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The Robinson-Patman Act: Is Section 2(c) Back?

G. David Schiering*

The author, who has participated in the defense of actions involving section 2(c) of the Robinson-Patman Act, traces the history of litigation brought under this controversial statute and then examines the attempts by eliminated middlemen to revive section 2(c). The historical treatment culminates with an analysis of the language in *Broch* and *Thomasville* which suggests that behavior proscribed by section 2(c) should not be considered a per se violation of the Robinson-Patman Act because a finding of discrimination is required for a violation and because the economic-justification defenses available under other sections of the Act are equally available under section 2(c). The author concludes that middlemen should not be permitted to use this section to prohibit their elimination and thereby create a market barrier to increased efficiency in the distribution of goods.

I. INTRODUCTION

"THE ROBINSON-PATMAN ACT," stated Earl Kintner, "is not the hallmark of clarity." The Act has been described as "unworkable," "hopelessly obscure," and the "'Typhoid Mary' of antitrust." Other authors have characterized the Robinson-Patman Act as "confusing, obscurely worded and overly maligned." The "ostensible purpose of the Act was to curb the use of buying power as a means of compelling price favoritism." Unfortunately, mass merchandising, which Congress was attempting to regulate through the Act, was only vaguely understood when the Act was passed. This lack of understanding and the degree of congressional compromise necessary to pass the Act, together with changing economic

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This article is an outgrowth of a speech given at the Ohio State Bar Association's Ninth Annual Antitrust Institute.

2. Id.
4. Id.
5. KINTNER, supra note 1, at 14.
6. Id. For additional reviews of the legislative history of the Robinson-Patman Act, see C. AUSTIN, PRICE DISCRIMINATION (1952); D. BAUM, THE ROBINSON-PATMAN ACT (1964); C. EDWARDS, THE PRICE DISCRIMINATION LAW (1959); F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT (1962).
conditions and increasingly sophisticated methods of distributing goods, have resulted in a confusing regulatory device poorly suited, in many respects, to current economic realities.

On January 22, 1975, Thomas E. Kauper, Assistant Attorney General in charge of the Antitrust Division, noted that the Robinson-Patman Act warranted attention and, possibly, legislative amendment or even repeal. Kauper noted that:

The Robinson-Patman Act was adopted during the Depression, with little thought given to its effect on long-run economic efficiency. Today, given our general concern with the state of the economy and our specific need to promote economic efficiency, Robinson-Patman clearly deserves reexamination. . . . It could be left as it is. It could simply be repealed. It could be amended to preserve special remedies against anticompetitive price discrimination by eliminating language which discourages legitimate price competition. . . . What is clear is that we need to be thinking about it and, to the extent necessary, doing something about it.

Even more recently, on October 29, 1975, Mr. Jonathan C. Rose, Acting Deputy Assistant Attorney General, Antitrust Division, noted that the Act stabilizes oligopoly prices, fosters price-fixing, discourages hard bargaining, discourages competition and new entry, forces costly and complicated distribution systems, forces uneconomic and wasteful expenditures, and forces costly and unnecessary legal advice. He concluded quite simply that in his personal opinion "outright repeal is probably the most intellectually sound and economically defensible approach."

7. Kauper, Some Comments on Enforcement Activities Of The Antitrust Division And The Division's Role In Legislative Reform, 19 LAW QUADRANGLE NOTES 5, 8 (Winter 1975) (based on an address before the Antitrust Section of the New York State Bar Association, January 22, 1975).

The White House Task Force report on antitrust policy recommended a revision of the Robinson-Patman Act which omitted entirely any reference to brokerage. The report explains that the proposed revision, which proscribes direct or indirect discriminations in the "exaction of consideration," would encompass the transactions now covered by section 2(c). The White House Task Force Report On Antitrust Policy, reprinted in 411 BNA ANTITRUST & TRADE REGULATION REPORT 1, 18 (Supp. II, May 27, 1969) (hereinafter cited as the Neal Report). The proposed revision would, however, permit the cost-justification and meeting-competition defenses to be used in defending challenges to brokerage activity. Id. at 10.

8. Id. at 8.

9. Rose, the Robinson-Patman Act: A Misguided Response To The A & P, speech before The Legal Committee of the Grocery Manufacturers Association on October 29, 1975 (available on request from the Department of Justice).

10. Id. at 15.

"It is safe to say that no federal enactment has received more widespread criticism throughout its statutory life." Handler, The Shift from Substantive to Pro-
Mr. Kauper and Mr. Rose were certainly aware that 20 years ago, a distinguished group of lawyers spent almost 2 years conducting an evaluation of the Robinson-Patman Act.\textsuperscript{11} The result was a 400-page document entitled \textit{Report Of The Attorney General's National Committee To Study The Antitrust Laws.\textsuperscript{12}} While the Report is chock full of brilliant analyses, there is not a simple recommendation that could be seized upon as the basis of appropriate legislative reform. One of the best but obviously overly general recommendations for current analysis is as follows:

Statutory provisions affecting distribution should, therefore, be applied to reflect not only reasonable clarity and internal consistency, but above all, to remove market barriers to efficient distribution and thus serve basic antitrust objectives.\textsuperscript{13}

With this general recommendation in mind, it would be worthwhile to inspect some aspect of the Robinson-Patman Act which in 1976 could be revised to remove market barriers to efficient distribution. Section 2(c) of the Act\textsuperscript{14} has, in some respects, become a barrier to efficient distribution and unfortunately has experienced some revitalization in the 1970's. That section, therefore, is an appropriate candidate for current review.

