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TRACING AN ANTITRUST INJURY IN SECONDARY LINE PRICE DISCRIMINATION CASES

INTRODUCTION

The Robinson-Patman amendment\(^1\) to section 2(a) of the Clayton Act\(^2\) protects small businesses from the economic bargaining power of their larger competitors by prohibiting sellers from discriminating in price between competing purchasers of similar goods. Under section 4 of the Clayton Act,\(^3\) a private plaintiff may sue for treble damages if he can prove that he was injured by an illegal price discrimination. In *J. Truett Payne Co. v. Chrysler Motors Corp.*,\(^4\) the Supreme Court ruled that presumptive injury and "automatic damages" cannot be inferred from the existence and extent of a price difference.\(^5\) In order to recover treble damages, the plaintiff must now prove that he suffered an actual, "antitrust" injury\(^6\) resulting from the anticompetitive effects of the Robinson-Patman violation.\(^7\) By requiring proof of actual injury in a section 2(a) case, the Court resolved an issue that had split the lower federal courts.\(^8\) The Court, however, did not delineate the standard of proof necessary for a plaintiff to show that his injury was attributable to a Robinson-Patman violation.\(^9\)

This Note examines the plaintiff's burden of proving both a violation of the Robinson-Patman Act and an actual, antitrust injury

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3. Id. § 15.
5. Id. at 561-63.
6. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful").
7. 451 U.S. at 562.
9. 451 U.S. at 568-69. The Supreme Court remanded the case to the lower court to determine whether Chrysler had in fact violated the Robinson-Patman Act; only then could the issue of damages be resolved. Id.
caused by the violation. An antitrust injury and a Robinson-Patman violation are different elements of the plaintiff's burden of proof. Although they overlap in theory, they contemplate different competitive injuries and require independent evaluation.\(^\text{10}\)

Part I of this Note discusses the plaintiff's requirement of establishing a violation of the Robinson-Patman Act. The Federal Trade Commission (FTC) currently seeks to establish a violation more precisely and with greater reference to probative facts than it has in the past.\(^\text{11}\) The Court in \textit{J. Truett Payne} implied that a private plaintiff will have to establish the Robinson-Patman violation with at least as much certainty as is required by the FTC.\(^\text{12}\)

Part II discusses the plaintiff's burden of establishing an antitrust injury in order to recover treble damages under section 4 of the Clayton Act. Price discrimination in violation of the Robinson-Patman Act that results in a "potential" lessening of competition will not always create a remedial private injury under section 4.\(^\text{13}\) The rival's increased profits alone will not cause specific injury to the plaintiff if the rival merely "pockets" the price difference.\(^\text{14}\) An antitrust injury


\(^{12}\) 451 U.S. at 561-62. In FTC v. Morton Salt Co., 334 U.S. 37 (1948), the Court had allowed the Commission to infer resulting injuries from a substantial price discrimination. \textit{Id.} at 46-47, 50. The \textit{J. Truett Payne} Court distinguished \textit{Morton Salt} on the grounds that the plaintiff was claiming a Robinson-Patman Act violation in conjunction with a Clayton Act § 4 treble damages suit that, unlike injunctive actions, requires proof of actual injury and anticompetitive effects. 451 U.S. at 561-63.


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will only occur if the rival actually uses his larger profit margin to solicit customers and the plaintiff consequently loses either customers or profits.\(^{15}\)

It has been alleged that customer solicitation can only be established by showing that the defendant lowered his resale price.\(^{16}\) In J. Truett Payne, however, the Court specifically refused to rule as a matter of law whether the plaintiff must prove that the favored competitor used his price advantage to lower his resale price to his customers.\(^{17}\) The Court thus left open the possibility that other factors may be considered in establishing a Robinson-Patman Act violation if the plaintiff can trace his injury to a different but equally specific and present form of customer solicitation, such as increased advertising or additional services. This Note concludes that if potential non-price acts may be sufficiently anticompetitive to establish a section 2(a) violation, they should be considered equally sufficient grounds for private damages if a present injury can be traced to them. Given the more stringent initial burden of proving the Robinson-Patman Act violation, the plaintiff should be allowed some degree of latitude in tracing his lost sales or profits to his favored competitor.

I. PROOF OF THE ROBINSON-PATMAN ACT VIOLATION

The Robinson-Patman Act prohibits price discriminations between competing purchasers of similar goods which have the capacity to injure competition.\(^{18}\) To establish a section 2(a) violation the private

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\(^17\) 451 U.S. at 564 n.4.

\(^18\) 15 U.S.C. § 13(a) (1976). The private plaintiff must show the existence of a price difference and the resultant anticompetitive effect. Piraino, The Legality of Distributor Incentive Discount Plans Under the Robinson-Patman Act, 58 Wash. U.L.Q. 807, 809 (1980); Note, Private Recovery Under the Robinson-Patman Act: Confusion in the Courts on the Proper Measure of Damages, 21 Syracuse L. Rev. 941, 942 (1970) [hereinafter cited as Confusion in the Courts]; see Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220, 227 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974); Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 698, 702-04 (9th Cir. 1964); Alexander v. Texas Co., 165 F. Supp. 53, 56-57 (W.D. La. 1958). Although in FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960), the Supreme Court held that a price difference is the equivalent of a price discrimination, id. at 549, it is clear that the statute itself establishes that the price differential must also be shown to
plaintiff must demonstrate both a potential injury to competition and the capacity of the price discrimination to cause this injury.20

A. The Plaintiff's Burden of Defining the Injury

The plaintiff's task of defining a section 2(a) injury is made difficult by the Robinson-Patman Act's prohibition of both broad and narrow injuries to competition.21 In a broad sense, the statute prohibits price discriminations that tend to lessen competition in the overall market.22 In the narrow sense, the statute seeks to protect the business

have potential anticompetitive effects. 15 U.S.C. § 13(a) (1976); see Heim, supra note 15, at 201 n.2.

19. 15 U.S.C. § 13(a) (1976). The statute prohibits discriminations which "may . . . substantially . . . 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 . . . ." Id. (emphasis added).

20. Heim, supra note 15, at 201 n.2. The "capacity" element stems from the statute's "prophylactic" prohibition of price discriminations which "may" have anticompetitive effects. Congress sought to avoid the crippling results of full scale anticompetitive behavior by catching price discrimination in its incipiency and preventing its growth. See FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948); Corn Prods. Refin. Co. v. FTC, 324 U.S. 726, 742 (1945); Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133, 1136-37 (5th Cir. 1979), vacated and remanded sub nom. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong. 2d Sess. 8 (1936); A Symposium on the Robinson-Patman Act, 49 Nw. U. L. Rev. 196, 203 (1954) [hereinafter cited as Symposium]. To establish the capacity of the price discrimination to injure competition, plaintiff must prove either that the discrimination is "substantial" in degree or that its effect on competition is "probable." See infra notes 60-67 and accompanying text.


