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**BUYER'S LIABILITY FOR INDUCING VIOLATIONS OF
SECTIONS 2(D) AND 2(E) OF THE
ROBINSON-PATMAN ACT**

I. INTRODUCTION

The Robinson-Patman Act¹ was passed by a Congress which was under great pressure from small independent retailers, brokers, and wholesalers seeking relief from the increasing economic power of chain stores.² The statute, described as a combination antitrust law and National Recovery Administration provision³ was designed to infuse the "golden rule" into economics: to prohibit discrimination against buyers by sellers.⁴ The act proscribes discrimination in price,⁵ brokerage fees,⁶ promotional allowances,⁷ and services.⁸

1. 49 Stat. 1526 (1936), 15 U.S.C. §§ 13, 13a-b, 21(a) (1964). The Supreme Court has passed on only one case, *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959), involving § 2(e), 49 Stat. 1527 (1936), 15 U.S.C. § 13(e) (1964); one case, *Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953), involving § 2(f), 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1964); and has never passed on § 2(d), 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1964). Since courts of appeals' decisions are not binding upon the Federal Trade Commission, but are only persuasive, see *The Supreme Court and the Robinson-Patman Act*, 9 *Antitrust Bull.* 29, 47-50 (1964), the lack of Supreme Court decisions has left a void which allows the Commission great discretion in interpreting the act.

2. See generally *Stocking, Workable Competition and Antitrust Policy* 223 (1961); Rowe, *The Robinson-Patman Act: Elements of a Price Discrimination Violation*, 51 *Ill. B.J.* 538, 539 (1963). For a short discussion of the changes in merchandising which caused pressure on the small retailer, see Rowe, *Price Discrimination Under the Robinson-Patman Act* 3-6 (1962).

Senator Logan, one of the act's more ardent proponents, stated during the debate in Congress: "Do not tell me that any manufacturer willingly and gladly gives such tremendous sums to the purchaser. He is coerced into it by the fact that the purchasing power has become so great that the seller is afraid to antagonize it. He must yield to any demand that may be made by the great purchaser . . ." 80 *Cong. Rec.* 6281 (1936). The chain-store investigation carried on by the FTC at the request of the Senate provided evidence of the large buyers' coercive power. See *FTC, Final Report on the Chain-Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 24-26 (1935).

3. Rowe, *supra* note 2, at 539.

4. 80 *Cong. Rec.* 7886, 7887, 8114 (1936) (remarks of Representative Patman).

5. Section 2(a) states, in part: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition . . ." 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

6. Section 2(c) states, in part: "That it shall be unlawful for any person engaged in commerce . . . to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . ." 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

7. Section 2(d) states: "That it shall be unlawful for any person engaged in commerce to pay or contract . . . for the benefit of a customer of such person in the course of such

Prohibitions against discrimination in the granting of promotional services and allowances were placed in the act after congressional hearings demonstrated that large buyers and chain stores were using their economic power to force sellers to contribute large amounts towards their advertising expenses.⁹ In presenting the final version of the bill to the House, Representative Utterback, Chairman of the House-Senate Conference Committee, declared:

Discriminatory prices and allowances are a millstone around the neck of the manufacturer, large or small; because in granting favors to a selected few of their customers, they give those few a competitive advantage over the rest, and enable them gradually to drive the rest out of business and thereby to destroy them as customers. In granting such discriminations the manufacturer is therefore committing a form of slow suicide¹⁰

Thus, congressional focus was on the seller.¹¹ No effective weapon against the inducement of discriminatory allowances or services by the buyer was to be found in the act.¹²

The Robinson-Patman Act does contain two provisions aimed at the buyer who induces the seller to discriminate. Section 2(f) prohibits any person who is engaged in commerce "knowingly to induce or receive a discrimination in price" which is prohibited by the act.¹³ Although isolated cases before the Federal

commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (1964).

8. Section 2(e) states: "That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms." 49 Stat. 1527 (1936), 15 U.S.C. § 13(e) (1964).

9. Patman, *Complete Guide to the Robinson-Patman Act* 127 (1963); 80 Cong. Rec. 9416 (1936) (remarks of Representative Utterback); see H.R. Rep. No. 2287, 74th Cong., 2d Sess. 15-16 (1936).

10. 80 Cong. Rec. 9416 (1936) (remarks of Representative Utterback).

11. Rowe claims that this emphasis on the seller rather than the buyer was apparently caused by fear of the unconstitutionality of such a buyer-oriented approach. See Rowe, *op. cit. supra* note 2, at 23.

12. Section 2(f) renders liable a seller who knowingly induces a discrimination in price, but fails to make similar provision for an inducement of discriminations in services or allowances. 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1964); see notes 13-20 *infra* and accompanying text.

13. "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." Robinson-Patman Act § 2(f), 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (1964).

Trade Commission and the courts have held that a purchaser who induces an advertising allowance or service violates this provision,¹⁴ most authorities are reluctant to accept such a position.¹⁵ The Supreme Court, in *Automatic Canteen Co. of America v. FTC*,¹⁶ explicitly declined to pass on the question of whether section 2(f) embraces the prohibitions found in sections 2(d) and 2(e).¹⁷ In a later case,¹⁸ the FTC stated that a buyer's inducement of a 2(d) or 2(e) violation is not specifically prohibited by the act.¹⁹ Whether Congress intentionally or inadvertently restricted section 2(f) to discriminations in price, the omission of direct prohibitions against the inducement of discriminations in services has left a loophole in the law and, apparently, is inconsistent with the aims of its sponsors.²⁰

Section 3 of the Robinson-Patman Act, originally a separate antitrust statute,²¹ prohibits any person from being a party to a sale which discriminates against competing customers of the purchaser with respect to, *inter alia*, allowances or services for advertising in connection with the sale of goods of the same grade, quality, and quantity.²² The section has been criticized as useless,²³ be-

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

15. See Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 158-59 (2d rev. ed. 1959); Baum, *The Robinson-Patman Act* 66-67 (1964).

16. 346 U.S. 61 (1953).

