PRIMARY motivating force behind the enactment of the Robinson-Patman Act[1] was a desire to prevent the large retail chain stores from using their great purchasing power to obtain commodities at a lower cost than could their smaller competitors. Instead of directly attacking the economic power of these chains, the act's draftsmen sought to prohibit abusive and discriminatory pricing practices by prohibiting a seller from marketing his product at more than one price. The belief was that by placing the prohibition on the seller, he would be able to resist the coercive pressure of a large buyer.

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One of the defenses available to a party charged with a violation of the Robinson-Patman Act is found in section 2(b)[2] of that statute, which, in its entirety, states:

> 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

[1] 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964). For the purposes of this discussion, "Robinson-Patman Act" will be used to designate those amendments to the Clayton Act, 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1964) which were enacted in 1936.

[2] 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964).

> 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.)

The first portion of section 2(b) is strictly procedural, as it shifts to the seller the burden of rebutting a prima facie case of discrimination in prices, services, or facilities. The subsequent proviso is known as the "good faith meeting of competition" defense. This defense is one of the more controversial and least settled provisions of the Robinson-Patman Act.

An analysis will be made here of the key concepts underlying this vital defense, emphasis being placed upon the position of the Federal Trade Commission (FTC) and the divergent opinions of reviewing courts. At the conclusion of this analysis, it will be shown that the application and construction of the good faith meeting of competition defense can be the key to the coalescence of the Robinson-Patman Act with the other federal antitrust statutes and that this proviso can also bring economic rationality to the Robinson-Patman Act. In order to create a proper perspective for this survey, a brief recounting of the legislative history of this defense will be undertaken.

I. LEGISLATIVE PERSPECTIVE

The prohibition against price discrimination contained in section 2 of the original Clayton Act asserted, in part, that "[N]othing herein contained shall prevent . . . discrimination in price in the same or different communities made in good faith to meet competition."[3] This provision was included by the Senate Judiciary Committee to allay fears of a complete legal ban on price discrimination.[4] The congressional debates indicate that the meeting of competition proviso was not meant to be an exculpatory concept but rather a refutation of possible anti-competitive implications which might be attributed to discriminations in price.[5]

Proponents of amendments to the original Clayton Act asserted

[3] 38 Stat. 730 (1914).

[4] S. REP. NO. 698, 63d Cong., 2d Sess. 43-44 (1914).

[5] ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 208-10 (1962).

that the good faith proviso made the section almost unenforceable as a means of combating price discriminations where two or more sellers were willing to grant a price reduction to a large buyer[6] or where predatory price cutting was designed to eliminate smaller rivals.[7] The report of the House Judiciary Committee on the clause[8] that was finally enacted in the Robinson-Patman Act stated, "This proviso represents a contraction of an exemption now contained in section 2 of the Clayton Act which permits discriminations without limit where made in good faith to meet competition."[9]

The legislative debates and the Conference Committee Report indicate that Congress was discarding the good faith meeting of competition proviso of the original Clayton Act in an attempt to strengthen the act. The 1936 provision was intended to operate only as a rule of evidence permitting a seller to rebut a prima facie violation of the Robinson-Patman Act.[10] The congressional assumption underlying this rebuttal was that a price quotation which was made in good faith to meet a competitor's equally low price could not logically damage competition. In spite of its clear legislative history, there has been a dichotomy between the original intent of the good faith meeting of competition proviso and the pricing systems permitted by the courts under that defense. The strongest advocate of the meeting of competition defense as originally interpreted has been the FTC, but its rulings have been reversed many times by the appellate courts.

II. LEGAL ANALYSIS

A. Application

The initial problem area of the good faith meeting of compe-

6 H.R. REP. NO. 2951, 74th Cong., 2d Sess. 6-7 (1936). It is of interest to note that in the interim between 1914-1936 there was not one reported case where the good faith meeting of competition defense was accepted.

7 FTC, *Final Report on Chain Store Investigation*, S. DOC. NO. 4, 74th Cong., 1st Sess. 90 (1935).

8 The Senate version retained the defense as worded in the original Clayton Act. The Senate-House Conference adopted the House proviso under pressure of the proponents of a strict prohibition against price discrimination.

9 H.R. REP. NO. 2287, 74th Cong., 2d Sess. 16 (1936).

10 H.R. REP. NO. 2951, 74th Cong., 2d Sess. 7 (1936). Representative Utterback stated on the floor of the House:

> It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. It does not determine substantive rights, liabilities, and duties. 80 CONG. REC. 9418 (1936).

Senator Van Nuys also indicated such an understanding, *id.* at 9903.

tition defense is determining its scope. The legislative history and the wording of the good faith proviso clearly indicate that section 2(a)[11] and 2(e)[12] of the Robinson-Patman Act are within the ambit of the 2(b) defense. The specific reference of section 2(b), "lower price or the furnishing of services or facilities," indicates the clear intent of Congress to permit good faith justification of discriminations in price, services, and facilities. A failure to permit such a defense in these areas would in economic terms seriously hinder competition.[13] Litigation concerning the applicability of the 2(b) defense has primarily centered around its use in cases involving sections 2(d)[14] and 2(c).[15]

The FTC in a series of decisions in the mid-1950's took the position that the section 2(b) defense could not be utilized to protect a supplier's disproportionate payments for a customer's promotional services or facilities as prohibited by section 2(d) of the Robinson-Patman Act.[16] This view was incorporated into the FTC Guides for Advertising Allowances and other Merchandising Payments and Services.[17] The courts have rejected this interpretation. In *Exquisite Form Brassiere, Inc. v. FTC*,[18] the foundation was laid for a challenged system of promotional allowances to be validated under the good faith meeting of competition proviso. The appellate court found the legislative history was not dispositive and sought other factors on which to base its decision.[19] Section 2(d) was analogized to section 2(a):

> The economic evil sought to be outlawed by it [The Robinson-Patman Act] is the same whether the services and facilities are furnished to the customer or by the customers with reimbursement, so long as discrimination is practiced. Congress was here dealing with a fundamental economic concept .... It is impossible to believe that it meant to treat one process of discrimination one way and to treat in another way another process equally effective as discrimination.[20]

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11 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

12 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (1964).

13 See text accompanying notes 59-75 *infra*.

14 Robinson-Patman Act § 2(d), 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964).

15 Robinson-Patman Act § 2(c), 49 Stat. 1526 (1936), 15 U.S.C. § 13(c) (1964).

16 Admiral Corp., 55 F.T.C. 2078 (1959); J. H. Filbert, Inc., 54 F.T.C. 359 (1957); Henry Rosenfeld, Inc., 52 F.T.C. 1535 (1956).

17 1 TRADE REG. REP. ¶ 3980, at 6078 (1965).

