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# THE ROBINSON-PATMAN ACT IN ACTION*

THE ANTI-TRUST statutes have two interests: to prevent the growth of combinations in restraint of trade, and to declare and enforce rules of monopolistic competition. Public attention was formerly concentrated on the market problems incidental to the monopolistic size and strength of producers—that is, of sellers. The earlier anti-trust statutes were therefore written, and in the main administered chiefly as rules which might if enforced preserve conditions of potential competition among manufacturers.[1]

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1. The anti-trust laws, and the literature concerned with them, have hitherto dealt almost entirely with problems of competition between sellers. NAT. IND. CONF. BOARD, PUBLIC REGULATION OF COMPETITIVE PRACTICES (1929) c. 3, 71-88; Handler, *Unfair Competition* (1936) 21 IOWA L. REV. 175, 180, 203-204, 221, 244-251; McLaughlin, *Legal Control of Competitive Methods* (1936) 21 IOWA L. REV. 274, 285; Watkins, *An Appraisal of the Work of the Federal Trade Commission* (1932) 32 COL. L. REV. 272, 277. Section 2 of the Clayton Act [38 STAT. 730 (1914), 15 U. S. C. § 13 (1934)] was framed primarily to eliminate regional price discrimination. See H. R. REP. No. 627, 63d Cong., 2d Sess. (1914). This form of discrimination was practiced by national manufacturers who undersold their smaller competitors operating within a comparatively restricted

But public interest has shifted to the problems of policy suggested by the progressive monopolization of the process of distribution. Recent structural changes in methods of distribution require the legislature to decide what should be done to control prices in a market in which there are a few powerful buyers and either few or many sellers.[2] The special problem of such markets is price discrimination, characteristically imposed by the powerful buyer on the relatively weak seller. Price discrimination, always an effective instrument of sellers' monopoly, has conspicuously accompanied, and perhaps contributed to the growth of large distributive units like the chain stores and the national mail order houses.[3] Manufacturers have sold to the chains at prices below those charged to independent retailers buying direct, and in many cases, even below those charged to regular wholesalers.[4] These price differentials may correspond in part to savings in production, selling, and delivery costs incidental to quantity selling. On the other hand, parts at least of the differentials are a concession to the bargaining power of the chains,[5] often given secretly,[6] and hardly based on differences in cost. Moreover, disclosed discounts frequently concealed rebates of .the same type, as when an advertising allowance was given and no advertising actually done.[7] As a result of reductions in purchasing costs thus achieved, together with lower operating costs made possible by such factors as more efficient management and the maintenance of subsidiary warehouses and brokerage offices, the chains were able fairly consistently to undersell both independent retailers, and, though with less complete success, cooperatives.[8] Independents, wholesalers and retailers, have consequently found it increasingly difficult to operate at a profit.[9] The Clayton Act was not elastic enough, nor

territory. The losses which such a practice entailed were recouped by maintaining prices "above fair market value in other sections." *Id.* at 8-9. This type of discrimination apparently disappeared after 1914. See CLARK, ECONOMICS OF OVERHEAD COSTS (1923) 424. For some of the few efforts by the Federal Trade Commission to consider the problem of large buyers under the anti-trust laws, see BURNS, THE DECLINE OF COMPETITION (1936) 5-7; see note 10 *infra*.

2. Some economists use the word "monopsony" to contrast the market of a few buyers with the monopolistic market of a few sellers. See ROBINSON, THE ECONOMICS OF IMPERFECT COMPETITION (1933) 218-231.

3. See F. T. C., FINAL REPORT ON THE CHAIN-STORE INVESTIGATION (Sen. Doc. No. 4, 74th Cong., 1st Sess., 1935) 24; H. R. REP. No. 2287, pt. I, 74th Cong., 2d Sess. (1936) 3-4.

4. See F. T. C., *op. citra supra* note 3, 53-59.

5. See F. T. C., *loc. cit. supra* note 3.

6. For examples, see WITTE, PURCHASING POLICIES AND PRACTICES OF CHAIN DRUG COMPANIES (Vol. III, No. 2, of U. of Chi. Studies in Bus. Adm., 1933) 43-45. And see *Hearings before the Special House Committee Investigating the American Retail Federation*, 74th Cong., 1st Sess. (1935) 42, 137.

7. See F. T. C., *op. cit. supra* note 3, 59-65.

8. See F. T. C., *op. cit. supra* note 3, 53-57, and note 179 *infra*.

9. F. T. C., *op. cit. supra* note 3, 67 *et seq.*; *cf.* Legis. (1936) 36 COL. L. REV. 1285, 1287, n. 14. But in a recent study of thirty drug store failures only two of the thirty

sufficiently detailed, to reach the discriminatory price practices characteristic of this competition between the older agencies of distribution and the chain stores.[10]

The Robinson-Patman Act[11] is the first attempt by the national legislature to extend the anti-trust laws into this area of competition between rival methods of distribution.[12] Originally drafted and supported by the formidable lobby of the independent wholesale grocers, the Act was designed as an amendment to Section 2 of the Clayton Act, to curb the buying advantages of the chain stores;[13] as passed, however, it was worded in language sufficiently general to affect many industries which its proponents did not originally intend to be regulated,[14] and operates as an inclusive

druggists attributed their failure to "chain-store competition." CAUSES OF FAILURE AMONG DRUG STORES (U. S. Dep't Commerce, Domestic Commerce Series, No. 59, 1932) 11.

10. Attempts on the part of the F. T. C. to utilize the original Section 2 of the Clayton Act in aid of buyers were bluntly checked in Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923), and National Biscuit Co. v. Federal Trade Commission, 299 Fed. 733 (C. C. A. 2d, 1924), *cert. denied*, 266 U. S. 613 (1924). These cases limited the application of § 2 to discriminations, the effect of which might have been "to substantially lessen competition or tend to create a monopoly" in the seller's "line of commerce." Although the Supreme Court rejected this interpretation in Van Camp Co. v. American Can Co., 278 U. S. 245 (1929), the Commission did not again attempt to employ § 2 to restrain discrimination induced by buyers until 1933, when it brought a complaint against the Goodyear Company. Matter of Goodyear Tire and Rubber Co., F. T. C., Docket No. 2116 (Sept. 13, 1933). Following the issuance of a cease and desist order on March 5, 1936, the respondent filed a petition for review in the Circuit Court of Appeals for the Sixth Circuit. See C. C. H. Fed. Trade Reg. Serv. ¶ 542 B. 308 (1936).

11. 49 STAT. 1526, 1528, 15 U. S. C. A. §§ 13, 13a (Supp. 1936), hereafter cited as "the Act."

12. The state legislatures have entered this area by enacting so-called anti-chain store taxes. For a review of the earlier forms of such measures, see Legis. (1931) 80 U. OF PA. L. REV. 289; Comment (1931) 40 YALE L. J. 431. Recent chain store taxes based on volume of business are discussed in Comment (1935) 45 YALE L. J. 314. For a summary of state chain store tax legislation basing the tax on number of stores, see F. T. C., *op. cit. supra* note 3, 108-109; and see *id.* 78-82. For a collection of state tax laws aimed at chains, see (1935) 21 IOWA L. REV. 93.

13. See *Hearings of Committee on the Judiciary on H. R. 8442, H. R. 4995, and H. R. 5062*, 74th Cong., 1st Sess. (July 10-19, 1935) 217, 27-28.

14. The following colloquy between Senator Vandenberg, inquiring as to the effect of the bill upon the automobile industry, and Senator Logan, who was in charge of the bill on the floor, is revealing:

Sen. Vandenberg. "Is it not a fact that this provision was written entirely with the field of retail merchandising in mind, and that it never was contemplated that it was intended to reach into industrial production?"

Sen. Logan. "Really that was my idea about it. However, it had to be general. We could not pick out one particular business."

Sen. Vandenberg. "I understand."

Sen. Logan. "But I had no idea, until the Senator from Michigan mentioned it, that it had anything to do with the automobile industry. It might have something to do

prohibition against discriminatory pricing in interstate commerce. Section 1 amends and extends Section 2 of the Clayton Act, but presents no fundamental change in legislative policy. Subsection (a) of Section 1 makes it "unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where either or any of the purchases involved in such discrimination are in" interstate commerce. It differs from the original Section 2 in that it is no longer necessary to demonstrate that the effects of the alleged discrimination in price "may be to substantially lessen competition or tend to create a monopoly in any line of commerce"; but only that the effect may be "to injure, destroy, or prevent competition with any person who either grants or knowingly[15] receives the benefit of such discrimination, or with customers of either of them." Although the distinction between an injury to an individual competitor and a substantial lessening of competition in a line of trade is more or less illusory, since an injury to a competitor is one of the most familiar means of proving that there has been a lessening of competition in general, the change in statutory language may make it possible to prove a violation of the law more easily than under the former Section, and at an earlier point in the life-history of a trade practice.[16] Subsection (a) makes several defenses available to an alleged violator. Most important of these is the provision that nothing in the Subsection "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 . . . commodities are . . . sold or delivered."[17] Other clauses permit sellers to select "their own customers in bona fide transactions and not in restraint of trade" and to change their prices "in response to changing conditions affecting the market . . . " Subsection (b) places upon the accused the "burden of rebutting the prima-facie case" made by showing that there has been discrimination, but it permits "a seller" to rebut that

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with the industry of mining . . . But . . . if we attempt to make exemptions . . . . we may run into difficulties with the Supreme Court." 80 CONG. REC. 6429 (1936).

15. Insertion of the word "knowingly" in Section 1(a) was probably inadvertent, for its effect is to relieve the *grantor* from liability although he grants a discrimination which may injure competition with the grantee's customer, provided that the grantee has no knowledge that he has received such a discrimination. That this was not intended, see 80 CONG. REC. 9414 (1936).

16. See H. R. REP. No. 2287, *supra* note 3, pt. I, at 8. Col. Charles H. March, Chairman of the F. T. C., believes that the addition of the clause, "or to injure . . . competition" etc., will have the effect of enlarging "enormously the ability of one who is unlawfully discriminated against to protect himself." Drug Trade News, September 28, 1936, p. 45, col. 1, 5.

17. But § 1(a) also provides, "That the Federal Trade Commission may . . . establish quantity limits . . . as to particular commodities . . . where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce . . ."

case by showing that the discrimination "was made in good faith to meet an equally low price of a competitor . . . "[18] Other subsections deal with dummy brokerage allowances,[19] advertising allowances, demonstrators, and other practices commonly used as vehicles for discrimination. The original Section 2, moreover, prohibited only the granting of unlawful discriminations; in the new Act, Congress has made it unlawful "to induce or receive" such discriminations in price, a provision designed to protect sellers against the bargaining power of the chains.[20]

The third section of the Act represents a considerable change in antitrust law in that it prohibits certain discriminatory transactions regardless of their effects upon competition generally, or upon competitors of the parties involved. This Section, under sanction of criminal penalties, unqualifiedly forbids "any person engaged in commerce . . . to be a party to, or assist in, any . . . sale . . . which . . . to his knowledge" grants "any discount, rebate," etc., not "available" to "competitors of the purchaser" in contemporaneous sales "of goods of like grade, quality, and quantity."[21]

This Comment will undertake to measure the impact of the Act on a group of business practices important in the present marketing organization of the main consumers' goods industries. Although the factual material for the study was drawn primarily from the experience of the drug industry, with a view to making a detailed and continuous survey possible, it is believed that the problems of interpretation and adaptation encountered there are typical of those which confront such industries generally in attempting to conform to the Act.

*The Wholesaler's Discount.* Discounts based on a purchaser's trade status are commonly given in the business of marketing consumers' goods.[22] The

18. Subsection (b) is not considered herein. See Zorn and Feldman, *Federal Trade Commission Hearings and the Robinson-Patman Act* (1936) 70 U. S. L. Rev. 620, 625-627; Legis. (1936) 50 Harv. L. Rev. 106, 116-117.

19. Section 1(c). The Robinson-Patman Act (Washington Post, 1936) 35-38; Thorp and George, Check List of Possible Effects of the Robinson-Patman Act (Dun and Bradstreet, 1936) 16; Fly, *The Sugar Institute Decisions and the Anti-Trust Laws: 2* (1936) 46 Yale L. J. 228, 239-242; Legis. (1936) 36 Col. L. Rev. 1285, 1312-1314.