17. "We of course do not . . . purport to pass on the question whether a 'discrimination in price' includes the prohibitions in such other sections of the Act as §§ 2(d) and 2(e)." *Id.* at 73 n.14. *Accord*, *American News Co. v. FTC*, 300 F.2d 104, 111 (2d Cir.), cert. denied, 371 U.S. 824 (1962); *Grand Union Co. v. FTC*, 300 F.2d 92, 95 (2d Cir. 1962).

18. *Grand Union Co.*, 57 F.T.C. 382 (1960), modified, 300 F.2d 92 (2d Cir. 1962).

19. 57 F.T.C. at 422-23.

20. In 1961, Representative Patman, in an attempt to fill this gap in the act, introduced H.R. 124, 87th Cong., 1st Sess. (1961), to amend § 2(f) to cover all violations of § 2(a), § 2(d), or § 2(e). 107 Cong. Rec. 102 (1961).

21. S. 4171, 74th Cong., 2d Sess. (1936).

22. "It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any . . . allowance, or advertising service charge is granted to the purchaser over and above any . . . allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity . . ."

"Any person violating any of the provisions of this section shall . . . be fined not more than \$5,000 or imprisoned not more than one year, or both." Robinson-Patman Act § 3, 49 Stat. 1528 (1936), 15 U.S.C. § 13(a) (1964). Since violations of this section carry criminal penalties, enforcement of § 3 lies with the Justice Department, not with the FTC. In 1963, Senator Sparkman introduced S. 1935, 88th Cong., 1st Sess. (1963), to repeal the present § 3 and to reenact it as § 3A of the Clayton Act, thereby making the civil remedies available under the Clayton and Sherman Acts also available under § 3. 109 Cong. Rec. 13169-70 (1963). Senator Sparkman introduced a similar bill, S. 995, 89th Cong., 1st Sess. (1965), in 1965. 111 Cong. Rec. 1953-57 (1965).

23. See 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 201.

cause, in order to show discrimination, the Government must prove special treatment in sales of the same quality and quantity. By small variations in the number of units, the seller and the buyer can circumvent the statutory proscriptions.²⁴ As a result, prosecutions under this section for granting or inducing promotional allowances or services have been nonexistent.²⁵

The Commission, however, in recent years, has used Section 5 of the Federal Trade Commission Act²⁶ to fill the void. This section, in sweeping terms, prohibits unfair methods of competition. Thus, in *Grand Union Co.*,²⁷ the FTC found that the supermarket chain induced certain suppliers to buy advertising space on its sign in Times Square. This action caused the suppliers to violate the provisions of the Robinson-Patman Act since the suppliers did not offer similar allowances to Grand Union's competitors.

The Commission felt that it had authority under section 5 to prohibit practices adversely affecting competition in violation of the policies of the antitrust laws, although the practices were not specifically prohibited.²⁸ On appeal to the Second Circuit, the Commission's asserted jurisdiction was upheld.²⁹ The court decided that the FTC was not legislating a new antitrust prohibition: "Jurisdiction . . . has been expanded from the technical confines of § 2(d), but only fully to realize the basic policy of the Robinson-Patman Act, which was to prevent the abuse of buying power."³⁰

24. See Wilson, *Control of Advertising and Promotion Under the Robinson-Patman Act in Retailing Profitably Under the Robinson-Patman Act* 29 (Bailey ed. 1963).

25. *Ibid.*

26. Federal Trade Commission Act § 5, 52 Stat. 111 (1938), as amended, 15 U.S.C. § 45 (1964).

27. 57 F.T.C. 332 (1960), modified, 300 F.2d 92 (2d Cir. 1962).

28. 57 F.T.C. at 419. The respondent had argued that the Commission was extending, without authority, the scope of § 2(d) by using § 5. The Commission relied on past decisions of the Supreme Court, *id.* at 419: *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392 (1953); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457 (1941); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922).

29. *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

30. *Id.* at 98. (Emphasis omitted.) The Commission's dissenting opinion, 57 F.T.C. at 426, and the court of appeals' dissent, 300 F.2d at 104, concluded that the FTC was establishing a new rule of law. Both dissents also criticized the *per se* nature of the Commission's findings insofar as the FTC did not consider relevant the question of whether Grand Union's activity had an effect on competition. *Ibid.*; 57 F.T.C. at 429. Such a finding would be necessary in a 2(f) proceeding, but not in a 2(d) action. See note 69 *infra*. Judge Moore, dissenting in the court of appeals, stated that, even accepting the majority's position that § 5 of the FTC was applicable here, "we still must decide whether to look to 2(d) or to 2(f) to determine the other 'indicia of illegality.' In answering this question, the majority . . . feels that it can clearly sense the pulse of Congress in 1936 and concludes that Congress would have wanted the court to make the buyer's participation in a 2(d) transaction a *per se* violation of Section 5. . . . I cannot find any evidence that Congress would have expanded 2(d) rather than 2(f)—had it desired to extend the Act to buyers." 300 F.2d at 104. (Emphasis omitted.) (Footnote omitted.)

II. ELEMENTS OF A VIOLATION

A. *Knowingly Induce*

Because of the hybrid nature of this type of section 5 complaint,³¹ it must allege that the buyer *knowingly induced* a seller to violate section 2(d) or section 2(e).³² This requirement does not, however, excuse culpable ignorance. In *Giant Food Inc. v. FTC*,³³ the court held that the standard of knowledge should be whether the buyer, at the time that it induced or received payments, possessed information sufficient to put it on inquiry as to whether the supplier had made such payments available to competitors. The FTC has held that the knowledge requirement is not affected by the current legality of the practice; that proof need only show that the buyer knew the facts upon which the later findings of illegality were based.³⁴ Thus, the buyer must anticipate the Commission in an area where predictability is the exception rather than the rule.

