Interseller Price Verification and Hard Bargaining: Reconciliation of the Sherman Act, Robinson-Patman Act, and the Forces of Competition

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INTERSELLER PRICE VERIFICATION AND HARD BARGAINING:
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PATMAN ACT, AND THE FORCES OF COMPETITION.

I. INTRODUCTION

Time has not erased the fundamental inconsistencies inherent in the
Robinson-Patman Act. A product of the 1930's when a slowly recovering
economy remained shaken by severely depressed prices, the statute is mis-
placed in the oligopolistic markets of modern America which tend to maintain
artificially high price levels. The Robinson-Patman Act's broad prohibition of
price discrimination has been widely described as anticompetitive and an-
tithetical to the Sherman Act. Yet, despite repeated calls for its reform or
repeal, the Robinson-Patman Act remains the law, and courts can only hope

3. See Campbell & Emanuel, A Proposal for a Revised Price Discrimination and Predatory Pricing Statute, 13 Harv. J. Legis. 125, 132 & n.37 (1975); Note, Meeting Competition Under the Robinson-Patman Act, 90 Harv. L. Rev. 1476, 1480-81 (1977) [hereinafter cited as Meeting Competition]. There are also indications that the American economy is becoming predominantly oligopolistic. Increased management emphasis on market share has caused marginally profitable sellers to withdraw from various markets, thereby increasing industrial concentration. Position Wanted, Wall St. J., Feb. 3, 1978, at 1, col. 6.

In addition to being artificially high, prices in an oligopolistic market are generally inflexible. A price cut would only be matched by other sellers and result in lower profits for all. See F. Scherer, Industrial Market Structure and Economic Performance 147 (1970); text accompanying notes 131-33 infra. But see Flexible Pricing, Business Week, Dec. 12, 1977, at 78 (suggesting that sluggish demand and increased competition from imports have forced companies to price flexibly).

4. Some forms of price discrimination are procompetitive. Sporadic or temporary price discrimination is a process whereby oligopolists secretly grant discounts to selected customers in order to obtain extra business. As this process spreads throughout an oligopolistic market, it will eventually result in a widespread price cut from the artificially high price level. See R. Posner, The Robinson-Patman Act 12-15 (1976); Meeting Competition, supra note 3, at 1481-82. Despite the procompetitive effect of sporadic price discrimination, it nevertheless falls within the Robinson-Patman Act's ban of price discrimination.

to work the least competitive damage possible under this "singularly opaque and elusive statute." This Comment will examine the judicial treatment of a classic illustration of the inconsistency between the Sherman Act and the Robinson-Patman Act—-discussion of prices among competing sellers in order to verify customer reports of the availability of better offers from other sellers.

The problem originates in the "meeting competition" defense of the Robinson-Patman Act. The statute prohibits sellers from discriminating in price among purchasers of goods of like grade and quality, but exempts discrimination "made in good faith to meet an equally low price of a competitor." Courts have interpreted the good faith element as requiring a seller to have specific and reliable reports of a competitor's lower price before he can discriminate in price, for the buyer himself is viewed as inherently unreliable because of his desire to obtain the best deal possible. The buyer

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7. The Robinson-Patman Act is likely to remain the law for at least the immediate future. See F. Rowe, Price Discrimination Under the Robinson-Patman Act 551 & n.69 (1962). The statute's protectionist attitude towards small businessmen has traditionally drawn strong support in Congress, making repeal or reform politically inexpedient. In urging passage of the Robinson-Patman Act, its cosponsor stated: "This bill has the opposition of all cheats, chiselers, bribe takers, bribe givers, and the greedy who seek monopolistic powers which would destroy opportunity for all young people and which would eventually cause Government ownership, as the people of this country will not tolerate private monopoly.

"The bill has the support of those who believe that competition is the life of trade, that the policy of live and let live is a good one; that it is one of the first duties of Government to protect the weak against the strong and prevent men from injuring one another, that greed should be restrained and the Golden Rule practiced." 80 Cong. Rec. 3447 (1936) (remarks of Rep Patman)


Perhaps the best way of dislodging congressional support for the Robinson-Patman Act is to establish that it does not, in fact, benefit the small businessman. See, e.g., 1977 Justice Dep't Report, supra note 2, at 75-100, 181-209; Kuenzel & Schiffres, Making Sense of Robinson-Patman: The Need To Revitalize Its Affirmative Defenses, 62 Va. L. Rev. 1211, 1215-17 (1976).


10. See text accompanying notes 35-39 infra.


12. See pt. III(A) infra.

may even have lied about competing offers in the past. Therefore, a seller cannot cut his price simply on the basis of the buyer's report of a competing offer; he must attempt to verify the buyer's report.

If the seller has been unable to verify the buyer's report, the seller has four options, none of which is attractive. Before cutting his price to the buyer, the seller could verify the reported price with a competitor, the ultimate source of specific and reliable information as to a competing price. This verification would satisfy the good faith requirement of the meeting competition defense, enabling the seller to defend successfully a price discrimination charge. Such interseller price verification may, however, fall within the ambit of section 1 of the Sherman Act, which has been interpreted as prohibiting exchanges of specific price information among competitors where the effect of such an exchange is to stabilize prices.

The seller's second option is to lower his price to the customer reporting the lower price without verifying the report with his competitor. But in these circumstances the seller could not raise a meeting competition defense to a price discrimination charge. By cutting his price on the basis of an unverified report, he has not acted in good faith.

The seller could also cut his prices to all buyers and thereby make the sale to the buyer who had reported the lower price. Because he has charged the same price to all buyers, the seller cannot be charged with price discrimination. Few sellers, however, will make an across-the-board price cut merely to close a single sale.

The seller's final option is to refrain from cutting his price to the buyer. By charging the same price to all customers, the seller would be immune to an accusation of price discrimination. He could, however, lose the buyer as a customer if the report of a competing offer were in fact true. This result is unfair to the extent that it deprives the seller of his right to defend himself against price raids from competitors. More importantly, the absence of price cuts will reinforce the inflexible price structure of oligopolistic markets.


15. See pt. III(A) infra.


20. See note 3 supra.
In *United States v. United States Gypsum Co.*, the Third Circuit attempted to resolve this dilemma by exempting interseller price verification for Robinson-Patman purposes from Sherman Act liability. While prior cases had reached the same conclusion, *Gypsum* was the first decision to gauge the effect of this practice on competition. The result was a fairly narrow exemption for interseller price verification.

But did the *Gypsum* restriction on interseller price verification go far enough? This Comment explores existing case law and economic theory in an attempt to arrive at a meaningful reconciliation of the Sherman Act and Robinson-Patman Act. As a partial solution to this problem, some courts and commentators have suggested an increased use of section 2(f) of the Robinson-Patman Act—the buyer liability section—in order to deter buyers from misrepresenting the existence of competing offers. Overuse of section 2(f), however, could have anticompetitive effects. Accordingly, this Comment will also discuss the extent to which section 2(f) should be used.

## II. THE ROBINSON-PATMAN ACT

In the midst of the Great Depression, the traditional wholesaler and retailer had been displaced as the dominant force in merchandise distribution by an aggressive new business entity—the chain store. It was widely assumed that


22. 550 F.2d at 126.


24. *See* 550 F.2d at 124.


The *Gypsum* court also established the following four-part test to determine when interseller price verification would be lawful: "(1) the [defendants] engaged in the practice solely to comply with the strictures of Robinson-Patman; (2) they had first resorted to all other reasonable means of corroboration, without success; (3) they had good, independent reason to doubt the buyers' truthfulness; and (4) their communication with competitors was strictly limited to the one price and one buyer at issue." *Id.* at 126.


27. *See* note 34 *infra*.


30. *See* pt. VI *infra*.

31. Because of the volume of their business, chain stores wielded immense bargaining power.
the low price appeal of the chain stores contributed to the increasing number of failures among small businessmen in the 1930's. In 1936 Congress responded to the demand for regulation of chain stores with passage of the Robinson-Patman Act.

The Robinson-Patman Act contains a number of provisions, the most

and obtained price discounts unavailable to smaller, independent buyers. Additional savings resulted from operating economies, since chain stores eliminated the middleman and his profit by performing the functions of both the wholesaler and retailer. See E. Kintner, supra note 6, at 8-11; F. Rowe, supra note 7, at 3-6.

32. See F. Rowe, supra note 7, at 4-5; 1977 Justice Dep't Report, supra note 2, at 104-07. The Department of Justice has questioned the validity of this assumption. See id. at 103.

33. For the legislative history of the Robinson-Patman Act, see F. Rowe, supra note 7, at 11-23, 559-620. The preexisting price discrimination statute was § 2 of the Clayton Act. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914) (current version at 15 U.S.C. § 13 (1970)). Section 2 was directed at the cutthroat pricing policies of the large national trusts of the early 1900's. Prices would be slashed in one territory to drive competitors out of business and acquire a monopoly. See C. Edwards, The Price Discrimination Law 5-6 (1959); F. Rowe, supra note 7, at 6-7. Designed to prevent injury at the seller level or primary line of competition, § 2 was ineffective when dealing with the high-powered bargaining tactics of the chain stores which affected competition at the buyer level or secondary line of competition. See E. Kintner, supra note 6, at 8-11; F. Rowe, supra note 7, at 7.

Other congressional attempts to restrict the growth of chain stores had ended in failure. A proposed chain store tax bill died in committee hearings once it was revealed that A & P's tax liability would have been $523 million on an annual net income of $9 million. F. Rowe, supra note 7, at 8 n.22. The Codes of Fair Competition, authorized by the National Industrial Recovery Act, ch. 90, § 3, 48 Stat. 195 (1933), collapsed when the Supreme Court invalidated the Act as an unconstitutional delegation of legislative powers. See A L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). See generally R. Rowe, supra note 7, at 10-11; 1977 Justice Dep't Report, supra note 2, at 108-13.

Section 1 of the Robinson-Patman Act amends § 2 of the Clayton Act and is usually referred to as § 2 of the Robinson-Patman Act. Section 2 may serve as the basis for a civil action by a private party, the Federal Trade Commission (FTC) or the Department of Justice. 15 U.S.C. §§ 15, 21, 25 (1970 & Supp. V 1975). The Department of Justice leaves primary responsibility for enforcement with the FTC. 1977 Justice Dep't Report, supra note 2, at 3. As part of the Clayton Act, § 2 is an “antitrust law” within the meaning of § 1 of that Act and therefore enables private plaintiffs to recover treble damages. 15 U.S.C. §§ 12, 15 (1970). Critics feel this feature exacerbates the Robinson-Patman Act's encouragement of uniform pricing. See 1977 Justice Dep't Report, supra note 2, at 35. Incorporating the Robinson-Patman Act into the Clayton Act has been described as a “political masterstroke which invested an anti-chain store measure with the venerable trappings of antitrust.” F. Rowe, supra note 7, at 23. The result is that, for better or for worse, the Robinson-Patman Act now applies to all American industries.