20. Subsection (f): "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."

21. Section 3 also contains the following prohibitions: "it shall be unlawful for any person engaged in commerce . . . to sell . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

22. See Burns, The Decline of Competition (1936) 277-280; Alexander, *The Wholesale Differential* (1936) 9 J. of Bus. of U. of Chi. 314; Legis. (1936) 36 Col. L. Rev. 1285, 1298.

wholesaler's discount is perhaps the most important example of this class.[23] In the Robinson-Patman Act Congress failed to declare the legality of this practice explicitly,[24] and its failure makes the ultimate determination of the issue a matter of statutory construction for the courts. The legality of the wholesaler's discount as a discrimination under the Act will depend largely on whether or not the Federal Trade Commission and the courts will consider chain stores as competitors of independent wholesalers. For Section 1(a) of the Act prohibits only those price discriminations whose "effect . . . 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." Nor is a discount illegal under Section 3 of the Act unless it constitutes a discrimination against the purchaser's "competitors."

As a matter of economic fact chain store systems clearly compete with the independent wholesaler as well as with the independent retailer; the chains supplant the wholesaler by supplanting his customers and performing for their individual stores services previously performed by the wholesaler for the independent. It may be expedient, however, to consider the question less realistically; for if the Federal Trade Commission and the courts conclude that chain stores compete with wholesalers, it may be possible under the Robinson-Patman Act to outlaw a trade usage of long standing, not specifically forbidden by the Act, and hitherto regarded as permissible.[25] Thus in administering the Act the courts may find it convenient to classify chain stores and wholesalers as non-competitive because they do not sell directly to the same customers.[26] The use of this definition would probably

23. For an example of the wholesaler's discount, see Matter of Bird & Son, Inc., F. T. C. Docket No. 2937 (September 30, 1936), reprinted in Drug Trade News, October 12, 1936, p. 39, cols. 1-5; *Commission Hears Bird Case*, Printer's Ink, December 10, 1936, 57, 60. The wholesaler may receive his discount in the form of a higher quantity discount rate than that accorded to independents or to the smaller chains buying direct from the manufacturer. See Matter of Richard Hudnut, F. T. C. Docket No. 2973 (November 6, 1936), reprinted in Drug Trade News, November 23, 1936, p. 58, cols. 3-5; LEARNED, PROBLEMS IN MARKETING (1936) 186.

24. The bill as originally reported to the House contained the following provisions: "That nothing herein contained shall prevent or require differentials as between purchasers depending solely upon whether they purchase for resale to wholesalers, to retailers, or to consumers, or for use in further manufacture; for the purpose of such classification of customers . . ., the character of the selling of the purchaser and not the buying shall determine the classification . . ." See H. R. REP. No. 2287, *op. cit. supra* note 3, pt. II, at 1-2. This clause was later deleted without explanation at the request of the Committee on the Judiciary. See 80 CONG. REC. 8139, 8223.

25. See Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923).

26. Competition is "the effort of two or more parties, acting independently, to secure the custom of a third party by the offer of the most favorable terms . . ." Webster's New International Dictionary (1928) at 455.

lead to the further conclusion that wholesalers are not to be regarded as competitors of cooperative buying associations and chain buying syndicates.[27] For the *Mennen* case indicates that such retailers' associations will be classified in the category to which their constituent members belong.[28] The circuit court of appeals there said[29] that the nature of a purchaser's selling rather than its buying determines its trade status, and that under the original Clayton Act and the Federal Trade Commission Act, a manufacturer had a "right" to classify retailers' group buying organizations as retailers.[30]

But even if chain store systems are regarded as competing with wholesalers, the wholesalers' discount cannot be considered illegal under the Act unless it can be shown to restrain or injure that competition as a price discrimination. In some instances, no price discrimination could be shown. For the wholesaler's discount may be offset by other discounts given exclusively or in greater amount to chains, as where the chain obtains a larger quantity discount by purchasing in larger quantities, the net result being that the chain receives the same or an even lower price than the

27. Retailer cooperatives exist to some extent in the drug trade. At the close of 1929, 7,550 drug retailers, or 13.1% of the total number, were members of cooperative buying associations. See F. T. C., COOPERATIVE DRUG AND HARDWARE CHAINS (1932) (Sen. Doc. No. 82, 72d Cong., 1st Sess.) 3. But they have not enjoyed the success of those in the grocery trade. *Id.* at 12; *cf.* MERRELL, GRETHER, AND KITTELLE, RESTRICTION OF RETAIL PRICE CUTTING WITH EMPHASIS ON THE DRUG INDUSTRY (N. R. A. Work Materials No. 57, 1936) 43, and Ball & Larrabee, *Drug Voluntaries*, Printer's Ink (December 3, 1936) 53 (both suggesting reasons for this failure). Manufacturers dislike to grant trade discounts to cooperatives for fear of boycotts by regular wholesalers. *Cf.* F. T. C., *supra*, at 14; see LEARNED, PROBLEMS IN MARKETING (1936) 190.

For a discussion of chain buying syndicates, see F. T. C., SPECIAL DISCOUNTS AND ALLOWANCES TO CHAIN AND INDEPENDENT DISTRIBUTORS—TOBACCO TRADE (Sen. Doc. No. 86, 73d Cong., 2d Sess., 1934) 13, 14. For chain drug company officials' attitude toward cooperative buying, see WITTE, *op. cit. supra* note 6, at 39. "The cooperative usually confines its activities to those lines in which the individual chain's volume is not large enough to allow it to get quantity discounts itself." *Id.* at 37.

28. Mennen Co. v. Federal Trade Commission, 288 Fed. 774 (C. C. A. 2d, 1923), *cert. denied*, 262 U. S. 759 (1923).

29. *Id.* at 782.

30. A special problem of classification is raised by those retail chains who engage in wholesaling operations. In the drug trade in 1930, 14.3% of all drug chains reporting (21.9% if measured by sales) engaged in such operations, and in 1928, the ratio of their wholesale sales to total sales was 10.5% (2.3% of all drug chain sales). F. T. C., WHOLESALE BUSINESS OF RETAIL CHAINS (Sen. Doc. No. 29, 72d Cong., 1st Sess., 1932) 6, 9. These chains sell at wholesale primarily to dispose of surplus stock. *Id.* at 29.

They might argue that in selling at wholesale they are in competition with wholesalers and therefore entitled to the wholesaler's discount. The problem is complicated by the fact that at the time of purchasing commodities, the chains cannot determine what portion thereof, if any, will be sold at wholesale. It is possible that manufacturers would be required to give such chains "rebates on that part of the business later shown to have been done at wholesale." See THORP AND GEORGE, *op. cit. supra* note 19, at 20.

wholesaler.[31] If the chain and wholesaler receive the same price, the chain would have no cause to complain under the Act even though the cost of selling to it was lower than that of selling to the wholesaler, for the Act apparently does not compel the granting of a price differential because of differences in cost.[32]

It has been suggested that even if wholesalers are not regarded as competitors of chains and other retailing groups, wholesalers' discounts are illegal if they are so large that the wholesaler will pass enough of the benefit on to his retailing customers, to permit them to undersell retailers buying direct from the manufacturer, since the Act prohibits price discriminations whose "effect . . . may be . . . to injure . . . competition with . . . customers of either" the manufacturer or the wholesaler.[33] In the drug industry at least, however, it is highly improbable, if not impossible, that the wholesaler's discount is ever sufficiently large to permit this result, since the wholesaler's costs of distribution plus the profits he takes more than neutralize his trade discount.

The attitude of the Federal Trade Commission toward the wholesaler's discount is not clear from the complaints which it has brought thus far under Section 1 of the Act. Although at least three refer to wholesalers,[34] and in two of these the Commission cites examples of the wholesaler's discount, only one can possibly be construed as questioning its legality.[35] Even in this instance, it is by no means clear that the Commission intended to plead that the wholesaler's discount was unlawful.[36]

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31. Some manufacturers consistently sell at the same price to retailers and wholesalers. LEARNED, PROBLEMS IN MARKETING (1936) 199; *Distribution Policy of a Hosiery Manufacturer* (1925) 3 HARV. BUS. REV. 240. Other manufacturers sell at lower prices to chains than to wholesalers, LEARNED, *op. cit. supra*, at 440, 445.

32. At one stage in the legislative history of the bill a phrase was inserted which would have clearly permitted a seller to refuse such a differential. See H. R. REP. No. 2287, *op. cit. supra* note 3, pt. I, at 2. Its deletion later was termed a "minor change," and was explained on the ground that the phrase was "unnecessary." See H. R. REP. No. 2951, 74th Cong., 2d Sess. (1936) 6.

33. See Montague, *Merchandising Under the Robinson-Patman Act*, Advertising & Selling, October 8, 1936, 29, 76; Daughters, *Lawful Discrimination under the Robinson-Patman Act*, Dun & Bradstreet Monthly Review, October, 1936, 7, 8, 40.

34. Matter of Richard Hudnut, Matter of Bird & Son, Inc., both *supra* note 23, Matter of United States Quarry Tile Co., F. T. C., Docket No. 2951 (October 17, 1936), reprinted in Drug Trade News, October 26, 1936, p. 32, cols 4-5. See THE ROBINSON-PATMAN ACT (Washington Post, 1936) 11.

35. Matter of Richard Hudnut, *supra* note 23.

36. Little information is yet available as to the drug trade's reaction to the Act insofar as trade status discounts are concerned. It is reported that "in none of the trades" in which the wholesaler's discount exists, have the producers used the Act "as an excuse to withdraw the discounts allowed prior to its passage." Alexander, *The Wholesale Differential* (1936) 9 J. OF BUS. OF U. OF CHI, 314, 338. This is contradicted, however, by one drug chain in a communication to the YALE LAW JOURNAL, dated November 2, 1936.

The strongest practical justification for the wholesaler's discount, as a matter of policy, is the manufacturer's interest in keeping the independent wholesaler in business, partly because of the wholesaler's ability to distribute to independent retailers in rural areas where chain stores are less numerous than in cities,[37] and partly to prevent the chain-store purchasers from dominating distribution completely.[38] But the contention that the wholesaler performs a useful economic function hardly justifies a usage which give him a price advantage over alternative agents of distribution. To the extent that he actually provides needed services not made available by the chain, his survival would seem assured without a price subsidy. Meanwhile, elimination of the wholesaler's discount will tend to remove those wholesalers who have been accustomed to demand larger trade discounts rather than to increase the efficiency of their management.[39]

*Quantity Discounts.* Discounts which purport to reward the purchaser of large quantities of a commodity with a price lower than that charged to other purchasers are the most familiar of all vehicles for price discrimination.[40] The drug industry has developed the quantity discount in a variety of forms, of which three or four may be isolated as typical and important.[41] One frequently used in the drug industry is the "straight quantity discount." It appears as a specific percentage deduction from the unit price when a stipulated number of units are purchased in one sale.[42] The schedule of discounts commonly provides for progressively larger deductions as quantities purchased increase. Of the several forms of quantity discounts, this is the one most nearly capable of being administered to reflect the savings in costs believed to result in many industrial situations from purchases in large quantities. But this form of the quantity discount is frequently given,

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37. See Ostlund, *The Distribution at Wholesale of Various Proprietary, Drug, and Sundry Items* (1936) (Bull. No. 20, Statistical Div., Nat. Wholesale Druggists' Assoc.) 6; Address of H. J. Ostlund reprinted in Drug Trade News, September 28, p. 14, col. 4. But *cf.* WITTE, *op. cit. supra* note 6, at 23–24.

38. That the independent is the only bulwark that the manufacturer has against domination by the chains, see WITTE, *op. cit. supra* note 6, 71–74. And see BURNS, *op. cit. supra* note 1, at 280.

39. *Cf.* Copeland, *The Present Status of Wholesale Trade* (1928) 6 HARV. BUS. REV. 257, 262–263; Ball and Larrabee, *Whither Wholesaling?*, Printer's Ink, December 17, 1936, 6, 108. For an unsuccessful attempt to entrench the wholesalers' discount under the N. I. R. A., see Section 1 of Article VIII of the N. R. A. Code of Fair Competition, Wholesaling or Distributing Trade; LEARNED, PROBLEMS IN MARKETING (1936) 446-457.