\section*{II. Legislative History and Early Decisions}

Section 2(c) of the Robinson-Patman Act reads as follows:

\begin{quote}
\textit{(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other inter-}\end{quote}

\begin{footnotes}
11. One of the lawyers was present Supreme Court Justice John Paul Stevens. However, Justice Stevens did not separately identify himself with any particular majority or minority opinion which would give insight into his philosophical approach to the antitrust laws. Justice Stevens has, however, signed decisions as a Circuit Judge in a number of antitrust cases. For a list of those decisions see \textbf{206 TRADE REG. REP.} 4 (Dec. 8, 1975).

12. \textbf{NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS} (1955) (hereinafter cited as \textbf{REPORT}).

13. \textit{Id.} at 132.

\end{footnotes}
mediary 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.\textsuperscript{15}

The provision contains 115 words, 14 commas, 12 “ors,” and 1 period. It is certainly not, as Earl Kintner said, the hallmark of clarity. In fact, section 2(c) is probably the most confusing and faultily drafted section of the Robinson-Patman Act.

In general, section 2(c) prohibits commission payments by a seller to a broker who is actually acting for the buyer in a transaction.\textsuperscript{16} It also prohibits the granting of a discount \textit{directly} to a buyer if the discount is “in lieu of” a brokerage commission.\textsuperscript{17} Section 2(c) was specifically directed against the practices of obtaining discriminatory price concessions through fictitious or “dummy” brokers, and against reductions of price equivalent to the seller’s ordinary payment of brokerage on other sales.\textsuperscript{18}

Prior to the passage of the Act, large buyers were obtaining indirect price concessions by requiring sellers to pay a “brokerage” fee to agents of the buyers.\textsuperscript{19} In many instances, those agents were not, in fact, performing any brokerage services. The agents would pass the brokerage fee along to the buyers who thereby received a discount. There were, in addition, other abuses of the brokerage payment being used to achieve price concessions.\textsuperscript{20} It seemed fair to conclude, upon passage of the Robinson-Patman Act, that section 2(c) was intended to encompass and prohibit all \textit{abuses} of the brokerage function which resulted in price discrimination.\textsuperscript{21}

But if it was abuses to which the section was directed, then price concessions equal to the cost savings actually realized by eliminating the seller’s legitimate brokerage costs should have been permissible. This cost-savings defense had been specifically provided for in challenges to price discriminations covered by section 2(a) of

\textsuperscript{15} \textit{Id.}

\textsuperscript{16} Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939); Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), \textit{cert. denied}, 305 U.S. 634 (1938).

\textsuperscript{17} \textit{See} Great Atl. & Pac. Tea Co., 26 F.T.C. 486 (1938), \textit{aff’d}, 106 F.2d 667 (3d Cir. 1939), \textit{cert. denied}, 308 U.S. 625 (1940).


\textsuperscript{19} \textit{See} F. Rowe, \textit{supra} note 6, at 333.


\textsuperscript{21} \textit{See} Report 187-88.
the Act.\textsuperscript{22} That is, if a seller reduced his price by an amount equal to the value of functions or services normally performed by the seller, but actually performed by the buyer in this transaction, then no illegal price discrimination occurred. Interestingly enough, however, an early draft of section 2(a) specifically stated that this cost-justification defense was not applicable to differences in cost resulting from reduced \textit{brokerage} costs.\textsuperscript{23} The House Report and the Conference Report then eliminated this reference to brokerage in section 2(a) and added to the new section 2(c) a provision prohibiting the payment of brokerage except for services rendered.\textsuperscript{24} The Conference Committee Report explained that this change was made because section 2(c) deals with the matter of brokerage.\textsuperscript{25} And there simply is no indication in the legislative history as to whether 2(c), as finally enacted, was intended to permit price reductions which reflected true savings in brokerage costs.

