1970

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Beatrice Foods: Injury to Competition

John F. McClatchey

I. INTRODUCTION


The agreement was the result of negotiations initiated by Kroger with Beatrice and four of Beatrice's competitors. Kroger had asked each of the five milk producers to submit proposals for bottling milk under Kroger's private label. During the course of the negotia-

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2 Of the seven markets, five were in West Virginia, the sixth contained stores on both sides of the Ohio River in Ohio and West Virginia (which was called the "River area"), and the seventh market was in Eastern Kentucky. Both the hearing examiner and the Commission found that only the five West Virginia markets were relevant to the Beatrice Foods case. The River area market was excluded because Beatrice had no customers there other than Kroger; the Kentucky market was excluded because a local milk pricing law controlled Beatrice's sales to Kroger there. Beatrice Foods Co., [1967-1970 Transfer Binder] TRADE REG. REP. ¶ 19,045, at 21,289 (FTC 1969).

3 Mr. Francis X. Casserly handled the negotiations for Kroger because he was experienced in arranging a similar changeover to Kroger private label milk in another of Kroger's divisions. Initially, Casserly contacted four of Beatrice's competitors, Valley Bell Dairy, the Borden Company, Fairmount Foods Company, and Broughton's Farm Dairy, Inc. Beatrice was not contacted because Beatrice's containers were not acceptable to Mr. Casserly. Mr. G. C. Stollings, one of Beatrice's general managers, contacted Mr. Casserly after hearing of the negotiations. Stollings assured Kroger's representatives that Beatrice could package milk in the type of containers Kroger desired. As a result of Beatrice's container assurances, Mr. Casserly invited Beatrice to submit a proposal for the private label milk contract. Id. at 21,291-92.

4 Although Kroger was most interested in acquiring private label milk from one
tions it became evident that the Kroger contract would go to the lowest bidder.⁵ After several modifications, Beatrice's proposal was accepted by Kroger in April, 1962, approximately 5 months after the opening of negotiations between Kroger and the five milk producers. Under the terms of the agreement between Beatrice and Kroger, Beatrice supplied Kroger with private label milk and other dairy products in the seven markets. The prices of the private label milk sold to Kroger were lower than prices Beatrice charged for its brand name milk.⁶ Beatrice's service on the milk sales to Kroger also varied from the service given to other customers.⁷

The first count of the complaint charged Beatrice with giving

of the five dairy producers, other dairy items were involved in the contract negotiations. Mr. Casserly, Kroger's representative, testified that the Fairmount and Beatrice fluid milk bids were almost indistinguishable. He stated that the only significant difference was with respect to the bids on cottage cheese (a comparatively significant item in dollar volume). On that item, Casserly testified that he considered the constant price offered by Beatrice to be more favorable than Fairmount's fluctuating price. Id. at 21,299.

⁵ The Commission was quite critical of the negotiations and the conduct of Mr. Casserly. The majority opinion concluded from Casserly's testimony that the Kroger negotiator's primary concern was to get the lowest price possible from the producers. Casserly evidently encouraged the spirited bidding by informing four of the producers that he already had a 20 percent discount offer from Broughton Dairy (which was a distortion of the truth) and by being very secretive about the other dairies' offers. Id. at 21,300.

⁶ The pricing arrangement eventually adopted in the Beatrice-Kroger agreement was a novel one for the market under consideration. According to Commissioner Jones, this novel pricing presented serious obstacles to Beatrice's attempted cost justification defense. As the majority opinion stated:

Kroger and Beatrice chose to use a pricing system in which prices were ultimately determined by the cost of raw milk plus a fixed differential to cover distribution expense and profit. Competitors of Kroger, on the other hand, continued to purchase under the normal list-price-less-discount structure which bore no necessary relationship to the cost-plus formula but which was governed by local competitive conditions. Id. at 21,309 (emphasis added).

The Commission further pointed out that the prices to Kroger were based upon average distribution costs which were not necessarily related to actual distribution costs. Due to the cost-plus formula pricing and the use of average distribution costs, Beatrice's prices to stores close to the plant were occasionally higher than its prices to more distant stores. Id.

⁷ The Commission's opinion described the pricing and servicing arrangement as follows:

The prices finally arrived at in the course of the negotiations were stated in terms of specific dollar amounts, but, unlike prices charged by Beatrice to other customers, which were based on a list price less a percent discount, the prices to Kroger were intended by the parties to vary from month to month in accordance with the Federal Milk Marketing Order. Also, unlike Beatrice's sales to others, sales to Kroger were to be made on a "stripped service" basis whereby Kroger personnel performed all of the functions in the nature of in-store services that Beatrice's route salesmen otherwise performed. The claimed saving to Beatrice of the expense of these services lies at the base of the attempted cost justification defense. Id. at 21,288.
illegal price discriminations to Kroger in violation of section 2(a) of the Robinson-Patman Act. The complaint charged:

"The effect of such discriminations in price has been or may be substantially to lessen competition or tend to create a monopoly in the purchasing, processing or sale of fluid milk and other dairy products and to injure, destroy or prevent competition between (1) Beatrice and its competitors in the manufacture, processing, distribution and sale of such products, and (2) retailers paying higher prices and competing retailers paying lower prices for Beatrice's said products."