40. *Cf.* Learned, *Quantity Buying from the Seller's Point of View* (1929) 8 HARV. BUS. REV. 57, 63–65.

41. See F. T. C., SPECIAL DISCOUNTS AND ALLOWANCES TO CHAIN AND INDEPENDENT DISTRIBUTORS—TOBACCO TRADE, *supra* note 27, 16–26.

42. The classification herein adopted is not identical with that employed by the F. T. C. in its chain store reports. The Commission had no category for non-progressive, non-cumulative quantity discounts. *Id.* at 21–23.

like other discounts, merely to promote sales.[43] Another familiar form of quantity discount is the cumulative "volume allowance with a quota specified."[44] It consists of a percentage discount based on the total purchases made during a stated period and is given only if the purchases total a specified minimum.[45] As the amount of the total purchases increases above the minimum for the period specified, the size of the discount is ordinarily increased in proportion.[46] Discounts of this type are cited in a recent complaint in which the Federal Trade Commission charges Richard Hudnut and its subsidiaries with allowing independent retailers and chains having less than twenty stores a 5% discount payable at the end of a year if purchases during that year exceed $2,500 and with allowing customers operating more than twenty stores a similar discount if purchases during the year exceed $5,000.[47] The chief purpose of such discounts is probably to "encourage buyers to concentrate their purchases with one company," thereby inducing regular patronage, an objective which is apparently seldom accomplished.[48] Professor Learned has stated that cumulative discounts do not substantially reduce distribution costs due to a concentration of orders, nor result in a reduction of small purchases, and that many demands for rebates are "made to secure an advantage over a competitor."[49]

Variants of the cumulative quantity discount in the drug trade utilize in several ways the plan of giving a customer a special discount if his purchases

43. For an exceptionally clear example of the use of the straight quantity discount for this purpose, see LEARNED, PROBLEMS IN MARKETING (1936) 440. A further example is afforded by the practice of a cheese manufacturer who allows "a five percent discount on all specific purchases . . . amounting to five dollars or more in which one delivery is required." Matter of Kraft-Phenix Cheese Corp., F. T. C., Docket No. 2935 (September 30, 1936), reprinted in Drug Trade News, October 12, 1936, p. 38, cols. 3-5, p. 39, col. 1. The respondent has apparently conceded that the discount is given for purposes of sales promotion. See its Answer to the complaint, digested in (1936) 4 U. S. L. WEEK 297; *cf.* Drug Trade News, October 12, 1936, p. 34, col. 2.

44. See F. T. C., *op. cit. supra* note 41, at 21; Stevens, *Some Laws of Quantity Discounts* (1929) 2 J. OF BUS. OF U. OF CHI. 407, (1930) 3 J. OF BUS. OF U. OF CHI. 51.

45. The allowance may be given in the form of a lower unit price, rather than in the form of a percentage discount. See Matter of Standard Brands, Inc., F. T. C., Docket No. 2986 (November, 1936). This type of volume allowance may be given in addition to a regular quantity discount. See Matter of Richard Hudnut, *supra* note 23.

46. See, e.g., Matter of Standard Brands, Inc., *supra* note 45.

47. Matter of Richard Hudnut, *supra* note 23. And see Matter of Shefford Cheese Company, F. T. C., Docket No. 2936 (September 30, 1936), reprinted in Drug Trade News, October 12, 1936, p. 38, cols. 1-3. For examples of the cumulative type, see COPELAND, PROBLEMS IN MARKETING (4th ed., 1931) 722. See also the description in Federal Trade Commission v. National Biscuit Company, 7 Fed. Trade Com. Dec. 206 (1924).

48. See Learned, *Quantity Buying from the Seller's Point of View* (1929) 8 HARV. BUS. REV. 57, 65; *cf.* Copeland, *Some Present-Day Problems of Distribution* (1931) 9 HARV. BUS. REV. 299, 306.

49. Learned, *supra* note 48, at 67.

during one period increase above the total made during some prior period.[50] Finally, there is "the volume allowance with no quota specified," which has little resemblance to the quantity discount, as it is commonly employed.[51] It accounts for a large proportion of all discounts in the drug trade and may best be defined as a concession to the bargaining power of the purchaser[52] justified not because a particular sale or series of sales involve a large quantity, but because it is worth a price to the seller to get the purchaser as a customer, either from valuable advertising he will receive from the fact that a prominent retailer carries his product,[53] or because he has reason to expect, although each sale may not involve a particularly large quantity, that total purchases by the customer will accumulate in volume otherwise sufficient to permit a discount.[54] Thus in a recent complaint the Commission charged that Bird & Sons, Inc. sells floor coverings to Montgomery-Ward and Company at prices lower than those offered to competing purchasers and regardless of the quantity purchased by Montgomery-Ward.[55]

Section 1(a) of the Act prohibits quantity discounts unless they can be shown to "make only due allowance for differences in the cost of manufacture, sale, or delivery, resulting from the differing methods or quantities in which . . . commodities are . . . sold or delivered." The Act thus permits quantity discounts if the person defending the discount can prove that the sale or delivery to the favored customer cost less than the sale or delivery of the same commodity or service to other purchasers, and that the discount did not exceed in amount those differences in costs.[56]

There are several ways in which quantity sales might be considered to lower manufacturing costs. If overhead expenses are viewed as costs allocable to the production of each unit of output, each sale may be regarded as decreasing the amount of overhead "costs" which each unit sold should contribute to gross earnings. Since a large order effects a greater economy of this type than a small one, discounts proportional to the size of the order, giving to the purchaser a part of this economy, might be considered as justified by a saving incident to the size of the sale.[57] Second, to the extent that a particular manufacturer plans his production depending upon the orders

50. See F. T. C., *op. cit. supra* note 41, 23-25. An example is afforded by the price policy of a soap manufacturer who pays a cash allowance equal to "5 percent of the aggregate amount billed during the year, if the purchases exceeded by 10 percent the average annual purchases of the four preceding years. This allowance is computed and adjusted semi-annually." *Id.* at 23-24.

51. *Id.* at 16-21. This type is particularly common in the grocery trade. *Id.* at 21.

52. *Cf. id.* at 16.

53. *Cf.* WITTE, *op. cit. supra* note 6, at 47.

54. Communication from a small manufacturer to the YALE LAW JOURNAL, August, 1936.

55. Matter of Bird & Son, Inc., *supra* note 23.

56. Section 3 of the Act merely requires that in contemporaneous sales of goods of *like* grade, quality, and *quantity*, all discounts shall be available to all competitors.

57. Learned, *supra* note 48, at 59-60.

received in advance, a large order will permit him to space his manufacturing operations more evenly, thereby saving him the increase in labor charge per unit which results from overtime wages.[58]

Both the size of a sale and the methods used in handling it may affect a manufacturer's selling costs. Differences in the seller's procedure often accompany differences in the size of the sale and result in more or less tangible economies. Thus, customers who purchase in large quantities often place their orders without solicitation from salesmen, thereby effecting savings in selling costs in the form of salesmen's salaries.[59] Or when methods of sales are similar but quantities are varied, a larger order may be considered as reducing selling costs per unit in the form of salesmen's traveling expenses, since such expenditures are fixed, regardless of the size of each order.[60] Clerical and bookkeeping expenses in handling orders are other items included in calculating sales costs which are relatively small per unit on large orders.[61]

Moreover, costs of delivery may be different for sales which differ in quantity or method of handling or both. Thus, the unit cost of packaging, labeling, and transporting the commodity varies with the quantities involved in a particular sale.[62] And these differences in costs may be either offset or widened by other differences in methods of delivery, as where delivery is made to the individual stores of a chain rather than to a chain's central warehouse.[63]

This catalogue of possible variations in business procedure which might be regarded as sources of "differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are . . . sold or delivered" sufficient to justify a discount indicates how confused and inconclusive the quest for cost differentials under the Act may become. A preliminary classification of those cost elements which may not be considered allocable to particular sales under this Section is suggested by the Congressional debates on the Act. The statements of Congressmen in charge of the bill, though often contradictory, indicate that they regarded the manufacturing process as involving some "facilities or activities inseparable from the business as a whole," and others which were

58. *Id.* at 60–61.

59. LEARNED, PROBLEMS IN MARKETING (1936) 440, 445.

60. See Learned, *supra* note 48, at 61. 61. *Id.* at 62.

62. *Ibid.* McKesson & Robbins, Inc. (wholesale druggists) state: "From accounting experience we know that considerable shipping economies are effected where single monthly shipments instead of a great number of small shipments can be made." Drug Trade News, November 9, 1936, p. 3, col. 2, p. 63, col. 3.

63. See Fly, *supra* note 19, at 242–244. Furthermore, even when delivery is made to a central warehouse, the savings may be more than offset by the extra cost of handling. Thus, one purchaser receiving shipments at his warehouse in large quantities asks "that individual items be labeled for individual stores to which they are to go and that individual bills be made for each store." Learned, *supra* note 48, at 62.

"attributable to the business of particular customers."[64] They considered price differentials unlawful if "based on allocated or imputed, as distinguished from actual, differences in cost, representing particular facilities . . . which the favored customer may not have immediately utilized but with which the seller cannot dispense in the general conduct of his business."[65] Precisely what the Congressmen had in mind whan they distinguished "allocated" from "actual" costs is not clear, since almost all costs must be "allocated" in the accounting sense, especially for any firm which uses its facilities to produce more than one commodity or service. The most plausible reading of the passage, in its context, indicates that the distinction corresponds roughly to that taken by some cost accountants between direct and indirect costs.[66] "Direct costs . . . are costs visibly traceable to a given job or order or class of business without the need of difficult studies or allocations, but merely by watching the process."[67] Indirect costs are those "not so directly traceable," such as "the work of the central office, the power plant, watchmen and sweepers, and the sales force."[68] This distinction hinges upon the ease with which costs may be directly traced to each particular sale. Perhaps all that can be said is that any discount can be justified if it is *easy enough* to impute cost differences to the sale in which the discount is granted. The courts may find the process of imputation easier than the Congressmen did. The trial court in the *Sugar Institute* case, considering the legality of the Institute's attempted ban on quantity discounts, found that savings in indirect costs could be allocated to particular sales.[69] The fact that there seems to be no practical reason here for a sharp distinction between direct and indirect costs, coupled with the fact that the words of the statute on their face do not suggest the distinction, may foreshadow a judicial construction of the Section ignoring the distinction between "direct" and "indirect" costs which it seemed the purpose of Congress to make.

However far afield the courts will permit sellers to go in finding cost differences to justify discounts, the Act requires that differentials in price "make only due allowance" for such cost differences. This limitation of proportionality makes it difficult if not impossible to defend trade status discounts as generalized quantity discounts based on savings in costs; and

64. See H. R. Rep. No. 2287, *op. cit. supra* note 3, pt. I, at 10.

65. See Sen. Rep. No. 1502, 74th Cong., 2d Sess. (1936) 5-6. But see statements to the contrary made by Mr. Utterback. 80 Cong. Rec. 9417 (1936).

66. The trial court in United States v. Sugar Institute, 15 F. Supp. 817, 868 (S. D. N. Y. 1934), *aff'd*, 297 U. S. 553 (1936), found that quantity sales effected no appreciable savings to the refiners in *direct* costs. See Fly, *supra* note 19, at 242.

67. See Clark, Economics of Overhead Costs (1923) at 56.

68. *Ibid.*

69. United States v. Sugar Institute, 15 F. Supp. 817, 869 (S. D. N. Y. 1934), *aff'd*, 297 U. S. 553 (1936). The court found that sales which distributed production more evenly through the year effected savings to the refiners. See Fly, *supra* note 19, at 242.

raises serious doubts as to the legality of quantity discounts, which are more directly connected with the statutory criteria of "quantity or method" of sale, since it seems impossible to measure these differences in cost with any precision. Systems of cost accounting with respect to production costs have been developed in a few industries, "but even these are usually in terms of general averages . . . and almost never kept on a basis of purchasers' orders. In but few cases, are they developed in terms of the costs involved for various quantities which may go through the manufacturing process."[70] And apparently no adequate system of cost accounting dealing with the allocation of selling costs where a manufacturer employs different selling methods has yet been developed.[71] Therefore the prediction that "due allowance" may be construed to mean "reasonably more or less"[72] will be of little comfort to the seller who wants to continue to grant quantity discounts.