The Commission and the courts have left undecided, however, the question of whether inducement in this context means solicitation and receipt of discriminatory allowances or services, or whether solicitation alone would be sufficient grounds on which to predicate a section 5 violation.³⁵

B. *Competing Customers*³⁶

In a proceeding against a buyer for inducing discriminatory allowances or services, the Commission must show that the benefits were not available to other purchasers who were competitors of the favored customer.³⁷ Since the victim of the alleged discrimination must be a purchaser, a mere refusal to sell does not constitute an offense under the act.³⁸

31. *Id.* at 102 (dissenting opinion).

32. *Grand Union Co. v. FTC*, 300 F.2d 92, 100 (2d Cir. 1962), modifying 57 F.T.C. 382, 410 (1960).

33. 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

34. *Furr's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17352, at 22518 (Oct. 20, 1965).

35. The court of appeals, in *American News Co. v. FTC*, 300 F.2d 104, 111 (2d Cir.), cert. denied, 371 U.S. 824 (1962), stated: "Neither the Commission nor the courts have held that an attempt to induce or inducement . . . without a concomitant receipt of illegal payments, violates § 5." This position appears to have been followed in *Giant Food Inc. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963), and *R. H. Macy & Co. v. FTC*, 326 F.2d 445, 450 (2d Cir. 1964). But see *Grand Union Co. v. FTC*, 300 F.2d 92, 100 (2d Cir. 1962); *Individualized Catalogues, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16873, at 21865 (April 3, 1964).

36. In addition to requiring that the customers be in competition, there is also a commerce requirement in the act which has been held to be met if either the buyer, seller, or the buyer's competitors are in interstate commerce. *Shreveport Macaroni Mfg. Co. v. FTC*, 321 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964).

37. See *Furr's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17352, at 22516 n.6 (Oct. 20, 1965). It will be noted that § 2(d) refers to customers and § 2(e) refers to purchasers. Following the court's position in *American News Co. v. FTC*, 300 F.2d 104, 109 (2d Cir. 1962), these words will be used interchangeably.

38. *Ben B. Schwartz & Sons v. Sunkist Growers, Inc.*, 203 F. Supp. 92, 99 (E.D. Mich. 1962).

The Commission has narrowly construed the definition of competing customers to conform with trade practices,³⁹ and has made provision for regional or local promotions without requiring that such promotions or allowances be offered in other localities.⁴⁰ The definition of competing customer has been further limited by the Second Circuit. To be a competing customer, the court, in *Atalanta Trading Corp. v. FTC*,⁴¹ held that the other customer must be a purchaser of a product of like grade and quality. In *Atalanta*, a meat packer supplied one customer with a special advertising allowance on pork shoulder picnics, canned hams, and Canadian bacon. No other purchaser in the area bought these products within five months of the "favored" customer, although other purchasers did buy other pork products. The Commission accepted the hearing examiner's contention that "ham is ham"⁴² and that, therefore, all the purchasers were in competition with each other.⁴³ The Second Circuit rejected this argument, holding that, although the source was the same, the products were different, and that the purchasers were not in competition.

Once retailers in the same location have been sold similar goods, the Commission and the courts have held them to be in competition although their merchandising practices and clientele may be quite dissimilar. In *FTC v. Simplicity Pattern Co.*,⁴⁴ the defendant had two types of customers, large chain and variety stores and small fabric shops. The defendant argued that these stores were not in competition since their motivation in selling the patterns was different. The large variety stores sold them for profit; the fabric stores sold them as an accommodation to their customers. The Supreme Court rejected this "motivation theory" of competition, stating that "the existence of competition does not depend on such motives."⁴⁵ Rather, the Court noted that both types of stores desired to sell the patterns, especially since their liquid assets were tied up in maintaining a selection of the patterns.⁴⁶

Perhaps the most difficult problem in deciding who is a competing customer arises from the competitive relationship between retailers and wholesalers. Recent Commission action⁴⁷ appears to follow earlier court decisions which held that a seller violates the act by giving a retailer a promotional allowance not given to a wholesaler.⁴⁸ The Ninth Circuit took a contrary position, however, in *Tri-Valley Packing Ass'n v. FTC*,⁴⁹ holding that a food distributor who granted

39. See Rowe, *op. cit. supra* note 2 at 396-97; Wilson, *supra* note 24, at 31-32.

40. FTC, Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance With Sections 2(d) and 2(e) of the Clayton Act, As Amended by the Robinson-Patman Act 6 (1960).

41. 258 F.2d 365 (2d Cir. 1958).

42. *Atalanta Trading Corp.*, 53 F.T.C. 565, 568 (1956).

43. *Id.* at 572.

44. 360 U.S. 55 (1959).

45. *Id.* at 62.

46. *Id.* at 62-63.

47. Fred Meyer, Inc., Trade Reg. Rep. (F.T.C.) ¶ 1636S (March 29, 1963).

48. *FTC v. Morton Salt Co.*, 334 U.S. 37, 53-55 (1948); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956).

49. 329 F.2d 694 (9th Cir. 1964).

an allowance to area retailers, but not to a wholesaler, did not violate section 2(d) since there was no functional competition between them. Only if the wholesaler's customers had direct dealings with the distributor so as to become its "indirect customer" would the act be violated by the distributor.⁵⁰ The conflict between these positions is, therefore, still unresolved. The Commission's current position that, in reality, retailers and wholesalers are in competition for the same consumer dollars seems too broad. Rather, the central question should be "whether competition is affected by the grant of an allowance or service . . ."⁵¹ This position escapes the narrowness of the straight functional approach to competition which fails to consider the economic realities of marketing and distribution systems. The Commission's broad approach appears to overlook the central purpose of the act—to protect the competitive position of the small enterprise.