In general, section 2(a) of the Robinson-Patman Act makes it unlawful for a seller to discriminate in the price of commodities of like grade and quality purchased in interstate commerce for use, consumption, or resale in the United States where the effect of such discrimination may be substantially to lessen or injure competition. Section 2(a) also contains a cost justification defense, which generally permits a discrimination that makes only due allowance for differing costs in serving different customers.

Section 2(b) provides a second defense for the seller charged with a violation of section 2(a). Section 2(b) validates an otherwise unlawful price discrimination if the lower price is granted in good faith to meet the equally low price of the seller's competitor.

The second count of the complaint charged Kroger with the violation of section 2(f) of the Robinson-Patman Act, which


10 Section 2(a) provides in part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, when either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, that nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . . 15 U.S.C. § 13(a) (1964).


makes a buyer liable for knowingly inducing or receiving a prohibited price discrimination.\(^{13}\)

On September 26, 1967, the hearing examiner rendered an initial decision\(^{14}\) in which he absolved both Beatrice and Kroger from all liability on the ground that there was no proof of the requisite probability of injury to competition at either Beatrice's or Kroger's level. The examiner found that Beatrice had established the meeting competition defense, but had failed to establish the cost justification defense. He held that Kroger had not violated section 2(f) because there was no evidence that it knew or had reason to know that Beatrice's prices were not cost-justified or extended to meet competition.\(^{15}\)

In a split decision,\(^{16}\) rendered on December 1, 1969, the Commission absolved Beatrice from the section 2(a) charge, but found Kroger liable for violating section 2(f).\(^{17}\) A majority, which included Commissioners Jones, Elman, and apparently Nicholson,\(^{18}\) upheld the meeting competition defense of Beatrice over the dissents of Commissioners Dixon and McIntyre. Commissioner Dixon stated that Beatrice did not stop at meeting the competition, but rather beat its competitor's prices. He reasoned that the meeting competition defense cannot be used to "justify... the calculated and deliberate undercutting of a competitor's price."\(^{19}\) According to Commissioner McIntyre's opinion, the burden of establishing the meeting competition defense rests upon the party raising it and

\(^{13}\) The complaint specifically referred to the negotiations with Beatrice and to the contract which resulted from the negotiations. The complaint further stated that Kroger "knew or should have known" that the prices received from Beatrice were discriminatory. Beatrice Foods Co., [1965-1967 Transfer Binder] TRADE REG. REP. \$ 17,309, at 22,461 (FTC 1965).


\(^{15}\) The meeting competition and buyer liability issues are discussed in Borowitz, Beatrice Foods: Meeting Competition and Buyer Liability, 22 CASE W. RES. L. REV. 54 (1970) (infra in this issue).

\(^{16}\) The positions of the individual Commissioners are important because Commissioners Nicholson and Elman have left the Commission and have been replaced by Chairman Kirkpatrick and Commissioner Dennison.


\(^{18}\) Commissioner Nicholson did not write a separate opinion. According to a brief notation following the majority opinion, Nicholson dissented only as to the finding that Kroger was liable for a section 2(f) violation. Id. at 21,314.

\(^{19}\) Id. at 21,315. Commissioner Dixon further stated that in order to take advantage of the meeting competition defense, the seller must in good faith believe that the competitor's price he is attempting to meet is itself lawful. Id.
Beatrice failed to carry that burden of proof. Commissioners Jones, Dixon, and McIntyre agreed on the lack of primary-line (seller level) injury to competition, the existence of secondary-line (buyer level) injury, the insufficiency of Beatrice’s cost justification defense, and the existence of Kroger’s violation of section 2(f).

II. THE ISSUES

As the facts of the case clearly indicated, there was no question that Beatrice discriminated in the price of commodities of like grade and quality purchased by competing buyers in interstate commerce. As the Commission’s majority opinion stated: “No one denies that the Beatrice-Kroger arrangement contemplated and resulted in different prices charged by Beatrice to Kroger and to Kroger’s competitors on some products in some market areas and at some times.”

In reaching this conclusion about Beatrice’s discriminatory prices, the Commission examined both the prices charged by Beatrice to some of Kroger’s competitors and the savings that Kroger’s competitors would have gained had they been charged the same prices as Kroger.

However, the case contained several important issues that the Commission examined in considerable detail. These were as follows:

(a) The standard to be applied in determining whether Beatrice’s price discrimination caused the requisite probability of injury to competition at the seller’s or primary level, that is, at Beatrice’s level;

(b) The standard to be applied in determining the requisite probability of injury to competition at the buyer’s or secondary level, that is, to competition between Kroger and its competitors, including (1) the significance in such determination of Kroger’s increased costs of handling private label milk as opposed to the allegedly lower costs of buyers handling brand label milk, and (2) the significance of the alleged differences in value between Beatrice’s private label milk and its brand label milk;

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20 Id.
21 Id. at 21,301.
22 The prices charged to Kroger for fluid milk for the months of June 1962 to October 1963 ranged from 59.9 cents to 70.7 cents per gallon. During some of the same months Beatrice charged Kroger’s competitors prices which averaged from 71.1 cents to 98 cents. In one of the relevant markets, Beatrice charged one of Kroger’s competitors prices 27 percent higher than prices charged Kroger. The savings to some of Kroger’s competitors, had they been charged the same price as Kroger, would have ranged from $1,000 to $18,000. Id. at 21,301-02.
(c) Beatrice's meeting competition defense;  
(d) Whether Kroger was liable for a section 2(f) violation.  
The latter two issues are treated in a subsequent article in this  
symposium. Issues (a) and (b) above will be considered in the  
remainder of this article.