The Act is already perceptibly changing quantity discount usage in the drug trade. Members of the trade report that they have at least temporarily abolished all discounts which never purported to be based on costs, such as "volume allowances with no quotas specified."[73] Furthermore, while one toilet goods manufacturer writes that "we have not altered our quantity discount terms, believing that the discounts granted are fully justified by savings in selling and/or delivery costs,"[74] many manufacturers have apparently encountered considerable difficulty in establishing discount schedules which have a demonstrable relation to the savings in cost resulting from quantity purchases. This difficulty no doubt accounts for the action of some manufacturers who have abolished all discounts regardless of the relative cost of selling and distributing any order.[75] Some who have taken such

70. See Address of Dr. Willard L. Thorpe to Trade Association Executives, reprinted in CONFERENCE PROCEEDINGS ON THE ROBINSON-PATMAN ANTI-DISCRIMINATION ACT (1936) 55, 58.

71. *Ibid.*

72. THE ROBINSON-PATMAN ACT (Washington Post, 1936) 29; and *cf.* findings of fact in Matter of Goodyear Tire & Rubber Co., *supra* note 10: ". . . the problem is a practical one . . . [and] a discount is not to be condemned merely because it does not mathematically accord with cost differences."

73. Communication from a large drug chain to the YALE LAW JOURNAL, November 2, 1936. On the other hand, it is reported that many manufacturers are simply marking time, and continuing existing price practices until the F. T. C. indicates its attitude toward the specific prohibitions of the Act. Communication to the YALE LAW JOURNAL, December 26, 1936.

74. Communication to the YALE LAW JOURNAL, November 9, 1936. The Vick Chemical Company states: "The . . . Robinson-Patman Bill caused no change in Vick's sales policy . . . Our chief concern is to protect the best interests of all druggists. We have done this by not giving extra discounts or rebates, special quantity discounts or advertising allowances in any form to any customer." Drug Trade News, November 9, 1936, p. 3, col. 5.

75. Thus one pharmaceutical specialties and cosmetics distributor informed the trade that "effective October 26, 1936, . . . the same prices and terms will apply to all

action, however, are using the Act as an excuse for abolishing certain concessions to buyers which, though not outlawed by the Act, had long been obnoxious to them as price reductions.[76] Others, in a mood of initial panic, regard the Act as requiring a revolutionary change in all prior business practice, a conviction which may disappear as the Act takes on the concreteness of administration and adjudication.

Another change in quantity discount practice has occurred because the Act makes it difficult to avoid discriminating by way of a discount against those buyers, the quantities of whose purchases fall just below the amount necessary to justify the next higher discount. One seller has attempted to avoid this difficulty by subdividing the classes into which a purchase might fall, thus increasing the number of classes and decreasing the price differentials between each class.[77] Certain manufacturers are dealing with the problem in the opposite way, by revising and raising their minimum discount limit and dropping "from their lists of distributors" short-line jobbers "who have been in the habit of buying less than minimum quantities."[78] These manufacturers feel that although this action will have the result of confining their sales "only to those customers who are best able to earn maximum discounts," it is the most practicable solution to the problem of justifying quantity discounts under the Act.[79] This action appears to substantiate the contention made by a large wholesaler that some "manufacturers favored the smaller houses by giving them smaller quantities at the best discount."[80] The fact that an upward revision of discount schedules is resulting may also explain the statement of one chain that all wholesalers are being "forced to buy in quantities stipulated by the manufacturer."[81]

The treatment of quantity discounts under the Act raises squarely one of the ultimate objections to its policy: its excessively cost-minded theory

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customers . . . alike, regardless of the quantities purchased." Communication to the YALE LAW JOURNAL, November 6, 1936. See Druggists' Research Bureau, *What are Economical Quantity Purchases?*, DRUGGISTS' CIRCULAR, September, 1936, 77: "It is not always easy for a manufacturer to establish quantity discounts which are in keeping with the savings effected and which, at the same time, are equitable and fair to all his customers. Some manufacturers, recognizing this great difficulty, have eliminated all quantity discounts."

76. For examples of this use of the Act, see Sales Management, September 15, 1936; Drug Topics, October 19, p. 3, cols. 4-5.

77. See Drug Trade News, November 9, 1936, p. 3, col. 2.

78. See Drug Trade News, October 26, 1936, p. 1, col. 5, p. 33, cols. 2-3.

79. *Id.* at p. 1, col. 5. But that this action may have been due to "the establishment of consignment selling policies by manufacturers," see *id.* at p. 33, col. 2.

80. Communication to the YALE LAW JOURNAL, November 5, 1936.

81. Communication to the YALE LAW JOURNAL, November 2, 1936. One small drug manufacturer-distributor picturesquely writes that the Act "hurt the chain" because they formerly purchased "from hundreds of dealers," from whom they bought small quantities, and "chiseled and pumped" for everything they could get out of them "and were in most cases always successful . . .," and that these tactics have ceased.

of prices and price control.[81a] Any evaluation of the effect of the Act on quantity discounts, even accepting its premises as to the relation of costs and prices, must recognize that it will not neatly circumscribe all quantity discounts based on cost differentials and, leaving them untouched, eradicate the rest. The difficulty of adducing proof that a particular quantity discount is justified cost-wise will doubtless result in the elimination of many volume allowances which may have coincided, perhaps fortuitously, with cost differentials. The Act will furthermore make it difficult to justify either quantity discounts of the cumulative type and others which do not purport to reflect cost savings but are used as sales promotional devices or those which are used as vehicles of price competition in industries where listed prices are inflexible. For the Act allows discounts which recognize savings in cost resulting directly from large sales, but makes no provision for discounts which may themselves effect a savings in cost by stimulating sales, thereby increasing production, and making possible, it may be, a realization of economies incident to the larger scale.[82]

Defenders of the Act concede the force of these objections of economic policy; in their view they are overbalanced by the possible utility of the Act in eradicating "the volume allowance with no quota specified," which had been used to cloak discrimination in favor of the larger chains and mail-order houses. As in other areas of trade practice regulation within the scope of the Act, judgment as to its desirability depends on how seriously one regards the menace of the chain stores, and how important one considers price discrimination as a factor in their success.[83]

*Freight Allowances.* When goods are sold at a delivered price, buyers whose mode of taking delivery involves unusually low costs are commonly granted allowances which purport to give them the benefits of f.o.b. purchasing, in that the price charged them is corrected, by way of freight allowances, for the difference between the cost of delivery to them and the usual cost of delivery contemplated by the list price. While such freight allowances may be easier to justify than quantity discounts under the cost proviso of Section 1(a), they may be more vulnerable than most other discounts to attack under the first clause of Section 3. Consider, for example, a typical problem in freight allowances suggested by a usage in the drug industry. Some chains have their purchases shipped directly to their individual stores, while others receive their purchases at central warehouses from which they distribute the merchandise to their individual stores. Where

81a. *Cf.* p. 482 *infra.*

82. The trial court in the *Sugar Institute* case recognized this possibility. United States v. Sugar Institute, 15 F. Supp. 817, 869 (S. D. N. Y. 1934); see Fly, *supra* note 19, at 242.

83. As to the importance of price discrimination as a factor in chain store success, see *infra* note 180, *supra* note 3. On the chain stores as monopolies, see p. 479 *infra.*

these differences exist, a manufacturer who regularly prepays all freight charges regardless of the number of deliveries may give an allowance to those chains operating central warehouses "to cover the cost of distribution," or in the form of a "straight distribution allowance in lieu of deliveries at various stores."[84] Under Section 1(a), the legality of such allowances would appear to depend upon whether they can be justified as based upon savings in the "cost . . . of delivery." It should be possible in the usual case to demonstrate that delivery and billing costs of shipping carload quantities to a few central points are lower than costs of delivering small quantities to many stores.[85] But Section 3 prohibits any discount or allowance unless it is "available" to all "competitors" purchasing contemporaneously in like quantities. The question is whether a manufacturer can make freight allowances "available" to all his competing customers in accordance with this provision merely by offering the allowances to any purchaser who takes delivery at a central warehouse. The element of doubt in the situation is the fact that as a practical matter many purchasers would be unable to take advantage of the offer because of their inability to maintain central warehouses. A similar problem is presented whenever the manufacturer conditions the granting of a discount on some fixed requirement. It is hardly possible that he will be forbidden to impose any such conditions. On the other hand, it is equally unlikely under Section 3 that he could impose a purely arbitrary condition as a subterfuge to exclude all purchasers except the favored competitors. The freight allowance based on delivery to the purchaser's central warehouse does not on its face seem entirely a device to conceal discrimination, since delivery to the central warehouse of one chain results in some savings in cost to the manufacturer who delivers to the scattered stores of competing chain buyers. Yet the mere fact that those able to take advantage of the freight allowance are ordinarily those who have the greatest bargaining power might lead a court to hold that the offer of a discount was not "available" to all "competitors." In any event, the uncertainties of interpretation may cause many manufacturers to sell to all customers directly on an f.o.b. basis.

*Terms of Sale.* The practice of granting differing terms of sale to different purchasers presents a more puzzling problem of statutory interpretation.[86] Such differences may at times be clearly discriminatory. Thus, the

84. See F. T. C., *supra* note 41, at 43.

85. But see note 63 *supra*. *Cf.* F. T. C., *op. cit. supra* note 32, at 43. Of course, the manufacturer could not use the cost savings resulting from delivery to a customer's central warehouse to justify both a quantity discount and a freight allowance unless the saving equaled the sum of the combined discounts.

86. For a brief, general description of the practice, see COPELAND, PROBLEMS IN MARKETING (2d ed., 1923) 723. And see CONVERSE, ELEMENTS OF MARKETING (1931) 895-896.

National Association of Wholesale Druggists reports that in the drug trade a 1% discount (2% in the South) is offered for cash payment on all wholesalers' sales as a customary trade practice, but that larger discounts are occasionally granted for cash payment which are "essentially price adjustments."[87] It is not clear, however, that the Act applies to such discriminations. As originally introduced, the bill's prohibitions applied to discriminations either in price or in "terms of sale."[88] This phrase was ultimately deleted, however, because the Conference Committee believed that "the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the remainder of Subsection 1(a)."[89] In each case, then, the problem is to decide whether differences in terms of sale impinge on price so directly as to be considered differences in price. It seems reasonably clear that differences in the size of cash discounts would be treated as price differentials. But it is doubtful whether a manufacturer who sells to two customers at the same price, giving credit to one and demanding cash from the other, or offering them different credit terms, is to be regarded as discriminating in price. Such differentiation among customers seems permissible under the clause reserving to sellers discretion in "selecting their own customers in bona fide transactions and not in restraint of trade."

Where differences in terms of sale are considered as price differentials, they are nevertheless legal if they can be justified as being based on savings "in the cost of . . . sale . . . resulting from" a different method of sale. This provision would not permit random variations in the amount of cash discounts accorded to different customers. Nor could a manufacturer selling on credit charge higher prices to those purchasers whom he deemed bad credit risks because at the time of making such sales he could not justify the discrimination as one based upon "differences in . . . cost." But a manufacturer would probably be justified in charging a somewhat lower price in a cash sale than in a sale on credit, since a cash payment would certainly reduce his costs by giving him the use of the money for the loan period. Of course, the cash discount could make no more than "due" allowance for this saving in interest. It might be contended that cash payment does not reduce "the cost of manufacture, sale, or delivery" within the meaning of the Act, and that any cost reduction thus achieved does not result from "differing methods" of sale or delivery; but so narrow a construction

87. See OSTLUND, ANALYSIS OF THE OPERATION OF SERVICE WHOLESALE DRUGGISTS IN 1935 (1936) (Bull. No. 21, Statistical Div., Nat. Wholesale Druggists' Asso.) 4. A discriminatory policy in regard to cash discounts is described in Federal Trade Commission v. Mennen Co., 4 Fed. Trade Com. Dec. 258 (1922). For a use of the cash discount as a device for price adjustment, see COPELAND, PROBLEMS IN MARKETING (4th ed. 1931) 704; TOSDAL, PROBLEMS IN SALES MANAGEMENT (rev. ed. 1926) 382.