18 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

19 *Id.* at 506. The case of Delmar Constr. Co. v. Westinghouse Elec. Corp., 1961 Trade Cas. 77769 (S.D. Fla. 1961) was relied upon by the court as judicial precedent for applying the § 2(b) proviso to § 2(d). 301 F.2d at 506 n.10.

20 *Id.* at 502.

The reasoning of *Exquisite Form* was reaffirmed in *Shulton, Inc. v. FTC.*[21] There the appellate court reversed a Commission attempt to hold as a matter of law that a defendant charged with a violation of section 2(d) could not be permitted to introduce evidence that the payments to the customer as advertising allowances were made individually and in good faith.

Although the courts have extended the good faith defense to section 2(d), there has been a consistent refusal to extend section 2(b) to apply to section 2(c). Several early decisions held that the brokerage provisions of section 2(c) must be read independently of section 2(b).[22] The reason for this interpretation is that in a violation of section 2(c) there has not been discrimination in prices, services, or facilities, but the parties have engaged in a brokerage practice designed to deceive others as to the actual price paid, whether or not that price is discriminatory.[23] Therefore, neither the legislative history nor economic logic dictates extension of the meeting of competition proviso to section 2(c) violations.

Although the proviso specifies that a "seller" may use the good faith meeting of competition defense, it has implications for section 2(f)[24] which imposes liability upon a buyer for inducing price discrimination.[25] In at least one case, *Mid-South Distribs. v. FTC,*[26] the court held that the section 2(b) defense was relevant to the determination of knowledge of the buyer:

> As to these [the defenses of sections 2(a) and 2(b)], in a section 2(f) proceeding it is part of the Commission's burden of going forward with the evidence to show that the buyer *knew* that the seller could *not* justify the prior differential under one or both.[27]

Even though judicial decisions have placed upon the FTC the bur-

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[21] 305 F.2d 36 (7th Cir. 1962).

[22] Modern Marketing Serv., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945); Quality Bakers of America v. FTC, 114 F.2d 393 (1st Cir. 1940).

[23] An excellent opinion on this distinction is found in FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959). *But see* FTC v. Henry Broch & Co., 363 U.S. 166 (1960).

[24] Robinson-Patman Act § 2(f), 49 Stat. 1526 (1936), 15 U.S.C. § 13(f) (1964).

[25] The Supreme Court laid the basis for this application in Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953), wherein the Court held that the evidentiary shift of the burden of proof contained in § 2(b) requires the Commission to demonstrate that the buyer knew the seller was selling at discriminatory prices. The implication is clear that to establish a § 2(f) violation, proof must be introduced that the buyer knew the defenses of §§ 2(a) and 2(b) were unavailable.

[26] 287 F.2d 512 (5th Cir.), *cert. denied,* 368 U.S. 838 (1961).

[27] *Id.* at 517. See also American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), *cert. denied,* 364 U.S. 884 (1960).

den of going forward with evidence pertaining to the meeting of competition, the Commission has refused to compile evidence of a lack of justification and has relied upon the nature of the price discrimination to show that the differentials were unjustified.[28] As a practical matter the issue has become what type of evidence and how much proof is necessary to demonstrate the buyer's knowledge of unjustifiable price differentials.

In summary, the good faith defense of section 2(b) may be asserted to justify acts that would otherwise be in violation of sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act. Section 2(b) is applicable in a section 2(f) proceeding to show knowledge of the buyer that the seller's prices were not justifiable. Only the brokerage provision of section 2(c) is outside the scope of the meeting of competition defense because the gravamen of that offense is the intent to deceive rather than to discriminate.

B. *The Good Faith Meeting of Competition Proviso as an Absolute Defense*

The good faith meeting of competition proviso of section 2(b) has been construed as providing a complete legal justification for illegal discriminatory practices. In dicta, the Supreme Court in *Corn Prods. Ref. Co. v. FTC*[29] noted that section 2(b) was a complete defense to a discriminatory pricing system.[30] On the same day, the Supreme Court handed down its opinion in *FTC v. A. E. Staley Mfg. Co.*[31] which analyzed a section 2(b) rebuttal of an industry-wide illegal pricing system. Although the Court held that the defendant corporation had not sustained its factual burden of establishing a good faith defense, Mr. Chief Justice Stone stated: "The change in language [from the original good faith proviso] of this exception was for the purpose of making the defense a matter of evidence in each case, raising a question of fact as to whether the competition justified the discrimination."[32]

In *Standard Oil Co.*,[33] the FTC interpreted this approach of the Supreme Court as meaning that the legal force of the rebuttal

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28 D & N Auto Parts Co., 55 F.T.C. 1279, 1302 (1959).

29 324 U.S. 726 (1945).

30 *Id.* at 735.

31 324 U.S. 746 (1945).

32 *Id.* at 752-53.

33 41 F.T.C. 263 (1945), *modified*, 173 F.2d 210 (7th Cir. 1949), *rev'd*, 340 U.S. 231 (1951).

would be nullified if the evidence indicated that a competitive injury was present.[34] The full Commission rejected the hearing examiner's finding that Standard Oil had established a section 2(b) defense. The FTC held illegal Standard's practice of selling to four large "jobbers" in the Detroit area at prices which were one and one-half cents per gallon less than those charged to retail service stations.[35] Each of these "jobbers" had at one time or another sold on the retail level. A clear prima facie case of price discrimination was presented.

The Supreme Court, when it finally accepted the case, chose to rule on two issues: (1) whether the sales involved were in interstate commerce, and (2) whether Standard's lower price to the "jobbers" was justified because made to retain them as customers and in good faith to meet an equally low price of a competitor.[36] On the latter point, Standard's contention was that in the highly competitive oil industry other refiners offered lower prices to large customers in order to obtain their business.[37] The majority opinion, relying upon the Court's opinions in *Corn Prods.*,[38] and *A. E. Staley*[39] and upon its interpretation of the congressional intent of section 2(b),[40] said:

> The heart of our national economic policy long has been faith in the value of competition. . . . We need not now reconcile, in its entirety, the economic theory which underlies the Robinson-Patman Act with that of the Sherman and Clayton Acts. It is enough to say that Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial rights of self-defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller's competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer. . . . There is . . . plain language and established practice which permits a seller, through section 2(b), to retain a customer by realistically meeting in good faith the price of-

[34] *Id.* at 281-82.

[35] *Id.* at 281-84.

[36] Standard Oil Co. v. FTC, 340 U.S. 231, 234 (1951).

[37] *Id.* at 238.

[38] Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945).

[39] FTC v. A. E. Staley Mfg. Co., 324 U.S. 746 (1945).