22. In language borrowed from § 2 of the original Clayton Act, the Robinson-Patman amendment prohibits price discriminations "where the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce." 15 U.S.C. § 13(a) (1976). "Section 2(a) of the Robinson-Patman Act seeks to protect against two types of injuries which may result from the discriminatory pricing policies of an interstate seller. The probability of a general injury to competitive conditions in the market in which the seller or the purchaser sells his product will support a cease and desist order or afford an aggrieved party the basis for an action in damages. An injury of this broad nature is more prevalent in primary-line cases, as where a dominant seller uses discriminatory pricing policies to enhance its market position and therefore diminish the general vigor of competition
opportunities of those involved in marketing a particular product.23
Because of these dual objectives, the statute has been criticized as
inherently contradictory.24 If the small business is an inefficient mar-
ket participant that represents a deadweight social cost and a misalloca-
tion of resources, its protection to avoid a narrow injury would
cause a broad injury to the overall market.25

The confusion surrounding this conflict stems from the use of the
Robinson-Patman Act's narrow injury provision to protect individual
competitors.26 Although this is too limited an application of the
statute under modern economic theory,27 it is an understandable in-
terpretation in light of the statute's legislative history.28 By enacting
the Robinson-Patman amendment in 1937, Congress sought to
strengthen the Clayton Act, which only focused on broad injuries.
Congress perceived this approach to be too restrictive.29 The Robin-
son-Patman amendment was thus intended to prevent injuries at the secondary level between the seller's competing purchasers, whereas the original Clayton Act monitored competition in the overall primary-line market.

The legislative objective behind this change was to protect the "little man" from the bargaining strength of his larger rivals and to provide that all buyers in direct competition would receive evenhanded treatment from their suppliers. By providing such protection, Congress sacrificed vigorous short-run competition and temporary efficiency in order to maintain a more stable form of long-run competition by keeping the market fully operative. It was believed


32. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-44 (1960); FTC v. Henry Broch & Co., 363 U.S. 166, 168-69 (1960); Piraino, supra note 18, at 808; Tomlin, supra note 10, at 170. In enacting the Robinson-Patman amendment, Congress was clearly concerned with the survival of the spirit behind the "mom and pop" store. Representative Patman warned that "the day of the independent merchant is gone unless something is done and done quickly. . . . [W]e have reached the crossroads; we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist. . . ." 1935 Hearings, supra note 28, at 5-6 (statement of Rep. Patman); accord 80 Cong. Rec. 8134-35 (1936) (statement of Rep. Nichols); C. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 6-11 (rev. 2d ed. 1959); 1 ABA Sect. Antitrust Law, Monograph 4, The Robinson-Patman Act: Policy and Law 97 (1980) [hereinafter cited as Policy and Law]. Otherwise, "such differentials would become instruments of favor and privilege and weapons of competitive oppression." FTC v. Morton Salt Co., 334 U.S. 37, 43-44 (1948) (quoting H.R. Rep. No. 2287, 74th Cong., 2d Sess. 9 (1936)); accord Blakeney, supra note 21, at 479 n.2; Symposium, supra note 20, at 197; Confusion in the Courts, supra note 18, at 942.

33. Piraino, supra note 18, at 808; see FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963); FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960); FTC v. Morton Salt Co., 334 U.S. 37, 43, 49 (1948); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1026 (2d Cir. 1976), cert. denied, 429 U.S. 1097 (1977); American Motors Corp. v. FTC, 384 F.2d 247, 251 (6th Cir. 1967), cert. denied, 390 U.S. 1012 (1968); Purolator Prods., Inc. v. FTC, 352 F.2d 874, 883 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); C. Edwards, supra note 21, at 29-30; Rowe, Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act, 66 Yale L.J. 1, 34 (1956); Policy and Law, supra note 32, at 22; Symposium, supra note 20, at 207; Confusion in the Courts, supra note 18, at 942.

that the elimination or weakening of individual competitors would eventually result in monopoly power, and that any compelling short-run economic motivations would satisfy one of the statute's express defenses. Less imperative efficiency justifications were outweighed by the societal benefits from equal opportunity and the broader distribution of income.

Modern economists argue, however, that the protection of individual competitors does not necessarily enhance competition and may actually serve to penalize marketing efficiency. In pure economic

35. Symposium, supra note 20, at 197-98, 203. "The Robinson-Patman Act rests on the conviction that efficiency creates monopoly power for large purchasers, that this power, when combined with the inevitable monopoly possessed by large sellers, results in . . . further elimination of small dealers and the greater increase of monopoly." Levi, supra note 24, at 62; see C. Edwards, supra note 21, at 518; Policy and Law, supra note 32, at 22-23; Confusion in the Courts, supra note 18, at 942.

36. 15 U.S.C. § 13(a) (1976). The Act recognizes three economic defenses: The challenged price differential may be made in good faith to meet a competitor's equally low price ("meeting competition" defense). A seller may make due allowance for differences in manufacture or delivery costs ("cost justification" defense). A price differentiation may also be in response to changing conditions affecting the product's marketability ("changing conditions" defense). Id.; see E. Kinter, supra note 34, at 343-44; Policy and Law, supra note 32, at 26. But see Symposium, supra note 20, at 205. "[T]hese defenses under the terms of the Act as interpreted by the courts are subject to very stringent interpretation if the FTC desires." Id. "Under the Act, discriminations resulting from the lower costs of selling to larger buyers are supposedly protected by the cost justification defense. However, aside from the fact that prices are determined by competition rather than cost studies, the difficulty and expense of making the required cost analysis and the impossibility of predicting what savings will be found will discourage price concessions based on alleged savings." Id. at 208 n.45; accord Levi, supra note 24, at 68 ("Normal conduct does not suffice for these defenses.").

37. C. Edwards, supra note 21, at 521. Implicit in the social value of equal opportunity are the concepts of fairness and rugged individualism. The goals of fairness and economic efficiency often conflict, and require a compromise. The Robinson-Patman Act has been criticized for "invok[ing] standards of fairness that are not implicit in the effort to maintain a competitive economy." Id. Some critics claim that society must balance its objectives of economic efficiency, social equity and political freedom. Blakeney, supra note 21, at 494; Cooper, supra note 34, at 962. Others claim that fair treatment of competitors outweighs any minor loss in efficiency that results from a more perfect allocation of resources. Policy and Law, supra note 32, at 26-27. There is a strong belief that individual effort merits protection in our economic system. Tomlin, supra note 10, at 170; see S. Rep. No. 1502, 74th Cong., 2d Sess. 4 (1936); H.R. Rep. No. 2287, 74th Cong., 2d Sess. 8 (1936); 80 Cong. Rec. 9417 (1936); Symposium, supra note 20, at 197-98. "[T]he freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

38. See Blakeney, supra note 21, at 495-96; Cooper, supra note 34, at 965-66.

39. C. Edwards, supra note 21, at 543 ("The effect is likely to be some reduction of competitive incentive and of the intensity of competition on the seller's side of the market."); F. Rowe, supra note 26, at 34 ("Robinson-Patman law . . . enacts a legal
theory, a price discrimination means only that the same product is sold to different customers at prices unrelated to differences in transaction costs. Modern economists are reluctant, however, to apply this definition categorically. First, the complexity of the present-day market structure makes it difficult to segregate and measure relevant cost factors. Second, price discriminations have different purposes today than they did historically. Some types of price discrimination may be both efficient and pro-competitive in the general, interbrand market even though they do not meet one of the efficiency defenses provided for in the statute. For example, a manufacturer may respond to interbrand competitive pressures by furthering competition between his retail dealers. By prohibiting price discriminations in...
the intrabrand market, the Robinson-Patman Act inhibits the manufacturer's natural responses to the competitive pressures in the larger, interbrand market. This results in price rigidity, restricts innovative marketing schemes and invites collusion.

Modern economists further argue that competition in general suffers when individual competitors are artificially protected, because the incidental elimination of a small business may be the result of overall increased efficiency. Affording individual competitors a false sense of security reduces competitive vigor and perpetuates inefficient market behavior. The ultimate consumer will consequently be penalized by artificial prices, product deficiencies, and a less than optimal distribution of resources. This result subverts a primary objective of the antitrust laws—the promotion of competition for the benefit of the economy and the consumer.