88. See H. R. REP. No. 2287, *op. cit. supra* note 3, pt. I, at 18.

89. See H. R. REP. No. 2951, *op. cit. supra* note 32, at 5.

of the Act seems unnecessary, and, if adopted, would result in the elimination of a business practice which in most instances is clearly within the category of discounts otherwise permitted by the Act.

*Advertising Allowances.* The advertising allowance is another device which manufacturers frequently employ as a vehicle for special concessions to favored customers.[90] Typically it takes the form of a payment, either in cash, credit, or merchandise, which purports to be made for newspaper advertising, handbill distribution, window display, or for what is vaguely termed "featuring" or "pushing."[91] In the drug trade, such allowances are quite common, being given more frequently to chains than to wholesalers who do relatively less advertising.[92] The motives for granting these allowances are mixed. They are obviously given to some extent for their ostensible purpose, namely, to obtain advertising of the manufacturer's product.[93] The manufacturer may favor the large chain over the small one or the direct buying independent either because the large chain can get lower advertising rates, or because its advertising is more effective in that its numerous stores make the advertised product more accessible to the public.[94] On the other hand, advertising allowances are often merely concessions to bargaining power.[95] This is probably least generally true in the case of allowances for newspaper advertising, since that form of advertising is easily checked by manufacturers to insure that the allowances are expended for the purpose specified.[96] The Federal Trade Commission reports that newspaper advertising allowances "are given on the basis of actual cost" more often than other forms.[97] But in the case of window and counter displays, advertising allowances are commonly a form of price cutting; for, although they are frequently based on a specified number of windows or counters for a specified period, many manufacturers make little or no attempt to ascertain whether they have been accorded the services for which they granted the allowances.[98] One authority views all forms of advertising allowances as a medium of price competition more palatable than price cutting to a manufacturer who "prefers not to admit violations of his faith . . . in a one-price religion."[99]

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90. See F. T. C., *op. cit. supra* note 41, 26-31.

91. *Id.* at 31-43. Frequently the allowance is in the form of "free" goods, which is given for "featuring" or "pushing" the manufacturer's product. *Id.*, 34-39. "The term 'featuring' . . . means nothing more, essentially, than that special or particular prominence is to be given to some article . . ." *Id.* at 34. Free deals are considered *infra*, page 472.

92. For the distribution of allowances among wholesalers, chains, and department stores, see F. T. C., SPECIAL DISCOUNTS AND ALLOWANCES TO CHAIN AND INDEPENDENT DISTRIBUTORS, *supra* note 41, at 9.

93. See LYON, ADVERTISING ALLOWANCES (1932) 16-22.

94. *Cf.* quotations from manufacturers in F. T. C., *op. cit. supra* note 41, at 27.

95. *Id.* at 31-43. 96. *Id.* at 31. 97. *Id.* at 32. 98. *Id.* at 32-35.

99. LYON, *op. cit. supra* note 93, at 24.

Section 1(d) of the Act was specially designed to clarify the legality of advertising allowances.[100] It forbids "any person . . . to pay . . . anything of value to or for the benefit of a customer . . . as compensation . . . for any services or facilities furnished by or through such customer in connection with the sale of any products . . . sold . . . by such person unless such payment . . . is available on proportionally equal terms to all other customers competing in the distribution of such products."[101]

One question raised by this Section is whether advertising allowances given to chains must be made available on proportionally equal terms to wholesalers, in view of the difference in the character of their business. As has been previously stated, it can be argued that the requirements of Sections 3 and 1(a) do not apply as between wholesalers and chains on the ground that they are not "competitors" nor "in competition" within the respective meanings of those Sections. But Section 1(d) applies to persons "competing in the distribution" of commodities. This phrase seems to describe quite accurately the chain-wholesaler relationship, and it therefore appears probable that advertising allowances must be made available to them on a proportionately equal basis.[102]

A second and more fundamental problem is raised by the fact that the Section is silent as to the element to which the allowance or payment is to be *proportionally equal*. One possibility is that the phrase is to be read as meaning "proportionally equal to the value of the advertising services rendered the manufacturer by the customer."[103] Under this standard, a manufacturer who gave customer *A* an allowance for a counter display would have to make counter display allowances available to all his customers competing with *A* in the distribution of goods, but could vary the amount of the allowance according to the value of the particular counter display. But it would be extremely impractical to attempt to regulate allowances accord-

100. Section 3 of the Act simply requires, as in the case of quantity discounts, that in contemporaneous sales "of goods of like grade, quality, and quantity," all advertising allowances shall be "available" to all "competitors."

101. Thus far, the F. T. C. has issued one complaint in which the respondent is charged with granting advertising allowances in violation of Section 1(d). Matter of Bourjois, Inc., F. T. C., Docket No. 2972 (November 9, 1936), reprinted in Drug Trade News, November 13, 1936, p. 57, cols. 4-5, p. 58, col. 1. The inducement or acceptance of advertising allowances would not appear unlawful unless the word "price" in Section 1(f) can be interpreted to include this type of discrimination. See note 20, *supra;* and *cf.* THE ROBINSON-PATMAN ACT (Washington Post, 1936) 45.

102. But see Legis. (1936) 36 COL. L. REV. 1285, 1315.

103. See THORP AND GEORGE, *op. cit. supra* note 19, at 13. According to the House committee in charge of the bill, "the phrase 'proportionately equal terms' is designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services . . . in the quantities specified. Where a competitor can furnish them in less quantity, but of the same relative value, he seems entitled, and this clause is designed to accord him, the right to a similar allowance commensurate with those facilities." See H. R. REP., No. 2287, *op. cit. supra* note 3, pt. I, at 16.

ing to this test in view of the inevitable variation in the value of the same service when rendered by different customers and the difficulty of arriving at any accurate estimate of that value.[104] For example, in the case of an allowance for counter display such variables would have to be measured as the size of the display and its location in the store, the location of the store itself, and the good-will of the proprietor.

The Section might be interpreted, however, as meaning that allowances and payments are to be proportionately equal to the volume of the customer's purchases from the manufacturer.[105] This test at least has the advantage that it is susceptible of practical administration. But its adoption would distort the function of the advertising allowance, since the manufacturer would not necessarily secure returns equivalent to his expenditures.

In the case of newspaper advertising, the manufacturer could satisfy the requirements of the Section regardless of which interpretation is adopted by offering to contribute some uniform percentage of the cost of any such advertising any customer wished to do. This was occasionally the practice before the Act,[106] but it has the obvious disadvantage of permitting customers to force the manufacturer to do more advertising than he wishes, particularly since the advertising may be of greater value to the customers' stores than to the manufacturer's product.[107]

The plan apparently being most generally adopted by manufacturers who wish to continue advertising allowances under the Act[108] utilizes the volume-of-purchases standard. This is conspicuously true in the case of newspaper advertising. Thus, many state that their allowances for newspaper advertising are now "on a 50–50 basis," the grantor sharing an equal portion of the advertising cost with the recipient, and the amount of the allowance being limited to a maximum of from two to five percent (depending on the particular manufacturer) of the price paid by the customer for each order.[109]

104. See Thorp and George, *op. cit. supra* note 19, 13–16; The Robinson-Patman Act (Washington Post, 1936) 42.

105. See Thorp and George, *op. cit. supra* note 19, at 13.

106. See Lyon, *op. cit. supra* note 93, at 63–64.

107. *Cf.* Thorp and George, *op. cit. supra* note 19, at 13. But *cf.* Statement of Hugo Mock to the Toilet Goods Association, reprinted in Drug Trade News, September 28, 1936, p. 98, col. 1.

108. Following the passage of the Act, the Great Atlantic & Pacific Tea Co. "discontinued all newspaper advertising in the Eastern district." Furthermore it "issued a ruling that no advertising allowances were to be accepted until the current confusion surrounding administration of the new law was cleared up." See N. Y. Times, July 18, 1936, p. 13, col. 4. But in August, this grocery chain "decided to accept advertising allowances from food manufacturers again and is offering contracts . . . essentially the same as those in effect previous to the enactment of the . . . law, except that they contain a clause to the effect that 'the manufacturer avows its willingness to make the same agreement as is here made with any other purchasers similarly situated and on proportionally equal terms.'" See N. Y. Times, August 27, 1936, p. 37, col. 1.

109. See Andrews, *Patman Policies*, Printer's Ink, November 5, 1936, 29, 37, 40–41.

One possible objection to all plans of this type is that on small orders the size of the allowance would be so insubstantial as to preclude the possibility that it could be actually expended even for cooperative newspaper advertising.[110] This being the case, if the retailer accepts the allowance, it would become an unlawful price discrimination under Section 1(a); and if he is forced to refuse it, he might claim a violation of Section 1(d).

In the case of allowances for window and counter display advertising, many manufacturers are said to have abolished them altogether,[111] but of those who have not, some are likewise employing the volume-of-purchases standard. Thus, a prominent manufacturer of toilet goods writes that all of its "payments for store advertising [are] on a per box basis."[112] However, this method is apparently not altogether satisfactory to some of the chains. They propose to sell advertising space to the manufacturers under an agreement entirely separate from the sales contract.[113] Under the plan, according to its proponents, "there will be no relation between the amount of goods bought by the chains and the price paid by manufacturers."[114] Instead, that price is to be determined upon a basis proportionate to the annual "volume of business done by each store subject to the contract."[115] These chains conclude that by divorcing the question of window and counter display advertising of the seller's products from the sales transaction itself, manufacturers will avoid the prohibition of the Section on the ground that the payment for advertising would no longer be "in connection with . . . the sale . . . " It seems doubtful, however, if this argument will be successful, although it could conceivably be urged that such advertising allowances would be granted on a basis "proportionally equal" to the value of the service for which the payments are given.[116]

The obvious weakness of Section 1(d) in failing to prescribe any element to which allowances are to be made proportionally equal is perhaps understandable in view of the difficulty of finding any entirely satisfactory standard for such comparisons. The only way out of the dilemma, short of abolishing advertising allowances altogether, would be to require a complete divorce of advertising allowances from the sales contract, a step which has been urged by experts.[117] To the extent that the isolation of the agreement would drive the allowance into the open where it could be measured against the

110. See Statement of Hugo Mock, *supra* note 107, at col. 1.

111. "There is little or no demand for windows or counters." Communication from a drug wholesaler to the YALE LAW JOURNAL, November 5, 1936.

112. Communication to the YALE LAW JOURNAL, November 9, 1936.

113. See Drug Trade News, September 28, 1936, p. 62, cols. 1-5, p. 63, col. 3, p. 101, cols. 3-4. And see proceedings of the meetings of the Affiliated Drug Stores, a buying syndicate composed of 31 drug chains operating more than 450 units, reported in Drug Trade News, *supra*, at p. 65, col. 1-2.

114. *Id.* at 62, col. 1.

115. *Id.* at 65, col. 1.

116. *Cf. id.* at 101, col. 4.

117. LYON, *op. cit. supra* note 93, at 94-95.

value of the service for which it was supposedly given, elimination of allowances granted solely because of bargaining power would tend to result. But this plan would never eliminate the element of discrimination entirely, for even if the manufacturer gave allowances only for actual value received, he would not be compelled to give such allowances to the smaller chains and independent retailers.

Aside from its failure to overcome the difficulty inherent in attempting to compel an equitable apportionment of advertising allowances, Section 1(d) has a further weakness. It does not require that independents buying from wholesalers be given allowances on proportionally equal terms with chains, since if such independents receive allowances at all, they secure them from wholesalers, and not, as do the chains, from manufacturers.[118] Meanwhile, since manufacturers are commonly adopting the volume-of-services standard in order to comply with the Subsection, the real function of advertising allowances, namely, to compensate the purchaser in accordance with the advertising services he renders, is being distorted. The fact that the Subsection may effect a wider distribution of advertising allowances does not weaken this objection.