Whether the Commission is charging a seller with violating section 2(d) or section 2(e), or a buyer with violating section 5, the central issue of this requirement remains the same—whether the purchaser who did not receive such special treatment was a competitor.⁵²

C. *Benefit*⁵³

The prohibition against promotional allowances applies only to those payments made for the benefit of the favored customer.⁵⁴ Therefore, a buyer facing a section 5 violation may show that no benefit was received,⁵⁵ or was intended to be received, from the special treatment that it induced. The Commission has held that a seller's payment to a third party for the benefit of a customer⁵⁶ and allowances for institutional advertising fall within the meaning of benefit under sections 2(d) and 2(e).⁵⁷

The question of whether intention to benefit is essential to finding a violation of the Robinson-Patman Act has apparently been settled by the Commission and the courts. In the "Chain Lightning" promotional plan,⁵⁸ a radio station contracted with grocery chains to provide them with special advertising, in exchange for the stores' promise to run promotional displays for certain products. The

50. *Id.* at 709; accord, *Atalanta Trading Corp.*, 53 F.T.C. 565, 570 (1956), order vacated on other grounds, 258 F.2d 365 (2d Cir. 1958).

51. *Baum*, *op. cit.* supra note 15, at 54.

52. See *Furr's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17352, at 22516 n.6. (Oct. 20, 1965).

53. "Benefit" is impliedly limited to the area of advertising and promotions. E.g., *General Foods Corp.*, 52 F.T.C. 798, 822 (1956); *Rowe*, Price Discrimination Under the Robinson-Patman Act 377 (1962).

54. See note 5 supra.

55. See *Individualized Catalogues, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16873, at 21865 (April 3, 1964).

56. E.g., *P. Lorillard Co.*, 54 F.T.C. 1550 (1958), *aff'd*, 267 F.2d 439, 444-45 (3rd Cir.), cert. denied, 361 U.S. 923 (1959); See, e.g., *Swanee Paper Corp.*, 56 F.T.C. 1077 (1960), *aff'd*, 291 F.2d 833 (2d Cir. 1961), cert. denied, 368 U.S. 987 (1962); See also Advisory Opinion Digest No. 6, Trade Reg. Rep. ¶ 17375 (Nov. 23, 1965).

57. *R. H. Macy & Co.*, 60 F.T.C. 1249 (1962), modified, 326 F.2d 445 (2d Cir. 1964).

58. See *P. Lorillard Co. v. FTC*, 267 F.2d 439 (3d Cir.), cert. denied, 361 U.S. 923 (1959).

station then solicited manufacturers to purchase radio time and offered them the additional inducement of promotional displays in the stores. The circuit court, in *P. Lorillard Co. v. FTC*,⁵⁹ upheld the Commission in finding that participating sellers violated section 2(d) with respect to other competing stores. Whether the sellers intended to benefit the stores was not deemed important. "This section of the Act does not concern itself with motive or intention. It is only concerned with the consequences which flow from an act. If those consequences eventuate, the act from which they result is forbidden."⁶⁰

The Seventh Circuit has taken a different approach.⁶¹ In *The Nuarc Co.*,⁶² the FTC held that a manufacturer's purchase of advertising in a trade magazine wholly owned by a customer violated section 2(d). Despite the separate corporate identity, the Commission held that the payments to the magazine were payments to the customer, and refused to consider whether the payments were for the benefit of the customer.⁶³ The court of appeals reversed, refusing to accept the contention that benefit was irrelevant.⁶⁴

We believe that Section 2(d) requires a showing that some benefit accrued to, or was intended to accrue to, the customer. . . .

The only benefit that could have . . . accrued . . . was through the indirect route of profits . . . accruing to . . . the owner of both enterprises. This, without more, cannot be the basis of a Section 2(d) violation.⁶⁵

Thus, some benefit must at least be intended for the customer, and it must be intended for him as a customer, not in some other capacity.⁶⁶

The test of actual benefit has also been applied to institutional advertising—advertising aimed at community prestige and good will rather than at the sale of a certain item. In *R. H. Macy & Co. v. FTC*,⁶⁷ the department store was charged with violating Section 5 of the FTCA by inducing suppliers to contribute to a special advertising campaign. This advertising was limited to public service announcements. Macy's claim that this advertising was not for its benefit and, therefore, that suppliers did not violate section 2(d) was rejected by the court.⁶⁸ The fact that the allowances were used to promote indirectly

59. 267 F.2d 439 (3d Cir.), cert. denied, 361 U.S. 923 (1959).

60. 267 F.2d at 444. Accord, *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 837 (7th Cir. 1958); cf. *Swanee Paper Corp. v. FTC*, 291 F.2d 833, 836-37 (2d Cir. 1961), cert. denied, 368 U.S. 937 (1962).

61. *Nuarc Co. v. FTC*, 316 F.2d 576 (7th Cir. 1963).

62. 61 F.T.C. 375 (1962).

63. *Id.* at 393. The FTC has accepted, apparently, the court of appeals' reasoning in this situation. See *Billy & Ruth Promotion, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16375 (April 3, 1964); *Individualized Catalogues, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16373 (April 3, 1964).

64. *Nuarc Co. v. FTC*, 316 F.2d 576 (7th Cir. 1963).

65. *Id.* at 582. (Emphasis added.) (Citations omitted.) This position is in accord with Commissioner Elman's dissent. 61 F.T.C. at 398-99.

66. 316 F.2d at 582.

67. 326 F.2d 445 (2d Cir. 1964).

68. *Id.* at 450.

Macy's as a store, rather than any specific product, did not preclude benefit from arising. The purpose of such advertising was to attract more people into the store.

D. *Available on Proportionally Equal Terms*

Although failure to proportionalize is the crux of a 2(d) or 2(e) violation,⁶⁹ the Commission has issued only general guidelines, concluding that "no single way to proportionalize is prescribed by law."⁷⁰ This approach is justified simply because it would be impossible to prescribe correct conduct for buyers and sellers in every industry.⁷¹ In general terms, the FTC has approved plans basing allowances or services on the dollar volume of goods purchased during a specified time, on the quantity of goods purchased during a specified time, or plans under which the seller furnished services to the buyer worth a certain percentage of the buyer's volume.⁷²

The Commission has been liberal in its interpretation of this requirement, realizing that exact proportionality is often impossible,⁷³ and stressing honesty, rather than exactness, in establishing a promotional program.⁷⁴

69. A prima facie case under § 2(d) or § 2(e) is made by establishing that one purchaser received an allowance or service and a competitor did not. The seller then has the burden of showing that these allowances or services were available on proportionally equal terms. Thus, his position is made difficult by not knowing exactly what he must show, and, many times, he has no idea if his conduct was proper. Some courts have maintained that the FTC need only show that one purchaser received an allowance or service, and not that another customer was denied such treatment. Compare *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1959), with *Atalanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958). See also 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 162-63.