[40] In a footnote in the opinion, the Court stated: "We find that the legislative history, at best, is inconclusive." Standard Oil Co. v. FTC, 340 U.S. 231, 247-48 n.14 (1951). The dissent written by Mr. Justice Reed presents a more accurate attempt to decipher the intent of Congress. The minority interpretation contended that the Robinson-Patman Act was intended to restrict the use of this defense. *Id.* at 256-61.

fered to that customer, without necessarily changing the seller's price to its other customers.[41]

The majority recognized the economic fact that a seller's good faith meeting of a competitor's equally low price does not affect the competitive situation on the buyer level.[42] Defensive pricing by a reacting seller was determined not to cause any competitive injury on the customer level, as the purchaser could have accepted the price of the seller's competition.[43] In holding that Standard Oil could justify its practices by a section 2(b) defense, the good faith meeting of competition proviso became an absolute and complete defense to a discriminating practice charge. Although this decision established the 2(b) defense as an absolute defense, subsequent cases were necessary to determine the facts necessary to prove that there was a good faith meeting of a competitors' equally low price. It was not until December 31, 1963, that the FTC filed its first reported[44] opinion[45] wherein the Commission found facts which sustained a discrimination defense based on section 2(b).

The foregoing typifies a condition which has occurred in many areas of trade regulation — the views of the FTC were not accepted by reviewing judicial bodies. The result is the partial development of two standards by which the facts of a case are analyzed — the Commission's and the courts'.

C. *Meeting a Competitor's "Lawful" Lower Price*

In *Standard Oil Co. v. FTC*,[46] both the majority and the dissenting Supreme Court opinions characterized the competitor's price which a seller may meet in good faith as a "lawful lower price."[47] The FTC has interpreted the phrase to prevent the assertion of the meeting of competition defense in those situations where a reasonably

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41 *Id.* at 248-50. (Footnotes omitted.)

42 *Id.* at 250.

43 *Ibid.*

44 In 1938, the FTC supplied Representative Wright Patman (D-Tex.), one of the statute's authors, with "informal opinions" explaining the Commission's reasons for closing sixty-four price discrimination cases without filing formal complaints. Among these cases were several opinions which accepted the good faith meeting of competition as a complete defense. It should also be noted that the Commission's early cease and desist orders under § 2(a) expressly recognized the party's right to meet in good faith a competitor's equally low prices. ANTITRUST & TRADE REGULATION TODAY 176 (2d ed. 1966).

45 Continental Baking Co., No. 7630, FTC, Dec. 31, 1963.

46 340 U.S. 231 (1951).

47 *Id.* at 238, 242, 252. See also Standard Oil Co. v. FTC, 355 U.S. 397, 408, 410 (1958).

prudent seller knew or should have known that his competitor's lower price violated the Robinson-Patman Act. For example, in *E. Edelmann & Co.*[48] the hearing examiner permitted the introduction of evidence on the quesion of whether the seller knew or should have known about the illegality of his competitor's prices.[49] The difficulty with the Commission's position is that it forces the businessman to speculate as to the legality of the prices quoted by his competitors. This is illustrated by the Commissioner's and hearing examiner's rulings in *Standard Motors Prods., Inc.*[50] The examiner had held that the section 2(b) defense failed in part because the seller should have known that the prices which were alleged to have been met were illegal as they were volume discounts which could not be cost justified.[51] The Commission upheld the examiner on this point by showing that the competitive prices had in the interim been declared illegal in another case.[52] The position of the Commission has remained the same in recent decisions.

The courts have taken a slightly different approach on this issue. They have distinguished between industry-wide collusive prices and individual competitive prices. Where a seller adopts an illegal reciprocal industry-wide pricing system, the good faith meeting of competition is not available as a means of justification. The Supreme Court's decisions in *Corn Prods. Ref. Co. v. FTC*[53] and *FTC v. A. E. Staley Mfg. Co.*[54] regarded the section 2(b) defense as inapplicable to industry-wide basing point systems. The courts and the Commission are in agreement that the meeting of competition defense will not justify a series of reciprocal illegal price discriminations, each validating the other in the guise of meeting a competitor's lower price. While disapproving participation in an illegal reciprocal pricing system, the courts *may* permit an individual seller in a competitive situation to meet a competitor's illegal price.[55] This right of self-defense is not only economically sound but also

[48] 51 F.T.C. 978 (1955), *aff'd*, 239 F.2d 152 (7th Cir. 1956), *cert. denied*, 355 U.S. 941 (1958).

[49] *Id.* at 996-97. See also C. E. Niehoff & Co., 51 F.T.C. 1114, 1133 (1955), *modified*, 241 F.2d 37 (7th Cir. 1957), *vacated per curiam*, 355 U.S. 411 (1958).

[50] 54 F.T.C. 814 (1957), *aff'd*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

[51] *Id.* at 823.

[52] *Id.* at 832, citing Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956).

[53] 324 U.S. 726, 735 (1945).

[54] 324 U.S. 746, 753 (1945).

[55] Dean Milk Co. v. American Processing & Sales Co., 1950-51 Trade Cas. 64301 (N.D. Ill. 1951). See also Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

would appear to be in accord with the general purposes of the Robinson-Patman Act. Failure to permit justification in the situation where an individual seller is faced with a large seller offering discriminatory prices would force the smaller seller to either violate the Robinson-Patman Act or be driven out of business.

The courts have required actual, not conjectural, illegality. In *Standard Oil Co. v. Brown*,[56] the Fifth Circuit held that for purposes of determining "good faith," the competitor's price must have been adjudicated illegal or be of an "inherently illegal" nature. "[I]f the seller discriminates in price to meet prices that he knows to be illegal or that are of such a nature as are inherently illegal, as was the basing point pricing system in the Staley case . . . there is a failure to prove the 'good faith' requirement in § 2(b)."[57] This represents a logical modification which prevents the judicial addition of meeting "legal" or "lawful" prices from requiring a businessman to speculate on the legality of his competitor's prices. Although the Commission might continue to require the seller to meet its interpretation of "lawful" price, the courts will follow the admonition of the *Report of the Attorney General's National Committee To Study the Anti-Trust Laws:*

> The Supreme Court's *Standard Oil* opinion in several places adverted to competitors' "lawful" prices that the seller might meet in good faith, even though Section 2(b) does not expressly so limit its application. While undiscerning application of the proviso, we agree, could lead to serious abuse, the Court's references to "lawful" prices must be placed in the context of its *Automatic Canteen* and *Staley* rulings as to a businessman's reasonable knowledge of his rivals' pricing data in a competitive economy.
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> As the *Standard Oil* opinion indicates, the legality of a competitor's prices can bear on the good faith of a respondent who meets them. But we do not interpret the Supreme Court's decision as establishing such lawfulness as an absolute condition in every Section 2(b) "meeting competition" defense. Rather, we believe, the Court's reference to "lawful" prices excluded a price established pursuant to a conspiracy or an illegal single basing-point system, or otherwise unrelated to potential differences in the rival seller's costs.[58]

It is submitted that this is the proper line of reasoning to follow.