The conflict between the broad and narrow competitive effects can be resolved if the narrow injury is defined as an injury to a class or group of competitors rather than as an injury to individuals. Each distributor an incentive to aggressively promote the seller's products, the plans are also likely to result in competing distributors receiving different prices for identical goods. Piraino, supra note 18, at 807; accord Blakeney, supra note 21, at 498-501; Cooper, supra note 34, at 964-66. It has been argued that such programs are defensible because they lack "the 'causal nexus' between the price discrimination and any injury to competition." Piraino, supra note 18, at 814. The other conceptual basis for allowing such programs is that they are not a price discrimination at all if they offer equal opportunities, although not necessarily equal prices, to all the dealers concerned. This is referred to as the "'non-discrimination'" theory. Id. at 813.

45. See F. Rowe, supra note 26, at 31 & n.33; Cooper, supra note 34, at 975; Symposium, supra note 20, at 205 n.45.

46. See F. Rowe, supra note 26, at 113-14; Handler II, supra note 14, at 35; Levi, supra note 24, at 61-62; Policy and Law, supra note 32, at 27; Symposium, supra note 20, at 205-06. In Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953), the Supreme Court warned against interpreting the Robinson-Patman Act so as to "give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." Id. at 63.

47. See C. Edwards, supra note 21, at 543; F. Rowe, supra note 26, at 31.

48. See Levi, supra note 24, at 62, 74; Policy and Law, supra note 32, at 27. To legally discriminate in order to meet competition, a seller must be able to show specific prices and practices of the threatening rival. Such intimate knowledge of another seller's operations encourages collusion and information exchanges which may be prohibited under the Sherman Act. 15 U.S.C. §§ 1-2 (1976).

49. C. Edwards, supra note 21, at 543; Blakeney, supra note 21, at 494-95 & n.58; Cooper, supra note 34, at 982; Symposium, supra note 20, at 208 & n.45.

50. See Blakeney, supra note 21, at 495 n.58; Cooper, supra note 34, at 982; Symposium, supra note 20, at 208.

51. See Automatic Canteen Co. v. FTC, 346 U.S. 61, 63 (1953); Standard Oil Co. v. FTC, 340 U.S. 231, 248-51 (1951); F. Rowe, supra note 26, at 113-14; Blakeney, supra note 21, at 494-95; Levi, supra note 24, at 61-62; Symposium, supra note 20, at 206-07 & n.43; Confusion in the Courts, supra note 18, at 941.

52. See C. Edwards, supra note 21, at 520-21.
an approach would be more in keeping with the Robinson-Patman Act's objective "to preserve the business opportunities of buyers and sellers from damage by price discriminations, not to preserve single competitors from damage from all sources." Instead of showing the potential failure of one marginal dealer, therefore, the Act requires that the price discrimination be such that any marginal dealer similarly situated would suffer the same injury.

This approach would curtail the protection of dealers whose failure results from personal inefficiencies rather than from the suspect price discrimination and would, moreover, look to the effect of the discrimination on the overall market structure. The power to eliminate an entire class of competitors, even if arguably desirable, offends social values of competitive "fairness." The elimination of one dealer in an otherwise healthy market, however, does not have the same present or potential negative effect on the market that the loss of a class would have. Thus, the narrow injury provision cannot justifiably be invoked for the isolated preservation of an individual competitor unless his injury meets the more comprehensive definition.

53. Id. at 521. This view of the narrow injury to competition has been clouded by FTC decisions inferring injury to a group of competitors from the fact of a price difference. As a result, their decisions can be read as finding a Robinson-Patman violation from prospective damage to an individual competitor without clear examination of the economic ramifications of the price discrimination. See Symposium, supra note 20, at 199; see, e.g., Morton Salt Co., 39 F.T.C. 35 (1944), rev'd, 162 F.2d 949 (7th Cir. 1947), rev'd, 334 U.S. 37 (1948); A.E. Staley Mfg. Co., 34 F.T.C. 1362 (1942), rev'd, 144 F.2d 221 (7th Cir. 1944), rev'd, 324 U.S. 746 (1945).

54. For example, the elimination of one small grocery store would be a narrow injury to competition if its failure was caused not by individual inadequacies, but by a price discrimination that would have caused the same economic losses to other small grocery stores similarly situated. Even though the price discrimination might actually cause the elimination of only one small store, the seller's potential to cause the elimination of an entire class of competitors, thus restructuring the entire market, could justifiably be inferred. See C. Edwards, supra note 21, at 537. Such a manipulative effect on the market demonstrates a sufficient potential for future competitive abuse to violate the Act, because any initial increase in market competition is being purchased at too great a social cost. See id. at 538; Levi, supra note 24, at 63; Symposium, supra note 20, at 203.


56. See supra notes 37-38 and accompanying text.

57. C. Edwards, supra note 21, at 537. "Injury to competition in the narrow sense would have been perceived only where there were market changes similar to, though perhaps smaller than, those that might demonstrate injury in the broad
B. Plaintiff's Burden of Demonstrating the Anticompetitive Effect of the Discrimination

To meet his initial burden of proof in a section 2(a) case, the private plaintiff must define the relevant competitive threat prohibited by the Robinson-Patman Act. He must be able to establish either a potential injury to competition generally or a diminution of the business opportunities of a defined class of competitors. He cannot meet this burden merely by demonstrating his own injury. Having placed the price discrimination within the scope of the Robinson-Patman Act, the plaintiff must prove that it has the capacity to cause the proscribed anticompetitive effects.

It is continually reiterated that section 2(a) is a "prophylactic" statute\(^5\) that is violated merely upon a showing that "the effect of such discrimination may be substantially to lessen competition."\(^5\) The statute itself is unclear as to the standard of proof required to establish a potential injury.\(^6\) Although the word "substantially" does appear in reference to the "broad" competitive injury,\(^7\) it is omitted in the description of the "narrow" injury.\(^8\)

Initially, in FTC injunctive actions, the courts deferred to the Commission's judgment\(^9\) and held that there was a violation where an injury could "possibly" occur.\(^10\) The Commission ignored any evidence of actual effects and inferred that differences in prices without any obvious economic justification resulted in differences in competitive opportunities.\(^11\) It determined that if it could show a sub-

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\(^{7}\) See C. Edwards, supra note 21, at 519 n.1; Levi, supra note 24, at 61.


\(^{9}\) See C. Edwards, supra note 21, at 519 n.1.

\(^{10}\) See FTC v. Morton Salt Co., 334 U.S. 37, 54 (1948); Purolator Prods., Inc. v. FTC, 352 F.2d 874, 881 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); Page, supra note 10, at 503; Symposium, supra note 20, at 201. This deference is further mandated by statute: "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 38 Stat. 719 (1914) (codified as amended at 15 U.S.C. § 45(c) (1976)).


\(^{12}\) FTC v. Morton Salt Co., 334 U.S. 37, 45-47 (1948); see Kroger Co. v. FTC, 438 F.2d 1372, 1379 (6th Cir.), cert. denied, 404 U.S. 871 (1971); American Motors Corp. v. FTC, 384 F.2d 247, 250 (6th Cir. 1967), cert. denied, 390 U.S. 1019 (1968); Policy and Law, supra note 32, at 98; Symposium, supra note 20, at 199. The "inference of injury rule" was established by the Supreme Court in FTC v. Morton Salt Co., 334 U.S. 37 (1948). Morton Salt sold its Blue Label brand of salt on a standard quantity discount system available to all purchasers. Id. at 40-41. Under this system the purchaser paid for the salt and delivery according to the quantity...
stantial price difference in a business where profit margins were low and competition was keen, it could infer that the competitive opportunities of certain purchasers were injured. Thus, the Commission found violations despite testimony by the "injured" competitors that their profits were actually increasing and detailed cost analysis reports demonstratively justified the price differentials.