Similarly, a § 5 violation has been held to be a per se offense. *Grand Union Co. v. FTC*, 300 F.2d 92, 94-96 (2d Cir. 1962). A prima facie case against the buyer is established when the Commission introduces sufficient evidence to show that the buyer, at the time that it induced and received payments or services from the supplier, possessed sufficient information to inquire whether the supplier was making such payments or services available on proportionally equal terms to competitors. *Giant Food Inc. v. FTC*, 307 F.2d 184, 187 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963). The FTC, in recent decisions, has imputed such knowledge to the buyer upon an examination of the buyer's conduct. When some sellers question the validity of the plan, when the buyer determines in advance the amount of the seller's contribution, or when the buyer informs the seller that any allowance given would not affect existing contractual arrangements, the FTC will infer that the buyer knew he was inducing a 2(d) or 2(e) violation. See *ibid.*; *Furr's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17352, at 22519-20 (Oct. 20, 1965).

70. FTC, *op. cit.* supra note 40, at 4.

71. See Baum, *The Robinson-Patman Act* 61 (1964).

72. 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 189; FTC, *op. cit.* supra note 40, at 4. The courts have found that these types of proportionalization are not inclusive. *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 486 (2d Cir. 1962); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 61 n.4 (1959) (*dictum*).

73. Cf. *Dantzler v. Dictograph Prods., Inc.*, 272 F.2d 172 (4th Cir. 1959).

74. See *Lever Bros.*, 50 F.T.C. 494 (1953). This position was lauded by the Attorney General's Committee as "workable." 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 191.

A subject of greater controversy is the availability requirement. To be available, it must be economically feasible for the customer to use the allowance. "[T]he Act requires a frank recognition of the business limitations of each buyer. An offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him."⁷⁵ Therefore, the alternatives offered to other customers, in addition to being of proportionally equal value, must be of some practical value. In one case, handbills and radio "spots" were held to be reasonable alternatives in lieu of newspaper advertisements.⁷⁶ In *General Elec. Co.*,⁷⁷ the hearing examiner found that the corporation violated section 2(d) by making advertising allowances available only if no price or list price were mentioned in the advertisement. This, the examiner found, made the allowance of no value to discount stores.

Because the allowance or service is not available if the buyer does not know of it,⁷⁸ the seller is under an obligation to inform his customers of his program for granting such benefits.⁷⁹ Although the Commission has never decided whether an affirmative offer is required,⁸⁰ mere notice to salesmen to inform buyers of the plan has been held insufficient, without a showing that such information was actually given to the buyer.⁸¹

In a recent decision, the FTC has added the new element of exactness to the

75. *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 839 (7th Cir. 1958), cert. denied, 358 U.S. 947 (1959). See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 994 (8th Cir.), cert. denied, 326 U.S. 773 (1945); *Atlantic Prods. Corp.*, Trade Reg. Rep. (F.T.C.) ¶ 16676, at 21590 (Dec. 13, 1963); 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 189-90; FTC, op. cit. supra note 40, at 5.

76. *Lever Bros.*, 50 F.T.C. 494 (1953). In *Exquisite Form Brassiere, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16753, at 21636 (July 11, 1963), aff'd, Trade Reg. Rep. (1965 Trade Cas.) ¶ 71491 (D.C. Cir. 1965), the Commission held that the alternative offered to non-participants in a cooperative advertising plan—participation in a gift premium plan—was not proportionally equal. Ice buckets and irons did not match the valuable advertising space available to larger customers. See *House of Lord's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17437, at 22672 (Jan. 18, 1966).

77. Trade Reg. Rep. (F.T.C.) ¶ 16330 (March 1, 1963) (initial cease and desist order), dismissed on other grounds, Trade Reg. Rep. (F.T.C.) ¶ 16817 (Feb. 28, 1964).

78. E.g., *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1548 (1956).

79. See *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962); FTC, op. cit. supra note 40, at 4.

80. In *Vanity Fair Paper Mills, Inc.*, 60 F.T.C. 568, 575 (1962), the Commission stated that an allowance is not available if it has not been offered or made known to the other customers. This should not be construed to mean that the seller must affirmatively offer to provide the buyer with allowances or services, but rather, that such a policy must be made known to the buyer. The court of appeals, in upholding the Commission's order, stated that "legislative history . . . argues against a construction that would require the seller to make an actual 'offer' to all customers . . ." *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480, 485 (2d Cir. 1962).

81. *Ibid.* For all practical purposes, the FTC has disapproved of any program based on oral, rather than written, notification. See *House of Lord's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17437, at 22672 (Jan. 18, 1966).

notice requirement. In *House of Lord's, Inc.*,⁸² a manufacturer told its customers that it would contribute fifty per cent of the cost of any advertising that they might care to undertake. The Commission held that this violated section 2(d) because of its vagueness. "[A]n 'offer' as vague as this, even if actually made, simply does not convey enough information to permit an intelligent evaluation of what is being proposed."⁸³ Many buyers had interpreted the offer as one to share the cost of newspaper advertising, which many small buyers could not afford. Therefore, the plan was not *in fact* available to all the manufacturer's customers.⁸⁴

The recent FTC decision, *Fred Meyer, Inc.*,⁸⁵ has also injected a time element into the determination of availability. The Commission held that the availability provision requires "not only that competing purchasers be offered an opportunity to receive proportionally equal payment for performing the same services, but that they must be offered that opportunity at the same time."⁸⁶ Under this reasoning, any type of allowance or service given to one buyer exclusively for a period of time violates the act, even though competing buyers are offered other types of services or the same service at a later time.⁸⁷

III. DEFENSES

Defenses available to 2(d) or 2(e) violations are limited.⁸⁸ While section 2(a) requires a showing of injury to competition, sections 2(d) and 2(e) are *per se* violations.⁸⁹ The Commission need only show that one competitor received an

82. Trade Reg. Rep. (F.T.C.) ¶ 17437 (Jan. 18, 1966).

83. *Id.* ¶ 17437, at 22671.