Within three years, rather clear answers to this question had been given by the Second,\textsuperscript{26} Third,\textsuperscript{27} and Fourth\textsuperscript{28} Circuits. Those circuits established, by 1939, that section 2(c) was to be interpreted independently of section 2(a),\textsuperscript{29} that the cost-justification defense was not available in a section 2(c) case,\textsuperscript{30} and that a violation of section 2(c) could be found even in the absence of a discriminatory price or a lessening of competition.\textsuperscript{31} In \textit{Great Atlantic and Pa-}

\begin{itemize}
\item \textsuperscript{22} 15 U.S.C. § 13(a) states: "[T]hat 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. . . ."
\item \textsuperscript{23} S. Rep. No. 1502, 74th Cong., 2d Sess. 5 (1936), reprinted in F. Rowe, supra note 6, at 578.
\item \textsuperscript{24} H.R. Rep. No. 2287, 74th Cong., 2d Sess., 19-20 (1936), reprinted in F. Rowe, supra note 6, at 588.
\item \textsuperscript{25} H.R. Rep. No. 2951, 74th Cong., 2d Sess., 1-9 (1936). See F. Rowe, supra note 6, at 612.
\item \textsuperscript{26} Biddle Purchasing Co. v. FTC, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).
\item \textsuperscript{27} Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940).
\item \textsuperscript{28} Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939).
\item \textsuperscript{29} See Note, \textit{Beleaguered Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act}, 77 HARV. L. REV. 1308, 1313-14 (1964).
\item \textsuperscript{30} See REPORT 188-89.
\item \textsuperscript{31} See Modern Marketing Serv., Inc. v. FTC, 149 F.2d 970 (7th Cir. 1945). See generally Mezines, supra note 3, at 824-29.
\end{itemize}
the court tested an arrangement where the buyer, A&P, used its own personnel as field buyers, making brokers unnecessary. A&P purchased goods at a net price which was reduced by an amount equivalent to the customary payment to brokers. A&P claimed that the services it rendered provided the sellers with a cost savings equal to the normal brokerage commission and therefore A&P was justified in receiving that savings as a price reduction. But the court refused to allow the cost-savings defense as a justification for the price concession. Thus, even if the buyer performed its own brokerage functions, it could not be compensated by a price reduction equal to the value of that function.33

In *Biddle Purchasing Co. v. FTC*,34 the respondent, Biddle, acted as a purchasing agent for buyers in the food business and, in addition, sold to those buyers certain market information. When purchasing on behalf of those buyers, Biddle received a brokerage fee from the sellers which sometimes exceeded the charge which the firm made to the buyers. Biddle credited the buyers with the *full amount* of brokerage fees received from the seller. Therefore, at least in some cases, Biddle passed on to the buyers a brokerage fee which exceeded the cost of the services which it rendered to those buyers. Biddle claimed that it was rendering a proper service for both sellers and buyers and was therefore entitled to a commission from both. The court rejected his claim, reasoning that Congress had intended to prohibit payments of a brokerage fee by a seller to a buyer or a buyer's agent because those payments were an unfair trade practice. The court stated: [O]ne of the principal evils inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it possible for the seller to discriminate in price without seeming to do so."35 Section 2(c) was intended to "force price discrimination out into the open."36

In *Oliver Bros. v. FTC*,37 the Fourth Circuit recognized that payments made to a broker by a seller and then passed on to the buyers came within the ambit of 2(c). According to the court, however, passing such payments on had the inherent tendency to lessen competition and create a monopoly, regardless of the effect which such

32. 106 F.2d 667 (3rd Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).
33. *But see* Thomasville Chair Co. *v. FTC*, 306 F.2d 541 (5th Cir. 1962) (discussed at notes 60-68 *infra* and accompanying text); *Main Fish Co.*, 53 F.T.C. 88 (1956).
34. 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).
35. *Id.* at 692 (emphasis added).
36. *Id.* (emphasis added).
37. 102 F.2d 763 (4th Cir. 1939).
activity had on competition in any particular instance. Therefore, the court found it unnecessary to test whether those payments actually had the effect of lessening competition. In refusing to read into section 2(c) the requirement of section 2(a) that the practice have an adverse effect on competition to be deemed a violation, the court stated: "[N]o reason suggests itself why the limitations and provisions relating to one [section of the Act] should be read into those relating to the other." 38

The per se nature of 2(c) was at least indirectly recognized by the Supreme Court. 39 The requirement that there be a showing of injury to competition appeared to be unnecessary for a finding that section 2(c) was violated. It seemed that there simply were no defenses available if, in fact, the proscribed brokerage payment or payment in lieu of brokerage was found. 40

Other early cases tested and found illegal those brokerage commissions paid to and actually retained by agents of the buyer. The first two such cases were Webb-Crawford Co. v. FTC 41 and Quality Bakers of America v. FTC. 42 In those cases, the courts held that such payments were prohibited by section 2(c) because their effect is the same regardless of whether they are held by that agent or passed on to the buyer.

It seemed bad enough that section 2(c) was viewed by the courts as a per se section, that the effect on competition was irrelevant, and that the cost-justification defense was not available. But to make matters worse, in Southgate Brokerage Co. v. FTC, 43 the FTC challenged the propriety of brokerage payments received by a distributor which was purchasing for its own account and reselling to wholesalers. The distributor attempted to show that by taking title to the products and rendering the many services associated with a true distributor, it was entitled to the brokerage payments. The Commission had simply excluded evidence of those services and functions. 44 The court of appeals agreed, stating that the services rendered

38. Id. at 767.
39. In FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959), which actually was a section 2(e) case, the Court stated:

Subsections (c), (d), and (e) [of the Robinson-Patman Act], on the other hand, unqualifiedly make unlawful certain business practices other than price discrimination. . . . In terms, the proscriptions of these three subsections are absolute. Unlike § 2(a), none of them requires, as proof of a prima facie violation, a showing that the illicit practice has had an injurious or destructive effect on competition.