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[56] 238 F.2d 54 (5th Cir. 1956).

[57] *Id.* at 58.

[58] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 181-82 (1955). The report substantiated its view by stating:

> A businessman who operates in the haste and pressures of the market cannot always prophecize [*sic*] whether the competitor's price which he must meet may later be held unlawful; nor is overall anti-trust policy furthered by information exchange programs to spread such knowledge among competitors. *Id.* at 182. (Footnotes omitted.)

In cases where the issue of the legality of a competitor's prices is raised, the key usually lies in the presumption that the competitive prices are legal unless demonstrated otherwise. Although the FTC and the private litigant may challenge the legality of the prices met by the seller, there is difficulty in obtaining evidence of the unlawful price. This task would be especially onerous for the private litigant who is not armed with the investigatory powers of the FTC. Even for the Commission, two or more investigations would be necessary — a costly proposition.

D. Defensive Pricing

Closely related to the issue of meeting the "legal" lower price of a competitor is the nature of the seller's pricing practices. One undisputed characterisic of the section 2(b) proviso is its defensive quality. The Supreme Court in *Standard Oil Co. v. FTC*[59] specifically recognized this defensive character by refusing to apply the section 2(b) justification where the seller's price reductions undercut the "lower prices" of a competitor.[60] In most cases undercutting a competitor's price is not deemed "meeting" an equally low price. It must be noted that the mere fact that the seller's price is lower than his competitor's does not mean that the good faith meeting of competition defense is unavailable. Several judicial decisions indicate that a seller may still avail himself of section 2(b) if there is underpricing incidental to the pressure of the market place.[61] The Supreme Court in *FTC v. A. E. Staley Mfg. Co.*[62] stated: "We agree with the Commission that the statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."[63] The Court further recognized that this test did not place an impossible burden on competing sellers who seek to rely on section 2(b) to justify price discriminations. The facts in the *Staley* case reveal that the seller's salesmen

59 340 U.S. 231 (1951).

60 *Id.* at 241-42, 249.

61 One such contrary decision is Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945), which construed the words "equally low" of § 2(b) to mean "no lower." *Id.* at 380. On rehearing the court stated that a seller need only prove that he did not intentionally undercut his competitors. Samuel H. Moss, Inc. v. FTC, 155 F.2d 1016 (2d Cir. 1946) (per curiam).

62 324 U.S. 746 (1945).

63 *Id.* at 759-60.

knew or should have known that the buyer's claims as to the competitor's prices were inflated.[64]

A practical problem has been the development of criteria for distinguishing between the various forms of defensive pricing practices. In addition to pricing systems failing to comply with the "lawful" requirement, several such systems have been deprived of the protection of section 2(b) as they have been also deemed nondefensive. One factor in determining the character of pricing practices is whether activity is directed at the capture of new customers or is a defensive countermove to retain existing customers. The FTC in *Exquisite Form Brassiere, Inc.*[65] utilized several quotes from the Supreme Court's opinion in *Standard Oil Co. v. FTC*[66] to support its position that the section 2(b) defense authorized only the retention of a seller's present customers.[67] In *Standard Motor Prods., Inc.*,[68] one of the reasons advanced for rejecting the seller's claim of a section 2(b) justification was that the respondent's pricing system was not limited to retaining existing customers. The Second Circuit approved this interpretation and stated that under *Standard Oil* it was well settled that the meeting of competition proviso could be relied upon only when it was used "to hold customers rather than to gain new ones."[69]

Other courts have rejected this viewpoint either directly[70] or by implication.[71] The strongest opinion is found in *Sunshine Biscuits, Inc. v. FTC.*[72] The court stated unequivocally that a distinction between old and new customers would defeat the purpose of the act. "If . . . sellers could grant good faith competitive price reductions only to old customers in order to retain them, competition for new customers would be stifled and monopoly would be

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64 *Id.* at 758-59.

65 57 F.T.C. 1036 (1960), *modified*, 301 F.2d 499 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 888 (1962).

66 340 U.S. 231 (1951).

67 57 F.T.C. at 1045-46.

68 54 F.T.C. 814 (1957), *aff'd*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

69 Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

70 Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796, 802 (S.D. Cal. 1952), *aff'd*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

71 Ludwig v. American Greetings Corp., 282 F.2d 917, 918-19 (6th Cir. 1960), *appeal dismissed*, 366 U.S. 269 (1961); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

72 306 F.2d 48 (7th Cir. 1962).

fostered."[73] The court discounted the legislative history of the defense and specifically rejected the Second Circuit's view in *Standard Motor Prods., Inc.* as being "not persuasive."[74] The FTC, in announcing that Supreme Court review of the Seventh Circuit's opinion would not be sought, stated that it would not follow the decision.[75]

In this writer's opinion the FTC position is economically indefensible. The essence of competition is the battle to expand the market of the seller. To limit the use of the good faith defense to the retention of existing customers is to penalize the small or aggressive entrepreneur. In its effort to apply the Robinson-Patman Act to curb the practices of large sellers in individual situations, the Commission is creating a mold into which the realities of a competitive capitalistic system cannot be shaped. The stringent construction of the section 2(b) proviso to prohibit defensive pricing in an effort to obtain new customers would insulate entrenched concerns from competitive pressures, thus going directly against the fundamental goal of other antitrust legislation — a competitive economy.

E. The "Competitor" of Section 2(b)

The text of the section 2(b) proviso refers to meeting an "equally low price of a competitor, or the services or facilities furnished by a competitor." There was a controversy as to whether the word "competitor" referred to competitors of the sellers' customers as well as competitors of the seller. This issue was decisively settled in *FTC v. Sun Oil Co.*[76] Sun Oil was an integrated refiner and distributor which supplied McLaren, a retail service station operator in Jacksonville, Florida. Super Test Oil Co., a non-brand operation, opened a station directly across from McLaren and began selling at prices substantially lower than McLaren's.[77] As a result of this price differential, McLaren lost a substantial amount of business, and he requested assistance from Sun Oil. Sun Oil responded by selling to him at an increased discount for the specific purpose of meeting Super Test's prices. This continued for approximately one and one-half months, during which time a general price war erupted in the area. The Supreme Court noted that the legislative history

[73] *Id.* at 52.

[74] *Ibid.*

[75] ANTITRUST & TRADE REGULATION TODAY 75 (2d ed. 1966).

[76] 371 U.S. 505 (1963).

[77] In the Jacksonville area there was a traditional two-cent difference per gallon between the branded and non-branded gasolines. Super Test lowered its price on weekends so that there was a four or five-cent price differential.

appeared to favor an application of the section 2(b) defense to a seller's competitors.[78] But the Court decided to rest its opinion on the facts which demonstrated that Sun Oil was injuring its other suppliers.