III. INJURY TO COMPETITION:  
PRIMARY OR SELLER LINE

The language of the Robinson-Patman amendments to the Clay-  
ton Act is both flexible and ambiguous. While it is true that  
Congress was primarily concerned with the injurious effects price  
discriminations would have at the secondary or buyer-line level,  
the Supreme Court in its 1960 FTC v. Anheuser-Busch, Inc.  
decision recognized that section 2(a) was meant to protect the primary  
or seller-line competitors of a discriminatory seller. In this respect,

23 Borowitz, supra note 15.

In discussing this language, it has been said: "The statutory language is so broad as to be almost useless as an aid to deciding whether a particular discrimination is proscribed. The legislative history is also confusing . . . ." Note, Unlawful Primary Line Price Discrimination: Predatory Intent and Competitive Injury, 68 COLUM. L. REv. 137, 139 (1968).

25 See generally F. Rowe, supra note 8, at 11-23; Sherwood, Robinson-Patman Act Primary Line Injury: Meanderings from Porto Rico to Utah — and Beyond, 16 U.C.L.A. L. REv. 304, 305 (1969). See also FEDERAL TRADE COMMISSION, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. 85-86 (1935), which concluded that the small independent rivals of the large chain stores would continue to lose ground as long as the chains continued to offer lower prices to consumers. Part of this competitive advantage was attributed to the ability of the chains to wrench discriminatory concessions from their suppliers. But see Adelman, Price Discrimination as Treated in the Attorney General's Report, 104 U. PA. L. REv. 222, 232 (1955), where the author states that the FTC's own data showed that more than 85 percent of the competitive advantage garnered by the chain stores was a direct result of their own internal operating efficiencies.

26 363 U.S. 336 (1960). One holding of this decision, with Mr. Chief Justice Warren writing the opinion, was that the statutory phrase "discriminate in price" merely meant a price differential. Id. at 346-53. For the opinion of the court of appeals on remand, see FTC v. Anheuser-Busch, Inc., 289 F.2d 835 (7th Cir. 1961).

27 Section 2 of the original Clayton Act of 1914, ch. 323, § 2, 38 Stat. 730 (1914), was always interpreted as prohibiting a primary line "substantial lessening of competition." National Biscuit Co. v. FTC, 299 F. 733, (2d Cir. 1924); Mennen Co. v. FTC, 288 F. 774 (2d Cir. 1923). See also F. Rowe, supra note 8, at 7. This proscription of predatory conduct by sellers was carried over to the Robinson-Patman Act. 80 CONG. REC. 9415 (1936) (remarks of Congressman Utterback). For an extensive analysis of the legislative history of the Robinson-Patman Act, see C. Edwards, The Price Discrimination Law (1959). See also MacIntyre, The Role of the Robinson-Patman Act in the Antitrust Scheme of Things — The Perspective of Congress, 17 ABA ANTITRUST SECTION 325 (1960).
the Robinson-Patman Act embodies the original Clayton Act's proscription of certain discriminations in price "when the effect . . . may be substantially to lessen competition . . . in any line of commerce. . . ."

Section 2(a) of the Robinson-Patman Act, after stating the necessary jurisdictional elements,29 reenacts the original Clayton Act's "substantial lessening of competition" test. In addition, however, section 2(a) of the Act proscribes price discriminations "where the effect of such discrimination may be . . . to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . ."30 The legislative history of the addition is not illuminating,31 and both the courts and the Commission, in interpreting the Act, have had to consider whether a "substantial lessening of competition" provides a different standard than "injury to competition [with the discriminating seller]."

From an antitrust standpoint, the addition should represent mere surplusage. The focus should always be on the vigor of competition within the market. Certainly, mere injuries to certain specific competitors should be tolerated if, on the whole, the competitive level in the market remains satisfactory.32 As the Attorney General's Committee stated in 1955:


29 Basically, the Act will apply only when there are (1) sales (2) of commodities (3) of "like grade and quality" (4) in commerce. See F. Rowe, supra note 8, at 36. Even the interpretation of the jurisdictional elements has been less than clear. For example, there has been considerable debate about the meaning of "like grade and quality." See id. at 62-76. Compare FTC v. Borden Co., 383 U.S. 637 (1966) (labels or consumer preference do not differentiate products for the purpose of determining grade or quality), with Callaway Mills Co. v. FTC, 362 F.2d 435, 440 (5th Cir. 1966) (proof of comparable consumer preference and "salability" of a product is necessary to establish a prima facie case of like grade and quality).

30 15 U.S.C. § 13(a) (1964); see note 10 supra.

31 Ostensibly, the drafters of the Act merely injected the addition to plug a loophole. Under the original Clayton Act it would be possible in a localized monopoly to have the local monopolist driven out of business by a new and predatory monopolist without having a "lessening of competition." The market would be at the same level of competition both before and after the predatory action. It was felt that this situation would be covered by the Robinson-Patman "injury to competition" test. As Congressman Utterbach stated, the amendment was not intended to cover competition in general; it was only to focus upon "the effect of the discrimination upon immediate competition with the grantor or grantee." 80 Cong. Rec. 9415 (1936). For a criticism of this rationale, see Sherwood, supra note 25, at 310-12.