34. Section 2(c) of the Robinson-Patman Act prohibits the payment or receipt of commissions or brokerage allowances except for services rendered. 15 U.S.C. § 13(c) (1970). Section 2(d) and 2(e) prohibit, respectively, payment to customers for services or facilities furnished by the purchaser, and the furnishing by sellers of services and facilities unless they are available to all purchasers “on proportionally equal terms.” 15 U.S.C. §§ 13(d)-13(e) (1970). Unlike § 2(a), no showing of injury to competition is required under these sections. FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 (1959).

Section 2(f) prohibits the buyer from knowingly inducing or receiving a discrimination in price prohibited by § 2(a). 15 U.S.C. § 13(f) (1970); see pt. VI infra. Sections 2(c) and 2(f) are the only
important being section 2(a), which prohibits a seller from discriminating in price among buyers of goods of like grade and quality in interstate commerce. In addition, to be unlawful, the price discrimination must have an anticompetitive effect, which includes injury to competition among sellers, buyers, or customers of either of them. The Supreme Court's expansive view of competitive injury has eased the plaintiff's burden in establishing a prima facie case.

Once a prima facie case is established, the defendant has the burden of rebutting the presumption of illegality. Sections 2(a) and 2(b) set out the available defenses, the most useful of which are the cost justification and meeting competition defenses. The cost justification defense allows sellers to sections which deal directly with the buyer. This is somewhat paradoxical considering that the Robinson-Patman Act was directed at the aggressive bargaining techniques of buyers. See note 31 supra. Rowe attributes this "backdoor" approach to constitutional considerations. F. Rowe, supra note 7, at 23.

The little-used § 3 is a criminal statute that prohibits some of the § 2 violations along with certain other pernicious pricing practices. 15 U.S.C. § 13a (1970). The vagaries of § 3 cast doubt on its constitutionality. See 1955 Attorney General's Report, supra note 18, at 201. But see United States v. National Dairy Prods. Corp., 372 U.S. 29, 32-33 (1963) (despite the Court's dissatisfaction with the section, the third clause of § 3 was held constitutional "as applied").

35. Price discrimination as used in the Robinson-Patman Act means simply a difference in price. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 550 (1960). Economists define price discrimination as the sale of "different units of a good or service at price differentials not directly corresponding to differences in supply cost." F. Scherer, supra note 3, at 253. Under this definition, price discrimination includes the sale of goods with the same cost at different prices as well as the sale of goods with different costs at the same price. Campbell & Emanuel, supra note 3, at 128. The Act's emphasis on price difference, instead of cost difference, has been criticized as economically unsound. See Kuenzel & Schiffres, supra note 7, at 1212-14. Theoretically, any undue emphasis on price is mitigated by the cost justification defense, but in practice, the defense is virtually impossible to establish. R. Posner, supra note 4, at 40; see text accompanying notes 41-45 infra.


37. Section 2(a) provides that price discrimination is prohibited "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." 15 U.S.C. § 13(a) (1970). See generally E. Kintner, supra note 6, at 110-58; F. Rowe, supra note 7, at 113-206. The price discrimination prohibition applies equally to all levels of the distribution chain. For example, fourth-line injury, that suffered by a disfavored customer in his competition with a customer of a customer of the original seller's favored buyer, is also actionable. See Perkins v. Standard Oil Co., 395 U.S. 642 (1969); E. Kintner, supra note 6, at 97.


39. Kuenzel & Schiffres, supra note 7, at 1212; see Eaton, supra note 9, at 413-14.


41. Id. §§ 13(a)-13(b); see Eaton, supra note 9, at 414; Kuenzel & Schiffres, supra note 7, at 1217 ("These defenses are central to any attempt to make sense of the Act because they are its
pass along cost economies to customers. The seller's burden in establishing the defense is, however, staggering. Preparation of elaborate cost studies is required, mere estimates being insufficient. The cost of proving cost justification—both in time and money—is prohibitive.

Section 2(b) of the Robinson-Patman Act, the meeting competition defense, provides in pertinent part:

Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

prime method of accommodating economic and competitive considerations. The meeting competition defense is outlined in text accompanying notes 46-57 infra.

Other statutory defenses include changing condition and refusal to deal. 15 U.S.C. § 13(a) (1970). The changing condition defense permits discrimination resulting from a changing condition that affects the market for goods or marketability of the goods, e.g., obsolete or perishable goods. See F. Rowe, supra note 7, at 322. The refusal to deal defense codifies the rule of United States v. Colgate & Co., 250 U.S. 300 (1919), that a seller, provided he is not a monopolist, has the right to both state the terms by which he will deal and terminate business relations with those who do not comply. FTC v. Simplicity Pattern Co., 360 U.S. 55, 64 (1959). A refusal to deal carried out in concert with others, however, violates § 1 of the Sherman Act. See United States v. General Motors Corp., 384 U.S. 127 (1966).


42. Section 2(a) provides in part: "That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . . ." 15 U.S.C. § 13(a) (1970). The cost justification defense is not available in §§ 2(c), 2(d), or 2(e) proceedings. FTC v. Henry Broch & Co., 363 U.S. 166, 176 (1960) (§ 2(c)); FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 n.11 (1959) (§§ 2(d), 2(e)). But see Thomasville Chair Co. v. FTC, 306 F.2d 541, 545 (5th Cir. 1962).

43. Kuenzel & Schiffres, supra note 7, at 1233. Proposed reforms of the Robinson-Patman Act advocate a liberalization of this defense. See 1977 Justice Dept Report, supra note 2, at 282, 291; Campbell & Emanuel, supra note 3, at 202-03.

44. Automatic Canteen Co. v. FTC, 346 U.S. 61, 68 (1953); see Kuenzel & Schiffres, supra note 7, at 1225-27; cf. FTC v. Morton Salt Co., 334 U.S. 37, 48 (1948) (justification of discounts necessitates proof "that the full amount of the discount is based on . . . actual savings in cost"). Allocation of cost among joint products (e.g., primary product and by-product) and classes of customers is particularly troublesome. See Kuenzel & Schiffres, supra at 1227-31.

45. See 1977 Justice Dept Report, supra note 2, at 22; Kuenzel & Schiffres, supra note 7, at 1225-27.

Once established, section 2(b) is an absolute defense and applies despite the possible injury to nonfavored purchasers. As such, section 2(b) is of considerable importance considering plaintiffs ease in establishing a prima facie case and the difficulty of proving the cost justification defense. Moreover, section 2(b) ameliorates the Robinson-Patman Act's tendency toward uniform prices by allowing a seller to cut prices in order to meet competition. The meeting competition defense "may be the prime means of placing Robinson-Patman sensibly into the national antitrust policy of competition."

While recent decisions have recognized the importance of section 2(b) and eroded a series of prior limitations that made the defense difficult to

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47. Standard Oil Co. v. FTC, 340 U.S. 231, 250-51 (1951). While the meeting competition defense is not available in a § 2(c) action, see FTC v. Henry Broch & Co., 363 U.S. 166, 176-77 (1960), it can be raised in a § 2(d) or § 2(e) proceeding. See FTC v. Simplicity Pattern Co., 360 U.S. 55, 67 n.11 (1959); Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 504-05 (D.C. Cir.), cert. denied, 369 U.S. 888 (1962) (§ 2(d)).


49. Kuenzel & Schiffres, supra note 7, at 1233; see text accompanying notes 38-45 supra.

50. See notes 4, 33 supra.

51. Kuenzel & Schiffres, supra note 7, at 1234-35. Contra, Cohen, supra note 6, at 50-51.

52. For example, a seller is no longer required to prove that it was meeting a lawful lower price; a § 2(b) defense is justified unless the seller knows that the price met is unlawful or inherently unlawful. Cadigan v. Texaco, Inc., 492 F.2d 383, 387 (9th Cir. 1974); National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 523-24 (7th Cir.), cert. denied, 393 U.S. 977 (1969); Standard Oil Co. v. Brown, 238 F.2d 54, 58 (5th Cir. 1956). See generally Kuenzel & Schiffres, supra note 7, at 1251-53.

Furthermore, it now appears that § 2(b) is not restricted to a seller attempting to retain old customers, but is also available to a seller seeking new customers. Cadigan v. Texaco, Inc., 492 F.2d 383, 387 (9th Cir. 1974); Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220, 226-27 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974); Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48 (7th Cir. 1962). Contra, Standard Motor Prods., Inc. v. FTC, 265 F.2d 674 (2d Cir.), cert. denied, 361 U.S. 826 (1959); cf. Viviano Macaroni Co. v. FTC, 411 F.2d 255, 258 (3d Cir. 1969) (§ 2(b) defense rejected where the defendant's "offer was made in an effort to obtain additional business from [the buyer] and not to defend itself against the inroads of rapacious competitors"). See generally Kuenzel & Schiffres, supra note 7, at 1253-55. As the Seventh Circuit noted, to hold otherwise would give an established seller "a monopoly of his customers and a seller entering the market would not be permitted to reduce his prices to compete with his established rivals . . . ." Sunshine Biscuits, Inc. v. FTC, 306 F.2d at 52. In addition, the seller's existing customers to whom he had lawfully lowered his price would be favored over prospective customers. Id. The lower prices, however, can only be granted to a buyer—old or new—who has been offered a lower price by a competitor. Thus, blanket price cuts in a particular area are not permitted. See Hampton v. Graff Vending Co., 478 F.2d 527, 535 (5th Cir.), cert. denied, 414 U.S. 859 (1973); Forster Mfg. Co., 68 F.T.C. 191, 198-99 (1965), aff'd, 361 F.2d 340 (1st Cir. 1966), cert. denied, 385 U.S. 1003 (1967). But see Balian Ice Cream Co. v. Arden Farms Co., 231 F.2d 356, 364-68 (9th Cir. 1955), cert. denied, 350 U.S. 991 (1956).

Several cases have also expanded the sources of competition to which a seller may respond. A seller need not prove that the competing goods are of like grade and quality as his goods but only that his goods "at various price levels generate public demand (or 'saleability') substantially equivalent to that of [competing goods] at the same price levels . . . ." Callaway Mills Co. v. FTC, 362 F.2d 435, 441 (5th Cir. 1966). A § 2(b) defense is also available if the lower price
sustain, courts continue to comply with the congressional intent that a seller may meet but not beat a competitor's price. A seller will be denied a meeting competition defense if he knew or should have known that his price would undercut a competitor's price. The seller need not, however, show that his price in fact met a competitor's price, but only the "existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor." Thus a seller who in good faith unintentionally undercuts his competition may yet be able to use the meeting competition defense.