> To allow a supplier to intervene and grant discriminatory price concessions designed to enable its customer to meet the lower price of a retail competitor who is unaided by his supplier would discourage rather than promote competition. So long as the price cutter does not receive a price "break" from his own supplier, his lawful reductions in price are presumably a function of his own superior merit and efficiency. To permit a competitor's supplier to bring his often superior economic power to bear narrowly and discriminatorily to deprive the otherwise resourceful retailer of the very fruit of his efficiency and convert the normal competitive struggle between retailers into an unequal contest between one retailer and the combination of another retailer and his supplier is hardly an element of reasonable and fair competition. We see no justification for such a result in § 2(b).[79]

The argument that a failure to permit seller assistance to a purchaser would promote price rigidity was rejected on the grounds that the ability of a large supplier to make "spot" price reductions would discourage enterprising independent competitors of the buyer.[80] The Court further stated that discounts to McLaren would injure other Sunoco service station operators who would have their business diverted to McLaren.[81] The Court did imply that if the Super Test station operator was aided by his supplier, then Sun Oil would be meeting its own competitors.[82] In its treatment of the case, the court of appeals set aside the Commission's cease and desist order and remanded the matter to the FTC to permit Sun Oil to introduce such evidence.[83]

The economic rationality of the Supreme Court's decision is open to question. In this writer's opinion the view of the Fifth Circuit in reversing the Commission is more realistic in the context of the market place. The court of appeals concluded that an interpretation which would not allow a seller to give discounts so that his customer could compete with a supplier-retailer

> conflicts with the purpose of the Act to protect the small retailer;

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[78] 371 U.S. at 519.

[79] *Id.* at 522.

[80] *Id.* at 523.

[81] *Id.* at 518.

[82] *Id.* at 522.

[83] Sun Oil Co. v. FTC, 294 F.2d 465, 481 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1962).

> fosters vertical integration of retailing operations, jeopardizing the future of the non-major as well as the independent filling station operator; discourages sound marketing in that it confers a competitive advantage on a supplier gaining trade by sporadic predatory low prices unrelated to economic factors, in the sense that a high-volume low margin policy of a super-market is related to such economic factors as low cost efficiency of operation and the maximization of over-all profit; denies the realities of the market place in refusing to accept the undeniable fact that a supplier of gasoline competes with a supplier-retailer at the consumer level through filling station operators; tends to spread rather than localize price wars; and makes it impossible, as a practical matter, for a supplier to defend one of its filling stations, fighting for survival, or even to defend itself against the destructive price raids of a supplier-retailer.[84]

It is submitted that temporary cooperative pricing by a retailer and his supplier may be an indispensable defensive maneuver to exist in a local price war. A supplier may have to supplement the limited resources of his small retailer, the only other alternatives being forward integration by the seller or the loss of a buyer. There is a mutuality of interest between the seller and buyer in meeting the equally low price of the latter's competitor. In spite of the writings of many[85] and the economic realities discussed above, the term "competitor," in the context of the section 2(b) proviso, includes only competitors of the seller.

F. *Burden of Proof*

As previously stated the meeting of competition defense is available to a seller only after the FTC or the private litigant has established a prima facie violation of a provision of the Robinson-Patman Act.[86] The FTC and the courts have unanimously interpreted section 2(b) to require the seller to assume the burden of bringing himself within the exculpating provision.[87]

The crux of the problem concerning the burden of proof is not the allocation between the litigants but the type and amount of evidence required to sustain a section 2(b) defense. The FTC has

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84 *Ibid.*

85 ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 250-55 (1962); Note, 62 COLUM. L. REV. 171 (1962); Note, 75 HARV. L. REV. 429 (1961); Note, 47 VA. L. REV. 1229 (1961); Note, *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 YALE L.J. 935 (1957).

86 See text accompanying note 2 *supra.*

87 Standard Oil Co. v. FTC, 340 U.S. 231, 246 (1951); FTC v. Morton Salt Co., 334 U.S. 37, 43 (1948); FTC v. Cement Institute, 333 U.S. 683, 721-26 (1948); FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 758-59 (1945).

its own concept of the type of evidence a respondent must introduce to fulfill his burden of proof for justifying the discriminatory practices. The appellate courts have not always accepted the Commission's findings on the sufficiency of the evidence but have usually followed the factual determinations made by the Commission. Unless a seller is prepared to appeal an adverse ruling of the FTC, he must satisfy the evidence requirements of the Commission. To discern the relevant facts necessary to establish a good faith meeting of competition defense, the few cases in which the Commission has sustained the defense should be carefully analyzed.

The first case in which the Commission upheld the respondent's defense under section 2(b) was *Continental Baking Co.*[88] There the seller was charged with violating the section 2(a)[89] prohibition on price discrimination and the section 2(d)[90] ban on nonproportional advertising allowances. The Commission, speaking through Commissioner Elman, found that the respondent had factually established the good faith meeting of competition justification. The following facts were gleaned from the submitted evidence. First, Continental had for many years refused to grant discriminatory discounts in spite of its major competitors' discounting practices. Discounts were given only after Continental's officers concluded that the company's market position was being impaired and that discounts were necessary to prevent further loss of business. Second, a highly selective discount policy had been adopted by the respondent which granted discounts to particular customers only when that buyer was offered an equal or larger price cut on a competing product line. Third, the only price reductions responded to by Continental were those deemed by Continental's officials to induce regular customers to shift to a competitor. Next, Continental took steps to verify the customers' claims of price concessions from competitors. Finally, none of the discounts granted ever produced a price lower than the price offered by a competitor. Commissioner MacIntyre filed a separate opinion in which he analogized the granting of a price differential to self-defense. In *Beatrice Foods Co.*,[91] a case with similar facts, the hearing examiner accepted the respondent's good faith defense.

In *Ponca Wholesale Mercantile Co.*,[92] the FTC also accepted

[88] No. 7630, FTC, Dec. 31, 1963.
[89] Robinson-Patman Act § 2(a), 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).
[90] Robinson-Patman Act § 2(d), 49 Stat. 1526 (1936), 15 U.S.C. § 13(d) (1964).
[91] No. 7599, FTC, Sept. 15, 1964.
[92] No. 7864, FTC, Feb. 24, 1964.

the good faith meeting of competition defense. There a cigarette wholesaler made discriminatory price cuts to retail chains to match offers from cigarette manufacturers selling directly to these same retailers. State law required a state tax stamp to be affixed within the state to all cigarette packages. The chain retailers had the alternative of either setting up their own stamping services or purchasing from wholesalers, such as Ponca, who would perform the service. The majority with Commissioner MacIntyre writing the opinion accepted the defense on the ground that Ponca had to make the price discounts to stay in business.