32 An unfortunate controversy has raged over whether the Act was meant to protect competition or competitors. From an antitrust standpoint, the Act should only protect competition. See Purex Corp., 51 F.T.C. 100, 112 (1954); F. Rowe, supra note 8, at 126-32. However, there has too often been a tendency to look at the harm to certain,
This Committee recommends that analysis of the statutory "injury" center on the vigor of the competition in the market rather than hardship to individual businessmen. For the essence of competition is a contest for trade among business rivals in which some must gain while others lose, to the ultimate benefit of the consuming public. Incidental hardships on individual businessmen in the normal course of commercial events can be checked by a price discrimination statute only at the serious risk of stifling the competitive process itself.\(^3\)

Indeed, the word "substantially"\(^3\) has been read to qualify not only the lessening of competition in an entire line of commerce, but also the injury to competition with any person who either grants or knowingly receives the discriminations.\(^3\) The FTC has stated: "The difference between the two concepts, if there be one, is slight since the Commission has interpreted the word 'substantially' as modifying both phrases in this portion of the Act."\(^3\) The central issue under the injury to competition test is whether the seller's price differences reflect the kind of competition fostered by the antitrust laws generally or competition that is so predatory and destructive that it will be inimical to effective market rivalry.\(^3\)

It has been clear for many years that, given the proper jurisdictional facts, the existence of predatory intent by a seller will

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34 The exact interpretation of the word "substantial" has been the subject of a long and arduous history in the courts. Much of the controversy has stemmed from the Supreme Court's decision in FTC v. Morton Salt Co., 334 U.S. 37 (1948). In that decision, the Court stated:

It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers. Id. at 50 (emphasis added).

The FTC, especially in its cease and desist orders, has tended to follow this restrictive approach. See, e.g., Thompson Products, Inc., 55 F.T.C. 1252 (1959).

Courts of appeals, however, have usually rejected a per se approach. See, e.g., Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), petition for cert. dismissed, 344 U.S. 206 (1952). As one court stated: "[I]t is implicit in the Act that discriminations which are negligible and which at best have a remote effect on competition are not within its prohibitions." E. Edelmann & Co. v. FTC, 239 F.2d 152, 155 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958). Most commentators agree that to fit the Robinson-Patman Act into the general antitrust policies of the Sherman and Clayton Acts, "minute inequalities" among competitors should not be proscribed. See C. Edwards, supra note 27, at 639; F. Rowe, supra note 8, at 132-36.

35 F. Rowe, supra note 8, at 125.


37 See E. Kintner, supra note 8, at 111.
support a finding of probable injury to competition at the primary line.\textsuperscript{38} Predation has been a difficult concept to define. One authority in the field has defined predatory intent as "(1) an intent to sell to one set of customers at a lower price than short-term profit maximizing considerations would dictate, (2) for the purpose of driving out of business a competitor (3) who is a significant market influence, (4) regardless of the competitor’s efficiency.\textsuperscript{39} The Commission would seem to concur with this definition. At times, however, it has concentrated on the purpose requirement and has skimped on requirements (3) and (4).\textsuperscript{40}

Proof of the illicit intent may be made either directly or indirectly. Direct proof consists of tangible manifestations of the subjective state of mind of the discriminator.\textsuperscript{41} Thus, such evidence as memoranda,\textsuperscript{42} statements,\textsuperscript{43} conversations of officials of the corporate defendant,\textsuperscript{44} and even the use of industrial spies\textsuperscript{45} has been accepted as direct proof of a predatory intent. Indirect proof of predatory intent may consist of certain acts of unfair competition,\textsuperscript{46} or of circumstantial evidence such as "below cost" sales.\textsuperscript{47} At any


\textsuperscript{39}Sherwood, \textit{supra} note 25, at 316. For the sake of comparison, that author has collected other attempts to define the subjective state of mind. \textit{See}, e.g., Turner, \textit{Conglomerate Mergers and Section 7 of the Clayton Act}, 78 HARV. L. REV. 1313, 1340 (1965) (defining predatory pricing as "selling at a lower price than customary profit-maximizing considerations would dictate, for the purpose of driving equally or more efficient competitors out of all or the greater part of the market"); \textit{Note, supra} note 24, at 141, which defines predatory intent as an "intent to destroy one's competition with resort, if necessary, to means not justified by one's short-term self-interest.

\textsuperscript{40}See F. Rowe, \textit{supra} note 8, at 144.

\textsuperscript{41}Sherwood, \textit{supra} note 25, at 215-16.

\textsuperscript{42}See General Foods Corp., 50 F.T.C. 885 (1954).

\textsuperscript{43}See Lloyd A. Fry Roofing Co. v. FTC, 371 F.2d 277 (7th Cir. 1966).

\textsuperscript{44}See Forster Mfg. Co. v. FTC, 355 F.2d 47 (1st Cir. 1964), \textit{cert. denied}, 380 U.S. 906 (1965); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957).


\textsuperscript{46}See, e.g., E. B. Muller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944), where the defendant, among other things, fraudulently falsified bills of lading to obtain advantageous freight fares, used iron oxide to artificially color his product (chicory), and falsely represented that his competitor used sugar beet molasses and other foreign substances to fortify its product.