III. THE MEETING COMPETITION DEFENSE AND THE DUTY TO VERIFY

A. The Standard of Good Faith

Before a seller can meet a competitor's price in good faith, he must possess

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 granted by the seller S-1 to his buyer B-1 is made to meet an equally low price offered by S-2, a competitor of S-1, to B-2, a competitor of B-1. Bargain Car Wash, Inc. v. Standard Oil Co., 466 F. 2d 1163, 1175 (7th Cir. 1972). If S-2 did not give B-2 a lower price, however, then S-1 cannot lower his prices in order for B-1 to meet competition from B-2. See FTC v. Sun Oil Co., 371 U.S. 505, 512 n.7, 515-16 (1963). See generally Eaton, supra note 9, at 417. For the effect of this rule on small retailers, see 1977 Justice Dep't Report, supra note 2, at 93-97. There is still considerable dispute as to the legality of meeting competition through pricing systems. Compare Callaway Mills Co. v. FTC, 362 F. 2d 435, 441-42 (5th Cir. 1966), with Exquisite Form Brassiere, Inc. v. FTC, 360 F. 2d 492, 493 (D.C. Cir. 1965), cert. denied, 384 U.S. 959 (1966). The Supreme Court has stated that § 2(b) "places emphasis on individual competitive situations, rather than upon a general system of competition," FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 753 (1945). The Fifth Circuit has stated, however, that pricing systems are not per se illegal. Callaway Mills Co. v. FTC, 362 F. 2d at 441. But cf. Surprise Brassiere Co. v. FTC, 406 F. 2d 711, 715 (5th Cir. 1969) (suggesting that Callaway is limited to cases where a competitor's prices vary with the cumulative annual purchases of each customer). See generally Eaton, supra note 9, at 418-19; Kuenzel & Schiffres, supra note 7, at 1245-49. Not until Continental Baking Co., 63 F.T.C. 2071 (1963), 27 years after the passage of the Robinson-Patman Act, did the FTC first accept a meeting competition defense in a litigated case. E. Kintner, supra note 6, at 179. See 80 Cong. Rec. 8235 (1936). This requirement has been criticized as anticompetitive in that it leads to price uniformity. See Shniderman, The Impact of the Robinson-Patman Act on Pricing Flexibility, 57 Nw. U.L. Rev. 173, 177-78 (1962); Meeting Competition, supra note 3, at 1485-87. For a discussion of the difficulties of determining when a price meets, but does not beat, a competitor's price, see 1955 Attorney General's Report, supra note 18, at 183-84. See Hampton v. Graff Vending Co., 478 F. 2d 527, 535-36 (5th Cir.), cert. denied, 414 U.S. 859 (1973); Purolator Frods., Inc. v. FTC, 352 F. 2d 874, 884-85 (7th Cir. 1965), cert. denied, 389 U.S. 1045 (1968); Forster Mfg. Co., 68 F.T.C. 191, 203 (1965), aff'd, 361 F. 2d 340 (1st Cir. 1966), cert. denied, 385 U.S. 1003 (1967). FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945); see Eaton, supra note 9, at 416. This is also the essence of the verification requirement. See pt. III(A) infra. See International Air Indus., Inc. v. American Excelsior Co., 517 F. 2d 714, 726 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976); Jones v. Borden Co., 430 F. 2d 568, 572-73 (5th Cir. 1970); Beatrice Foods Co., 76 F.T.C. 719, 809-12 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F. 2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). See generally Kuenzel & Schiffres, supra note 7, at 1249-50.
some knowledge that indicates the necessity of a lower price. The initial question, then, is how much information must the seller have before he is entitled to react. The Supreme Court answered this question in FTC v. A.E. Staley Manufacturing Co..

Section 2(b) does not require the seller to justify price discriminations by showing that in fact they met a competitive price. But it does place on the seller the burden of showing that the price was made in good faith to meet a competitor's... The statute at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.

In determining what factual situations meet the test of good faith, courts seem to require a certain degree of specificity and reliability.

1. Specificity

A seller's information on competing offers is often imprecise. Buyers frequently have a policy of not disclosing the terms of competing offers. Even if a competitor's price list is available to the seller, it may not provide accurate information, since discounts off-list price are often granted to buyers. Consequently, courts do not require the seller to have positive proof of the amount of a competitive offer or the identity of the competitor. To hold otherwise would be tantamount to requiring the seller to, in fact, meet a competitor's price, a standard the Supreme Court rejected in Staley. On the

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58. Even if a seller knows of a competitor's lower price, he is not justified in cutting his price if he knows the buyer will not accept the competitor's price. See National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 524 (7th Cir.), cert. denied, 393 U.S. 977 (1968).
60. 324 U.S. 746 (1945).
61. Id. at 759-60.
62. See Kuenzel & Schiffres, supra note 7, at 1238. Courts which have permitted sellers to meet competition with pricing systems have to some degree implicitly reduced the requirement of specificity. See note 52 supra.
63. See Kuenzel & Schiffres, supra note 7, at 1239.
64. See, e.g., Forster Mfg. Co. v. FTC, 335 F.2d 47, 55 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965). A few sellers may be fortunate enough to obtain a competitor's invoice or valid price list. See, e.g., Hanson v. Pittsburgh Plate Glass Indus., Inc., 482 F.2d 220, 226 (5th Cir. 1973), cert. denied, 414 U.S. 1136 (1974).
66. Forster Mfg. Co. v. FTC, 335 F.2d 47, 55 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965). The seller must, however, know the value of his own offer. Viviano Macaroni Co. v. FTC, 411 F.2d 255, 258 (3d Cir. 1969). Otherwise "[h]e would have no way of comparing his offer with those of [his competitors] in order to insure that his company was only making an equally low offer and not a lower one." Id.
67. Forster Mfg. Co. v. FTC, 335 F.2d 47, 56 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965); see text accompanying note 61 supra.
other hand, the mere report of an unspecified lower price from an unknown competitor is not specific enough to justify a price cut. The same result is obtained even if the competitor is known. Other than these broad parameters, there are no set rules for specificity.

2. Reliability

The majority of reports of competing offers originate with a seller's customer. While a customer may supply information that is sufficiently specific, the information may nevertheless be unreliable. The buyer's tendency "to secure the most advantageous terms of [sale] possible" may cause him to misrepresent competing offers. If a buyer's report is suspect, Staley imposes on the seller a clear duty to verify. Thus, a buyer's report of a lower price,
suspect in light of a seller's own cost study, cannot be relied upon without independent verification.\textsuperscript{77}

If there is no indication of a buyer's unreliability, however, the existence of a duty to verify is unclear. \textit{Staley} is susceptible of two interpretations. In \textit{Staley} the seller relied upon the buyers' report of lower prices "in circumstances which strongly suggested that the buyers' claims were without merit . . ."\textsuperscript{78} The Court felt that these circumstances and the absence of any efforts to verify the reports, "\textit{taken together}," did not constitute good faith.\textsuperscript{79} Thus, the Court's creation of a duty to verify arguably could be limited to cases in which the seller has some independent factual indication that the buyer's report is suspect.\textsuperscript{80} On the other hand, the Court's reference to the buyer's tendency "to secure the most advantageous terms of [sale] possible"\textsuperscript{81} suggests that the buyer is inherently unreliable. Under this reading of \textit{Staley} the seller may always have a duty to verify a buyer's report of a lower price, for the report would always be sufficiently suspect.

Lower courts have split on their interpretation of \textit{Staley}. The Third Circuit requires the seller to investigate the buyer's report of a lower price in all cases to protect "the integrity of the section 2(b) defense."\textsuperscript{82} In contrast, the Ninth Circuit has suggested that reliance on the buyer alone satisfies the requirement of good faith. In \textit{Cadigan v. Texaco, Inc.},\textsuperscript{83} competitors of Texaco offered the buyer, a gas station owner, a price for gasoline. The buyer informed Texaco of these offers but nevertheless accepted a higher Texaco offer.\textsuperscript{84} The buyer continued to inform Texaco of better offers and threatened to stop purchases if Texaco did not make a better offer.\textsuperscript{85} Texaco then granted a discriminatory price cut.\textsuperscript{86} Without any reference to efforts by Texaco to verify the buyer's report of lower prices,\textsuperscript{87} the court upheld as a matter of law Texaco's meeting

\textsuperscript{77} See National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 528-29 (7th Cir.), cert. denied, 393 U.S. 977 (1968).
\textsuperscript{79} Id. at 759 (emphasis added).
\textsuperscript{80} Cf. Kuenzel & Schiffres, supra note 7, at 1239 ("need to verify arises only when the information at hand is inadequately specific and reliable").
\textsuperscript{81} 324 U.S. at 759.
\textsuperscript{82} United States v. United States Gypsum Co., 550 F.2d 115, 126 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560); Viviano Macaroni Co. v. FTC, 411 F.2d 255, 259 (3d Cir. 1969). The \textit{Viviano} court stated: "While we can again sympathize with the difficulty facing petitioner in finding precise information as to the identity of the competitors and the amount of offers, there is no indication in the record that Samuel Viviano did anything more than merely accept the word of the [buyer] as to there being competitive offers outstanding." Id. at 259; accord, Glowacki v. Borden, Inc., 420 F. Supp. 348, 358 (N.D. Ill. 1976); Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 313 n.10 (N.D. Cal. 1971).
\textsuperscript{83} 492 F.2d 383 (9th Cir. 1974).
\textsuperscript{84} Id. at 385-86.
\textsuperscript{85} Id. at 386.
\textsuperscript{86} Id.
\textsuperscript{87} The buyer's report of a competing offer was for a discount off the posted dealer prices. Id. at 385. Otherwise, the offer could have been verified by reference to the posted price.
The validity of Cadigan, however, is questionable. It is inconsistent with Staley, which requires verification if the buyer's report is suspect. In Cadigan, the buyer's report was extremely suspect, considering his acceptance of Texaco's initial offer after claiming he had received a better one. This unusual business practice should have suggested to Texaco that the better offers did not, in fact, exist. In addition, the Third Circuit's distrust of the buyer represents a more realistic view of the marketplace since the buyer and the seller are "commercial antagonists." As the First Circuit stated:

The seller wants the highest price he can get and the buyer wants to buy as cheaply as he can, and to achieve their antagonistic ends neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule. Haggling has ever been the way of the marketplace.

As noted before, it is not uncommon for buyers to misrepresent the amount of competing offers, a practice which lends further support to the Third Circuit's position.

B. Forms of Verification

Direct verification of a buyer's report of a competing price may occur in a variety of ways. A competitor's price list may be publicly available or the competitor may have made a public bid to certain stores. The buyer may

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88. Id. One court has stated that the Cadigan court simply failed to indicate that the seller had independently verified the buyer's report. See Glowacki v. Borden, Inc., 420 F. Supp. 348, 358 n.3 (N.D. Ill. 1976). Thus, Cadigan could still be viewed as consistent with the Third Circuit's position that the seller must verify the buyer's report of a lower price.

89. See text accompanying notes 76-77 supra.

90. This argument presumes no strong brand preferences among consumers for Texaco gasoline, which would have enabled the buyer to pass his higher costs on to the consumer. See generally F. Scherer, supra note 3, at 10. The court's opinion made no mention of brand preference.