84. *Id.* ¶ 17437, at 22672.

85. Trade Reg. Rep. (F.T.C.) ¶ 16368 (March 29, 1963).

86. *Id.* ¶ 16368, at 21225.

87. See generally Hickey, *The Fred Meyer Case—Its Implications Under Section 2(d) of the Robinson-Patman Act*, 9 Antitrust Bull. 255 (1964). The logical conclusion would seem to be that a seller could no longer use any unique person or object in a promotional display (e.g., a television star to "plug" a certain product at a store, or a special car at a dealer's showroom), since it would not be available at a competitor's establishment at the same time.

88. Section 2(a) includes certain defenses—cost differentials and changing market conditions. These have been excluded from §§ 2(d) and 2(e). See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959). This policy has been criticized as ignoring economic realities. "[I]t must be recognized that 'payments' made and 'services or facilities' furnished are 'price equivalent' forms of competition. So far as the buyer is concerned, such arrangements give him his purchases at lower costs, at a lesser price. . . . If prices may recognize cost savings . . . why should not payments for services and the furnishing of services . . . be permitted similarly to recognize the actualities of competition?" Barnes, *The Robinson-Patman Challenge to Buyers' Competition*, 9 Antitrust Bull. 415, 483-84 (1964).

89. *FTC v. Simplicity Pattern Co., Inc.*, 360 U.S. 55, 65, 68 & n.13 (1959); *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132, 135 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947); Patman, *Complete Guide to the Robinson-Patman Act* 129 (1963). The *per se* approach was criticized by the Attorney General's Committee. 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 191-93. The Committee was, in turn, subjected to harsh criticism by the House Select Com-

allowance or service and another did not.⁹⁰ Section 2(b) provides the only effective defense to such violations: it allows a seller to rebut the prima facie case of discrimination by showing that the service or price given was made in good faith to meet competition.⁹¹

Although meeting competition is itself an absolute defense,⁹² the courts and the Commission have strictly limited it⁹³ to allowances or services made⁹⁴ to

mittee on Small Business. The committee report stated: "What the [Attorney General's] committee chose to overlook was that the purpose of attaching per se illegality to the section 2(c), (d), and (e) prohibitions was precisely to force unearned commissions out in the open." H.R. Rep. No. 2966, 84th Cong., 2d Sess. 97 (1956). The committee further noted: "The fact of these substitutes for price concessions is comparatively easy to detect, whereas the magnitude of discriminations not directly translatable into price differences is practically impossible to measure." *Ibid.*

Support for the per se approach also came from Edward Howrey, former Chairman of the FTC. "It would be very difficult . . . to administer a statute which required proof of injury to competition in connection with . . . promotional allowances where the allowances and services often . . . are not related to the price of the particular product . . ." Howrey, *The Federal Trade Commission and the Attorney General's Committee Report, in The House Counsel and the Attorney General's Committee Report 119* (Zaidin ed. 1956).

90. See note 69 supra.

91. "[N]othing herein contained shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price or the furnishing of services or facilities . . . was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor." Robinson-Patman Act § 2(b), 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1964). For many years, the Commission held that the § 2(b) defense was not available to a § 2(d) charge. E.g., *Henry Rosenfeld, Inc.*, 52 F.T.C. 1535, 1549-50 (1956). However, after the court of appeals held that the defense was available in *Esquisite Form Brassiere, Inc. v. FTC*, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 883 (1962), the FTC reversed its position. See *J. A. Folger & Co.*, 61 F.T.C. 1166, 1187 (1962). This change in policy has been criticized by Representative Patman, who claimed that Congress never intended that the meeting competition defense apply to § 2(d). Patman, *op. cit. supra* note 89, at 145.

92. See *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 181-82.

93. See, e.g., *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951); *FTC v. Cement Institute*, 333 U.S. 683 (1948); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746 (1945); *Continental Baking Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16720 (Dec. 31, 1963); *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134, 1173 (1962), rev'd on other grounds, 329 F.2d 964 (9th Cir. 1964).

94. *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-50 (1951). "[W]herever a lawful lower price of a competitor threatens to deprive a seller of a customer, the seller, to retain that customer, may in good faith meet that lower price." *Id.* at 242. *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48, 51 (7th Cir. 1962), distinguished that case: "Since the Standard Oil Company had made the lower price . . . only to retain its customers and had not acquired new customers . . . the question presented in the instant case [whether Sunshine could grant discounts to purchasers not then its customers] was not before the Supreme Court." The court held that Sunshine had not violated the act. The FTC announced that it would not follow the Sunshine decision, but would continue to apply its interpretation of the Standard Oil rule. See *FTC Issues Explanation For Not Seeking Supreme Court Review of a Decision by U.S. Court of Appeals For 7th Circuit*, FTC News Release, Nov. 23, 1962.

meet a competitor's efforts to steal an old customer, not to attract new customers. This limitation has been severely criticized⁹⁵—first, because section 2(b) permits a seller to meet services furnished by *any* competitor, not merely the seller's competitor; and, secondly, because it is by no means clear when an old customer, who has not dealt with the seller for a period of time, ceases to be an old customer and becomes a new customer again.⁹⁶ Another restriction, but fully in accord with the good faith provision of section 2(b),⁹⁷ precludes the seller from relying on the defense unless he shows, in each instance, that he knew of the competitors' offers to his customers and formulated his policy solely to defeat their efforts.⁹⁸ The defense will not be available if the seller goes beyond meeting the competitor's offer and actually surpasses it.⁹⁹

A recent Commission decision¹⁰⁰ has, in effect, cast grave doubts on the usefulness of this defense by making it available only if the competition met involved goods of the same grade and quality which are marketed under similar conditions. This decision follows the reasoning of the *Atalanta* case¹⁰¹ that competing customers are those who deal in goods of the same quality and grade. Yet, in practice, a seller does not always know the exact type of goods that his

Indications that the FTC may be more receptive to a change in its strict rule can be seen in *Continental Baking Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16720, at 21647 (Dec. 31, 1963). See also 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 184.