\textsuperscript{47}See Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967). \textit{See also} F. Rowe, \textit{supra} note 8, at 146-51.
rate, the proof of predatory intent, be it direct or indirect, is of immense aid in defining the proscribed act. In fact, the illicit act is defined by the proven predatory intent. The Supreme Court has stated: "Good intentions will not save a plan otherwise objectionable, but knowledge of actual intent is an aid in the interpretation of facts and prediction of consequences."

The proven intent, combined with discriminatory pricing, allows the inference that the discriminator has sufficient market power to eventually cause the competitive injury. However, discriminatory pricing without any proof of predatory intent raises analytical problems in predicting a causal relationship between the price cuts and future injury to competition. In 1965 the FTC attempted to resolve this analytical problem in its Dean Milk Co. decision.

The Dean Milk case concerned the quantity discount system which Dean Milk Company had instituted in the Evansville, Indiana-Henderson, Kentucky market area. This system had been in effect for 8 years. A majority of the Commission found illegal territorial price discrimination based on below "delivered cost" prices and competitive injury. The Commission stated:

A conclusion that there is a "reasonable possibility" of adverse competitive effects upon competition on the primary or seller level does not require findings of either actual injury to competition or actual injury to competitors, nor does it require a finding of an intent on the part of a discriminator to injure or destroy a competitor.

Thus, the Commission looked at various market factors which in connection with the price differentials would warrant a finding of "probable injury to competition." Several of these factors are: a significant diversion of business from the seller's competitors; diminishing profits to the seller's competitors; the inferior size and

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49 Appalachian Coals v. United States, 288 U.S. 344, 372 (1933). See also F. Rowe, supra note 8, at 144.
50 See F. Rowe, supra note 8, at 144; von Kalinowski, Price Discrimination and Competitive Effects, 17 ABA Antitrust Section 360, 366 (1960); Sherwood, supra note 25, at 317. Professor Sherwood has interpreted Commissioner Elman's dissent in the Dean Milk case (see text accompanying notes 54-57 infra) as stating that if a conclusive presumption of competitive injury is raised by actual proof of predatory intent, the burdensome and often imprecise determination of injury can be eliminated. Id.
52 Id. at 22,528.
economic power of the seller's competitors; and price differentials of an economically significant depth.\textsuperscript{53} According to the Commission majority, these factors could cause future injury in the market; in the long run, the small competitors could be financially crippled, the local market could develop monopolistic or oligopolistic tendencies, and there could be a significant reduction in the number of sellers in the market.

The majority's reasoning was strongly criticized in Commissioner Elman's dissent.\textsuperscript{54} Elman stated that before Dean Milk entered the local market there were a number of small, marginal dairies in competition. Dean's entry in itself would account for the failure of some of the marginal producers.\textsuperscript{55} In addition, the company captured perhaps less than 2 percent of the market throughout the 8 years.\textsuperscript{56} Commissioner Elman reasoned that this fact negated any immediate attempt on the part of Dean Milk to monopolize or dominate the local market.\textsuperscript{57}

After the \textit{Dean Milk} case, the Commission seemed to abide with this new rationale in its \textit{National Dairy Products Corp.} decision. In \textit{National Dairy}, National offered a 3-week, two-for-one promotional scheme. This half-price offer met with spectacular and unexpected success. There was no quantity limit on the offer, and

\textsuperscript{53} Professor Rowe has compiled a list of factors which he feels tend to confirm the existence of probable competitive impairment:

(a) Monopoly or overpowering position of the seller in wider markets;
(b) Aggressive objectives toward smaller and weaker rivals;
(c) Deep, sustained undercutting of rivals' prices, or elimination of an established price spread between a "premium" and a lesser product;
(d) Persistent sales below the seller's "cost;"
(e) Actual or impending demise of a seller's sole rival in a particular market.

F. ROWE, supra note 8, at 161-62.

\textsuperscript{54} Commissioner Elman, whose 9-year term on the FTC ended on September 25, 1970, was a strong and persistent critic of his fellow Commission members for not encouraging the free competitive process. In a recent speech in St. Louis, Mr. Elman fired a parting shot at the FTC as he argued for a radical structural reform among the regulatory agencies whereby they would, among other things, be relieved of their "adjudicative responsibilities" and would become investigators, prosecutors, and policy formulators. \textit{See} Wall Street J., Aug. 12, 1970, at 4, col. 1; \textit{id.} at 12, col. 4 (Midwest ed.).

\textsuperscript{55} [1965-1967 Transfer Binder] TRADES REG. REP. at 22,566.

\textsuperscript{56} \textit{id.}

\textsuperscript{57} One commentator, who agreed with Commissioner Elman, has attempted to rationalize the majority's findings on the basis of a presumption of illegality from Dean's long-term, below-cost pricing. \textit{See} Sherwood, supra note 25, at 345. However, the majority illogically dismissed a charge of discrimination causing injury in the Lexington area because of insufficient data. \textit{[1965-1967 Transfer Binder] TRADE REG. REP.} at 22,543.