92. Id.

93. See text accompanying notes 73-75 supra.

94. Several other cases appear, at first glance, to support Cadigan by indicating that a seller can rely on a buyer's report of a lower price without direct, independent verification. See, e.g., Jones v. Borden Co., 430 F.2d 568, 572-73 (5th Cir. 1970); Krieger v. Texaco, Inc., 373 F. Supp. 108, 112 (W.D.N.Y. 1973); Beatrice Foods Co., 76 F.T.C. 719, 809-12 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971). These cases can be harmonized with the duty to verify, however, in that some evidence was present from which the existence of a competing price could be inferred, thereby lending credence to the buyer's report. Those cases, dealing with the form of verification rather than the duty to verify, will be discussed in pt. III(B) infra.


even show the seller a written quotation signed by a competitor. Unfortunately, in many cases such direct verification is not possible. Nevertheless, the existence of a competing price may be inferred from the totality of the circumstances. Recent decisions seem to indicate the willingness of the courts to permit this indirect form of verification.

1. Similar Reports

Reports of lower prices from more than one buyer may indicate the reliability of a buyer's report. In *Jones v. Borden Co.*, Borden's sales dropped following a price cut by a competitor. Borden inquired whether a five-percent discount would make it competitive again, and after the buyer replied that "that would be about right," Borden granted the discount. The discount was given to a second customer after he, too, reported that Borden was five-percent higher than competition. Borden also granted this discount to two other buyers after they reported that Borden was being undersold. The court held as a matter of law that Borden's granting of the discounts was a good faith effort to meet competition. Similarly, in *McCaskill v. Texaco, Inc.*, Texaco's price cut to three different retailers who reported competing prices was deemed to be in good faith. This approach may be inappropriate, however, in a market where most buyers have a proven reputation for misrepresenting offers. In such a case the fact that several buyers report a competing offer would add little credence to the report.

2. Termination of Sales

A meeting competition defense has been upheld where a termination or a lack of sales has coincided with a buyer's report of a lower price. In *Krieger v. Texaco, Inc.*, an owner of several gas stations stopped buying from Texaco.

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98. See Kuenzel & Schiffres, supra note 7, at 1239. Several reports of the availability of better prices, however, do not justify a blanket price cut in a particular area. See note 52 supra. In addition, the reports must come from buyers who have been offered better prices and not from those who have only heard of a better price. See Forster Mfg. Co., 68 F.T.C. 191, 196-97 (1965), aff'd, 361 F.2d 340 (1st Cir. 1966), cert. denied, 385 U.S. 1003 (1967).
99. 430 F.2d 568 (5th Cir. 1970).
100. Id. at 572-73.
101. Id. at 573.
102. Id.
103. Id.
104. Id. In addition to the similar reports of a lower price, Borden's good faith defense was also bolstered by the drop in sales. See pt. III(B)(2) infra.
106. Id. at 1340.
for one station after reporting competing offers. In International Air Industries, Inc. v. American Excelsior Co., after several customers stopped purchasing the seller's product, the seller responded with a discount which still did not generate any sales. After a buyer reported the availability of a better discount, the seller increased his discount. The court upheld the seller's meeting competition defense even though buyers in this market often misrepresented competing offers.

There is danger in extending this reasoning too far. Arguably a mere threat to stop purchases could be used to infer the reliability of a buyer's report. But every demand by a buyer for a lower price contains an implied threat to stop purchases. If this rationale is used, practically all price discrimination could be justified, thereby emasculating the Robinson-Patman Act.

3. Appraisal of Market Conditions

The Federal Trade Commission's (FTC) decision in Beatrice Foods Co. suggests that a seller's appraisal of market conditions may be sufficient for him to determine the reliability of a buyer's report of a competing price. In Beatrice the buyer, Kroger, requested "winner-take-all" bids for the supply of private label milk. After Beatrice offered a seventeen-percent discount, Kroger misrepresented to Beatrice that it had one offer of a twenty-percent discount and expected an even better offer. After reviewing a range of market data, Beatrice concluded that a competing offer could have been in the range of a twenty-percent discount and therefore offered a successful bid slightly in excess of a twenty-percent discount.

The FTC permitted Beatrice's meeting competition defense in a three-to-two decision, stating that Beatrice "did everything in their power to find the

109. Id. at 112.
110. Id.
111. 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).
112. Id. at 718. The seller verified this first discount directly by a reference to a competitor's public bid. Id.
113. Furthermore, the second discount undercut the competition. Id. at 718-19.
114. Id. at 726; cf. Ponca Wholesale Mercantile Co., 64 F.T.C. 937, 976 (1964) (drop in sales, after the challenged price cut was withdrawn, used to support seller's claim of good faith).
115. A threat to terminate purchases was present in Cadigan v. Texaco, Inc., 492 F.2d 383, 386 (9th Cir. 1974), discussed in text accompanying notes 83-90 supra.
116. Of course, there are some who do not consider this an undesirable goal. See note 6 supra and accompanying text.
118. See Kuenzel & Schiffres, supra note 7, at 1240.
119. 76 F.T.C. at 794. Kroger was found guilty of a § 2(f) violation. Id. at 821.
120. The information considered included the identity of the competitor and its cost formula, prices for miscellaneous products, and advertising assistance to the buyer. Id. at 810-11.
121. Id.
right price level in a cautious and prudent manner . . ."122 In essence, Beatrice simply attempted "to gather as much information from the buyer as possible and appraise the information in light of market conditions."123 The Beatrice decision has received favorable comment from both courts and commentators.124

4. Interseller Verification

Use of the indirect forms of verification discussed above would enable most sellers to satisfy the verification requirement without resorting to interseller verification. But in the case where such means are unavailable, the only remaining source of information concerning a competing offer is the competitor himself.125 Even if other forms of verification are available, the seller may contact his competitor to assure compliance with the good faith requirements of section 2(b);126 a competitor represents the ultimate source of specific and reliable information as to a competing offer.127 Interseller price verification, however, constitutes an exchange of price information among competitors, raising the possibility of a violation of section 1 of the Sherman Act. The conflict between interseller price verification and the Sherman Act is discussed next.

IV. THE SUPREME COURT'S TREATMENT OF PRICE INFORMATION EXCHANGES AMONG COMPETITORS

A. Exchanges of Price Information and the Sherman Act

The exchange of price information among competitors has a different effect on competition depending upon the market in which the exchange occurs.128 In a purely competitive market, the exchange of price information facilitates allocative efficiency.129 Buyers will purchase only at the lowest prices and sellers will respond more effectively to changes in demand.130

In an oligopoly, however, the exchange of price information may have an

122. Id. at 809.
123. Kuenzel & Schiffres, supra note 7, at 1240.
125. In several interseller price verification cases, the court has stated that all other means of verification had been exhausted before the seller contacted his competitor. United States v. United States Gypsum Co., 550 F.2d 115, 126 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560); Gray v. Shell Oil Co., 469 F.2d 742, 747 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973); Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 310 (N. D. Cal. 1971).
126. In Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), cert. denied, 408 U.S. 928 (1972), the seller contacted his competitor even though the reported price was publicly available in trade journals. Id. at 181.
127. United States v. United States Gypsum Co., 550 F.2d 115, 126 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560). Of course, even the information obtained from a competitor may be unreliable since he, too, is a commercial antagonist of the seller. See note 293 infra.
129. What Happened, supra note 9, at 641.
130. Id.
undesirable effect. The oligopolist has such a large share of the market that he can increase his price by reducing his output. Theoretically, the oligopolist will produce less and raise his price to an artificially high level. At this point the oligopolist's goal is to avoid price competition and maintain the current price level. A seller's uncertainty about the pricing activities of his competitors, however, leads to a corresponding insecurity over whether he should maintain the established price level. The exchange of price information eliminates this uncertainty and serves to coordinate pricing decisions among oligopolists.

The nature and effect of price information exchanges has brought the practice within the purview of section 1 of the Sherman Act, which prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade." Under this section, certain inherently anticompetitive practices are considered per se illegal. The legality of all other restraints of trade, however, is judged under a rule of reason standard which calls for a consideration of the nature and business justifications of the behavior complained of, along with its effect on competition.

In several landmark cases, the Supreme Court established the legality of various price information exchanges. In United States v. Container Corp. of America, 393 U.S. 333, 337 (1969), the Court held that the exchange of price information is a per se violation of section 1 of the Sherman Act. In Fashion Originators' Guild, Inc. v. FTC, 312 U.S. 457 (1941), the Court noted that "in the absence of a per se rule, the legality of an agreement or practice cannot be determined by the presence of any restraint of competition. The test is whether the restraint imposed is such as merely regulates and promotes competition or whether it is such as may suppress or destroy competition." In Northern Pac. Ry. v. United States, 356 U.S. 1 (1958), the Court established that the legality of a restraint depends on a consideration of the nature and effect of the restraint on competition.

Justice Black justified the use of a per se rule as follows: "[T]he legality of an agreement or practice which because of its pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness . . . avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved . . . in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." Justice Brandeis once described the rule of reason's operation: "[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains . . . The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the business and its history; the nature of the restraint and its purpose; the danger of competition involved; the probable success of the restraint; the probable effect of the restraint on consumers; the probable effect of the restraint on producers of like products not under monopoly conditions; the effect of the restraint on the public, etc."
decisions, the Supreme Court considered the application of section 1 to price information exchanges among competitors. It is difficult, however, to draw from these cases a rule of universal applicability.

B. The Early Decisions

Early Supreme Court decisions were concerned with the exchange of price information among members of trade associations. In American Column & Lumber Co. v. United States, the American Hardwood Manufacturers' Association distributed a report of current prices. Monthly meetings were held during which association officials discussed future price and production levels. In United States v. American Linseed Oil Co., trade association members agreed to furnish information pertaining to all purchases of their products. Members submitted price schedules, adherence to which was obtained by the threat of fines. Finding in both cases that the purpose and effect of the action was to stabilize prices, the Court held that the trade associations' activities violated section 1.

In the companion cases of Maple Flooring Manufacturers Association v. United States and Cement Manufacturers Protective Association v. United States, however, the Court upheld the exchange of price information among trade association members. In Maple Flooring, the Maple Flooring Manufacturers Association distributed information as to average cost, production, and prices. In contrast to the previous trade association cases, parties to individual sales transactions were not identified and only information on past sales was distributed. While there was no evidence that the exchange of information resulted in uniform prices, the Court acknowledged the tendency of such an exchange to stabilize prices. Nevertheless, the absence of a purpose to fix prices absolved the defendants of liability.

of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918). The Supreme Court's latest discussion of the rule of reason is in accord with this approach. See Continental T.V., Inc. v. GTE Sylvania Inc., 97 S. Ct. 2549, 2557-61 & n.15 (1977).