40. See FTC v. Washington Fish & Oyster Co., 271 F.2d 39 (9th Cir. 1959).
41. 109 F.2d 268 (5th Cir.), cert. denied, 310 U.S. 638 (1940).
42. 114 F.2d 393 (1st Cir. 1940).
43. 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945).
44. Southgate Brokerage Co., 39 F.T.C. 166 (1944).
by the distributor were actually rendered to itself as a buyer. And, because the brokerage payment was made to a buyer, it was illegal. Even though the distributor competed with brokers in reselling the goods to wholesalers and, therefore, received no discriminatory price concession from the seller, nonetheless, the court held that "[P]rice discrimination . . . is not necessary to a violation of Section 2(c) . . . which specifically forbids the payment of brokerage by the seller to the buyer or the buyer's agent." The distributor could not, therefore, justify receipt of brokerage by the services it rendered because "For sellers to pay purchasers for purchasing, warehousing, or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity." This use of 2(c) clearly established a market barrier.

Although these early cases permitted section 2(c) to be used in an economically adverse manner, the interpretation of the section appeared settled by 1959. It seemed quite clear that a reduction in price achieved by a commensurate reduction in brokerage fee, whether that reduction was paid by the broker or by the seller, violated section 2(c). It also seemed quite clear that brokerage commissions paid directly from the seller to the buyer, brokerage payments made to and retained by the buyer's agent, and brokerage payments made from sellers to middlemen or brokers who were purchasing for their own accounts were prohibited by section

45. 150 F.2d at 609 (emphasis added).
46. Id. at 611. See also American Nat'l Growers Corp., 55 F.T.C. 1321 (1959); Chinook Packing Co., 55 F.T.C. 611 (1958); Columbia River Ass'n, 44 F.T.C. 118 (1947); W. E. Robinson & Co., 32 F.T.C. 370 (1941).
47. See Report 191: "In our opinion, the virtual legal monopoly conferred by Section 2(c) on one type of middleman clogs competition in the channels of distribution, and exacts tribute from the consumer for the benefit of a special business class."

Mr. Rose, in his speech on October 29, 1975, stated that:
Perhaps one of the most serious effects of the [Robinson-Patman] Act is its needless complication of distribution systems. . . . Sections 2(o), (d), and (e) of the Act bar the payment of brokerage and furnishing of allowances or facilities, without need to show anti-competitive effects of such practices. Such provisions serve to preserve unneeded brokerage operations and to restrict arbitrarily the manner in which a seller may structure his mixture of prices and compensating allowances.

Rose, supra note 9, at 10-11.
48. See, e.g., Southgate Brokerage Co. v. FTC, 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945); Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939).
49. See, e.g., Quality Bakers of America v. FTC, 114 F.2d 393 (1st Cir. 1940); Webb-Crawford Co. v. FTC, 109 F.2d 268 (5th Cir.), cert. denied, 301 U.S. 638 (1940).
50. See, e.g., In re Whitney & Co., 273 F.2d 211 (9th Cir. 1959).
2(c). Apparently it made no difference in any of these instances that the brokerage payment was equivalent to the value of the services rendered by the buyer, the buyer's agent, or the broker purchasing for his own account.\(^5\) In addition, it appeared that there was no need to ascertain the effect that such payments had on competition,\(^3\) and the cost-justification defense was unavailable.\(^4\) In short, section 2(c) looked like a *per se* section of the antitrust laws.

### III. The Decade Following Broch (1960–1970)

In 1960, the Supreme Court decided *FTC v. Henry Broch & Co.*\(^5\) In *Broch*, the seller agreed to absorb one-half of the price reduction by accepting a lower brokerage fee. The sale was consummated on that basis and the court held that 2(c) was violated because the buyer had received a discount in lieu of brokerage.

There was an attempt in *Broch* to justify this price reduction on the grounds that the buyer had rendered valuable services to the seller. The court rejected this defense, noting:

> There is no evidence that the buyer rendered any services to the seller or to the [broker] nor that anything in its method of dealing justified its getting a *discriminatory* price by means of a reduced brokerage charge. We would have quite a different case if there were such evidence . . . .\(^5\)

Thus, while the Supreme Court refused to apply the cost-justification defense, its holding was clearly limited to a *discriminatory* price which resulted from reduced brokerage. Elsewhere in the opinion, the Court noted that price *discrimination* was indeed the target of section 2(c), suggesting that a *per se* application of the section might not be necessary or appropriate:

> [C]ongress in its wisdom phrased § 2(c) broadly, not only to cover the other methods then in existence but all other means by which brokerage could be used to effect *price discrimination*.\(^5\)