95. See *id.* at 182-84. The Committee felt that § 2(b) should not be confined to defensive reductions, as this would not be "in keeping with . . . principles of competition, and would . . . foster tight and rigid commercial relationships by insulating them from market forces." *Id.* at 184.

96. *Sunshine Biscuits, Inc.*, 59 F.T.C. 674, 682-83 (1961) (dissenting opinion).

97. See note 91 *supra*.

98. *E.g.*, *Exquisite Form Brassiere, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16753, at 21691-92 (July 11, 1963), *aff'd*, Trade Reg. Rep. (1965 Trade Cas.) ¶ 71491 (D.C. Cir. 1965); *Minneapolis-Honeywell Regulator Co.*, 44 F.T.C. 351, 396-97 (1948), *rev'd in part* on other grounds, 191 F.2d 786 (7th Cir. 1951), *cert. denied*, 344 U.S. 206 (1952). However, there is evidence that the seller is held only to a showing that he gave discriminatory allowances in good faith, believing that he was meeting competition. *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945). A recent Commission decision injected the question of lawfulness into the defense. In *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134 (1962), *rev'd* on other grounds, 329 F.2d 694 (9th Cir. 1964), the FTC stated that the "respondent must at least show the existence of circumstances which would lead a reasonable person to believe that the lower prices it was meeting were lawful prices." *Id.* at 1173. (Footnote omitted.) This seems to be supported by *Standard Oil Co. v. FTC*, 340 U.S. 231 (1951). However, the courts of appeals in *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956), and *Standard Oil Co. v. Brown*, 238 F.2d 54 (5th Cir. 1956), have refused to place the burden of proof on the seller in showing that a competitor's prices were lawful. The Attorney General's Committee has suggested that the lawfulness of a competitor's price be an element of the good faith requirement, but not an absolute condition for invoking the defense. 1955 Att'y Gen. Nat'l Comm. Antitrust Rep. 182.

99. *Exquisite Form Brassiere, Inc.*, *supra* note 98, ¶ 16753, at 21690.

100. *Bigelow-Sanford Carpet Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16800, at 21755 (Feb. 10, 1964).

101. *Atalanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958).

competitor is offering his customers. However, this area of the section 2(b) defense has been further confused by the recent Supreme Court decision in *FTC v. Borden Co.*¹⁰² The Court rejected any consideration of market demand or advertising differences in determining whether goods were of like grade or quality for the purpose of deciding whether section 2(a) had been violated.¹⁰³ Although the Court recognized that the Commission has adopted a contrary position in determining whether the section 2(b) defense applies,¹⁰⁴ it refused to resolve this contradiction.¹⁰⁵ If the *Borden* decision is extended to section 2(b), the defense would be more available,¹⁰⁶ since the defendant would have to show only physical or chemical identity and not commercial similarity.

Whether a buyer charged with a section 5 violation can avail himself of the section 2(b) defense has not been determined. It has been suggested that to allow a buyer who has created the conditions which establish a section 2(b) defense to take advantage of the defense himself would be contrary to the intent of the statute.¹⁰⁷ A general denial of section 2(b) benefits to a buyer charged with a section 5 violation would appear to be too harsh. If a buyer solicits special treatment from all the suppliers of certain products, he, obviously, should not be able to use the meeting competition defense. But, if a buyer notifies his usual supplier that a competing seller has offered him special benefits and that, unless this offer is met, sound business policy dictates changing suppliers, it would seem unreasonable not to allow the buyer to avail himself of the section 2(b) defense.

Another defense available, although clearly disfavored, is that of *de minimis*.¹⁰⁸ It is rarely invoked effectively.¹⁰⁹ The Commission, in *Quaker Oats Co.*,¹¹⁰ inferred that a supplier's payment of 250 dollars to a retailer for a special

102. 34 U.S.L. Week 4288 (March 23, 1966). Although the decision involved a 2(a) violation, it may influence future 2(b) decisions.

103. *Id.* at 4290.

104. See *Bigelow-Sanford Carpet Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16860, at 21755 (July 11, 1963); *Standard Oil Co.*, 49 F.T.C. 923, 952 (1953), order vacated on other grounds, 233 F.2d 649 (7th Cir. 1956), cert. denied, 355 U.S. 396 (1958).

105. 34 U.S.L. Week at 4290.

106. *Id.* at 4294 (Stewart, J., dissenting).

107. *Max Factor & Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16992, at 22066-67 n.4 (July 22, 1964).

108. See *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); cf. *E. Edelmann & Co. v. FTC*, 239 F.2d 152 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957).

109. See *Furr's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17352 (Oct. 20, 1965). The trial examiner dismissed § 5 charges against a supermarket chain for inducing a number of suppliers to grant promotional allowances for its special sale. The dismissal was based, *inter alia*, upon the ground that purchases of these suppliers' products by some of Furr's competitors were so small as to be *de minimis*. *Id.* ¶ 17352, at 22516 n.6. The FTC, although it accepted the examiner's decision, stated that it did not pass on the validity of this defense, and its silence was not to be construed as approval. *Id.* ¶ 17352, at 22521.