Recent circuit cases have indicated that the requirement for demonstrated competitive effects is increasing; the standard has been intensified from proof of a "reasonable possibility" of competitive injury to a "reasonable probability" or "substantial effect" test. Part of the shift can be attributed to the concern of the Commission and the

purchased. Larger stores would buy in larger quantities, thereby effectively paying less for the salt. Id. In condemning the Morton Salt system, the Court explained that "the language of the Act, and the legislative history... show that Congress meant by using the words 'discrimination in price' in § 2 that in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors... [The statute does not require the Commission to find that injury has actually resulted... Here the Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay. The findings are adequate." Id. at 45-47 (footnotes omitted).

66. C. Edwards, supra note 21, at 234; Austern, supra note 21, at 775-77; see, e.g., Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 679 (5th Cir.), cert. denied, 382 U.S. 959 (1965); C.E. Niehoff & Co. v. FTC, 241 F.2d 37, 40 (7th Cir. 1957), modified on other grounds per curiam sub nom. Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958); Whitaker Cable Corp. v. FTC, 239 F.2d 253, 256 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957); E. Edelmann & Co. v. FTC, 239 F.2d 152, 154-55 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); Moog Indus., Inc. v. FTC, 238 F.2d 43, 51 (8th Cir. 1956), aff'd per curiam, 355 U.S. 411 (1958).

67. C. Edwards, supra note 21, at 234. The inference "has risen superior to evidence that the disfavored customers have grown and prospered, to evidence that the beneficiaries of the discrimination were small and weak, and to unanimous statements by the disfavored customers that they were not injured." Id. at 533 (footnotes omitted); see, e.g., Purolator Prods., Inc. v. FTC, 352 F.2d 874, 880 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir.), cert. denied, 382 U.S. 959 (1965); Standard Motor Prods., Inc. v. FTC, 265 F.2d 674, 676 (2d Cir.), cert. denied, 361 U.S. 826 (1959); E. Edelmann & Co. v. FTC, 239 F.2d 152, 155 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); Moog Indus., Inc. v. FTC, 238 F.2d 43, 49-51 (8th Cir. 1956), aff'd per curiam, 355 U.S. 411 (1958).

68. See, e.g., FTC v. Sun Oil Co., 371 U.S. 505, 527 (1963) ("[FTC] must make realistic appraisals of relevant competitive facts... [and an] adequate probative analysis"); Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1174 (7th Cir. 1972) ("reasonable probability of substantial injury to competition"); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 678 (5th Cir.) ("probability of a general injury to competitive conditions" or "where the result may be substantially to injure, destroy, or prevent competition"); cert. denied, 382 U.S. 959 (1965). In both Bargain Car Wash, 466 F.2d at 1163, and Foremost Dairies, 348 F.2d at 678-79, however, the courts essentially inferred an injury without analyzing the price discrimination's economic effects. See Austern, supra note 21, at 776 & n.19.
courts with the potential conflict between the Robinson-Patman Act and modern economic theory. Both the FTC and the courts are beginning to recognize the need to prove a narrow competitive injury more precisely and with reference to probative facts.

The private plaintiff in section 2(a) cases must meet the standard of proof required of the FTC and may in fact be held to a higher standard in that he is not accorded the deference traditionally shown to the Commission. The courts defer to the FTC as experts in antitrust matters. Moreover, there is concern that the FTC's effective and efficient administration of these laws would be hampered by unnecessary and uninvited judicial interference. These considerations are not present with reference to a private plaintiff. Therefore, although the FTC can arguably still establish a violation based on a "possible" injury, the private plaintiff must establish that the price discrimination presents at least a "reasonable probability" of competitive injury to his class or group of competitors.

69. Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961). "The Act is really referring to the effect upon competition and not merely upon competitors. . . . In this respect § 2(a) must be read in conformity with the public policy of preserving competition, but it is not concerned with mere shifts of business between competitors. It is concerned with substantial impairment of the vigor or health of the contest for business, regardless of which competitor wins or loses." Id. at 840 (footnotes omitted); accord Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969); Refrigeration Eng'g Corp. v. Frick Co., 370 F. Supp. 702, 713 (W.D. Tex. 1974); C. Edwards, supra note 21, at 537; Symposium, supra note 20, at 199.


71. See Williams Inglis & Sons Baking Co. v. ITT Contin. Baking Co., No. 79-4207, slip op. at 3932 (9th Cir. Feb. 10, 1982) (en banc) (amended opinion) ("Inglis must prove that Continental's price discrimination produced a requisite effect on competition"); Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 & n.6 (9th Cir. 1977) ("[I]n 15 U.S.C. § 13(a), Congress proscribed only those price differences which have a substantial effect on competition. In effect, Congress has determined that price differentiation poses a threat to competition sufficient to justify legal intervention only where such an effect can be shown."). cert. denied, 439 U.S. 829 (1978); Texas Gulf Sulphur Co. v. J.R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969) ("The cases uniformly hold that § 2 of the Act . . . only prohibits price discrimination by a seller where the 'effect' causes or may cause forbidden competitive injury.").


75. Austern, supra note 21, at 777-79, 796 (discusses stricter standard for primary line private plaintiff cases); see C. Edwards, supra note 21, at 531 & n.12 (stricter
II. PROOF OF ACTUAL ANTITRUST INJURY

The current trend in the law is to require private plaintiffs in section 2(a) cases to meet a higher standard in proving a violation of the Robinson-Patman Act. The requirement that the plaintiff demonstrate more probative effects forces him to establish a greater market impact and prevents him from relying solely on proof of his personal injury. In order to recover treble damages under section 4 of the Clayton Act, however, a personal antitrust injury must also be established. To prove an antitrust injury in a Robinson-Patman secondary-line case, the private plaintiff must show a “present” injury that is “traceable.” The plaintiff’s loss must parallel and result from a benefit to the favored competitor.

A. The Concept of an Antitrust Injury

The Supreme Court first defined “antitrust injury” under section 4 in Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., a case involving a section 7 Clayton Act violation. Section 7, like section 2(a), is a prophylactic statute. It prohibits mergers where the effect “may be substantially to lessen competition, or to tend to create a monopoly.” In Brunswick, the plaintiffs claimed that the defendant’s acquisition of a failing company violated section 7 because the rival company did not become bankrupt as expected, and the plaintiffs consequently lost business. The Court found that although the plaintiffs’ losses may have occurred “by reason of” the unlawful acquisitions, [they] did not occur ‘by reason of’ that which made the

standard for primary line applied to secondary line in 1955 Attorney General’s National Committee to Study the Antitrust Laws); see, e.g., Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163, 1174 (7th Cir. 1972); Rod Baxter Imports, Inc. v. Saab-Scania of Am., Inc., 489 F. Supp. 245, 248-49 (D. Minn. 1980).