139. 257 U.S. 377 (1921).
140. Id. at 396. A sales report was also distributed which identified the purchasers and price paid. Id.
141. Id. at 396-99, 402-04.
142. 262 U.S. 371 (1923).
143. Id. at 381.
144. Id. at 389.
146. 268 U.S. 563 (1925).
147. 268 U.S. 588 (1925).
148. 268 U.S. at 586.
149. Id. at 567.
150. Id. at 582.
151. See id. at 585-86. The purpose of the Maple Flooring exchange was to conduct business...
Cement Manufacturers was similar to the earlier trade association cases in that members exchanged information concerning prices charged specific customers. The information was used in connection with specific job contracts which, in essence, were one-way options in favor of the purchasing contractor. In a specific job contract, manufacturers agreed to provide the entire cement requirement for a specific construction job at a set price. The manufacturer was obligated to supply only the cement for the specific job in the contract. Contractors took advantage of this system by obtaining commitments from several suppliers for the same job. Through the exchange of price information, defendants attempted to determine whether the cement contracted for in a specific job contract was actually being used for the job specified. As in Maple Flooring, the Court noted that the exchange would tend to stabilize prices. Because, however, their purpose was not to fix prices, but rather to prevent fraud, the defendants were absolved from liability.

C. The Recent Decisions

1. United States v. Container Corp. of America

In Maple Flooring and Cement Manufacturers the Court focused upon the purpose of the exchanges as the determinative element in a section 1 charge against competitors who exchanged price information. In United States v. Container Corp. of America, the Court abruptly departed from this approach by invalidating an exchange of price information because of its stabilizing effect on prices. The Court did not overrule the two prior cases, choosing instead to distinguish these decisions carefully on their facts. Unlike Maple Flooring, the information exchanged in Container included the prices charged to specific customers. In language that was to become the focus of later decisions, the Court distinguished Cement Manufacturers in that there was present in that case a "controlling circumstance," the protection of the cement manufacturers' legal operations in an intelligent manner, a result the Court felt the Sherman Act was not intended to inhibit. Id. at 583.

152. The defendants also exchanged information on transportation costs and overdue accounts. 268 U.S. at 592.
153. Id. at 594.
154. Id. This system allowed the contractor to bid on jobs with a fixed cement cost. The contractor was not obligated to purchase the cement, and, if prices declined, he could back out. But if prices increased the manufacturer was still obligated to deliver. Id. at 594-95.
155. Id. at 595.
156. Id. In this way, the contractors obtained cement at a fixed price that could be used for other jobs not covered by the contract.
157. Id. at 596.
158. Id. at 604. The evidence presented did not clearly show how the exchange of information had affected prices. See id. at 605-06.
159. Id. at 595-96, 606.
161. Id. at 334-35. Thus, an exchange of average cost data that does not reveal current prices as to specific customers would seem beyond the scope of Container.
rights from fraud in specific job contracts.162 Despite these distinctions, the Court clearly moved away from the purpose-oriented approach of Maple Flooring and Cement Manufacturers.163 The Container opinion emphasized the effect on prices and made no reference to the purpose of the exchange.164

Defendants in Container were eighteen manufacturers who accounted for ninety-percent of the shipments of corrugated containers from plants in the southeastern United States.165 Because of the fungible nature of the containers the principal basis of competition was price.166 Whenever price information was not available from other sources, defendants contacted each other to obtain information as to the current price available to specific customers,167 in order to verify customer reports of competing offers.168 Justice Douglas, speaking for the Court, found that the result of the exchange of information was to stabilize prices, although at a downward level.169

Knowledge of a competitor's price usually meant matching that price. . . . [In an oligopolistic industry with a fungible product and inelastic demand, the] exchange of price data tends toward price uniformity. . . . The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.170

The stabilization of prices brought the case within the ban of section 1 of the Sherman Act since "interference with the setting of price by free market forces

162. Id. at 335.
164. The Court found the agreement in Container, "though somewhat casual," analogous to those in American Column and American Linseed. 393 U.S. at 337. In both cases a purpose to fix prices had been found. See text accompanying note 145 supra.
165. 393 U.S. at 336. The six largest defendants controlled 60% of the market. Id. at 342 (Marshall, J., dissenting).
166. Id. at 337. Demand was inelastic since buyers ordered only for their immediate requirements. Id.
167. Id. at 335. Although there was no express agreement to exchange price information, the Court determined that the reciprocal nature of the exchange satisfied the "combination or conspiracy" element of § 1. A defendant furnished the information requested "with the expectation that it would be furnished reciprocal information when it wanted it." Id. (footnote omitted).
168. United States v. Container Corp. of America, 273 F. Supp. 18, 67 (M.D.N.C. 1967), rev'd, 393 U.S. 333 (1969). This, of course, is similar to the alleged purpose of the interseller price verification in the Robinson-Patman Act cases. See text accompanying notes 218, 238 infra. Compliance with the Robinson-Patman Act, however, was not, apparently, at issue in Container. See note 250 infra.
169. 393 U.S. at 336.
170. Id. at 336-37.
is unlawful *per se.*"\(^{171}\) Justice Douglas concluded the Court's opinion in broad language stating that "[p]rice is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition."\(^{172}\)

The exact holding of Justice Douglas' opinion has proven to be elusive.\(^{173}\) An issue largely unresolved by the opinion is whether it established a *per se* standard of liability for agreements to exchange price information concerning specific customers.\(^{174}\) Justice Fortas, concurring in the majority decision, stated that it did not establish a *per se* rule.\(^{175}\) It is unclear, however, what test the Court did establish.\(^{176}\) Both the majority and Justice Fortas relied on the actual effect on price to find liability.\(^{177}\) The dissenting Justices would also have found liability if the exchange had affected prices,\(^{178}\) but, unlike the majority and Justice Fortas, they found no effect on prices.\(^{179}\) Thus *Container* would seem to have created a modified *per se* test; once an effect on prices has been shown, liability will be automatically imposed.\(^{180}\)

2. United States v. Citizens & Southern National Bank

The elusive holding of *Container* is reflected in the morass of lower court decisions subsequent to *Container.*\(^{181}\) Unfortunately, the Supreme Court's decision in *United States v. Citizens & Southern National Bank*\(^{182}\) has

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\(^{171}\) *Id.* at 337 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223, 224 n.59 (1940)).

\(^{172}\) *Id.* at 338 (footnote omitted).


\(^{174}\) The use of the term "*per se*" in the opinion is partly responsible for the problem. *See* 393 U.S. at 337, 338 n.4. In addition, the opinion refers to both actual effects on prices and an "irresistible inference" that prices were affected. *Compare id.* at 336 with *id.* at 337.

\(^{175}\) *Id.* at 338-39 (Fortas, J., concurring). The dissent also declined to adopt a *per se* standard of liability. *Id.* at 340 (Marshall, J., dissenting). Yet, all three opinions in the decision exhibit a willingness, to varying degrees, to imply anticompetitive effects from an exchange of price information in certain circumstances. *What Happened,* supra note 9, at 653-55.

\(^{176}\) Commentary on this topic has been prolific. *See,* e.g., Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb,* 24 U.C.L.A. L. Rev. 475, 500 (1977) (rule of reason); *What Happened,* supra note 9, at 654 (modified *per se* rule) & n.62 (compilation of commentary); *The Supreme Court, 1968 Term,* 83 Harv. L. Rev. 7, 233-34 (1969) (per se rule); 46 Geo. Wash. L. Rev. 113, 127-28 n.117 (1977) (compilation of commentary).

\(^{177}\) 393 U.S. at 336. Justice Fortas concluded that the "evidence, although not overwhelming, is sufficient in the special circumstances of this case to show an actual effect on pricing . . . ." *Id.* at 339 (Fortas, J., concurring).

\(^{178}\) *Id.* at 343 (Marshall, J., dissenting).

\(^{179}\) *Id.* at 344. This was also the finding of the lower court. United States v. Container Corp. of America, 273 F. Supp. 18, 67 (M.D.N.C. 1967), rev'd, 393 U.S. 333 (1969).

\(^{180}\) This test should be distinguished from the modified *per se* interpretation of *Container* posited in *What Happened,* supra note 9, at 654-55. It is there suggested that *Container* established a test whereby the anticompetitive effects of exchanges of information would be *presumed* in a sufficiently oligopolistic market. *Id.*

\(^{181}\) These cases have been collected and summarized elsewhere. *See* *id.* at 657 n.69; 46 Geo. Wash. L. Rev. 113, 127-28 n.117 (1977).

\(^{182}\) 422 U.S. 86 (1975).
“contributed to the confusion.” The defendant bank, Citizens & Southern, confronted with state restrictions on branch banking, founded several de facto branches in suburban areas. Citizens & Southern would acquire five-percent of the stock of a bank, and officers, shareholders and customers of Citizens & Southern would purchase the majority of the remaining shares. Citizens & Southern provided these de facto branches with information on a variety of banking procedures including the current interest rates and service charges in effect at Citizens & Southern and its other affiliates. This pricing information was stamped “for information only” and each bank was warned to use its own judgment in setting interest rates and service charges.

The Government challenged the branching program as a violation of section 1 of the Sherman Act. Applying the rule of reason approach, the Court found that the relationship between Citizens & Southern and its de facto branches was not an unreasonable restraint of trade. The branching program was designed to avoid the anticompetitive state restriction on branch banking, which made the residents of suburban and rural areas “a captive market” for the local banks. Because the de facto branches provided new options to suburban customers without eliminating any existing options, the branching programs were “plainly . . . procompetitive.”

183. What Happened, supra note 9, at 658.
184. Citizens & Southern, along with three other banks, controlled 75% of the commercial banking business in the Atlanta area. 422 U.S. at 131 (Brennan, J., dissenting).
186. 422 U.S. at 92. In order for the branch banks to obtain regulatory approval, Citizens & Southern provided assurances of financial backing. It also selected the chief executive officers for each bank and supervised the selection of directors. Id. at 92-93.
187. Id. at 93.
188. Id. The dissent pointed out, however, that on occasion Citizens & Southern had exhorted the branches to “get the rates [on loans] up.” Id. at 132. (Brennan, J., dissenting).
189. The Government’s suit followed an attempt by Citizens & Southern to convert the de facto branches into de jure branches following an amendment to the state banking laws. Id. at 94. In addition to challenging the ongoing relationship between Citizens & Southern and its branches as a violation of the Sherman Act, the Government alleged that the proposed acquisitions violated § 7 of the Clayton Act, 15 U.S.C. § 18 (1970), a claim the Court eventually rejected. 422 U.S. at 120-22.
190. See id. at 116 (citing Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918)).
191. Id. at 117-20.
192. Id. at 118.
193. Id. at 119. The dissent argued that the de facto branches were unnecessary since the state had amended the banking laws to permit branch banking in the suburbs. Thus, the desirability of the de facto branches was “relevant only insofar as it may also be claimed that continuation of such arrangements undisturbed by the Sherman Act would be vital to their creation were Georgia to reinstate its restrictions in the future,” an argument the dissent found
Alternatively, the Government asserted a Sherman Act violation in that the branching programs "encompassed at least a tacit agreement to fix interest rates and service charges, . . . so as to make the interrelationships—to that extent at least—illegal 'per se.'" Asserting unequivocally that "dissemination of price information is not itself a per se violation of the Sherman Act," the Court finally resolved the per se controversy created by Container.