*"P.M.s" or Push Money.* Some manufacturers grant "P.M.s" or cash allowances as a means of encouraging wholesalers' salesmen and retailers' clerks to apply special selling effort to the grantor's products.[119] These payments are sometimes made indirectly by giving the purchaser a discount based on the volume of his purchases which he is expected to pass on to his salesmen.[120] In other instances, the payment takes the form of a bonus over and above the salesman's salary, varying in amount according to his total sales, which is often paid directly by the manufacturer or wholesaler to the purchaser's salesmen.[121]

Although these payments are not directly outlawed by the Act, those at least which are paid to the customer must be made available on proportionally equal terms to all customers competing with him in the distribution of commodities under Section 1(d). But there is some doubt as to whether that

118. *Cf. id.* at 31–32.

119. See F. T. C., *op. cit. supra* note 41, at 43–44; WITTE, *op. cit. supra* note 6, at 52–53.

120. Thus, one toothbrush manufacturer "gave a Detroit drug chain . . . . a small credit 'to pay 4 cents per brush to clerks for special selling effort.'" A cigar manufacturer allowed a "jobber, 1 percent in credit as a commission to his salesmen. A toothpaste company giving a lump-sum allowance for several purposes includes among them 'extra compensation or prizes to salespeople.'" F. T. C., *op. cit. supra* note 41, at 44.

121. Examples of this method of granting "P.M's." are cited in two complaints issued by the F. T. C. under the Act: In the Matter of Bourjois, Inc., *supra* note 101; In the Matter of Richard Hudnut, *supra* note 23. These complaints also allege that the practice, as indulged in by the respondents, violates Section 5 of the Federal Trade Commission Act.

Subsection is applicable where the payments are made directly to the clerks. While the Statute covers not only payments made "to . . . a customer," but also those made for his "benefit," it seems open to question whether "P.M.s" are paid for the benefit of the customer. Recent complaints issued by the Federal Trade Commission attack the practice,[122] and if it is held that Section 1(d) is applicable to "P.M.s", the problem is again raised as to the meaning of "proportionally equal terms." It seems probable that manufacturers granting such allowances indirectly through customers would employ the volume-of-purchases standard, while those giving "P.M.s" direct would presumably be required to grant to each clerk of each customer "competing in the distribution" of the manufacturer's product the same percentage of his total sales. It is not unlikely that in view of these requirements, manufacturers will cease to grant such payments rather than attempt to make them available to all customers in accordance with the Act. It is unfortunate, however, that the Act did not specifically abolish them altogether. While there is a sharp conflict among the distributors of push money as to the desirability of the practice,[123] disinterested persons probably would condemn it as a form of commercial bribery apt to result in the deception of the consumer by the sales clerks who receive the payments.

*Demonstrators.* It has been the practice of certain manufacturers to provide favored customers with demonstrators while refusing such a service to others. The customers in whose stores demonstrators are to be placed are usually selected according to the volume of their purchases.[124] Thus, according to a recent Federal Trade Commission complaint, Richard Hudnut apparently furnishes a demonstrator only to those customers whose annual purchases total $5,000.[125] The practice has been particularly common in the toilet goods and cosmetic trades. Its discriminatory character is enhanced by the fact that some manufacturers in those trades pay the salaries of demonstrators in department stores over long periods of time, thus making the demonstrators "no more than subsidized clerks";[126] and it is charged

122. See note 121, *supra.*

123. See the report of a recent trade practice conference of the toilet goods industry held under the auspices of the Federal Trade Commission, Drug Trade News, November 23, 1936, p. 1, col. 1, p. 38, cols. 1-5.

124. *Cf.* Statement of Hugo Mock, *supra* note 107.

125. Matter of Richard Hudnut, *supra* note 23. Other complaints alleging violation of Section 1(e) are: Matter of Bourjois, Inc., *supra* note 101; Matter of Coty, F. T. C., Docket No. 2975 (November 6, 1936); Matter of Elmo, Inc., F. T. C., Docket No. 2974 (November 6, 1936), reprinted in Drug Trade News, November 23, 1936, p. 58, cols. 1-3. These complaints also charge that the practice of the respondents with respect to demonstrators violates § 5 of the Federal Trade Commission Act.

126. See Telegram from Frederick H. Young Company to trade practice conference of the toilet goods industry, reprinted in Drug Trade News, November 23, 1936, p. 38, col. 4-5.

that they do not confine their efforts to recommending the product of the manufacturer who pays them, but also act as salesmen for all products at their counters.[127] Another common complaint is that such salesmen, by recommending exclusively the products of the manufacturers who pay them, create the false impression in the buyer's mind that the store itself—the demonstrator's apparent employer—recommends the product as the best of its kind to be had in the store, thus deceiving the public and injuring the manufacturer's competitors.[128]

Section 1(e) is designed to strike at this practice. It makes it "unlawful for any person to discriminate in favor of one purchaser . . . of a commodity . . . by . . . furnishing, or by contributing to the furnishing of, any services or facilities connected with the . . . sale . . . of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." It should be observed that unless the word "purchaser" can be interpreted so as to include not only buyers purchasing from the manufacturer but also those who buy the manufacturer's product from wholesalers, the Subsection can have no application to retailers who do not purchase directly from the manufacturer. On the other hand, unlike Section 1(d) this provision is not limited so as to apply solely to "customers competing in the distribution" of the manufacturer's products. The omission of this phrase makes it unnecessary to show that the service was granted to one "purchaser" and refused another operating within the same competitive area in order to prove a violation of the Subsection.

Manufacturers will encounter serious difficulties in furnishing demonstrators to their customers on "proportionally equal terms." As in the case of advertising allowances, the only feasible way of apportioning demonstrators is in proportion to the volume of the customer's purchases. Thus, the manufacturer who grants a demonstrator for the whole year to a customer who purchases $5,000 annually might furnish a demonstrator for one tenth of a year to a store whose annual purchases total $500. But this suggestion has been termed impractical by manufacturers, because the services of such a demonstrator "would not be in proportion to the services of a whole time demonstrator."[129] Because of this difficulty, leading members of the drug trade state that the Act will cause the "virtual abolition" of manufacturer-paid demonstrators, a result which appears to meet with the approval of a substantial number of producers.[130] No doubt demonstrators when furnished by the manufacturer can serve a legitimate function in securing consumer acceptance of valuable new products which the retailer acting

127. Matter of Elmo, Inc., *supra* note 125; Matter of Bourjois, Inc., *supra* note 101.

128. See Telegram from Frederick H. Young Company, *supra* note 126.

129. Statement of Hugo Mock, *supra* note 107.

130. See Drug Trade News, November 23, 1936, p. 1, col. 1.

alone refuses or is unable to secure.[131] Yet the practice has apparently resulted in considerable discrimination in favor of a few large department stores and in the deception of the consumer.

*Free Deals.* The free deal is a common sales promotion device, particularly in the food and drug trades. As its name implies, a free deal is granted by including among the goods sold in a particular transaction a certain amount of merchandise for which no charge is nominally made.[132] The free goods may consist either of additional articles of the same kind sold, or of an assortment of other types of merchandise which the seller manufactures or distributes,[133] and in the drug trade, are distributed both through the wholesaler and directly to the retailer.[134] The extent of free deal offers in the drug trade has increased within the last ten years, until the practice is now of considerable importance. In March, 1936, for example, 190 separate offers were made.[135] And, according to a study made by the National Wholesale Druggists' Association, when the free goods are calculated as a per cent of the total amount of the merchandise involved in the transaction, they constitute a discount of 12.6%.[136]

The manufacturer's purpose in offering free deals may be simply to stimulate the sales of his merchandise generally, or to focus the retailer's attention on the manufacturer's line of goods during a particular period, or to move excess stock, or to sell new or unpopular products by giving along with them free goods whose reputation is established.[137] Again, the free deal is frequently offered to meet competition,[138] and often operates as a price cutting device.[139]

In general, it involves relatively little discrimination between customers. Occasionally, however, manufacturers offer a proportionally larger amount of free goods in deals in which larger quantities are purchased.[140] Again, one manufacturer states that it gives free goods only to druggists who will

131. Thus, the Bourjois Sales Corp. states: "The maintenance of demonstrations is a practice of long standing and one of the few means of developing certain important divisions of the Toilet Goods business particularly the cosmetic . . . lines and even more particularly the creation of a general demand for new merchandise." Drug Trade News, November 23, 1936, p. 56, col. 4.

132. OSTLUND, THE DISTRIBUTION OF FREE DEALS BY SERVICE WHOLESALE DRUGGISTS (1931) (Bull. No. 17, Statistical Div., Nat. Wholesale Druggists' Assn.) 2; *cf.* F. T. C., *op. cit. supra* note 41, 36–39.

133. OSTLUND, *op. cit. supra* note 132, at 2.

134. *Id.* at 3–4, 25.

135. See Drug Trade News, Sepember 28, 1936, p. 50, col. 1.

136. OSTLUND, *op. cit. supra* note 132, at 26.

137. *Id.* at 6; *cf.* BORDEN, PROBLEMS IN ADVERTISING (2d ed. 1932) 432.

138. Drug Trade News, September 28, 1936, p. 50, col. 2.

139. *Cf.* OSTLUND, *op. cit. supra* note 132, at 1.

140. Communication from drug manufacturer to the YALE LAW JOURNAL, November 20, 1936.

display its products on their shelves and in their windows, and who will recommend them over the counter. Such requirements, it states, result in the elimination of free deals to chains, who usually feature merchandise of their own brand or manufacture.[141]

Where free deals are given to one customer and denied or offered on less advantageous terms to another, they will be difficult to justify under the Act. In the first place, such a practice will probably be considered a discrimination in price which must meet the cost test of Section 1(a),[142] a requirement which will be particularly hard to satisfy where the discrimination favors the independent retailer. And even if the manufacturer is able to argue that the free goods constitute payment for advertising rather than a price differential, the payment must be available to all competing customers "on proportionally equal terms" under Section 1(d). But because of the comparative unimportance of the free deal as a method of discrimination, the Act can hardly have any considerable significance with respect to this practice.[143]

*Private Brands.* There has existed for some time in many industries a practice whereby manufacturers sell at reduced prices to individual chains, mail-order houses, and larger wholesalers, products labeled with the distributor's private brand, but of a grade and quality similar to or identical with that of the manufacturer's nationally advertised product.[144] Although its figures are not conclusive, because they include merchandise manufactured by the chains as well as private brands, the Federal Trade Commission found that in 1931, 43% of 174 reporting drug chains owned private brands.[145] When measured by total sales this figure is raised to 58%, indicating the

141. *Ibid.* ". . . there seems to be a consistent, though not very important, tendency to favor the wholesaler-retailer system of distribution as compared with the chain system . . . in the giving of deals . . ." LYON, THE ECONOMICS OF FREE DEALS (1933) at 96.

142. See THE ROBINSON-PATMAN ACT (Washington Post, 1936) 15.

143. The desirability of this practice is questioned by some members of the trade. See Address of Charles Ehlers, Pres. of the Nat. Asso. of Retail Druggists, Drug Topics, September 28, 1936, p. 14, col. 5. Deals may often lead "the unwary independent into trouble, because he has purchased simply to take advantage of what he thought was a good proposition, and then found himself overstocked with unsalable merchandise." WITTE, *op. cit. supra* note 6, at 54. Although certain members of the trade write that the Act has forced them to eliminate free deals, the pages of the drug trade newspapers still abound with such offers. See, e.g., *This Week's Deals*, Drug Topics, November 16, 1936, 38-40.

144. See F. T. C., CHAIN-STORE PRIVATE BRANDS (Sen. Doc. No. 142, 72d Cong., 2d Sess., 1933) 1-4. For examples of this practice, see the following cases: LEARNED, PROBLEMS IN MARKETING (1936) 457; TOSDAL, PROBLEMS IN SALES MANAGEMENT (3d ed. 1931) 124, 127; *id.* (rev. ed. 1926) at 275.