\textsuperscript{58} [1967-1970 Transfer Binder] \textit{TRADE REG. REP.} \textit{\$} 18,027 (FTC 1967).
consequently customers ordered large volumes. The local competition experienced a temporary loss of sales, but over the long run no producer incurred a loss and the demand in the local area was greatly increased by National's "breakthrough." Despite these facts, the Commissioner found a probable future injury:

The evidence establishes that respondent, if not satisfied with its market share, could and would engage in offers that not only substantially divert trade but are so designed that other sellers cannot compete. As so motivated, the probability of an adverse effect from respondent's price cuts is established and a close study of the market is not required . . . . The test of competitive injury is "one that necessarily looks forward on the basis of proven conduct in the past" . . . .

In 1967, the Supreme Court seemed to lend support to the Commission's nonpredatory, future injury approach with the *Utah Pie Co. v. Continental Baking Co.* decision. The *Utah Pie* case arose from a claim for treble damages by the Utah Pie Co. against three defendants — Pet Milk Co., the Carnation Milk Co., and the Continental Baking Co. — which had allegedly injured the plaintiff's competitive position and violated section 2(a) by selling frozen fruit pies at discriminatory prices in the Salt Lake City market. It was shown that, prior to 1958, the fruit pie market in the Salt Lake City territory was essentially an oligopoly. At that time Utah Pie had produced only fresh fruit pies and had suffered a loss of $6,000. In 1958 it built a new plant and entered the frozen fruit pie business. Although the company realized that it was entering an oligopoly, competing against multimarket, multiproduct firms, it calculated that it could save enough in shipping costs to be competitive.

Utah Pie was fortunate in entering the market at the right time. The market was a rapidly expanding one, growing from about 57,000 dozen pies in 1958 to almost 267,000 dozen pies in 1961. Because of its transportation cost savings and an aggressive price campaign, during the 1958-1961 period Utah had net incomes of $7,000, $12,000, $7,500, and $9,000 and market shares of 67%, 35%, 45.5%, and 45.3% respectively.

Naturally, the three multimarket sellers responded to the increased competition of Utah Pie. At trial, the jury explicitly found that there had been no conspiracy between the three. However,
it did find that there had been territorial price discrimination in the Robinson-Patman sense. There were price differentials between the Salt Lake City market and other surrounding markets that were not fully cost-justified.

Based on these price differentials, the trial court awarded a verdict for Utah Pie. The court of appeals reversed, stating that while there had been price differentials, there was no evidence supporting a finding of probable injury to competition. The Supreme Court reversed and remanded the case. It upheld the jury verdict by pointing out the presence of predation and below-cost sales. In addition, the Court stated:

The jury was entitled to consider the potential impact of Continental's price reduction absent any responsive price cut by Utah Pie. The jury could rationally have concluded that had Utah not lowered its price, Continental, which repeated its offer once, would have continued it, that Safeway would have continued to buy from Continental and that other buyers, large as well as small, would have followed suit. The jury could also have reasonably concluded that a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force.

Even if the impact on Utah Pie as a competitor was negligible, there remain the consequences to others in the market. There were nine other sellers in 1960 who sold 12.7% of the total market. In 1961 there were eight other sellers who sold 8.2% although the total market had expanded.

Thus, the Court seemed to lend support to the FTC's Dean Milk approach.

In 1968, the Court of Appeals for the Seventh Circuit reversed

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62 Continental Baking Co. v. Utah Pie Co., 349 F.2d 122 (10th Cir. 1965).
63 Id. at 135-36.
64 The case was remanded to the court of appeals because that court in holding that the plaintiff had failed to prove a prima facie case, had declined to rule on several issues. On remand, the Court of Appeals for the Tenth Circuit ordered a new trial after finding the jury's determination of damages to be unsupported by the facts. Continental Baking Co. v. Utah Pie Co., 396 F.2d 161 (10th Cir. 1968).
65 386 U.S. at 696, 702-03.
66 Id. at 699.
67 Id. at 699-700.
68 The Utah Pie case has been criticized by both legal practitioners and economists. See Bowman, Restraint of Trade by the Supreme Court: The Utah Pie Case, 77 Yale L.J. 70, 84-85 (1967) ("Utah Pie must rank as the most anticompetitive antitrust decision of the decade. This is no mean achievement in view of strong competition from such decisions as Brown Shoe [370 U.S. 294 (1962)], Von's Grocery [384 U.S. 270 (1966)], Clorox [386 U.S. 568 (1967)], and Consolidated Foods [380 U.S. 592 (1965)]."); Sherwood, supra note 25, at 364-70.
the Commission’s *Dean Milk* decision. The court, while basing its decision chiefly on the absence of a causal relationship between Dean Milk’s lower prices and any adverse effect on its competitors, distinguished the *Utah Pie* case on the ground that, unlike the defendants in *Utah Pie*, Dean did not engage "in the kind of aggressive, persistent, below-cost sales of the magnitude that occurred in *Utah Pie*." In short, the Seventh Circuit treated *Utah Pie* as a predation case.

In addition, the Court of Appeals for the Fifth Circuit has construed *Utah Pie* as holding that when evidence of predatory intent is found, the Robinson-Patman Act reaches an erosion of competition incident to a drastically declining price structure.

In *Beatrice Foods Co.*, the Commission stated that a finding of primary-line injury might be based either on proof of predatory intent or on a market analysis sufficient to raise a reasonable probability of injury to competition. The Commission found neither a sufficient market analysis to support a finding of probable competitive injury, nor a sufficient showing of predatory intent. Most significantly, in dealing with the Supreme Court’s *Utah Pie* decision, the Commission stated: “The Supreme Court held essentially that the evidence presented was sufficient to go to the jury on the issue of predatory intent.”