In all of these cases the Commission found an underlying theme of *competitive necessity* to justify the discriminatory practices. The hope of sellers for future effective use of the section 2(b) proviso was short-lived. In *Callaway Mills*,[93] the Commission sought to impose further requirements which had to be satisfied. The respondent was required to introduce evidence that not only were the goods of its competitors of comparable quality and salability but also the schedule of volume allowances was in response to individual competitive situations. Commissioner Elman dissented on both issues — the necessity of proving like grade and quality and proof of defensive pricing. The dissent did not accept the assumption that the adoption of a discount price schedule was not defensive and stated that to require Callaway Mills to negotiate with over 2,200 customers on numerous grades of carpeting would place an impossible burden on the seller.

The split within the Commission on the sufficiency of the evidence necessary to establish a section 2(b) defense has recently become more pronounced. A recent case which illustrates the split within the Commission on this issue is *National Dairy Prods. Corp.*[94] The Sealtest Division of National Dairy was charged with violation of sections 2(a) and 2(d) of the Robinson-Patman Act in the sale of ice cream and milk in four areas by giving substantial rebates to large purchasers. To justify these rebates under the meeting of competition defense, the dairy sought to demonstrate an identity of its costs with competitors', thus drawing an inference that the prices of its competitors were legal and were lower than its own.[95] In applying the test that a respondent must show the existence of facts which would lead a reasonable person to believe that the seller's

[93] No. 7634, FTC, Feb. 10, 1964, *rev'd*, 362 F.2d 435 (5th Cir. 1966).
[94] 3 TRADE REG. REP. (1966 Trade Cas.) ¶ 17656 (FTC July 28, 1966).
[95] *Id.* at 22922.

discriminatory prices would in fact meet the equally low prices of a competitor, Commissioner Dixon, writing for the majority, stated:

> [T]he fact that respondent [the dairy] knew its competitors' discount schedules does not mean that it knew, or that it had any reasonable basis to assume, that the wholesale list prices of these competitors were the same as its own. It is obvious that if respondent's milk is normally competitive at a 3 percent discount with a competitor's milk at a 6 percent discount, respondent by granting the 10 percent discount to meet the 10 percent discount on the competitors' schedule, could not claim to be meeting the competitor's lower price. In such a case, respondent would be substantially undercutting the price of its competitor by granting the same discount.[96]

The majority distinguished the *Continental Baking*[97] decision, where there were explicit findings that the respondent's prices were no lower than competitors, from the *National Dairy* decision, where the respondent was relying on an inference of the identity of price lists "when the facts, known to respondent, indicate the contrary."[98] The *Callaway Mills Co. v. FTC*[99] decision of the court of appeals was distinguished on the grounds that National Dairy was defending special discounts given in individual situations not justifying an entire discount schedule.[100] After rejecting the proffered meeting of competition defense and cost justification evidence, the Commission upheld the examiner's finding that the Robinson-Patman Act had been violated.[101]

The opinion of the Commission was not unanimous, as Commissioner Elman issued a strong dissent. The dissent accused the majority of disregarding *FTC v. A. E. Staley Mfg. Co.*[102] and *Callaway Mills*[103] which required the seller to prove that its list prices were the same as or no lower than those of its competitors.[104] It was Commissioner Elman's view that the only relevant question is whether the seller had reason to believe the buyer would shift his

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96 *Id.* at 22923.

97 No. 7630, FTC, Dec. 31, 1963. For a discussion of the case, see text accompanying note 88 *supra.*

98 3 TRADE REG. REP. at 22923.

99 362 F.2d 435 (5th Cir. 1966).

100 3 TRADE REG. REP. at 22921-22.

101 *Id.* at 22930.

102 324 U.S. 746 (1945). For a discussion of the case, see text accompanying notes 31-32, 54 *supra.*

103 No. 7634, FTC, Feb. 10, 1964. For a discussion of the case, see text accompanying note 93 *supra.*

104 3 TRADE REG. REP. at 22930-32.

business unless the seller matched the competitor's discounts; the Commissioner pointed out that if the seller attempted to satisfy the majority's test, he would run afoul of other antitrust laws.[105] The dissent also noted that the majority was resurrecting the idea, with its unrealistic view of the market place, that a seller seeking the protection of section 2(b) must affirmatively show that he had reason to believe the competitor's prices were lower than his own and lawful.[106] Commissioner Reilly in a concurring opinion sought to refute the dissent by reference to the *A. E. Staley* decision wherein the Supreme Court cited the failure of a seller to verify the lower price of a competitor as a reason for refusing to allow the section 2(b) defense.[107]

On the same day as the decision in *National Dairy* was issued, the Commission split along the same lines in *Tri Valley Parking Ass'n*[108] The FTC had charged an agricultural cooperative, selling and distributing canned fruit and vegetables, with marketing to large retail chains at a lower price. In finding unjustified discriminatory practices, the majority utilized the test of competitive necessity.[109] Commissioner Elman dissented, citing his dissent in *National Dairy*.[110]

If the Commission adheres to its present interpretation as to the type and sufficiency of evidence required of a seller to sustain his burden of proof, then for all practical purposes the good faith meeting of competition defense is not a viable means of justifying a discriminatory practice in an FTC proceeding. The type of evidence necessary to prove that the seller knew or had reason to believe that his competitor's prices were lawful and lower than his own in each individual competitive situation is usually unavailable. Under the doctrine of competitive necessity, the seller is required not only to make a decision as to the lawfulness of his competitor's price but also to demonstrate a perfect knowledge of the competitor's prices. It strains the imagination to believe that the draftsmen of the Robinson-Patman Act and the members of the Supreme Court could have contemplated such a strict evidentiary requirement. The interpretation of the Commission negates the

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105 *Id.* at 22931-32.
106 *Id.* at 22932.
107 *Id.* at 22933-34.
108 3 TRADE REG. REP. (1966 Trade Cas.) ¶ 17657 (FTC July 28, 1966).
109 *Id.* at 22938-40.
110 *Id.* at 22942, 22946.

entire concept of good faith that is implicit in the very words of the statute. The position of Commissioner Elman in *Callaway Mills* and *National Dairy* recognizes that good faith in a theoretical context differs from the good faith of a businessman in the economic realities of the market.