110. 60 F.T.C. 798 (1962). The dissent felt that *de minimis* should apply. It stated that

advertising display was not *de minimis* although the supplier's advertising expenditures amounted to millions of dollars annually. The Commission's denial of this defense is based on two factors. The *de minimis* doctrine would seem to have little significance where no effect on competition need be shown.¹¹¹ Furthermore, the Commission will view the discriminatory service or payment, not in light of the contributor's total advertising expenditure, but from the standpoint of the recipient's advertising budget.¹¹² Therefore, the buyer-recipient charged with a section 5 violation will rarely be able to avail himself of this defense. Under normal circumstances, the contributions received would not be *de minimis*, since, without these contributions, he would not be able to operate the special programs which cause the unfair competition.¹¹³

IV. THE "Max Factor APPROACH"

In the past, the Commission has often chosen to prosecute both the buyer under section 5 and the various sellers under section 2(d) or section 2(e).¹¹⁴ This method of enforcement is not only time-consuming, but also ineffective and inequitable. In situations where section 5 is applicable, it is the buyer, seeking financing for a special project, who applies pressure on the seller for discriminatory contributions or services.¹¹⁵ The large seller with an organized advertising program surely finds these requests annoying, while the small seller feels more coerced, believing that failure to participate would, at least, cost him the good will of the buyer.¹¹⁶ Yet, under the Commission's procedure, both the buyer and the seller would face a cease and desist order. Commissioner Elman, in *Max Factor & Co.*,¹¹⁷ attempted to resolve this situation. The Commissioner, noting that "unfair conduct by the buyer, not the seller, was the primary evil at which the Act was aimed,"¹¹⁸ dismissed section 5 charges against Max Factor. The Commission felt that the entry of cease and desist orders against a few

the Commission has more important things to occupy its attention than issuing broad non-discrimination orders when they are not warranted. *Id.* at 819-20.

111. There would appear to be some significance in invoking the defense to challenge the commerce requirement. See *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956).

112. In *J. A. Folger & Co.*, 61 F.T.C. 1166 (1962), the Commission held that payments made to a supermarket, although only \$150, "were . . . substantial when viewed in the light of the whole [promotional] . . . activity because it was these amounts plus the contributions of others which permitted [the supermarket] . . . to engage in [these] . . . promotional efforts." *Id.* at 1186. Cf. *Yakima Fruit & Cold Storage Co.*, 59 F.T.C. 693 (1961).

113. See *J. A. Folger & Co.*, 61 F.T.C. 1166, 1186 (1962).

114. See, e.g., *FTC v. J. Weingarten, Inc.*, 336 F.2d 687 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965); *Vanity Fair Paper Mills, Inc. v. FTC*, 311 F.2d 480 (2d Cir. 1962); *Grand Union Co. v. FTC*, 300 F.2d 92 (2d Cir. 1962).

115. *Max Factor & Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16992, at 22065 (July 22, 1964); *Abby Kent Co.*, Trade Reg. Rep. (F.T.C.) ¶ 17310, at 22466 (Aug. 9, 1965) (dissenting opinion).

116. *Max Factor & Co.*, Trade Reg. Rep. (F.T.C.) ¶ 16992, at 22065 (July 22, 1964).

117. Trade Reg. Rep. (F.T.C.) ¶ 16992 (July 22, 1964).

118. *Id.* ¶ 16992, at 22066. See note 13 *supra* and accompanying text.

scattered firms of the many who gave allowances to this one retailer would be inequitable and ineffective.¹¹⁹ Rather, the FTC would bring section 5 proceedings against the buyer. This approach seems to be the most sensible and, in the long run, the most effective way of reducing discrimination in certain industries. In industries where competition is high, where there are few buyers, many sellers, and little differentiation between products, it appears to make little sense to punish the sellers. Those who are not under the order will certainly yield to pressure from a large buyer. Those under the order will be tempted to violate it in order to meet competition and stay in business.¹²⁰ In other industries, where competitive forces are less keen, and the buyer-power is more restricted, the FTC can approach the problem by using its more traditional manner of enforcement.¹²¹ The Commission should examine the industry pressures in each situation and fashion its enforcement policy according to the means best calculated to achieve the aim of Congress—protection of the small enterprise (both buyer and seller) from the huge buying power of the large chain stores.¹²²

V. CONCLUSION

Unfortunately, the Commission appears to have reverted to its more orthodox approach. In *Abby Kent Co.*,¹²³ the Commission was faced with widespread violations of the advertising provisions of the act within the garment industry. This was an excellent opportunity to apply the *Max Factor* doctrine. The Commission, while acknowledging that "department and specialty store chains to a large extent have been responsible for discriminatory allowances in the industry . . ."¹²⁴ decided against enforcing the provisions of section 5. Instead, it chose to enforce consent decrees against approximately one per cent of the 30,000 garment manufacturers.¹²⁵ This method of enforcement appears to offer little hope for the termination of section 2(d) violations in the industry.¹²⁶

119. *Id.* ¶ 16992, at 22066. The Commission later dismissed similar orders against Nestle-Lemur, Lanolin Plus, and other sellers who contributed to this retailer's promotional campaign. See *Nestle-Lemur Co. & Lanolin Plus, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 16995 (July 31, 1964); *Chesebrough-Pond's, Inc.*, Trade Reg. Rep. (F.T.C.) ¶ 17007 (July 27, 1964); cf. *FTC v. J. Weingarten, Inc.*, 336 F.2d 637, 694 n.21 (5th Cir. 1964), cert. denied, 380 U.S. 908 (1965).

120. See *Abby Kent Co.*, Trade Reg. Rep. (F.T.C.) ¶ 17310, at 22466 (Aug. 9, 1965) (dissenting opinion).

121. That is, enforcement of § 2(d) or § 2(e) against the seller and § 5 against the buyer.

122. See *Tri-Valley Packing Ass'n*, 60 F.T.C. 1134, at 1177-78 (1962) (dissenting opinion), rev'd on other grounds, 329 F.2d 694 (9th Cir. 1964); text accompanying note 10 *supra*.

123. Trade Reg. Rep. (F.T.C.) ¶ 17310 (Aug. 9, 1965).

124. *Id.* ¶ 17310, at 22464 n.3.

125. *Id.* ¶ 17310, at 22466 (dissenting opinion).

126. Commissioner Elman, in his dissent, called upon the Commission to explore new approaches to meet 2(d) and 2(e) violations in such quasi-monopsonistic industries. He suggested: (1) the *Max Factor* approach; and (2) use of the Trade Regulation Rule procedure, whereby the FTC would establish precise guidelines under § 1.65 of the Commission's Rules of Practice and Procedure for the industries. (This procedure would remove