In discussing the facts in *Beatrice*, the Commission attributed the closing of one competitor’s plant and the discontinuance by other competitors of several distribution points to reflections of changing market conditions that did not, by themselves, prove any causal relationship between price concessions made to Kroger and the subsequent fortunes of either Beatrice or its competitors.

The *Beatrice* decision appears to reflect a return by the Commission, at least in the absence of an undefined “market analysis,” to a predatory intent standard for finding probable injury to competition at the primary line. The decision also reflects the importance of the causal relation issue in primary-line cases, as well as a willingness by the Commission to attribute reverses of the seller’s competitors to something other than the seller’s price discrimination.

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69 *Dean Milk Co. v. FTC*, 395 F.2d 696 (7th Cir. 1968).
70 Id. at 708.
71 *Borden Co. v. FTC*, 381 F.2d 175, 179 n.12 (5th Cir. 1967).
73 Id. at 21,302.
74 Id.
IV. INJURY TO COMPETITION: SECONDARY OR BUYER LINE

A. In General

In the Beatrice case, the Commission found that the mere existence of substantial price differentials between competing purchasers in a price sensitive atmosphere is sufficient to give rise to an inference of reasonable probability of injury to competition at the secondary or buyer's line. There is nothing new in this approach. The Supreme Court in FTC v. Morton Salt Co. stated that substantial price differentials justified an inference of secondary-line injury. In Foremost Dairies, Inc. v. FTC, a circuit court of appeals, citing Morton Salt, stated:

[1]t seems well-established that where the record indicates a price differential substantial enough to cut into the purchaser's profit margin and discloses a reduction which would afford the favored buyer a significant aggregate saving that, if reflected in a resale price cut, would have a noticeable effect on the decisions of customers in the retail market, an inference of injury may properly be indulged.

In Beatrice, the respondents claimed that the price differentials were not fairly indicative of the size of the advantage given to the favored buyer, Kroger. In fact, they claimed that an examination of other relevant factors would show that Kroger did not receive any competitive advantage from the price differentials. Two of these factors are particularly noteworthy. The first involved the asserted increased costs borne by the favored buyer. The second involved the asserted value differentials between private label and brand label products. Both of these factors were alleged to have eliminated any apparent competitive advantage, thus precluding any injury to competition.

B. Increased Buyer's Costs ("Functional Discounts")

The issue raised by this section is whether a nominal price differential to a favored buyer may be offset by added costs or functions performed by this favored buyer. More specifically, is this the...
type of price discrimination which will cause a competitive injury on the secondary line?\textsuperscript{79}

The issue is best presented in terms of this hypothetical situation: Is there a probability of injury to competition at the buyer’s level where the seller charges Buyer A a price of 10 and Buyer B a price of 15; A performs functions such as stacking merchandise, providing architectural design services, and employing outside salesmen, all at a cost of 5; B does none of these things, making the equivalent costs of A and B attributable to the product on resale 15?\textsuperscript{80}

One possible approach to this question would be to recognize that the performance of several marketing functions could be handled by an integrated distributor. Thus, the amount of reimbursement or price differentiation granted to the integrated buyer by the supplier could be “reasonably related to the expenses assumed by the buyer.”\textsuperscript{81} Under this method, it would be an acceptable defense to equate the price differential with the buyer’s increased costs.\textsuperscript{82}

The FTC, however, has evolved a different approach to the question. Accordingly, the seller will be liable under section 2(a) of the Robinson-Patman Act unless he can cost justify the difference in selling prices on the basis of his own cost savings, rather than the buyer’s increased costs. In addition, the seller will be liable under section 2(d)\textsuperscript{83} unless the additional functions performed by A are

\textsuperscript{79} See generally C. Edwards, supra note 27, at 313-17 (1959); E. Kintner, supra note 8, at 138-44 (1970); F. Rowe, supra note 8, at 188-93.

\textsuperscript{80} In Doubleday & Co., 52 F.T.C. 169 (1955), the Commission recognized the justification for these discounts:

Functional discounts long have been a traditional pricing technique by which sellers compensated buyers for expenses incurred by the latter in assuming certain distributive functions. The typical functional discount system provided for graduated discounts to customers classified in accordance with their place in the distributive chain, namely, wholesaler, retailer and consumer in diminishing amounts. They were intended to reflect, at least from an economic viewpoint, the seller’s estimates of the value of the marketing functions performed by the various classes of customers. Id. at 207.

\textsuperscript{81} Id. at 209.

\textsuperscript{82} This approach was apparently the one originally utilized by the Commission. See Doubleday & Co., 52 F.T.C. 169 (1955), discussed in Note, FTC Reexamines Functional Discounts in Integrated Industries, 56 Colum. L. Rev. 626 (1956); Comment, Regulation of Business — Robinson-Patman Act — A Further Look at Functional Discounts, 54 Mich. L. Rev. 659, 676-78 (1956). In Doubleday the Commission specifically objected to the trial examiner’s holding that a seller must justify his prices based upon his own costs, rather than the buyer’s increased costs. 52 F.T.C. at 209 n.7. For an analysis of this position and its subsequent evolution in the FTC, see F. Rowe, supra note 8, at 190-93.