145. See F. T. C., *supra* note 144, at 21.

greater use of brands among the larger chains.[146] The rapid growth of the practice can readily be seen from the fact that the proportion of private brand sales to total sales among those drug chains selling such merchandise was practically doubled from 1922 to 1930, private brand merchandise constituting over 17% of total sales in the latter year.[147] The reasons which the chains advance for this growth vary, although those most often given emphasize the fact that sales of private brand goods afford greater profits.[148] Thus, measured by number of stores, 90% of the drug chains report a higher mark-up on private than on comparable nationally advertised brands,[149] although 51% report that they are able to sell private brands goods at lower prices,[150] while 36% report that prices are similar for the two classes of merchandise.[151] Moreover the sale and resale of private brands is less effectively hedged about by restrictions in the interest of the manufacturer than the marketing of nationally advertised goods, especially since the Supreme Court of the United States has upheld as constitutional State Fair Trade Acts which empower the manufacturer to require the maintenance of resale prices for trade-marked articles;[152] as a result the sale of private brands is a source of flexibility in competition otherwise unavailable.

There are at least two approaches to the legal problem raised by the practice of differentiating in sales price between nationally advertised and private brand goods. The first is founded on the assumptions that different brand names do not as a matter of fact differentiate the product nor do they remove competition between the sellers of national and private brands. If these premises are accepted, the validity of the differentiation must be considered under three portions of the Act.

Section 1(a) would prevent price differentials between nationally advertised and private brands unless they were based on one or more of the differences in cost prescribed in the statute.[153] Such differences might be

146. *Id.* at 24. 147. *Id.* at 32.

148. *Id.* at 2-12. ". . . . a well-known though moderately sized department store chain says: 'The fact that standard nationally advertised brands have so frequently become the subjects of predatory price cutting by those merchants who use them as "leaders," an advertising device, and thereby have destroyed the opportunities for legitimate profit on such items, has led many merchants to establish brands of their own.'" *Id.* at 9. In the drug trade, as a result of price cutting, "over 50% of the standard-brand items . . . were sold at less than the average cost of doing business in 118 drug chains as compared with less than 1 percent of the private brands." *Id.* at 87. Even though the prices at which private brand goods "are sold are commonly below those of competing standard-brand products," nevertheless, "the private brand goods carry a much higher gross profit and probably net profit . . ." *Id.* at 88.

149. *Id.* at 61. Compare *id.* at 68.

150. *Id.* at 66. 151. *Id.* at 67.

152. Old Dearborn Distributing Co. v. Seagram-Distillers Corp., U. S. Sup. Ct., (1936) 4 U. S. L. WEEK 356.

153. It is fairly common for manufacturers to own several brand names and to sell identical merchandise under these different names in order to conceal price discrimina-

considered to result from the different methods of sale involved. The argument is that in determining the price to be charged for the private brand, no portion of the cost of advertising national brands need be imputed to it. This allocation of the entire advertising cost to the nationally advertised brand seems somewhat artificial. For the sole justification for advertising is that it stimulates the sales of an individual manufacturer, thus permitting an increase in his production, with attendant reductions in unit costs; and presumably the private brand benefits by this reduction as much as does the national brand. Nevertheless, the view that advertising costs can be allocated exclusively to the advertised brands finds support in the decision of the Federal Trade Commission in the *Goodyear* case.[154] There the Goodyear Company had produced tires to be sold both under its own nationally advertised brand name, and by Sears, Roebuck and Company at retail under the latter's own brand name. In a proceeding under the unamended Section 2 of the Clayton Act, the Trial Examiner found that Sears derived a selling advantage from Goodyear's national advertising because the public knew that Sears sold tires made by Goodyear. He also found that Goodyear's sales to Sears increased sales resistance to Goodyear's brands, thereby requiring Goodyear to increase its own manufacturing expenditures. But despite these findings, the Commission held that Goodyear need not allocate any part of the cost of advertising tires sold under its own brand name to the cost of producing tires for Sears.[155]

The legality of variations in price between private and national brands may also be affected by Section 3. That Section applies only if the price differential in favor of a private brand can be considered a "discount," "rebate," "allowance," or "advertising service charge" within the meaning of the Section. If it can be so considered, it must be made "available" to all competing customers. Since by hypothesis, the private brand is commercially the same commodity as the national brand, the statute requires that both brands be offered at the same price.

Finally, if the furnishing of goods under a private label is held to constitute a service or facility, the "terms" upon which the private brand is furnished to one customer would have to be accorded "on proportionally equal terms" to all purchasers in accordance with Section 1(e). In this connection, the phrase "proportionally equal" will probably be construed to mean proportionally equal to the cost of production and delivery of the particular order of private brand merchandise. It should be noted that since

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tions. In such cases, the price differential does not purport to represent a difference in the cost of selling. See unpublished cases in the Library of the Harvard Graduate School of Business Research.

154. Matter of Goodyear Tire & Rubber Co., *supra* note 10; see GEORGE, THE FEDERAL TRADE COMMISSION DECISION IN THE GOODYEAR CASE (Dun and Bradstreet, 1936) 8.

155. Matter of Goodyear Tire & Rubber Co., *supra* note 10, at 9.

this Subsection is not limited in application to discriminations affecting "competition" or "competitors," the argument could not be made, as it could under Sections 1(a) and 3, that differentials in price based on differences in brands are unaffected if they occur only as between wholesalers and retailers.

If a more realistic approach to the problem is adopted, however, the premises on which this reasoning has been based become unacceptable, and the danger of illegality under the Act is greatly minimized, if not eliminated altogether. As a matter of economic fact, nationally advertised brands are different commodities than private brands, isolated from them commercially, if not physically, by the opinions and preferences of consumers, who are influenced by advertising, packaging, etc., more and more to regard different brands of the same commodity as unique.[156] Under this view, the Act would be considered as wholly inapplicable to price differentials based on differences between nationally advertised and. private brands, since the Act implies throughout that it covers only discriminations between purchasers of "like" commodities. And even if nationally advertised and private brands are deemed at law to be the same commodity, because of their physical identity, the retailers selling the national brand might not be regarded as competing with the retailers selling the private brand, since there would be virtually no competition between the two commodities, within a certain range of price variation.[157] In this event, Sections 1(a) and 3 would be inapplicable, and only Section 1(e) would remain to be considered. That Section alone would probably do little to discourage the private brand practice. For the manufacturer could satisfy its requirements by offering the private brand service to all his customers. Actually, this offer would not be accepted by many small wholesalers or chains because of the added expense and effort necessary to sell a private brand.[158]

If the Act is interpreted as being inapplicable to price differentials between private and nationally advertised brands, its immediate consequence may be an increase in the sales of private brands to the larger chains and perhaps to wholesalers. For, to the extent that manufacturers will raise the price at which they will sell nationally advertised brands to chains in an attempt to eliminate various forms of discounts in compliance with the Act, the chains may turn more and more to the private brand on which they have already been able to make substantial profits and with which they can more conveniently respond to forces of competition. This tendency might in turn

156. See CHAMBERLIN, THE THEORY OF MONOPOLISTIC COMPETITION (1933) 56-70; (Some Arguments in Favor of Trade-Mark Infringement and "Unfair Trading") 204-208.

157. *Id.*, at 65 *et seq.*

158. ". . . . many wholesalers have discovered that the development of a satisfactory private brand is a costly and not always satisfactory process." Ball and Larrabee, *supra* note 39, 105.

lead to the wastes of a brand war,[159] in the course of which manufacturers would continue to sell private brands for fear that the chains might increase their own manufacturing operations, and might also increase their advertising efforts in connection with their own national brand to counteract the competition of private brands.

*"Sales" Avoidance as an Escape Device.* There remain to be considered a few marketing practices substantially unaffected by the Act which the large distributors may increasingly utilize as devices to escape the Act's sanctions. Each centers around the fact that the Act can apply only where there are *sales* of *commodities,* and where a seller has at least two customers to whom he sells a commodity.

One practice which provides an opportunity to escape some difficulty under the Act is that of selling through del credere agents or factors rather than to wholesalers. This practice has noticeably increased in the drug trade since the passage of the Act,[160] although the increase is due more to the manufacturer's desire to fix or suggest resale prices and thereby to eliminate the use of his merchandise as a loss leader, than to a wish to avoid the requirements of the Act.[161] Nevertheless, as one manufacturer has stated, the concurrence is "a happy coincidence"; for by eliminating the sale to the wholesaler, and paying his agent on a commission basis,[162] the producer avoids the vexing problem as to the legality of the wholesaler's discount. But it should be noted that many manufacturers employing this scheme continue to sell outright to a few wholesalers operating in rural territories where chains do not maintain stores.[163] And some of these manufacturers sell direct to retailers, providing their purchases are for substantial amounts of merchandise.[164] Such sellers must make sure that discounts to these customers, if they are greater than those granted to customers buying through factors, are justified under the tests prescribed in Section 1(a). Furthermore, even though a manufacturer sells only through factors,

159. See CORBALEY, GROUP SELLING BY 100,000 RETAILERS (1936) 181; *Prelude to a Brand War,* Advertising and Selling, September 10, 1936, 27; *cf.* Sales Management, October 1, 1936, 456, 513. As to the waste which such a war entails, see SLICHTER, MODERN ECONOMIC SOCIETY (1931) 553-570; *cf.* Copeland, *Some Present-Day Problems in Distribution* (1931) 9 HARV. BUS. REV. 299, 307, 308.

160. See Drug Topics, September 28, 1936, p. 14, col. 2; Drug Topics, October 19, 1936, p. 5; *cf.* Drug Topics, October 26, 1936, p. 7.

161. Communication from a drug manufacturer to the YALE LAW JOURNAL, November 20, 1936.

162. See THE ROBINSON-PATMAN ACT (Washington Post, 1936) 14; *cf.* United States v. General Electric Co., 272 U. S. 476 (1926).

163. Communication from a drug manufacturer to the YALE LAW JOURNAL, November 20, 1936.

164. *Ibid.* At least $80 worth of merchandise must be purchased under this arrangement.

he must of course make certain that his quantity and other discounts are justifiable under the Act, or revise them. This necessity explains the fact that some of these manufacturers are reported to be altering their price schedules to accord with the terms of the Act.

A second possible escape device is a practice which existed in a number of industries even prior to the Robinson-Patman Act whereby a distributor himself purchased, or had purchased for his account, raw materials, and shipped them to a manufacturer who in turn processed them "as a fabricating agent."[165] Legally it appears clear that the transaction should be described as a bailment rather than a purchase and sale. This elimination of a sale between manufacturer and distributor would seem to make the Act entirely inapplicable. It is therefore possible that the Act will result in increasing the popularity among large distributors of these so-called "conversion contracts."[166] The unwieldiness of these arrangements, however, will militate against their widespread use. Thus, every principal ingredient of the finished product must be supplied by the bailor, and both parties must at all times take care that the product is fabricated from the identical, rather than similar, goods furnished by the bailor. The disorganization of the manufacturing process which this device would usually necessitate will probably make its cost prohibitive except in the case of one or two mail-order houses.

A third possibility is that where it is practical for large distributors to purchase the total output of small manufacturers,[167] both buyer and seller can escape the prohibitions of the Robinson-Patman Act. For the Act cannot be applied to a producer who sells to only one customer.[168]

Finally, the large chains and mail-order houses may resort to increasing their own manufacturing operations in an effort to escape the requirements of the Act.[169] Prior to the Act, the reasons most frequently advanced by drug chain officials for manufacturing their own products were that manufacturing enabled them to control the quality of their merchandise, that they secured good-will through exclusive sale of their own brands, that costs were lower and profits were higher, and—perhaps most important—that they avoided the "cut-throat" competition occurring in the sale of national brands.[170] 21.5% of all reporting drug chains, selling 69% of all merchandise

165. See THE ROBINSON-PATMAN ACT (Washington Post, 1936) 46.

166. See THORP AND GEORGE, *op. cit. supra* note 19, at 20.

167. Prior to the Act, chain buying syndicates were able "to take the output of an entire factory." WITTE, *op. cit. supra* note 6, at 37.

168. See GASKILL, WHAT YOU MAY AND MAY NOT DO UNDER THE NEW PRICE DISCRIMINATION LAW (Kiplinger Washington Agency, Inc., 1936) 48.