> . . . This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of broker-

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52. *See, e.g.*, Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940).
53. *See, e.g.*, Oliver Bros. v. FTC, 102 F.2d 763 (4th Cir. 1939).
56. *Id.* at 173 (emphasis added).
57. *Id.* at 169 (emphasis added).
age has been granted. As the Commission itself has made clear, whether such reduction is tantamount to a *discriminatory payment* of brokerage depends on the *circumstances* of each case.\(^{58}\)

\[\ldots\] We need not view [certain FTC decisions] as laying down an absolute rule that § 2(c) is violated by the passing on of savings in broker's commissions to direct buyers, for here, as we have emphasized, the "savings" in brokerage were passed on to a single buyer who was not shown in any way to have deserved favored treatment.\(^{59}\)

The Supreme Court had, therefore, left a variety of openings for courts to consider use of the cost-justification defense in a 2(c) case and to consider the effect on competition when testing brokerage practices under section 2(c). The circuit courts seized upon these openings very quickly. In 1962, only two years after the *Broch* decision, the Fifth Circuit decided *Thomasville Chair Co. v. FTC*.\(^{60}\) Quite simply, the Fifth Circuit read into section 2(c) the cost-justification defense traditionally available for challenges under section 2(a). The decision indicated that a seller could pass on to buyers the savings realized by the elimination of a broker.\(^{61}\)

In addition, the court recognized that such reductions in price violated section 2(c) only if the reductions resulted in a price which was *discriminatory*.\(^{62}\)

Basil Mezines concluded that the Fifth Circuit's reasoning "robs . . . Section [2(c)] of all vitality."\(^{63}\) To the contrary, this

\(^{58}\) *Id.* at 175-76 (emphasis added).

\(^{59}\) *Id.* at 177 n.19.

\(^{60}\) See also FTC v. Henry Broch & Co., 368 U.S. 360, 367 n.8 (1962): "Nor need the [FTC] order, where viewed in the context of Broch's violation, be read as prohibiting Broch from reducing commissions competitively to gain a particular buyer's account, if the competitive setting would otherwise have afforded a defense to a charge under § 2(c)." (Emphasis added).

\(^{61}\) 306 F.2d 541 (5th Cir. 1962).

\(^{62}\) *Id.* at 545:

[As we read it, the [Supreme] Court's [Broch] opinion says that a reduction in price, giving effect to reduced [brokerage] commissions paid by the seller, are violations of Section 2(c) only if such reduction in price is "discriminatory." We read that to mean "without justification based on actual bona fide differences in the costs of sales resulting from the differing methods or quantities in which such commodities are sold or delivered." ]

\(^{63}\) *Id.* See also Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963).

63. Mezines, *Brokerage—When is it Permitted Under the Robinson-Patman Act?*, 7 B.C. IND. & COM. L. REV. 821, 835 (1966). In 1969, however, a Commission of the American Bar Association took note of "the large and growing body of uniformly critical opinion questioning the FTC's enforcement of the Robinson-Patman Act, and, in particular, of the *per se* and quasi *per se* rules embodied in 2(c) of the Act. . . ." ABA COMMISSION TO STUDY THE FEDERAL TRADE COMMISSION, REPORT OF THE
interpretation seemed more in line with the goal of achieving the economically efficient distribution of goods. Other cases in the early 1960's indicated that a seller was free to eliminate the services of a broker, convert to direct selling, and reduce its prices in an amount substantially equivalent to the costs previously incurred in using a broker. In addition, the FTC and the Second Circuit recognized that certain discounts granted in an amount equivalent to a normal brokerage charge could be labelled as functional discounts rather than a saving of brokerage. But the shadow of the Southgate case remained, and several cases in the early 1960's adopted the Southgate approach. With these conflicting positions on the books in 1965 the section 2(c) cases simply stopped for about five years, except for FTC actions.

IV. SECTION 2(c) IN THE 1970'S—A NEW TWIST

The use of section 2(c) in private litigation has increased in the last few years. Only 11 private actions alleging violations of section 2(c) were reported during the 25-year period from 1936 to 1961. And only three such actions were reported from 1961 to 1970. But at least 15 private actions alleging violations of section 2(c) were instituted during the recent six-year period of 1970 through


64. See, e.g., Central Retailer-Owned Grocers, Inc. v. FTC, 319 F.2d 410 (7th Cir. 1963); Venus Foods, Inc., 57 F.T.C. 1025 (1960). See also Robinson v. Stanley Home Prods., Inc., 272 F.2d 601 (1st Cir. 1959); In re Whitney & Co., 273 F.2d 211 (9th Cir. 1959).


66. Empire Rayon Yarn Co. v. American Viscose Corp., 354 F.2d 182 (2d Cir. 1965), vacated and District Court aff'd., 364 F.2d 491 (2d Cir. 1966).