\textsuperscript{83} 15 U.S.C. § 13(d) (1964). Section 2(d) provides:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in considera-
amenable to treatment under that section and are so treated, that is, unless B is given the opportunity to obtain the lower price by providing the functions described.  

The increased costs to Kroger involved in the Beatrice case related to the number of deliveries and the activities of Beatrice's routemen. In serving Beatrice brand customers, the routemen called at least once every workday, moved the milk from the truck to the cases, moved old milk forward in the cases and put new milk in the back, spent time on ordering, billing, and invoicing, and sometimes returned to a store several times a day to keep the cases supplied. On the other hand, in delivering private label products to Kroger, the routemen called once every 5 days and unloaded the goods on a loading dock, after which Kroger employees did all the remaining work.

In the Beatrice decision, the Commission resolved the competitive injury issue on the grounds that there was a failure of proof. After first noting that it is no defense in a price discrimination case that the favored purchaser incurred additional costs, and that a defense exists only where the seller can justify his favorable price on the basis of his own cost savings, the Commission went on to state: "The record contains no evidence as to the amount of additional costs incurred by Kroger." In addition, the Commission stated that any evidence of Kroger's increased costs should have been geared to specific store locations.

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86 Id.
87 Id. at 21,306-07.
88 Id. at 21,307. The Commission went on to state: Indeed, one can assume that the incremental cost to a large chain store of moving milk from its delivery platform to the dairy cases and maintaining these cases would be comparatively insignificant. Kroger's use of centralized billing and long-range order procedures, on the other hand, would probably result in cost savings to it rather than in additional expenses. Id.
Thus, it is unlikely that respondents in future secondary-line cases will be able to prove lack of injury to competition on the buyer level unless the record contains detailed factual evidence of the favored buyer's increased costs on an individual store basis, and the record also establishes that the difference in prices do not exceed such additional costs. Creating such a record will be a formidable job, and, even if done, the seller will still be exposed to a section 2(d) charge if he cannot establish that he made the lower price available to the favored buyer's competitors in exchange for the performance of functions that they were reasonably able to perform.

C. **Private Label vs. Brand Label Products**

In its 1967 decision in *Borden Co. v. FTC*, the Court of Appeals for the Fifth Circuit examined the issue of injury to competition at the secondary line. The facts disclosed that in 1956 and 1957 Borden began selling private label milk to retailers in the South, especially in Tennessee and South Carolina. Prior to 1956, only Borden brand milk had been sold to these southern retailers. Borden was able to accomplish this label changeover by introducing private label packaging of milk in its southern plants. The court noted that the average price discrimination between the private label and brand label was $1.19 per case. The court further pointed out that wholesalers and retailers testifying in the case had admitted that private label milk was interesting to them only at a price of $1.50 to $2.00 less per case than Borden brand milk. The *Borden* court found the wholesalers' and retailers' attitude quite understandable. Through national advertising and promotion, Borden had created a consumer preference for the Borden label. The court stated that the wholesalers and retailers knew that milk carrying a private label rather than the Borden label could only be sold at a much lower price than Borden brand milk. Therefore, these wholesale and retail purchasers of the private label milk were willing to buy from Borden only at a substantially lower price.

The court concluded that Borden's price discrimination did not violate section 2(a) at the secondary level of competition. According to the *Borden* majority:

> [W]here a price differential between a premium and nonpremium brand reflects no more than a consumer preference for the premium brand, the price difference creates no competitive advantage to the

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80 381 F.2d 175 (5th Cir. 1967).
recipient of the cheaper private brand product on which injury could be predicated. . . . The record discloses no evidence tending to show that Borden's price differential exceeds the recognized consumer appeal of the Borden label. Nor has it been suggested that the prices are unreasonably high for Borden brand milk on the one hand, or unrealistically low for the private label milk on the other.91

In the Beatrice opinion, the Commission stated that some differential between name brand and private brand products may be tolerable under the Robinson-Patman Act, and that in a proper case the differential between the two may be taken into account in determining secondary-line injury. However, the Commission did not find Beatrice to be such a case. The majority concluded that the facts indicated that "Kroger, by its own action sought to deny the value of any differential between name brand and private brand products."92 The most damaging fact was that Kroger usually sold the private label products at a price equal to the brand name products.93

V. CONCLUSION

In the primary-line injury to competition area, Beatrice is a significant departure from the Commission's Dean Milk decision, in which "probable injury to competition" was found on the basis of a market analysis.94 In the secondary line, Beatrice reflects little change in the Commission's established approach to buyer-line injury to competition, as supported by the Supreme Court in Morton Salt.95 The Beatrice decision indicates that respondents in future cases will continue to have difficulty in successfully asserting the defenses of increased buyer costs and private versus brand label public preference.

Perhaps the two new Commissioners will add further gloss to the Commission's treatment of these issues.96

91 Id. at 181.
93 The majority examined several factors which they considered relevant in reaching their conclusion that the Borden rationale was not applicable to the Beatrice facts. The Commission pointed out that Kroger marketed the private label products very aggressively, that the private label products were given favored shelf space in the stores, and that Kroger even gave free samples of the private label products. Id.
94 See notes 52-53 supra & accompanying text.
95 See text accompanying notes 75-78 supra.
96 See note 16 supra.