169. Representative Patman is contemplating introducing a bill into the next Congress which would prevent a retailer from engaging in manufacturing. See Patman, *New Battle Lines are Forming*, Nation's Business, December, 1936, 15, 16.

170. See F. T. C., CHAIN-STORE MANUFACTURING (Sen. Doc. No. 13, 73d Cong., 2d Sess. 1933) 42.

sold by chains, engage in manufacturing,[171] but only three chains produce more than 25% of the total amount of merchandise which they sell, and the average chain produces only about 13.5% of its total sales.[172] Although there are serious practical limitations on the practice of direct manufacturing by retail drug chains[173] it is certain the drug chains have not reached the limit in expanding their own manufacturing operations.[174]

*Conclusion.* One of the purposes motivating the proponents of the Robinson-Patman Act is a desire to restrict the development of chain stores and other large-scale agencies of distribution. The theory of their argument is that the chains and other big units of distribution are becoming so huge as to threaten society with the extermination of the small business man and other consequences of monopolistic power; and further that an ability to command price discriminations is an indispensable condition of the growth of chains, so that the elimination of price discrimination could reasonably be expected to reduce their capacity to expand.[175] No stage of the argument is persuasively supported by the facts.

In the first place, there is no evidence to indicate that chain stores and mail order houses are eliminating sources of effective competition as they grow. Independent wholesalers and retailers have remained in the field;[176] new, local chains have been organized in many regions, like the "pine boards" in the drug trade,[177] to compete with the larger chains for available business; cooperatives and associations of independent retailers, though not conspicuously successful in the drug industry,[178] are growing vigorously in the grocery trades,[179] and promise to become even more important in the future.

171. *Id.* at 24. 172. *Id.* at 11. 173. *Id.* at 11-13, 59-61.

174. *Id.* at 34. In August, 1932, eleven drug chains predicted a future increase "in the proportion of goods manufactured by them to their total sales," one predicted a decrease, and two predicted no change. "This is at striking variance with the replies of food chains of which less than half of those reporting expect an increase." *Id.* at 91. A 33-unit chain states: "'If the price level on nationally advertised goods goes up, the proportion of sales in our own line will decrease. In other words, we sell goods under our own label only because we are forced to in order to make a profit.'" *Id.* at 93.

175. H. R. Rep. No. 2287, *op. cit. supra* note 3, pt. II, at 3.

176. In 1933, there were 58,407 drug stores in the United States, of which only 3,670 were operated by the 140 chains. In 1933, there were 1,558 wholesale druggists (9% fewer than in 1929). Learned, Problems in Marketing (1936) 649, 654. The independent is said to be holding his own in the grocery trade. See Corbaley, *op. cit. supra* note 159, at 27.

177. The "pineboard" is a recent innovation in the drug field. It consists of a single store or a small local chain, operating with low overhead and a large sales volume maintained by a policy of price-cutting even more extreme than in the regular chains. See Merrell, Grether, and Kittelle, *op. cit. supra* note 27, at 46-47.

178. See note 27 *supra*.

179. For a discussion of the recent growth of voluntary chains and cooperatives in the food distribution system, see Corbaley, *op. cit. supra* note 159, at 51-58. That these organizations can compete effectively with the corporate chains, see *id.* at 186-187; F. T. C., *op. cit. supra* note 3, at 56; Legis. (1936) 36 Col. L. Rev. 1285, 1287, n. 14.

The structural organization of business is changing; but there is no reason to suppose that the increasing size of national agencies of distribution requires markets to be monopolized as a matter of theory, or is in fact reducing the quantum of competition effective in those markets. It seems possible, on the contrary, that the old-fashioned wholesale distributor had more monopolistic influence in his local market than the contemporary chain or mail order house has either locally or nationally.

But even if it is conceded that the chain-store problem is important as an area of potential monopoly, it does not seem accurate to attribute the growth of chains and other large distributors to their power to extract discriminatory prices from sellers. Factors of superior efficiency and of economy in organization are considered more important than a capacity to demand discriminatory discounts in explaining the success of chain distribution.[180] As an experiment in anti-chain legislation, the Robinson-Patman Act seems for this reason to be futile and misdirected,[181] even if it is assumed that it could be effectively administered to eliminate price discrimination in the markets where it will be applied.[182]

The attempt to minimize price discrimination by means of the Robinson-Patman Act has been defended on more general grounds, as a regulation of competition desirable for several reasons of social and economic policy.[183]

180. The F. T. C. made studies of chain and independent buying and selling prices in four different cities. "On a weighted basis, using chain-store quantities, the difference represented by the lower chain buying prices on groceries ranged from about 3 percent of the total difference in selling prices at Cincinnati to about 20 percent in Washington . . ." F. T. C., *op. cit. supra* note 3, at 55. "Similarly in drugs, on a weighted basis, the difference in chain and independent buying prices ranged from 5.3 percent of the total difference in selling prices at Memphis to about 17.4 percent in Detroit." *Id.* at 56. For general analyses of the factors of chain store success, uniformly discounting the importance of buying advantages, see Phillips, *The Robinson-Patman Anti-Price Discrimination Law and the Chain Store* (1936) 15 HARV. BUS. REV. 62, 64, 75; Flynn, *Chain Stores: Menace or Promise* (1931) 66 NEW REPUBLIC 223, 270, 298, 324, 350, esp. 353; Palmer, *Economic and Social Aspects of Chain Stores* (1929) 2 J. OF BUS. OF U. OF CHI. 272.

181. Anti-chain store taxes, on the other hand, have been effective in curbing the power of the chains. See authorities cited *supra* note 12.

182. Even if the Robinson-Patman Act, unlike the Clayton Act and the Federal Trade Commission Act, is sympathetically interpreted by the courts, there are many trade practices available which will permit discrimination to continue despite the Act [see page 477 *supra*]; and even where the Act is clearly applicable, the Commission's slowness in procedure will keep it constantly trying to catch up with business usage. Thus the F. T. C. took two and one-half years to consider the *Goodyear Tire* case [see note 10 *supra*]; for a similar delay with the Matter of Bird and Son [*supra* note 23] see *Commission Hears Bird Case*, Printer's Ink, December 10, 1936, 57; and *Patman Test Thunders On*, Printer's Ink, December 17, 1936, 16.

183. "The purpose of this . . . legislation is to restore . . . equality of opportunity in business by strengthening anti-trust laws and by protecting trade and commerce against unfair trade practices and unlawful price discrimination, and also against restraint and monopoly for the better protection of consumers, workers, and independent

The doctrine implicit in most forms of the defense seems to follow this sequence: because all perfectly competitive markets are characterized by price uniformity—that is, the same commodity is there sold to all buyers at the same price—and because competition is generally regarded as a Good Thing, all price uniformity is a Good Thing, and price discrimination a bad one. The manifest incorrectness of the argument as a syllogism is rooted in a failure to distinguish between the effects of price uniformity in more and less competitive markets. In competitive markets, price discrimination is a monopolistic element, if it can persist; when imposed by a few large buyers on a large number of sellers, such price discrimination gives the buyers a larger profit than they would otherwise get, but its effect on output is probably negligible, unless it contributes to the development of monopolistic selling units. In a monopolistic market containing few sellers, on the other hand, discrimination is a response to competitive pressures, and will generally result in a higher output, and a lower average price, than would prevail if monopolistic price uniformity were enforced.[184] The effect of the Act, at least in theory, is to deny to sellers this privilege of discriminating between customers on the basis of the relative elasticity of their demand for the service. Proponents of the Act contend that its requirement of price uniformity might as easily result in uniformly lower as in uniformly higher prices: if a price cut is economically justifiable to one customer, because his demand for the commodity is quite elastic, it should be generalized to all customers, especially if they compete with the favored buyer, on vague grounds of "economic democracy" and "equal opportunity." But in many situations, where market demand for the commodity is not very elastic, the prohibition against discriminations will operate to require and protect a higher price level than would otherwise prevail: if the seller is forced to choose between a uniformly lower price, with a somewhat higher output, and a uniformly higher price, accompanied by a somewhat smaller output, it will often pay him to elect the latter policy.

Although the issue was never clearly presented in these terms, the Robinson-Patman Act amounts to a decision by Congress in favor of uniform prices against any alternative economic end. In many markets where the uniform prices to be enforced will be monopolistic prices, the decision amounts to a preference for one-price monopoly against discriminatory monopoly, an election to which there are serious objections, both economic and social.[185]

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producers, manufacturers, merchants, and other businessmen." H. R. REP. No. 2287, *op. cit. supra* note 3, pt. I, at 3. See also HEARINGS, *supra* note 13, at 136, 332.

184. BURNS, *op. cit. supra* note 1, c. 1; CHAMBERLIN, *op. cit. supra* note 156, c. 3; MARSHALL, INDUSTRY AND TRADE (3d ed. 1927) 415–418; PIGOU, ECONOMICS OF WELFARE (3d ed. 1929) 275–290, 339–340; ROBINSON, *op. cit. supra* note 2, 179–208; Fly, *Observations on the Anti-Trust Laws, Economic Theory, and the Sugar Institute Decisions: I* (1936) 45 YALE L. J. 1339, 1347; Fly, *The Sugar Institute Decisions and the Anti-Trust Laws: 2* (1936) 46 YALE L. J. 228, 247.

185. See materials collected in note 184, *supra*.

The burden of price uniformity which is implicit in the Act is increased by its view of the connection between costs and prices. For Section 1(a) establishes cost analysis as the proper criterion of discount regulation, thus apparently accepting the mistaken view that under competitive conditions price is or should be "determined" by costs, even in the "short period"[186] and at all stages of a trade cycle. Under Section 1(a) different prices can be charged to different purchasers of the same commodity only if they make no more than "due" allowance for differences in the cost of selling or delivering the commodity to those purchasers. To reduce the possibility of validating discounts through this Section, however, the burden of justifying the price variation is placed on the accused. It seems almost impossible to use the arbitrary premises and conflicting techniques of cost accounting[187] to prove that a seller has realized economies in any particular sale. At best the issue can be framed only in terms of the predictable. Thus, a judge finds that a quantity discount might reasonably be expected in the long run[188] to effect economies in the cost of production. But under Section 1 of the Act, the accused must "affirmatively" show that a particular price differential is based upon a definite and certain calculation of cost savings effected in the sale under scrutiny. And because the Act makes no allowance for the predictable, the issue may often be determined against the party upon whom the burden of proof falls.

In evaluating the Act as one of the anti-trust laws, it seems proper to suggest two propositions by way of conclusion: that the Act does not seem capable as framed of preventing the growth of monopolistic combinations; and that the rules of competition which it proposes promise in their operation to depart a considerable distance from the general policy of the anti-trust laws, a departure apparently not contemplated by those who planned the Act, nor by most of those who have thus far defended it.

186. That prices fluctuate as a function of demand, within limits set by costs, see BURNS, *op. cit. supra* note 1, at 30; MARSHALL, PRINCIPLES OF ECONOMICS (8th ed. 1930) 374-379; and, for an application of the analysis to the classic problem of railway rates, see DANIELS, THE PRICE OF TRANSPORTATION SERVICE (1932) 57 *ff.*, esp. 66-73. As was indicated above [page 481] the economic defense of price discrimination by a monopolist is based on the contingency that the discrimination will accommodate price to elastic demands for the commodity, not that it will permit prices to vary for differences in selling costs. The Act does not, of course, prevent a monopolistic seller from reducing his prices below total costs; but by requiring him, in theory at least, to reduce his price to all customers at the same time, it makes such price fluctuations more difficult. The advocacy here of a limited privilege of price discrimination in distribution should not be construed as a general support of regional price discrimination, local price-cutting, and other specialized forms of the practice. FETTER, MASQUERADE OF MONOPOLY (1931); Souter, *Modern Monopoly as the Gentleman Crook* (1933) 48 POL. SCI. QU. 240.

187. See Canning, *Cost Accounting* (1931) 4 ENCYC. SOC. SCIENCES 475, 477: Cost accounting "rests upon over-simplified and largely arbitrary fundamental analyses" not to "be taken too seriously."

188. United States v. Sugar Institute, 15 F. Supp. 817, 869 (S. D. N. Y. 1934).