In contrast, 148 FTC actions alleging violations of section 2(c) were instituted from 1936 to 1961\(^7\) but only five such actions were instituted by the FTC from 1971 through 1975.\(^7\)

In some measure, the recent increase in private actions under


\(^7\) Source is author's review of periodicals and trade regulation services. See Herbert R. Gibson, Jr., 3 TRADE REG. REP. ¶ 20,844 (FTC 1975) (complaint issued); Men's Mkt. Serv., Inc., 3 TRADE REG. REP. ¶ 20,759 (FTC 1974) (consent decree); H. C. Bohack Co., 3 TRADE REG. REP. ¶ 20,417 (FTC 1973) (initial decision to dismiss charges); Georgia-PaciCorp., 82 F.T.C. 727 (1973) (consent decree); Frozen Food Forum, Inc., [1970-73 Transfer Binder] TRADE REG. REP. ¶ 19,963 (FTC 1972) (proposed complaint). See also Jewel Cos. v. FTC, 479 F.2d 1323 (7th Cir. 1973). The author's request for current statistical information from the FTC under the Freedom of Information Act was denied. In 1959, 28 of the 61 cease-and-desist orders issued by the FTC involved alleged violations of section 2(c). Barber, supra note 69, at 196 n.53. The FTC's preoccupation with section 2(c) was criticized by one author who, after noting that the cease-and-desist orders involving brokerage from 1936 to 1957 were almost as numerous as all others combined, stated: "There is no reason to believe that during the more than twenty years since the passage of the Robinson-Patman Act, the payment of brokerage commissions by sellers to buyers has constituted the principal threat to competition evident among discriminatory practices.

. . ." C. Edwards, supra note 72, at 70-71. The Neal Report recognized the inappropriate amount of activity under section 2(c): "Because violations of these subsections are relatively easy to establish, they have attracted a disproportionate amount of enforcement activity and have had substantial anticompetitive effects, suppressing many legitimate transactions." The White House Task Force Report On Antitrust Policy, reprinted in 411 BNA ANTITRUST & TRADE REGULATION REPORT 1, 10 (Supp. II, May 27, 1969). In 1969, a Commission of the American Bar Association recommended that the FTC direct proceedings under section 2(c) only in instances where there is injury to competition. ABA REPORT, supra note 63, at 67-68. The Acting Chairman of the FTC, Paul Rand Dixon, has recently stated that he intends to ensure that the FTC enforces the Robinson-Patman Act fully. 750 BNA ANTITRUST AND TRADE REGULATION REPORT A-24, 25 (Feb. 10, 1976). Some interesting recent statistics on the activities of the Department of Justice can be found in Handler, Antitrust Myth and Reality in an Inflationary Era, 50 N.Y.U.L. REV. 211 (1975).
section 2(c)\textsuperscript{74} is attributable to a combination of economic conditions and increasingly sophisticated methods of distribution which both need and permit the elimination of unnecessary participants in the task of moving goods from the manufacturer to the ultimate purchaser. Distributors, commissioned agents, and brokers have, in varying numbers, been eliminated from that process. The termination of such middlemen, particularly distributors, has initiated a host of antitrust cases.\textsuperscript{75} Most of these cases have been brought under sections 1 and 2 of the Sherman Act.\textsuperscript{76} But for the most part, the courts have turned away these challenges recognizing that a manufacturer can unilaterally decide with whom it will or will not deal\textsuperscript{77} and can even consult with one distributor in deciding to replace another distributor so long as one of the distributors remains in the marketplace, thereby not lessening competition.\textsuperscript{78} As a result, mid-

\textsuperscript{74} The number of private actions filed under the antitrust laws generally has risen from 446 in 1965 to 1,230 in 1974. \textit{Id.} at 235 n.120.

\textsuperscript{75} The section 1 theory most often articulated is that the manufacturer conspired with a newly appointed distributor to terminate the prior distributor thereby constituting a conspiracy to eliminate the competition of the terminated distributor. The section 2 theory often advanced is that the manufacturer terminated the distributor and began selling directly to the distributor's potential customers thereby achieving a monopoly or, at least, constituting an attempt to monopolize.

\textsuperscript{76} \textit{See}, \textit{e.g.}, cases cited notes 77 and 78 infra.


dlemen whose participation in the distribution process has been reduced or eliminated are searching for other legal theories to redress their alleged injury. One approach has been to use section 2(c). The theory advanced is that when a seller eliminates a middleman and grants to the buyer a discount which includes some or all of the amount previously paid to that middleman, the buyer receives a discount in lieu of brokerage, thereby violating section 2(c). This theory would prohibit manufacturers from passing on to purchasers the savings realized from streamlining the distribution system.

Numerous cases have indicated that the antitrust laws do not prohibit manufacturers from eliminating completely one level of the distribution process by converting to direct sales rather than using middlemen. As stated in *B&B Oil & Chemical Co. v. Franklin Oil Corp.*:

It is just at this point that plaintiff's case fails, even conceding the inequities charged, since the result of the defendant's activities [the elimination of a distributor and conversion to direct sales] is not destruction of competition but merely the substitution of one supply source for another, whether it be the manufacturer himself or another distributor. The opinions have been unanimous, insofar as we have been able to determine, in holding that a manufacturer's changes in his distribution system, vertical realignments, eliminations, or transfers, do not offend the anti-trust acts.

If the elimination or substitution of middlemen is itself a permissible activity, it would seem highly inappropriate to prohibit the manufacturer from passing along to the buyer some or all of the savings realized by such a change.