Citizens & Southern, however, raises another problem. The Court noted that the exchange of price information resulted in a lack of price competition. Under the modified per se reading of Container, this effect on prices would have required a finding of liability. Yet in Citizens & Southern no purpose to fix prices was found and the defendant was absolved from liability. At first glance, Citizens & Southern would appear to resurrect Maple Flooring and Cement Manufacturers in that a showing of a price fixing conspiracy is necessary to invalidate an exchange of price information. A better interpretation, however, would be that the Court simply applied a broad rule of reason standard to determine if the exchange of information violated the Sherman Act. Although the Court never expressly stated that the procompetitive effects of the de facto branches outweighed the lack of price competition caused by the exchange of interest rates and service charges, such a balancing is implicit in the Court's opinion.


194. 422 U.S. at 112-13 (citations omitted).
195. Id. at 113.
196. See United States v. United States Gypsum Co., 550 F.2d 115, 123 n.9 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560). See Velvel, supra note 193, at 659. The dissenting opinion, in which Justice Douglas, the Container author, joined, did not discuss the majority's rejection of a per se rule. On this portion of the Government's claim, the dissent simply noted that the lower court did not find an express agreement to fix prices that would require the use of a per se rule. 422 U.S. at 141 (Brennan, J., dissenting). One commentator has interpreted the majority's decision, which clearly refers to the exchange of price information, as suggesting that the Court is retreating from a per se rule for all price fixing. See Velvel, supra note 193, at 537-41.
197. 422 U.S. at 113-14; id. at 141 (Brennan, J., dissenting).
198. See text accompanying notes 177-80 supra.
199. 422 U.S. at 113-14.
200. See text accompanying notes 145-58 supra.
201. One commentator has suggested that the weighing of the procompetitive versus anticompetitive effects of the exchange of information in Citizens & Southern represents an "unfortunate" retreat from the Court's reluctance in United States v. Topco Assocs., Inc., 405 U.S. 596, 609-10 (1972), to weigh competitive effects in different sectors of the economy. Velvel, supra note 193, at 544-46.
202. Of course, many courts and commentators have interpreted Container as applying a rule of reason standard. See What Happened, supra note 9, at 654 n.62, 657 n.69; 46 Geo. Wash. L. Rev. 113, 127-28 n.117.
exception to Container, even the Court was aware of the unusual facts of the case. Furthermore, lower court decisions subsequent to Citizens & Southern involving exchanges of price information have continued to treat Container as the leading Supreme Court case. Nevertheless, Citizens & Southern's failure to cite the Container majority opinion would seem to indicate that the "new antitrust majority" of the Court is disenchanted with Container. On balance, the Citizens & Southern approach appears to be an improvement over the Container approach. By employing a rule of reason, Citizens & Southern utilizes a balancing test to determine the overall effect on competition. The overall effect on competition would seem to be more important than the effect of an exchange of information on prices, which is what Container emphasizes. For example, if the Court had applied the Container rationale in Citizens & Southern, it would have prohibited the exchange of price information and consequently increased competition for interest rates and service charges. The prohibition, however, would also have inhibited the opening of de facto branches in the future. Thus the Court would have achieved increased competition in interest rates and service charges at the cost of eliminating an entirely new source of competition. Such a result would be "penny-wise and pound-foolish."

It could also be argued that Container remains the better rule where an oligopoly exists, considering that there is a greater likelihood in an oligopoly that an exchange of price information will stabilize prices and increase price rigidity. But the commercial banking industry in Citizens & Southern was even more concentrated than the corrugated container industry in Container.205

203. See What Happened, supra note 9, at 659.
204. The Court used hedging language to describe the problem before it: "Were we dealing with independent competitors having no permissible reason for intimate and continuous cooperation and consultation as to almost every facet of doing business, the evidence adduced here might well preclude a finding that the parties were not engaged in a conspiracy to affect prices. But...[the branching program was] permissible under the Sherman Act. In this unusual light," the Court could not find a violation of the Sherman Act. 422 U.S. at 113-14.
207. In a case where the opening of a new branch was being considered, a prohibition of exchanges of interest rates and service charges would be a factor considered by a parent bank in deciding not to open a new branch. See 422 U.S. at 119.
208. See pt. IV(A) supra.
tainer. \textsuperscript{209} Even in an industrial oligopoly devoid of the byzantine banking regulations of \textit{Citizens \& Southern}, the rule of reason standard would be more appropriate, for industrial oligopolies have their own set of byzantine regulations—the Robinson-Patman Act. In \textit{United States v. United States Gypsum Co.}, \textsuperscript{210} the Third Circuit indicated that an exchange of price information in an oligopoly for Robinson-Patman purposes, which resulted in a stabilization of prices, was nevertheless procompetitive. \textsuperscript{211} Although the Third Circuit's conclusion may have been based upon a misinterpretation of the Robinson-Patman Act, \textsuperscript{212} it nevertheless evinces a dissatisfaction with the arbitrary nature of the \textit{Container} approach. In addition, the Robinson-Patman Act's concern for competition at the secondary level \textsuperscript{213} would not even be considered under the \textit{Container} standard, which looks only to the effect of prices at the primary level. In essence, the \textit{Container} standard is too narrow. Although not a true per se test, it has per se characteristics; once an effect on prices at the primary level is shown, liability is automatic. On balance, \textit{Citizens \& Southern}'s rule of reason approach seems to be the better standard.

V. INTERSELLER PRICE VERIFICATION FOR ROBINSON-PATMAN PURPOSES AND THE SHERMAN ACT

A. The Interseller Price Verification Cases


Of the six lower court decisions that have permitted interseller price verification for purposes of compliance with the meeting competition defense of the Robinson-Patman Act, \textit{Wall Products Co. v. National Gypsum Co.} \textsuperscript{214} is perhaps the most important. \textsuperscript{215} \textit{Wall Products} also involves essentially the

\textsuperscript{209} Compare note 184 \textit{supra} with text accompanying note 165 \textit{supra}.

\textsuperscript{210} 550 F.2d 115 (3d Cir.), \textit{cert. granted}, 98 S. Ct. 52 (1977) (No. 76-1560).

\textsuperscript{211} See text accompanying notes 250-56 \textit{infra}.

\textsuperscript{212} See pt. V(B)(2) \textit{infra}.

\textsuperscript{213} See Kuenzel \& Schiffs, \textit{supra} note 7, at 1214.

\textsuperscript{214} 326 F. Supp. 295 (N.D. Cal. 1971).

\textsuperscript{215} The other interseller verification cases, to varying degrees, have relied on \textit{Wall Products} to support their conclusions. See \textit{United States v. United States Gypsum Co.}, 550 F.2d 115, 124 (3d Cir.), \textit{cert. granted}, 98 S. Ct. 52 (1977) (No. 76-1560); Belliston v. Texaco, Inc., 455 F.2d 175, 182 (10th Cir.), \textit{cert. denied}, 408 U.S. 928 (1972); Webster v. Sinclair Ref. Co., 338 F. Supp. 248, 252 (S.D. Ala. 1971). In Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972), \textit{cert. denied}, 412 U.S. 943 (1973), the court did not cite \textit{Wall Products} but did cite \textit{Belliston}, which had relied on \textit{Wall Products}. \textit{Id.} at 747.

An earlier decision, \textit{Di-Wal}, Inc. v. Fibreboard Corp., 1970 Trade Cas. ¶73,155 (N.D. Cal. Apr. 17, 1970), dealt with the same litigation as \textit{Wall Products}. The \textit{Di-Wal} opinion resulted after one defendant, Fibreboard Corp., moved for dismissal of the charges against it at the end of plaintiffs' case. In \textit{Di-Wal} the court found that the purpose of the defendant's verification requests and replies was to comply with the good faith standard of the meeting competition defense. \textit{Id.} at 88,557. Without citing \textit{Container}, the court concluded that no violation of § 1 of the Sherman Act had occurred. \textit{Id.} at 88,558. Following the \textit{Di-Wal} opinion the remaining
same allegations in the gypsum wallboard industry that were the subject of *United States v. United States Gypsum Co.*, a case whose outcome will probably decide the fate of interseller price verification.

In the 1960’s the gypsum wallboard industry was a classic homogeneous oligopoly with price being the principal basis of competition. An underutilization of capacity created strong pressure for price reductions in order to generate more sales. The resulting price cuts took the form of secret discounts off the published list price. Purchasers of wallboard, however, exploited market conditions by playing one seller against another for better prices. Price reductions spread quickly throughout the industry.

It should be recalled that the good faith standard of the meeting competition defense requires sellers to have reliable information before acting on buyers’ reports of a competing offer. In the wallboard industry, many buyers misrepresented the price of competing offers while refusing to produce invoices or other written support. In order to obtain reliable information, the competing sellers agreed to comply with each other’s requests for the prices charged to particular customers.

Verification calls were made only when defendants presented their evidence and the court then issued its more extensive *Wall Products* opinion.

For commentary on the *Wall Products* decision, see Note, *The Robinson-Patman Meeting of Competition Defense as Used in a Sherman, Section 1, Conspiracy Action*, 25 Baylor L. Rev. 357 (1973); *What Happened*, supra note 9, at 661-66 & n.104.

216. 550 F.2d 115 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560). *Wall Products* contains a detailed description of the gypsum wallboard industry, which, to a large extent, is applicable to *Gypsum*.

217. 326 F. Supp. at 301, 305. *See generally* F. Scherer, *supra* note 3, at 10. In 1963 the total number of producers was 14. Market entry was relatively easy, however, and several local, single plant producers had entered the market between 1960 and 1968. The five largest producers, four of whom were defendants, accounted for 68% of industry sales in 1968. Defendants United States Gypsum Co. and National Gypsum Co. were the two largest producers and accounted for 56% of industry sales. 326 F. Supp. at 301-02.

218. 326 F. Supp. at 305. This underutilization of capacity resulted from a 41% expansion in plant capacity between 1960 and 1968 and a simultaneous decline in the growth of demand. Demand for wallboard was dependent upon residential construction, which was in a slump and inelastic since wallboard was a small element in the total cost of construction. *Id.* at 300-05.

219. *Id.* at 305. A publicly announced price reduction would have been fruitless. Competitors would have immediately met the price reduction, and, since demand was inelastic, the same amount of wallboard would have been sold at lower prices. *Id.; see note 133 supra*.

220. 326 F. Supp. at 306.

221. *See pt. III(A) supra*.

222. 326 F. Supp. at 309. Even when buyers did produce support it was often erroneous. *Id.* Buyers also fraudulently took advantage of “job price protection” terms. Under job price protection a supplier would agree to provide a customer, at a fixed price, a sufficient quantity of wallboard to complete a particular project. Buyers often obtained job price protection for one project from more than one supplier. *Id.* at 308. This is quite similar to the fraudulent acts of the contractors in *Cement Manufacturers*. *See text accompanying notes 152-56 supra*.