G. *Role of Good Faith*

The one element that pervades all cases involving the meeting of competition defense of section 2(b), yet is incapable of accurate definition, is good faith. The best characterization of this "good faith" concept is supplied by Frederick M. Rowe:

> As a catchall criterion in judging the factual sufficiency of a tendered section 2(b) justification, the statutory phrase "good faith" in section 2(b) has created confusion. Applied in disparate contexts without common connotation, an inscrutable "good faith" concept has obfuscated a fuzzy phase of the law. Clarity is fostered by a recognition that "good faith" does not constitute a "term of art" or an additional element beyond the meeting of a competitor's equally low price, but rather mitigates the literal text of section 2(b).[111]

Although the judicial decisions do not indicate a concrete and precise definition of good faith, the opinions do reflect the spirit of the term. The Supreme Court, in the first *Standard Oil Co. v. FTC*[112] case, used the term "good faith" in its analysis of the legality of the prices quoted by the seller's competitors.[113] In the second *Standard Oil Co. v. FTC*[114] case, the Supreme Court characterized price differentials under a reciprocal pricing system as not consonant with "good faith."[115] The Second Circuit Court of Appeals in *Samuel H. Moss, Inc. v. FTC*[116] equated "good faith" with the intent of a seller to sell at quoted prices.[117] The only conclusion that can be drawn from these cases is that "good faith" is dependent upon the facts of the individual situation. Despite an attempt by the FTC to limit "good faith" by the application of a per se approach to Robinson-Patman Act violations, the courts have successfully resisted such an interpretation.

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111 ROWE, *op. cit. supra* note 85, at 248.
112 340 U.S. 231 (1951).
113 *Id.* at 244, 255.
114 355 U.S. 396 (1958).
115 *Id.* at 401.
116 148 F.2d 378 (2d Cir.), *cert. denied,* 326 U.S. 734 (1945).
117 *Id.* at 380.

The crucial problem is the future meaning that will be ascribed to "good faith." The *Report of the Attorney General's National Committee To Study the Anti-Trust Laws* made the following statement:

> We recommend that the term "good faith" be utilized *solely* to test the seller's adherence to the basic objectives of the meeting competition proviso: facilitating price reductions in genuine response to competitive market pressures in order to equalize a competitive opportunity. In practice, this will disqualify the seller to whom meeting of competition is only an incidental by-product of a scheme to monopolize or other objective inimical to overall antitrust policy.[118]

Several experts have concurred with this view.[119] Others prefer a more pragmatic approach in which the facts of the individual competitive situation determine whether "good faith" exists. Commissioner Elman explained this concept of "good faith."

> This is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of economic necessity. . . . Such a standard, whether it be considered "subjective" or "objective" is inherently ad hoc. Rigid rules and inflexible absolutes are especially inappropriate in dealing with the 2(b) defense; the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.[120]

Another possible use of "good faith" is to mitigate the literal prohibitions of the Robinson-Patman Act. It is submitted that the application of the Robinson-Patman Act may in certain situations be anti-competitive and seriously impede the marketing of goods. This writer believes that the role of the good faith provision of section 2(b) should be to permit a seller to compete effectively in the market so long as the overall economic consequences are beneficial. The fact that another competitor is injured in the process of competition should be of little or no consequence in determining good faith.

It is the good faith aspect of the meeting of competition defense that furnishes a means of coalescing the Robinson-Patman

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118 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 184 (1955).

119 BAUM, THE ROBINSON-PATMAN ACT, SUMMARY AND COMMENT 33-34 (1964); ROWE, *op. cit. supra* note 85, at 249.

120 ANTITRUST & TRADE REGULATION TODAY 176 (2d ed. 1966).

Act with the Sherman Act[121] and the other provisions of the Clayton Act.[122] These latter statutes are designed to curb the development and use of economic power, whereas the relative economic strength of a violator of the Robinson-Patman Act is irrelevant if an "injury" is produced. So long as the FTC utilizes the diversion of business test to ascertain the competitive injury, there must be a means of shifting the emphasis from injury to a competitor to a protection of competition. Only if the good faith concept is construed so as to consider all relevant economic factors, can there be found economic rationality in the Robinson-Patman Act and the development of a cohesive national policy regarding economic concentration.

III. EVALUATION OF THE ROBINSON-PATMAN ACT

It was stated earlier that an attempt would be made to show that the correct application and construction of the good faith meeting of competition defense can be the means of coalescing the Robinson-Patman Act with the other antitrust laws and bringing economic rationality to the act.[123] Up to this point in the discussion, however, attention has primarily been focused upon one section of the act — section 2(b). Therefore, both the economic theory underlying the entire act and the implications of that theory must be examined before a meaningful analysis of coalescence and economic rationality can be undertaken.

A. Economic Analysis

As previously mentioned the primary motivating force behind the enactment of the Robinson-Patman Act was an effort to curb the economic power of large retail chain stores.[124] The mechanism used was to prohibit a seller from marketing his product at more than one price, the belief being that the seller would be able to resist the coercive pressure of a large buyer. The circuitous manner of attacking this problem is readily apparent, for the thrust of the act is mainly directed at the *pricing practices* of the *seller* rather than the *economic power* of larger *buyers.*

The result of this backhanded draftsmanship has been to pro-

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121 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964).

122 38 Stat. 730 (1914), as amended, 15 U.S.C. §§ 12-27 (1964).

123 See text accompanying note 2 *supra.*

124 See text accompanying note 1 *supra.*

tect competitors rather than stimulate competition. Supporters of the Robinson-Patman Act claim that by protecting individual competitors, competition is strengthened by keeping those competitors in the relevant market. This might be a valid assumption in a situation where the wrongdoer is an economically powerful unit seeking to destroy a smaller competitor. On the other hand, if a small firm using similar discriminatory practices is seeking to invade the market area of a larger competitor, discriminatory practices might produce desirable economic consequences. It is suggested that in certain instances legislation designed to protect competitors may produce a result that is anti-competitive or that is not economically beneficial. The sheltering of inefficient and laggard firms from the pressures of competition cannot beget economic results such as lower prices for consumers and efficiency in the distribution process. The interpretation of the Robinson-Patman Act by the FTC and by some courts produced such consequences. To integrate the Robinson-Patman Act into the framework of the nation's policy of competition which is designed to produce economic efficiency, the good faith meeting of competition must be broadly construed so as to permit the consideration of economic results. The following are a few of the ways in which the section 2(b) defense can read economic rationality into the Robinson-Patman Act.

(1) *Relative Market Strength.*—The relevancy of the relative market strength of the firm engaging in a discriminatory practice in ascertaining the effect of the violation on competition should be recognized. If the firm is a new entrant or a small factor in the market, then there is no injury to competition even if the sales of the firm are substantially increased. Prevention of a new entrant from giving discounts in an effort to obtain customers might raise the cost of entry to such a point that existing firms have the market to themselves. Even if entry is not rendered impossible, the prohibition of discounts designed to attract additional customers might prevent a new entrant from reaching a size where economies of scale would lower the per unit price. This in the long run would reduce the possibility of effective competition with larger sellers. By protecting an entrenched seller from price warfare, a higher per unit profit can be extracted from the consumer.