76. 15 U.S.C. § 15 (1976). To have standing a plaintiff need only show that he was in the “target area” of the Robinson-Patman Act’s protection. See Handler I, supra note 10, at 995-97; McEntee & Kahrl, supra note 10, at 182; Page, supra note 10, at 497; Timberlake, supra note 10, at 241; Tomlin, supra note 10, at 175; Note, Compensable Injuries Under Section 4 of the Clayton Act, 37 Wash. & Lee L. Rev. 412, 416 n.35 (1980) [hereinafter cited as Compensable Injuries].

77. 15 U.S.C. § 15 (1976). Under section 4 of the Clayton Act, persons injured “by reason of anything forbidden in the antitrust laws” are entitled to treble damages. Id.; see F. Rowe, supra note 26, at 530. “Since commercial hardship may arise from an infinite range of factors, a fundamental prerequisite of any treble damage recovery is that the plaintiff’s injury is the causal consequence of the defendant’s proven violation.” Id. (footnote omitted).


81. Id.

82. 429 U.S. at 480-81.
acquisitions unlawful.”

The injury was required to be a direct result of the violation or of “anticompetitive acts made possible by the violation.”

Therefore, a plaintiff must not only prove that his injury was a foreseeable result of the defendant’s anticompetitive behavior, but also that it was actually foreseen by Congress at the time it made the activity illegal.

Antitrust injury is thus a more narrow concept than that of proximate cause. The plaintiff must prove more than that he suffered an actual injury caused by the antitrust violation; there must be “an intimate relationship between the circumstances which make the wrongdoer’s conduct unlawful and the resulting harm which is the subject of suit.” In a Robinson-Patman case, this “intimate relationship” manifests itself in two stages; first, there must be a price difference that causes an actual injury to the plaintiff, and second, this actual injury must be evidenced by a shift in the immediate

83. Id. at 488. Therefore, if the plaintiffs in Brunswick had lost business because the defendant used his “deep pocket” to bolster the acquired company in a market of relative “pygmies,” then the plaintiffs would have suffered an antitrust injury because the larger company could resort to predatory pricing supported by its financial advantages. See id. at 482; Areeda, Comment: Antitrust Violations Without Damage Recoveries, 89 Harv. L. Rev. 1127, 1133 (1976); Goetz, The Basic Rules of Antitrust Damages, 49 Antitrust L.J. 125, 133 (1980); Handler I, supra note 10, at 990-91; McEntee & Kahrl, supra note 10, at 183-84; Page, supra note 10, at 470, 491; Compensable Injuries, supra note 76, at 415 n.30. In Brunswick, however, the plaintiffs claimed only a loss of windfall profits, an injury that was unrelated to the defendant’s size or predatory conduct. The plaintiffs would have been in the same position if no merger had occurred. 429 U.S. at 481, 487-88; see Areeda, supra, at 1133; Handler I, supra note 10, at 991; McEntee & Kahrl, supra note 10, at 184; Page, supra note 10, at 470; Compensable Injuries, supra note 76, at 416. The Brunswick Court pointed out that loss of windfall profits may not even constitute an actual, much less an antitrust, injury for purposes of § 4. 429 U.S. at 488.

84. 429 U.S. at 489; see Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); Handler I, supra note 10, at 990-92; Compensable Injuries, supra note 76, at 416.

85. 429 U.S. at 489; see Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133, 1136 (5th Cir. 1979), vacated and remanded sub nom. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); Handler I, supra note 10, at 989-90; McEntee & Kahrl, supra note 10, at 184; Page, supra note 10, at 468, 491.

86. 429 U.S. at 487-89; McEntee & Kahrl, supra note 10, at 184.

87. To establish that a defendant’s actions “proximately caused” the plaintiff’s injury, there must be “some reasonable connection between the act or omission of the defendant and the damage which the plaintiff has suffered.” W. Prosser, Handbook of the Law of Torts § 41, at 236 (4th ed. 1971). In the context of proving an “antitrust injury,” however, the plaintiff must show that he was injured by the proscribed effects of the antitrust violation and not just by the fact of the violation itself. See supra notes 84-86 and accompanying text.

88. Handler I, supra note 10, at 990; accord Rez, supra note 31, at 669.
relationship between the favored and non-favored purchasers. To show actual injury, the plaintiff must show actual lost sales or profits caused by the price discrimination. To show antitrust injury, the plaintiff must show that he lost these sales or profits to the favored competitor. "Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient . . . ."

Problems arise in defining an antitrust injury because the concept of antitrust injury overlaps both the plaintiff's burden of proving damage—the fact of injury—and his burden of proving damages—the amount of injury. To prove the fact of injury, the plaintiff must show that he was actually injured and that his injury was of the type that the substantive antitrust law was designed to prevent. To prove the amount of the injury the plaintiff must prove the extent to which he lost profits or customers to the favored competitor. The


90. See Merit Motors, Inc. v. Chrysler Corp., 569 F.2d 666, 671-73 (D.C. Cir. 1977) (expert testimony as to "inherent" economic effects insufficient); Kidd v. Esso Stand. Oil Co., 295 F.2d 497, 498-99 (6th Cir. 1961) (per curiam) (requiring proof of lost profits or customers to favored competitors); American Can Co. v. Russellville Canning Co., 191 F.2d 38, 56, 60 (8th Cir. 1951) (evidentiary basis for awarding the plaintiff damages for the alleged impairment of its competitive position was too speculative and conjectural); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150, 153 (2d Cir. 1949) ("[t]he only proper proof of damages is the loss to the plaintiff's business"); Knutson v. Daily Review, Inc., 468 F. Supp. 226, 229 (N.D. Cal. 1979) ("must establish with reasonable probability the existence of a causal connection between defendants' violation of the antitrust law and plaintiffs' revenue-impairing injury"); Rez, supra note 31, at 673.

91. Hasbrouck v. Texaco, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,343, at 75,762 (E.D. Wash. 1980), aff'd in part, rev'd in part, 663 F.2d 930 (9th Cir. 1981). "[I]f the price discrimination . . . was the cause of the plaintiffs' injury, the plaintiffs should be able to match up their losses with gains to the favored competitors." Id.


93. See Knutson v. Daily Review, Inc., 548 F.2d 663, 666 (9th Cir. 1977), cert. denied, 433 U.S. 910 (1977); Page, supra note 10, at 490; Rez, supra note 31, at 668-69; Timberlake, supra note 10, at 252.


95. Hasbrouck v. Texaco, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,343, at 75,762-63 (E.D. Wash. 1980), aff'd in part, rev'd in part, 663 F.2d 930 (9th Cir. 1981); see Enterprise Indus., Inc. v. Texas Co., 210 F.2d 457, 458-59 (2d Cir.) (the plaintiff had to show that his gallonage was lost to the favored customers and not to other competitors in order to prove causation), cert. denied, 353 U.S. 965 (1957); Krieger v. Texaco, Inc., 373 F. Supp. 108, 113 (W.D.N.Y. 1972) (same); Youngson v. Tidewater Oil Co., 166 F. Supp. 146, 147 (D. Or. 1958) (same); Alexander v. Texas Co., 165 F. Supp. 53, 58 (W.D. La. 1958) ("Assuming that defendant committed unlawful price discrimination, plaintiff must still show that Texaco's price differences were the proximate cause of a diversion of business from him to the 12
plaintiff's burden of "tracing" his injury applies to both proofs; he will not have sustained a Robinson-Patman injury if the favored competitor has not used the price allowance to solicit customers from him, and he will not be able to measure the amount of his injury without showing what sales or profits he lost as a result of the rival's competitive advantage. In light of the courts' trend toward requiring more stringent proof for a Robinson-Patman violation, a reevaluation of the necessary proofs of damage and damages is necessary.