223. 326 F. Supp. at 309. Only certain officers of each seller made verification calls. When the officer placed a verification call he stated the reported price, the reporting customer, asked if it was true or false, and the competitor would then reply. No other comment or discussion of
after all other means of verifying the reported offers had been exhausted.\textsuperscript{224} The verification calls retarded the downward spiral of prices,\textsuperscript{225} a stabilizing effect on prices which would have been sufficient under Container to warrant liability under section 1 of the Sherman Act.\textsuperscript{226} The court, however, interpreted Container's distinction of Cement Manufacturers as permitting the exchange of price information, even if it results in the stabilization of prices, so long as a controlling circumstance is present.\textsuperscript{227} The court found two controlling circumstances present in the verification calls, either of which alone could have exempted the defendants from liability.\textsuperscript{228} First, the defendants' purpose of complying with the Robinson-Patman Act "constitut[ed] a circumstance equally as compelling and controlling as that found in Cement."\textsuperscript{229} Second, the protection against fraudulent misrepresentation by customers was "precisely the purpose" of the exchange of information in Cement Manufacturers.\textsuperscript{230} Wall Products seems to suggest that a finding of a lawful purpose ends the inquiry into liability under the Sherman Act.\textsuperscript{231}

prices took place. If the seller requesting verification did not have a specific price or customer and merely inquired as to prices in general, the request was refused. \textit{Id.} at 309 & n.6, 310.

\textsuperscript{224} \textit{Id.} at 310. These other means included comparison of the report with other reports from the same area, confidence in the veracity of the reporting customer, and written evidence of the offer either seen or sent in by field salesman. \textit{Id.} at 310-11. The court made no reference to inferring the reliability of a report from a termination in purchases, a verification method used in other cases. \textit{See} pt. III(B)(2) supra. The court's earlier \textit{Di-Wal} opinion made no reference to the seller's exhausting all other means of verification before resorting to interseller verification.

The court in \textit{Wall Products} did not indicate how many verification calls were made, stating only that the number of sales increased as the number of price discounts increased. 326 F. Supp. at 310. This number was apparently quite substantial. \textit{See} \textit{id.} at 306. In \textit{Di-Wal}, however, the number of calls averaged fewer than two a year. \textit{Di-Wal}, Inc. v. Fibreboard Corp., 1970 Trade Cas. \$73,155, at 88,557 (N.D. Cal. Apr. 17, 1970).

\textsuperscript{225} 326 F. Supp. at 311.

\textsuperscript{226} \textit{See} text accompanying note 180 supra. With the exception of United States v. United States Gypsum Co., 550 F.2d 115 (3d Cir.), \textit{cert. granted}, 98 S. Ct. 52 (1977) (No. 76-1560), the interseller price verification cases were decided prior to the Supreme Court's decision in Citizens & Southern, discussed in text accompanying notes 181-213 supra.

\textsuperscript{227} 326 F. Supp. at 312-13; \textit{see} text accompanying note 162 supra.

\textsuperscript{228} 326 F. Supp. at 312-15. The defendants were, however, found guilty on a separate charge of price fixing. \textit{Id.} at 328.

\textsuperscript{229} \textit{Id.} at 313. The controlling circumstance present in Cement Manufacturers was the protection of sellers from fraudulent deliveries under specific job contracts. \textit{See} text accompanying note 162 supra.

\textsuperscript{230} 326 F. Supp. at 315. The court could have found a controlling circumstance based upon the similarities between the fraud in the specific job contracts in Cement Manufacturers and that in the job price protection terms in the gypsum industry. \textit{See} note 222 supra. Instead, the court chose to broaden the fraud controlling circumstance of Cement Manufacturers to include the bad faith bargaining of the gypsum dealers. \textit{See} Kuenzel & Schiffres, supra note 7, at 1242. The purpose of the exchanges in Container, however, was also to verify lower prices reported by untrustworthy buyers. United States v. Container Corp. of America, 273 F. Supp. 18, 28, 59, 61 (M.D.N.C. 1967), \textit{rev'd}, 393 U.S. 333 (1969). Thus, the Supreme Court's invalidation of the exchange in Container renders the \textit{Wall Products} broad reading of the fraud exception question-
2. The Gasoline Price War Cases

The next three decisions to consider interseller price verification for purposes of compliance with the Robinson-Patman Act also found no Sherman Act liability. Each involved a major oil company, in the course of a gasoline price war, verifying reports of lower prices before granting a temporary discount to its local retailer. These decisions distinguished *Container* in that the oil companies’ exchange of information was not made pursuant to an agreement and did not have a stabilizing effect on price. In addition, the oil companies and their retailers had contracts under which the retailers were required to buy from the oil companies at a set price, while in *Container* the defendants competed for customers. The gasoline price war cases, relying to varying degrees on *Wall Products*, found that the defendants’ purpose of complying with the meeting competition defense absolved them of liability. Unlike *Wall Products*, however, several of the cases did not indicate that the defendants had first exhausted all other means of verification before contacting their competitors. In addition there was no evidence that

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**Footnotes:**

231. The court seemed to equate controlling circumstance with lawful purpose in the following language: “The ‘controlling circumstance’ distinguishing *Cement Manufacturers* from *Container* was the purpose of the exchange of price information by the sellers. In *Cement Manufacturers* the purpose of the exchange was to protect against fraudulent misrepresentations by buyers. In *Container* there was no such justification by way of purpose, since the defendants did not seek to justify their exchange of price information as a means of protecting against fraudulent misrepresentations by buyers. In *Container* there was no such justification by way of purpose, since the defendants did not seek to justify their exchange of price information as a means of protecting against fraud by buyers, compliance with the Robinson-Patman Act or any other similar lawful purpose.” 326 F. Supp. at 314 (emphasis added).


234. Gray v. Shell Oil Co., 469 F.2d 742, 746 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973); Belliston v. Texaco, Inc., 455 F.2d 175, 181 (10th Cir.), cert. denied, 408 U.S. 928 (1972). In Webster v. Sinclair Ref. Co., 338 F. Supp. 248 (S.D. Ala. 1971), the court did not indicate whether it found an agreement to exchange information. The gasoline price war cases have been criticized for focusing on the showing of a traditional agreement rather than upon *Container*’s emphasis on reciprocity. See *What Happened*, supra note 9, at 659-60 & n.84.

235. Belliston v. Texaco, Inc., 455 F.2d 175, 181-82 (10th Cir.), cert. denied, 408 U.S. 928 (1972). While the plaintiffs in Gray v. *Shell Oil Co.* alleged a stabilization in price, the court did not mention whether this had occurred. Webster v. *Sinclair Ref. Co.* also did not discuss the effect on prices.


238. Only the *Gray* court indicated that all other means of verification had first been
the retailers had misrepresented competing offers. The absence of these two factors indicated a broadening of the Wall Products reading of Container.239


Following the Wall Products decision the Government initiated a criminal investigation into the gypsum wallboard industry which culminated in United States v. United States Gypsum Co.240 The Government, alleging that broad discussions of present and future pricing policies occurred,241 contended that the purpose of the verification calls was to stabilize the downward trend in prices.242 As in Wall Products, defendants asserted that their only purpose was to obtain reliable information on buyers' reports of competing offers in order to comply with the good faith standard of the meeting competition defense.243 The trial court instructed the jury that even if the purpose of the verification calls was to comply with the meeting competition defense, the defendants had violated section 1 of the Sherman Act if the effect of the exchange of price information was to stabilize prices.244 The jury returned guilty verdicts against four of the manufacturers and three corporate officers.245

exhausted. Gray v. Shell Oil Co., 469 F.2d 742, 747 (9th Cir. 1972), cert. denied, 412 U.S. 943 (1973). The court did not, however, mention what these other means were. In Belliston, the verified prices were publicly available. Belliston v. Texaco, Inc., 455 F.2d 175, 181 (10th Cir.), cert. denied, 408 U.S. 928 (1972). Ironically, the court used this fact to show that reciprocity was not present and thus no agreement could be found. Id. In each case, the fact that more than one dealer reported competing prices could have been used to infer the reliability of the reported prices. See pt. III(B)(1) supra.

239. See Eaton, supra note 9, at 429; Kuenzel & Schiffres, supra note 7, at 1243. In United States v. United States Gypsum Co., 550 F.2d 115, 125 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560), the latest interseller price verification case, the Third Circuit expressly disapproved of this broadening. See text accompanying notes 259-60 infra.

240. 550 F.2d at 115 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560). After an indictment was returned in 1973 the defendants argued in the district court that the Government had deliberately postponed empanelling the grand jury to await the Wall Products decision. They moved for dismissal claiming that the unreasonable pre-indictment delay had worked a denial of due process. The motion was denied by the trial court and affirmed on appeal. United States v. United States Gypsum Co., 383 F. Supp. 462 (W.D. Pa. 1974), rev'd on other grounds, 550 F.2d 115 (3d Cir.), cert. granted, 98 S. Ct. 52 (1977) (No. 76-1560).

241. 550 F.2d at 120. This was contrary to the finding of the court in Wall Products. See note 223 supra.

242. 550 F.2d at 120.

243. Compare id. at 120 with Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 311 (N.D. Cal. 1971). The frequency of the calls was also disputed. The Government claimed that the calls occurred daily until 1973, while the defendants alleged that the calls were limited in scope and number. In addition, the defendants claimed that. other than in a few isolated cases, the calls had been discontinued before the start of the applicable statute of limitations. 550 F.2d at 120.

244. 550 F.2d at 120-21. This, of course, is the Container standard. See text accompanying note 180 supra.

245. 550 F.2d at 117-18 & nn.2-4. The jury verdict does not necessarily mean that an effect on prices was found. The jury could have found that the purpose of the verification calls was not
On appeal, the Third Circuit found the jury instructions erroneous and reversed the convictions. The court, virtually ignoring *Citizens & Southern*, viewed *Container*'s distinction of *Cement Manufacturers* as permitting an exchange of information that had a stabilizing effect on prices, so long as a controlling circumstance is present. Interpreting the phrase "controlling circumstances" broadly, the *Gypsum* court did not regard it as limited to the facts of *Cement Manufacturers*. The *Gypsum* court concluded that, in this case, the use of interseller price verification to comply with the Robinson-Patman Act was in the best interests of competition and should be considered a controlling circumstance.

In reaching its conclusion, the court observed that defendants had reasonable doubt as to the veracity of the buyer's report of a competing price and could not obtain reliable information by other means. If interseller price verification were prohibited, a defendant who lowered his price to a buyer would be unable to raise a meeting competition defense to a price discrimination charge, since by cutting his price on the basis of an unreliable report the seller would not have acted in good faith.

The Government suggested that, to comply with the Robinson-Patman Act but rather to fix prices, thereby requiring a guilty verdict regardless of the effect on prices.

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246. *Id.* at 121. Judge Weis dissented on this point. *Id.* at 134-36 (Weis, J., dissenting). Judge Hunter, author of the court's opinion, also voted to reverse for imprecise jury instructions on the purpose of, and withdrawal from, the conspiracy. *Id.* at 127-30 & n.11. Another judge voted to reverse for failure to declare a mistrial after the jury was deadlocked. *Id.* at 130-34 (Adams, J., concurring).