In *Green Bay Packaging, Inc. v. Hoganson & Associates,* the court squarely faced this issue. A commissioned agent had been receiving a 5 percent commission on sales he obtained for a manufacturer. This arrangement was terminated and the manufacturer allegedly agreed with the customers to sell directly to the customers granting a reduction in price equivalent to the 5 percent previously paid to the commissioned agent. The agent claimed this reduction in price was a discount in lieu of brokerage violative of section 2(c). The court dismissed this count for failure to state a claim:

The change in the relationship between a buyer and seller resulting in the elimination of a broker does not, *per se,* fall within the scope of anticompetitive practices prohibited by federal anti-trust laws. A manufacturer's elimination of a middleman to deal directly with the buyer does not offend the federal antitrust laws. . . . Federal courts have refused to construe the Robinson-Patman Act as prohibiting conversion to direct selling and passing on any savings to the buyer. . . . The thrust of [Plaintiff's] contention is that a manufacturer who makes a price reduction when he converts to direct selling has, without more, made an allowance in lieu of brokerage. The [Plaintiff's] contention is tantamount to declaring that manufacturers cannot so convert, or if done, the Robinson-Patman Act forbids passing on any saving to customers. Such a construction of the Robinson-Patman Act is legally improper, and practically speaking, unsound.

The issue for consideration in future challenges of this nature is what "more" must be proved to find a violation of section 2(c) when a manufacturer eliminates a middleman and converts to direct sales, granting some or all of the middleman expense as a reduction in price to the purchaser. A mere showing that the manufacturer agreed in advance with the purchaser to make such a conversion will not be adequate. The manufacturer which converts its entire marketing strategy from middlemen to direct sales should not be precluded from passing on the middleman expenses to all customers, even if a cost savings cannot be demonstrated, because there is no price discrimination and no lessening of competition in such a course of action. If the manufacturer converts from pure distributors or independent middlemen to direct sales there should be no violation of section 2(c) in passing on the middleman expense because the discount or price reduction afforded a truly independent

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84. *Id.* at 82.
85. *See id.*
86. *See* Thomasville Chair Co. v. FTC, 306 F.2d 541, 545 (5th Cir. 1962).
title-taking middleman is a functional discount and not a commission, brokerage or compensation. 87 The elimination of that function and the passing on of the expense is not, therefore, the granting of a discount in lieu of brokerage.

The more difficult case is where the manufacturer eliminates commissioned salesmen or agents in a limited number of sales and passes some or all of that expense on to the purchasers. As stated in Green Bay, these facts "without more" do not state a claim under section 2(c). 88 But if the practice results in discriminatory prices, further inquiry may be required, particularly if the industry involved is one which traditionally utilizes brokers. 89 As suggested by Thomasville Chair, 90 the manufacturer should still be permitted to demonstrate that the reduction in such sales is the equivalent of savings actually realized by the elimination of unnecessary selling expenses, that the reduction is therefore cost-justified, and that no indefensible discriminatory price resulted. 91 No violation of section 2(c) should, in such instance, be found. But if the reduction is discriminatory and cannot be cost-justified, and if the industry is one which customarily utilizes brokers, a substantial question is raised under section 2(c). It is, unfortunately, at this point that the barrier to efficient distribution is raised and only legislative reform can remove it. 92

Even in such circumstances, there is sufficient law to prevent the

88. 362 F. Supp. at 82.
89. See E. KINTNER, A ROBINSON-PATMAN PRIMER 211 (1970): "Doing some business with a broker is seemingly the pivotal element connecting the discount at issue with the brokerage provision [of Section 2(c)]."
90. 306 F.2d 541 (5th Cir. 1962).
91. Id. at 545; see 30 GEO. WASH. L. REV. 137 (1961) (cited in Thomasville as an "intelligent discussion" of the cost-justification issue).

It should be noted, however, that the FTC only grudgingly complied with the decision of the Fifth Circuit in Thomasville Chair. Upon remand, the Commission took the opportunity to state, "The Commission does not . . . acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree." In re Thomasville Chair Co., 63 F.T.C. 1048, 1049 (1963). The FTC did not delineate the grounds of disagreement with the Fifth Circuit, but the broad cost-justification defense announced by the Fifth Circuit in that case has been conspicuously absent from subsequent court and FTC decisions. See E. KINTNER, supra note 89, at 226. But see Tillie Lewis Foods, Inc., 65 F.T.C. 1099, 1152 (1964) (separate opinion), where one of the Commissioners of the FTC indicated a more receptive attitude toward Thomasville Chair Co. v. FTC.

92. In recommending repeal of section 2(c), the Neal Report noted that the section has "had substantial anticompetitive effects, suppressing many legitimate transactions and "directly" interfering with "price competition at both the seller and the broker level." Neal Report, supra note 73, at 10.
abuse of section 2(c) by eliminated middlemen. The Clayton Act provides that private actions brought under the antitrust laws may be brought only by "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws. . . ." The plaintiff must prove not only that the antitrust laws have been violated, but also that there was injury to the plaintiff as a direct and proximate result of the violation. Finally, the plaintiff must prove the amount of such damages. In a Robinson-Patman Act case, the plaintiff must prove not only that the defendant engaged in illegal pricing practices, but also that the plaintiff lost business as the proximate result of such pricing practices.