1. Fact of Antitrust Injury in a Robinson-Patman Case

In prohibiting price discriminations, Congress sought to protect competition in both the overall market and within classes of individual competitors. In secondary-line price discrimination situations, unfair competition between competing purchasers occurs if they pay different prices for the same goods. The favored purchaser has a competitive advantage over his rivals who pay more for the goods because he can more easily lower his resale price, incur more business expenses, or make a greater profit to facilitate expansion or weather poor economic times. The purpose of the Robinson-Patman amendment was to limit the availability of price differentials to situations where there were adequate and objective economic justifications.

96. See ICC v. United States ex rel. Campbell, 289 U.S. 385, 392 (1933); Handler II, supra note 14, at 32-33.

97. See supra notes 21-23, 52 and accompanying text. "In a secondary-line price discrimination case, it is not the price differential itself which makes defendant's conduct unlawful, just as it is not the merger itself which violates section 7; rather, the illegality results (if at all) from the statute's proscribed 'anticompetitive effects'—the likelihood that the alleged discrimination may substantially lessen competition." Handler I, supra note 10, at 992 (footnote omitted).


It is arguable, therefore, that a direct business injury is incurred by a non-favored purchaser at the time his rival receives a price advantage. In the past, discrimination had been characterized as an interrelationship between the plaintiff and the favored rival "whereby the difference granted to one casts some burden or disadvantage upon the other." It was accepted that resale competition alone constituted an adequate relationship. It was assumed that the plaintiff had been overcharged in order to subsidize the seller's lower price to a competitor. Under this theory, the plaintiff was injured even if the rival merely pocketed his financial gain, tracing the injury to the time of the discrimination.

A cognizable antitrust injury only occurs, however, when the favored competitor actually uses the price advantage competitively. See C. Edwards, supra note 21, at 225. "[T]he Clayton Act is concerned primarily, if not exclusively, with commanding equality of price among competitors at the time of purchase, rather than with the myriad factors of a reselling operation which may . . . offset disadvantage on the one hand or advantage on the other." Id. (quoting C.E. Niehoff & Co., 51 F.T.C. 1114, 1121-22, aff'd, 241 F.2d 37 (7th Cir. 1957), modified on other grounds per curiam sub nom. Moog Indus., Inc. v. FTC, 355 U.S. 411 (1958)).

100. See supra note 21, at 225. 80 Cong. Rec. 9416 (1936) (statement of Rep. Utterback); accord id. at 8114 (statement of Rep. Patman); see supra note 89 and accompanying text.

101. See supra notes 65-67 and accompanying text.

102. See supra note 24, at 66; Policy and Law, supra note 32, at 101.


105. It is true that the favored competitor has an enhanced ability to compete. This is unfair because it results from the price discrimination. Until the competitor realizes this potential in any way, however, the plaintiff has not yet suffered an anticompetitive injury. "Put in Brunswick's terms, the fact that the disfavored purchaser pays more for the same product than the favored purchaser, while constituting a form of economic injury or harm to plaintiff's pocketbook, does not amount to 'antitrust injury' or provide a proper measure of antitrust damages." Handler I, supra note 10, at 993; see, e.g., Dantzler v. Dictograph Prods., Inc., 309 F.2d 326, 330 (4th Cir. 1962), cert. denied, 372 U.S. 970 (1963); Hasbrouck v. Texaco, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,343, at 75,755-57 (E.D. Wash. 1980), aff'd in part, rev'd in part, 663 F.2d 930 (9th Cir. 1981); McCaskill v. Texaco, Inc., 351 F. Supp. 1332, 1341 (S.D. Ala. 1972), aff'd mem. sub nom. Harrelson v. Texaco, Inc., 486 F.2d 1400 (5th Cir. 1973). The plaintiff must "quantify the loss" and trace specific losses to specific acts. Coetz, supra note 83, at 133-34.

106. Tomlin, supra note 10, at 191. The "time" of injury for establishing a Robinson-Patman violation is at the time of the price discrimination itself because that is when the potential for injury is created. FTC v. Morton Salt Co., 334 U.S. 37, 46 (1948); C. Edwards, supra note 21, at 234. For purposes of private recovery under section 4, however, the potential must have been realized and the "time" of injury is when the actual injury occurs. Areeda, supra note 83, at 1129-30. In Uniroyal, Inc.
and the amount of damage suffered is measured by the impact of that "use" on the plaintiff.\(^{107}\) Thus, if the injury is simply the fact of the lower price and the rival has not engaged in the "unfair" competition contemplated by the Robinson-Patman Act, the plaintiff cannot recover.\(^{108}\) The lower price must "act" to cause damage directly to the plaintiff and be translated into a loss by the plaintiff to the favored rival.\(^{109}\) This is proof of antitrust injury because if the price discrimination was the cause of the plaintiff's alleged injury, he should be able to match his loss with gain to the favored competitor.\(^{110}\)

Courts have required the plaintiff to make this match with varying degrees of specificity. The traditional approach required the plaintiff to prove that the defendant's conduct materially contributed to his

\(\text{v. Jetco Auto Serv., Inc., 461 F. Supp. 350 (S.D.N.Y. 1978), the court found more than adequate proof of Uniroyal's Robinson-Patman violation, but denied Jetco relief, stating that} \) "there is no presumption that proscribed discrimination in price [or services] has caused damage to [Jetco]." \(\text{ld. at 358 (quoting Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353 (E.D.N.Y. 1960)).} \) "There [is] no necessary correspondence between preference and damage." \(\text{ICC v. United States ex rel. Campbell, 289 U.S. 385, 392 (1933).} \)


\(\text{108. See ICC v. United States ex rel. Campbell, 289 U.S. 385, 392 (1933); Handler II, supra note 14, at 32-33.} \)

\(\text{109. See Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 275-76 (E.D. Pa. 1979) ("no evidence of how many customers Sweeney lost to competitors as a result of the alleged discrimination . . . [therefore plaintiff] failed to provide a basis upon which the jury could determine the extent of injury, if any",} \textit{aff'd}. 637 F.2d 105 (3d Cir. 1980), \textit{cert. denied}, 451 U.S. 911 (1981); McCaskill v. Texaco, Inc., 351 F. Supp. 1332, 1341 (S.D. Ala. 1972) (need "causal connection between the lower price to someone else and injury to the plaintiff's business or property"), \textit{aff'd mem. sub nom.} Harrelson v. Texaco, Inc., 486 F.2d 1400 (5th Cir. 1973); Alexander v. Texas Co., 149 F. Supp. 37, 41 (W.D. La. 1957) ("Rather, the true yardstick of his damages . . . would be the gross loss of profit on sales he otherwise would have made to those customers who bought from the favored dealers, instead of from plaintiff . . .").} \)

injury. Under that view, the plaintiff did not need to "negative all possible alternative explanations for his decline in profits" or to show that the illegality "was a more substantial cause than any other." Recently, the courts have taken a stricter approach to the concept of tracing and have allowed damages only when it has been clear that the injury did not result from any form of legitimate competition or the plaintiff's own inadequacies. Some courts have even required proof of specific lost sales.

The rationale behind a stringent tracing requirement is that section 4's allowance of treble damages is both compensatory and punitive.


112. Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977). The court also established that although a plaintiff must prove some damages flowing from the antitrust violation "inquiry beyond this minimum point goes only to the amount and not the fact of damage." Id.