(2) *Price Benefits Accruing to the Consumer.*—The possibility of discriminatory practices leading to lower prices to the consumer is probably the most important factor that has been overlooked in Robinson-Patman Act litigation. One economic fact that

was overlooked in the FTC *Final Report on the Chain Store Investigation*[125] was that supermarkets charged a lower price than their smaller competitors for the same foods. Today, many of the smaller units have banded together to form purchasing co-operatives and thereby obtain the benefits of increased purchasing power. The result has been that until recently food prices have remained relatively stable while other prices were rising. The real beneficiaries were the consumers.

Another instance of the public benefiting from lower prices is the eruption of a price war. The consumer does not care who wins or loses, or even if the lower price is not lawful. Why should the consumer concern himself with the reason for price reductions unless price warfare is but the prelude to higher prices? Fear has often been expressed that a large firm may utilize its superior resources to eliminate smaller competitors and then raise prices. This is a possibility, but the immediate cost to the larger firm and the realization that exorbitant future profits will attract new entrants and possible renewed price warfare are deterrents to such schemes.

If price differentials result in a lower per unit cost to the consumer, then one of the key goals of competition is satisfied. To prevent the quoting of different prices for the same item, would force the consumer to subsidize the smaller units in the distribution system.

(3) Possible Misallocation of Resources.—One of the goals of a competitive distributive system is to satisfy the needs of the consumer at the price that reflects the relationship of supply to demand. In this vast country there are numerous regional markets, sub-markets, and buyers. Each has its own particular demand curve that corresponds to its needs, and these needs vary from region to region, from sub-market to sub-market, and from purchaser to purchaser. To prevent a seller from quoting different prices in the face of different demand curves of necessity forces a misallocation of resources, assuming that the price mechanism can accurately state an equilibrium of supply and demand. On the other hand, the seller must have some idea of the price that will reflect the supply.

B. *Social Implications of the Robinson-Patman Act*

Some of the congressional draftsmen conceived that this legislation would protect the small business unit and permit a distribution

[125] FTC, *Final Report on the Chain Store Investigation*, S. DOC. NO. 4, 74th Cong., 1st Sess. 51 (1934).

system devoid of economic power to flourish. An economy in which the individual units are of a relatively small size and are constantly competing for the customer's business on relatively equal terms was undoubtedly envisioned. This might have been a proper economic model for the nineteenth century, but it is out of touch with the realities of our modern society. Not only must businessmen compete with one another, but they must also contend with a bevy of power groups. Organized labor, "big" government, and international cartels are but a few of the forces which exist in the contemporary world.

The twentieth century has witnessed the growth of active power groups, and the nation has expanded to a population of nearly 200 million people. No longer is the population spread out in rural areas; great centralized urban areas have developed. Considering the size and demography of the United States, it is a formidable task to convey food and goods to the individual consumer. Large amounts of capital and great expertise are necessary to efficiently distribute the products of the farms and the factories. It is doubtful that a distribution system composed of small economic units could accomplish this job with the necessary speed and at the least possible cost. This is not to suggest that a monopolistic distribution complex is the most efficient means of transporting goods to the consumer. However, in light of what has been stated above, bigness should not be considered to be an evil per se.

One other factor should also be considered. Some have ascribed to the small businessman certain virtues that are held in esteem in a capitalistic society. Like the farmer, the small retailer is thought to be self-reliant and a good citizen. Although this writer has never seen any statistical evidence, it is submitted that the small retail businessman is no more self-reliant or a better citizen than his counterpart who works for one of the large chain stores. In absence of sociological evidence to the contrary, economic consequences should not be ignored in deference to a mythical belief in the natural superiority of the small independent businessman. In approaching the problem of evolving a distribution system to meet the needs of modern society, the analysis must not be clouded by any preconceived belief in the sanctity of small economic units and small retailers. The needs of the consumer and our economy are so complex and so quantitatively tremendous that the most efficient distribution system is a necessity.

IV. GUIDELINES FOR THE FUTURE APPLICATION OF THE GOOD FAITH MEETING OF COMPETITION DEFENSE

As presently interpreted by the FTC, a seller charged with a prima facie violation of the Robinson-Patman Act has an extremely heavy burden in proving that his discriminatory practices are designed to meet competition. In order to obtain the absolution of his discriminatory price under section 2(b), a seller must affirmatively purge himself of any aggressive tendencies and must omnisciently discern in each individual competitive situation the legality of his competitor's price and then must quote a price that "meets" his competitor's. It is submitted that the FTC by insisting on such stringent requirements is not only erecting barriers to competition but is also ignoring the economic benefits that may arise from discriminatory practices. It is suggested that the role of the Robinson-Patman Act in the national policy of control of business be thoroughly re-examined. In the interim, the good faith meeting of competition defense can be utilized as a means of accommodating the Robinson-Patman Act to the realities of the market.

The following recommendations are guidelines for the Commission and the courts in interpreting the section 2(b) defense so as to encourage competition and obtain the optimum economic results.

(1) Remove any requirement that the price which the seller is seeking to meet must be legal. The lawfulness of the price of the seller's competitor should not be relevant except where there is collusive reciprocal pricing or a basing point system. In those situations the legality of the competitor's prices should be a factor in determining the good faith of the seller.

(2) Aggressive pricing practices must not prevent a seller from justifying those practices under section 2(b). However, not all offensive pricing practices should be protected. Prices or practices that are designed specifically to destroy, not just injure, a competitor should not be afforded protection under the meeting of competition defense. This would refer to those cases where there exist both a predatory intent and the economic power to destroy.

(3) Extend by judicial decisions or by legislation, if necessary, the good faith meeting of competition defense to price discounts made by a seller to enable his customer to meet competi-

tion. This necessitates a nullification of the Supreme Court's decision in *FTC v. Sun Oil Co.*[126]

(4) The FTC must re-evaluate its requirements as to the type and sufficiency of evidence necessary to prove that section 2(b) justifies the challenged prices or practices. It is suggested that the criteria outlined in *Continental Baking*[127] are too stringent. Emphasis should be shifted from the defensive nature of the respondent's pricing policies to the economic effect of the discrimination. This economic analysis should concentrate on the resulting cost to the consumer and the ultimate efficiency of the distribution system.

Adherence to these guidelines would involve a shift in perspective for the Robinson-Patman Act. Instead of repealing the act, a practical impossibility in the present political climate, the FTC and the judiciary could initiate the above changes and thus breathe new life into this antiquated legislation. The consumer both needs and demands economic rationality in the distribution process which supplies his goods. Failure of the policymakers to recognize this fundamental fact can ultimately lead to grave consequences for the institution of competition and for the consuming public.

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126 371 U.S. 505 (1963). For a discussion of the case, see text accompanying notes 76-85 *supra.*

127 No. 7630, FTC, Dec. 31, 1963. For a discussion of the case, see text accompanying note 88 *supra.*