93. The defendant should, of course, first determine if the facts alleged are sufficient to meet the interstate commerce test for jurisdiction under the antitrust laws. The test under the Robinson-Patman Act is more stringent than the test under the Sherman Act. To satisfy the requirements for jurisdiction under the Sherman Act, the plaintiff may show either that the allegedly illegal activity took place in interstate commerce or that the allegedly illegal activity had a substantial effect on interstate commerce. Burke v. Ford, 389 U.S. 320 (1967); United States v. Women's Sportswear Mfrs. Ass'n., 336 U.S. 460 (1949); Page v. Work, 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961); Las Vegas Merchant Plumbers Ass'n. v. United States, 210 F.2d 732 (9th Cir.), cert. denied, 348 U.S. 817 (1954). But under the Robinson-Patman Act, jurisdiction vests only if the challenged activity (one or more of the allegedly illegal sales) actually takes place in interstate commerce. The substantial-effect-on-commerce test is not available. Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186 (1974). This limitation has been specifically applied to a section 2(c) case. Rohrer v. Sears, Roebuck & Co., 1975 Trade Cas. ¶ 60,352 (E.D. Mich. 1975).


If the plaintiff's loss of business resulted from the plaintiff's own inadequacies or from the legitimate competition of others, a cause of action under the antitrust laws does not exist. 98

In the case of a terminated distributor, agent, or broker, the middleman's loss of business is occasioned by the termination, not by the subsequent pricing practices of the manufacturer. In *Robinson v. Stanley Home Products, Inc.*, 99 a manufacturer appointed a manufacturer's representative as the exclusive commissioned agent for sales in a particular geographic area. One customer in that area began negotiations directly with the manufacturer and offered to purchase the goods directly at reduced prices. The manufacturer accepted this offer and terminated the commissioned agent representative. The terminated agent brought suit alleging that the direct sales at reduced prices violated section 2(c). The court granted the manufacturer's motion to dismiss for failure to state a claim and noted:

> It is difficult to see how in this case the claimed injury could be considered the direct result of the alleged violation. Assuming that [the manufacturer] sold cups to [the customer] at a lower price than it charged competitors of [the customer], this price differential was not the cause of plaintiff's loss of his commission. . . . The lower price allowed to [the customer] by [the manufacturer] may have been a source of injury to some competitor of [the customer]. It did not cause plaintiff's injury. The fact that elimination of plaintiff's commission may have been economically a condition precedent to the granting of a lower price by [the manufacturer] does not make the failure to pay that commission a result of the lower price. 100

In affirming this decision, the First Circuit stated that it did not reach the question of whether the representative was a person injured by reason of a violation of the antitrust laws. 101 Instead, the court affirmed on the basis that no violation had been alleged:

> To say that a manufacturer who makes a price reduction when he converts to direct selling has, without more, made an allowance in lieu of brokerage would either be to say that he cannot so convert, or that, if he does, the act forbids his passing on any saving to the customer. We do not so construe it. 102

100. Id. at 233.
101. 272 F.2d at 603 n.3.
102. Id. at 604.
Even if the court had found the facts alleged sufficient to withstand a motion to dismiss directed against the existence of a violation, the court still would have had to determine if the alleged violation was the direct and proximate cause of the plaintiff's injury. The reasoning of the district court quoted above indicates that the motion to dismiss still would have been granted because the fact of injury, if any, could not have been the result of the alleged violation.103

V. CONCLUSION

There will undoubtedly be more private actions based on section 2(c) where a middleman has been eliminated. They should be decided in accordance with Green Bay and/or Stanley Home Products, for to do otherwise would be to compel the continued existence of a severe market barrier in the distribution process. Hopefully, section 2(c) will not be permitted to preclude the elimination of middlemen and thus inhibit reduced costs and savings to buyers. The country's economic condition104 simply cannot permit the preclusion of increasingly sophisticated methods of distribution and section 2(c) should not be used in a way that would deter the use of those methods.

103. In Mullis v. Arco Petroleum Corp., 502 F.2d 290 (7th Cir. 1974), a terminated petroleum jobber alleged, inter alia, that direct sales violated the Robinson-Patman Act and that the termination was therefore illegal. In dissolving a temporary injunction against the termination, the Seventh Circuit (Judge Stevens) held:

[To support a preliminary injunction] [t]here must also be substantial reason to believe that the conduct of which the plaintiff complains is unlawful and is the cause of his threatened loss. . . .

In this case it is perfectly clear that, even if plaintiff is able to prove a violation of the Robinson-Patman Act, there is no causal connection between that violation and his termination.

Id. at 293.

104. For a contemporary comment on the relationship between inflation and the antitrust laws in general, see Handler, Antitrust Myth and Reality in an Inflationary Period, 50 N.Y.U. L. Rev. 211 (1975).