114. In Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133 (5th Cir. 1979), vacated and remanded sub nom. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981), the circuit court stated that the plaintiff must show that the defendant's conduct materially contributed to his injury, " 'as a matter of fact and with a fair degree of certainty.' " Id. at 1135-36 (quoting Terrell v. Household Goods Carriers' Bureau, 494 F.2d 16, 20 (5th Cir.), cert. dismissed, 419 U.S. 987 (1974)). The court further qualified its standard by announcing that "[c]onclusory statements by the plaintiff, without evidentiary support, . . . are not sufficient. Evidence of a slight decrease in market share roughly coincident with the alleged violation is not sufficient either." Id. at 1136; accord Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), cert. denied, 444 U.S. 1025 (1980); Hasbrouck v. Texaco, Inc., 1980-2 Trade Cas. (CCH) ¶ 63,343, at 75,762 (E.D. Wash. 1980), aff'd in part, rev'd in part, 663 F.2d 930 (9th Cir. 1981); McEntee & Kahrl, supra note 10, at 182; Rez, supra note 31, at 669; Timberlake, supra note 10, at 252.


116. An examination of the initial House debate concerning provisions relating to private damages reveals the primary legislative intent to "open the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and [give] the injured party ample damages for the wrong suffered." 51 Cong. Rec. 9073 (1914) (statement of Rep. Webb); see id. at 9079 (statement of Rep. Volstead); id. at 9270 (statement of Rep. Carlin); id. at 9414-17, 9466-67, 9487-95 (floor debate). The Supreme Court has consistently acknowledged section 4's remedial powers "to arm injured persons with private means to retribution." Bruce's Juices, Inc. v. American
"[T]he desire to encourage private enforcement and to penalize antitrust violations is no excuse for awarding damages that are non-existent, inconsistent with antitrust policy, or unconnected with the true rationale for imposing antitrust liability." Private injury to an individual does not necessarily occur when the defendant causes a public injury by violating an antitrust law. This apparent paradox, that a defendant can violate an antitrust law and yet produce no private injury, is less puzzling when the substantive law prevents both real and potential injuries, as does the Robinson-Patman Act. The

Can Co., 330 U.S. 743, 751 (1947); accord Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485-86 (1977) (treble damages primarily remedial). One commentator suggests that even when the damages are trebled, the award may still be essentially compensatory in that the plaintiff may have suffered additional but legally non-recognizable injuries as well. Tomlin, supra note 10, at 169 n.8.


plaintiff who alleges that a price difference caused a potential adverse effect on competition must further prove that he was actually injured in an amount that can reasonably be measured.122

2. Measure of Antitrust Injury in a Robinson-Patman Case

Having established the fact of his antitrust injury, the plaintiff must then establish the amount of damages he has consequently suffered. The Supreme Court has not yet ruled on the specificity required to adequately trace an antitrust injury in a price discrimination case, but it has explicitly disallowed the use of "automatic damages"123—that is, the inference of damage in the amount of the price discrimination.124

Translated into Robinson-Patman terms, antitrust injury is essentially an "undercharge" to the rival and not an "overcharge" to the plaintiff,125 because if there had been no discrimination the plaintiff may not necessarily have received the lower price. Recovery is based on tort law principles.126 "Had [the plaintiff] received the lower

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123. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561 & n.2 (1981). In Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), cert. denied, 333 U.S. 965 (1957), the Second Circuit ruled that a disfavored buyer is not automatically injured by reason of a price discrimination in his competitor’s favor. Id. at 458-59. The Ninth Circuit rejected the Enterprise approach and held that “unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award.” Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248, 1252 (9th Cir. 1969) (footnote omitted), cert. denied, 396 U.S. 1012 (1970). In J. Truett Payne, the Supreme Court affirmed the Enterprise court’s approach. 451 U.S. at 561 & n.2.
126. Handler II, supra note 14, at 33. Tort damages compensate plaintiffs for their out-of-pocket losses. If the injury is equivalent to the amount of the discrimination, then the damage award will have only "accidental relevancy" to the actual competitive injury suffered by the plaintiff. Confusion in the Courts, supra note 18, at 953; see Restatement (Second) of Torts § 903 comment a, at 453 (1979).
price, he would have made more money, but he is not out of pocket because a competitor bought more cheaply." If the injury were viewed as an "overcharge," the plaintiff would be entitled to at least the amount of the price difference because he would be paying directly for his rival's better position. When the injury is viewed as an "undercharge," or more precisely, as the fact of the undercharge which is the price difference, then injury to the plaintiff is not automatically the amount of the difference but the amount of damage that the difference caused.

The Supreme Court in *J. Truett Payne* refused to decide whether Payne's proof was sufficient to establish damages, because the Robinson-Patman Act violation had not been sufficiently proven below. The Court did indicate, however, that it favored leniency in proving the extent of damages once the plaintiff has established that he was in fact injured by a section 2(a) violation. The Court reviewed precedent in which it had consistently excused antitrust plaintiffs from an unduly rigorous standard of proving damages. Underlying these

127. Handler II, supra note 14, at 33.
128. *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 390-92 (1933). In this analogous case involving illegal rate discriminations under the Interstate Commerce Act, 49 U.S.C. §§ 2, 8 (1976), the Court noted that while the injury from an overcharge is the amount of the overcharge, the injury from a discrimination must be measured in terms of the discrimination's effects. 289 U.S. at 389-90. "The Commission does not find, and the complainant does not assert, that the rate was unreasonable in the sense that it would be subject to condemnation if a like rate had been charged to others similarly situated. What is unlawful in the action of the carriers inheres in its discriminatory quality, and not in anything else. When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper." *Id.* at 389 (citations omitted).
129. 451 U.S. at 568-69.
decisions was the fear that defendants would be able to escape liability by rendering the measure of damages uncertain, and that the inherent vagaries of the marketplace make speculation difficult as to what would have happened absent the violation.\textsuperscript{133}

The leniency allowed the plaintiff in proving the extent of his injury becomes superfluous, however, if the plaintiff is required to show the fact of his antitrust injury specifically with precise tracing.\textsuperscript{134} Once the plaintiff has shown specific lost sales, he will have measured his losses fairly accurately.\textsuperscript{135} In \textit{J. Truett Payne}, the Court implied that the plaintiff may have to be specific only in proving the Robinson-Patman Act violation and the resulting economic injury.\textsuperscript{136} Justice Rehnquist clearly stated that even if the plaintiff proved a Robinson-Patman Act violation, he "is not excused from [his] burden of proving antitrust injury and damages. It is simply that once a violation has been established, that burden is to some extent lightened."\textsuperscript{137} It is, therefore, arguable that the plaintiff need only show that his injury

\textsuperscript{133} Id. at 566-67; Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927). "Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts." Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

\textsuperscript{134} See Knutson v. Daily Review, Inc., 548 F.2d 795, 811 (9th Cir. 1976), cert. denied, 433 U.S. 910 (1977); Goetz, \textit{supra} note 83, at 139; \textit{supra} notes 93-96 and accompanying text.

\textsuperscript{135} American Coop. Serum Ass’n v. Anchor Serum Co., 153 F.2d 907, 914 (7th Cir.) (court carefully awarded damages only in those areas where it was absolutely certain that plaintiff lost profits due to defendant’s activities), cert. denied, 329 U.S. 721 (1946); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 478 F. Supp. 243, 274-76 (E.D. Pa. 1979) (as long as \textit{Enterprises} is the law, a plaintiff must show a specific injury by competitive breakdown of the damages he has incurred as a result of the alleged discrimination before he can recover), aff’d, 637 F.2d 105 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); Kelly v. General Motors Corp., 425 F. Supp. 13, 20 (E.D. Pa. 1976) ("the liability of the defendants for price discrimination would not be established unless Kelly and his fellow class members could individually demonstrate that the higher prices they paid for original equipment replacement parts caused them to lose profits to competing new car dealers"); Youngson v. Tidewater Oil Co., 169 F. Supp. 146, 147 (D. Or. 1958) (in order to recover damages "one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one’s inability to meet their prices, or both"); Alexander v. Texas Co., 149 F. Supp. 37, 41 (W.D. La. 1957) ("[r]ather, the true yardstick of [plaintiff’s] damages, if any, in this respect would be the gross loss of profit on sales he otherwise would have made to those customers who bought from the favored dealers, instead of from plaintiff, because of the price differential").

\textsuperscript{136} 451 U.S. at 566.

\textsuperscript{137} Id. at 568.
proximately resulted from the antitrust violation. Then, although the plaintiff will still be required to "trace" his loss to the favored competitor, he need not quantify it precisely. This would enable him to trace more easily an actual antitrust injury to an unfair competitive act by his rival, especially when the rival uses the price allowance to engage in competitive behavior other than lowering his resale price.

B. Proof of Antitrust Injury in a Robinson-Patman Case

For purposes of Robinson-Patman secondary-line cases, antitrust injury is the rival’s unfair competitive edge that is used to attract sales or profits from the plaintiff. Thus, the injury must be traced to the rival’s competitive use of his price advantage. Proof of a lower resale price has been described as the “sine qua non of any recovery in a secondary line price discrimination case . . . . Then, and only then, can the seller’s grant of an unlawful lower price to the favored buyer possibly result in injury to the plaintiff.” The plaintiff will be damaged because either he will have to lower his price to meet this competition that has been wrongfully induced, or he will choose not to lower his price and will lose customers.

The rival may use the price difference to his competitive advantage, however, not only by lowering his resale price, but also by increasing his advertising, offering additional service or engaging in competitive activities which, because they are “subsidized,” are “unfair.” If the plaintiff can show that he lost profits by increasing his advertising or lost customers by failing to offer similar services which induced these customers to get more for their money from the favored rival, then he should be able to collect damages for the injury he has suffered.

142. Handler II, supra note 14, at 33-34; see supra notes 90-91 and accompanying text.
"Where there is a basis on which a jury can reasonably infer significant antitrust injury, [one] should be very hesitant before determining that damages cannot be awarded."143

The FTC has long recognized that sales volume and price fluctuations do not constitute the only evidence of healthy competition.144 Some courts in the past have recognized that a price advantage can be used for competitive strategies other than a lowered resale price.145 In Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.,146 the defendant granted Sun Cosmetic’s competitors an allowance for the salary of a person to demonstrate the defendant’s products but refused to grant the plaintiff any assistance.147 The Second Circuit properly held that the salary allowance, as the amount of the price discrimination, was not the proper measure of the plaintiff’s injury.148 The court stated that because Sun Cosmetic did not hire a demonstrator with its own money it was in the same position as its favored competitors in terms of monetary outlay. However, "[t]he plaintiff [was] entitled . . . to prove all damages from the diversion of its customers to those New Jersey ‘agencies,’ to whom the defendant furnished ‘demonstrators,’ so far as that was due to the ‘demonstrators.’"149

If the plaintiff’s injury satisfies the requirements of being actual and antitrust, then he should not be precluded from attempting to trace his losses to the favored competitor’s actual use of the price advantage merely because the competitor did not use it to lower his resale price. The “lower resale price” is an attractive limitation on proving antitrust injury because price-affecting behavior is arguably easier to

143. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 304 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980); see Catalano Inc. v. Target Sales Inc., 605 F.2d 1097, 1102 (9th Cir. 1979), reo’d on other grounds per curiam, 446 U.S. 643 (1980).

144. E.g., Whitaker Cable Corp. v. FTC, 239 F.2d 253, 255 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957); E. Edelmann & Co. v. FTC, 239 F.2d 152, 155 (7th Cir. 1956), cert. denied, 355 U.S. 941 (1958); see Moog Indus., Inc. v. FTC, 238 F.2d 43, 51-52 (6th Cir. 1956), aff’d per curiam, 355 U.S. 411 (1958); Heim, supra note 15, at 208; Tomlin, supra note 10, at 180.

145. Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133, 1135 (5th Cir. 1979) (plaintiff gave greater allowances on used-car trade-ins in order to meet rival’s competition), vacated and remanded sub nom. J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981); Bargain Car Wash, Inc. v. Standard Oil Co., 406 F.2d 1163, 1167 (7th Cir. 1969) (court recognized that a free car wash may be a form of customer solicitation equivalent to a price cut); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150, 153 (2d Cir. 1949) (salary of a demonstrator is a competitive advantage); accord C. Edwards, supra note 21, at 532; Heim, supra note 15, at 208; Tomlin, supra note 10, at 180, 187.

146. 178 F.2d 150 (2d Cir. 1949).

147. Id. at 151.

148. Id. at 153.

149. Id.
show and measure. In a practical sense, it will be difficult for the plaintiff to show that a specific customer bought his car from a favored competitor because the competitor offered him a "free" tune-up, or that it was the advantageous price from the seller that originally triggered the promotional strategy. It is almost as difficult, however, to show that the price difference caused the competitor to lower his resale price and that he would not have lowered it if he had not received the unlawful subsidy.\textsuperscript{150}

The plaintiff is essentially required to "prov[e] a negative"\textsuperscript{151} by showing that he lost customers or profits because of an advantage afforded to his competitor. Any requirement of a specific positive act would not be sufficiently comprehensive. Each situation must be examined on its independent facts. Justice Cardozo acknowledged that the question of how much worse off the plaintiff is because others have paid less "is not independent of time and place and circumstance. It calls for something more than the use of a mathematical formula."\textsuperscript{152}

\textbf{Conclusion}

With the increasingly strict requirements placed on a private plaintiff to prove initially that the Robinson-Patman Act was, in fact, violated, it is reasonable to allow him some leeway in tracing his actual injury to the proved violation. If the favored competitor actually uses his price advantage to engage in anticompetitive behavior that, if only "potential," would violate the Robinson-Patman Act, then the plaintiff in a private action should be allowed to prove he lost sales or profits to the rival's fulfillment of that potential. If the plaintiff is granted some leniency in proving the antitrust dimension of his injury, it follows that he should be permitted to trace his loss to anticompetitive conduct other than a rival's lowered resale price.

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\textsuperscript{150} The difficulty of proof lies in the fact that it is hard to measure market effects and to predict hypothetically what would have occurred absent the violation. See Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 123-24 (1969); Areeda, \textit{supra} note 83, at 1127; Cooper, \textit{supra} note 34, at 981; Goetz, \textit{supra} note 83, at 125; Tomlin, \textit{supra} note 10, at 180, 189; \textit{Symposium}, \textit{supra} note 20, at 200.


\textsuperscript{152} ICC v. United States \textit{ex rel.} Campbell, 289 U.S. 385, 390 (1933). Justice Cardozo held that the price difference was an evidentiary circumstance to be viewed in light of all the circumstances. \textit{Id.} at 389-93. Justice Marshall, in Perkins v. Standard Oil Co., 395 U.S. 642 (1969), also pointed out that when applying antitrust laws the court "'must look at the economic reality of the relevant transactions.' " \textit{Id.} at 651 (Marshall, J., concurring and dissenting) (quoting United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 208 (1968)).