247. The *Gypsum* court cited *Citizens & Southern* only for the proposition that exchanges of price information are not per se illegal. *Id.* at 123 n.9.

248. *Id.* at 123.

249. *Id.*

250. A threshold question exists as to whether *Container* did, in fact, dispose of Robinson-Patman Act compliance as a controlling circumstance. The issue was not raised in the lower court, apparently because the *Container* defendants on occasion were beating competition and not just meeting it. *Note, The Robinson-Patman Meeting of Competition Defense as Used in a Sherman, Section 1, Conspiracy Action, 25* Baylor L. Rev. 357, 364 (1973). The defendants argued before the Supreme Court, however, that a per se rule of liability for exchanges of price information would not conflict with the verification requirement of the meeting competition defense. Brief for Appellees at 42-43, United States v. Container Corp. of America, 393 U.S. 333 (1969). None of the three opinions in the Supreme Court's decision of *Container*, however, referred to the Robinson-Patman Act. The gypsum industry cases have concluded, based on this omission, that *Container* does not preclude compliance with the Robinson-Patman Act as a defense to a Sherman Act charge. *See United States v. United States Gypsum Co.*, 550 F.2d at 123 n.9 ("The Court did not deal with [the Robinson-Patman Act]."); Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 312 (N.D. Cal. 1971). Nevertheless, the possibility exists that *Container* sub silentio decided any conflict between the Robinson-Patman Act and the Sherman Act in favor of the latter. *See United States v. United States Gypsum Co.*, 550 F.2d at 135 (Weis, J., dissenting); *cf. Handler, Antitrust: 1969, 55* Cornell L. Rev. 161, 177 (1970) (*Container* "rejected [the Robinson-Patman Act assertion] out of hand."). *See generally* 46 Geo. Wash. L. Rev. 113, 124 n.87 (1977).

251. *See* 550 F.2d at 121.

in lieu of the discriminatory price cut, defendants could either cut prices to all buyers or simply not make any price cuts. The court rejected the first option since it was not likely that a seller would make an across-the-board price cut merely to close a single sale. The Government's second option was equally unacceptable to the court since it would "put a floor under prices" and thereby contribute to the price rigidity of oligopolistic industries. Instead, the court elected to permit interseller price verification, enabling the defendants to use a meeting competition defense and make price cuts to individual buyers. The court viewed this as a desirable result since "it is through isolated price reductions that established price levels [in concentrated industries] are eroded, precipitating widespread price cuts."

Unlike the courts in prior interseller price verification cases, however, the Gypsum court recognized the ease with which an interseller price verification system could evolve into covert price fixing. Accordingly, it rejected the defendants' suggestion that interseller price verification for purposes of complying with the Robinson-Patman Act always constitutes a controlling circumstance. The Gypsum court expressly disapproved of the gasoline price war cases which had permitted interseller price verification in cases where there was no evidence that buyers misrepresented the amount of competing offers or that alternative means of verification were unavailable. The court viewed these cases as an unnecessary dilution of the Sherman Act.

Even in a case where the seller had exhausted all other means of corroboration, the court restricted the use of interseller price verification. In the court's view, if the seller's investigation indicated no reason to doubt the buyer's reliability, then the seller's duty under the meeting competition defense would be complete. In such a case the seller would not have to verify the buyer's report with his competitor before lowering his price to the buyer. The court used section 2(f) of the Robinson-Patman Act to bolster its

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253. 550 F.2d at 124.
254. Id. (citing 1955 Attorney General's Report, supra note 18, at 181).
255. Id. at 124.
256. Id. (citing P. Areeda, Antitrust Analysis 231 (1974)).
257. Id. at 124.
258. Id.
259. Id. at 125; accord, id. at 136. (Weis, J., dissenting). The court overlooked, however, the fact that alternate means of verification had been exhausted in one of these cases. See note 238 supra.
260. Id. at 125. In criticizing these decisions, the Gypsum court noted the Supreme Court's suggestion in Automatic Canteen Co. v. FTC, 346 U.S. 61, 69 (1953), that the Robinson-Patman Act should yield to the Sherman Act when the two statutes conflict. 550 F.2d at 125. At issue in Canteen was whether, in a proceeding brought under § 2(f) of the Robinson-Patman Act, the FTC or the buyer had the burden of proving evidence on the seller's costs in order to show that the seller's price was not discriminatory. 346 U.S. at 62-63; see pt. VI(B)(1) infra. The Supreme Court declined to put the burden on the buyer since, inter alia, "it would almost inevitably require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies." 346 U.S. at 69.
261. 550 F.2d at 126.
INTERSELLER PRICE VERIFICATION

conclusion. Since section 2(f)'s standard of buyer liability deters buyers from misrepresenting competing offers, a buyer's report of a lower offer can be given greater credibility.262

The court concluded that only in the event that the seller's investigation or previous experience indicated good reason to doubt the buyer's reliability could the seller verify the reported price with his competitor.263 The court stated that "if the seller could discriminate in price when he had good reason to believe that the buyer . . . was lying about a competitor's supposedly lower offer, then the 'good faith' requirement of section 2(b) would be rendered nugatory."264 The court then summarized its analysis by enumerating the four factors that must be present before it would permit interseller price verification:

(1) the [defendants must have] engaged in the practice solely to comply with the strictures of Robinson-Patman;
(2) they had first resorted to all other reasonable means of corroboration, without success;
(3) they had good, independent reason to doubt the buyers' truthfulness; and
(4) their communication with competitors was strictly limited to the one price and one buyer at issue.265

Judge Weis, dissenting, viewed the factual similarity between Container and Gypsum as fatal to defendants' case.266 He argued that considerations of

262. See id. As an example, the court referred to Beatrice Foods Co., 76 F.T.C. 719 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971), discussed in pt. III(B)(3) supra. Beatrice had attempted to corroborate Kroger's report of lower prices, but did not contact its competitors. The FTC absolved Beatrice from liability because it acted in good faith; it had no reason to disbelieve Kroger. But Kroger was held liable under § 2(f) because it had knowingly induced a discriminatory price. See text accompanying notes 117-24 supra. Prior to the Kroger decision it was thought that a buyer could not have violated § 2(f) if the seller had been absolved of liability under § 2(a). See pt. VII(B)(2) infra.
263. 550 F.2d at 126. As an example, the court referred to Wall Products. Id.
264. Id.
265. Id. This is essentially the test recommended in LaRue, supra note 9, at 340.
266. 550 F.2d at 135 (Weis, J., dissenting). Both the corrugated container and gypsum wallboard industries were homogeneous oligopolies where price was the principal basis of competition. See text accompanying notes 165-66, 217 supra. Judge Weis observed that in both industries buyers misrepresented reports of competing offers and that sellers verified these reports with each other only after exhausting all other means of verification. In addition, in neither case was the information distributed to buyers or the public. 550 F.2d at 135 (Weis, J., dissenting). In some respects Judge Weis felt that Gypsum presented a stronger case for a Sherman Act violation than did Container. The gypsum manufacturers did not deny that they had agreed to verify prices, while the Supreme Court in Container was forced to infer an agreement from the reciprocity of the exchange. See note 167 supra. There was also a dispute as to the effect on prices in Container. See text accompanying notes 177-79 supra. In Gypsum, however, the jury verdict established that the interseller verification had an effect on prices. 550 F.2d at 135 (Weis, J., dissenting). But see note 245 supra.

The majority in Gypsum agreed that the purpose of the exchange in Container was to combat the bad faith bargaining of buyers. The majority also acknowledged that Container refused to equate this bad faith bargaining with the fraud in Cement Manufacturers. 550 F.2d at 123 n.9.
motive, such as compliance with the Robinson-Patman Act, are irrelevant if a defendant is found to have stabilized prices. Moreover, he did not interpret the good faith standard of the meeting competition defense as requiring an investigation that results in price fixing or any other illegal activity.

B. Analysis

1. The Interseller Price Verification Cases and the Citizens & Southern and Container Standards

As noted before, the rule of reason standard of Citizens & Southern is the preferable method of determining the legality of exchanges of price information among competitors. Nevertheless, lower courts continue to ignore Citizens & Southern and look only to Container. In addition, with the exception of Gypsum, the interseller price verification cases were decided prior to Citizens & Southern. Thus, an analysis of these cases in light of both the Citizens & Southern and Container standards is required.

a. Wall Products

The treatment of the exchanges of price information in Wall Products is inconsistent with both Citizens & Southern and Container. Once the Wall Products court found that the defendants' purpose in verifying prices was to comply with the Robinson-Patman Act, it concluded, without further analysis, that a controlling circumstance was present, thereby precluding Sherman Act liability. The court's failure to determine the procompetitive effects of Robinson-Patman compliance and weigh them against the stabilization of prices renders Wall Products incompatible with the balancing test of Citizens & Southern.

The court in Wall Products interpreted Container's failure to discuss purpose as suggesting that an exchange of information for any lawful purpose constitutes a controlling circumstance. The court overlooked, however, the fact that the purpose of the exchange in Container was to verify unreliable customer reports of lower prices. Though such a purpose, standing alone, was lawful, the Supreme Court nevertheless declared the exchange of information illegal. Container's omission of a discussion of purpose indicates that

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(Implicit in this statement by the Gypsum court is a criticism of the Wall Products broadening of the Cement Manufacturers fraud exception. See note 230 supra.) Nevertheless, the Gypsum majority framed the problem before it, not as fraud, but rather compliance with the Robinson-Patman Act, an issue which the Supreme Court had not dealt with in Container. See note 230 supra. The majority, however, interpreted Container's distinction of Cement Manufacturers as indicating that a defendant's purpose in exchanging price information is not always irrelevant. See note 230 supra.

267. 550 F.2d at 135-36 (Weis, J., dissenting) (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940)). The majority, however, interpreted Container's distinction of Cement Manufacturers as indicating that a defendant's purpose in exchanging price information is not always irrelevant. 550 F.2d at 123.
268. 550 F.2d at 135 (Weis, J., dissenting).
269. See text accompanying notes 206-13 supra.
270. See cases cited note 205 supra.
271. See note 231 supra.
272. See text accompanying notes 167-68 supra.
the purpose of the exchange is irrelevant when its effect is to stabilize prices. Arguably, that Court's distinction of Cement Manufacturers because of the presence of a controlling circumstance is compatible with the view that purpose is not always irrelevant. That is, however, a strained reading of the phrase "controlling circumstance." The Court did not intend "to expand the holding of Cement Manufacturers, but rather to confine it." The emphasis in Wall Products on purpose is irreconcilable with Container's emphasis on effect.

b. Gypsum

Gypsum, then, must also be inconsistent with Container. Following the lead of the Wall Products decision, the Gypsum court read the use of the term controlling circumstance as an indication that purpose is not irrelevant. The court then classified Robinson-Patman compliance as a controlling circumstance, immunizing the defendants from liability despite the stabilizing effect on prices. Of course, Wall Products and Gypsum could be distinguished from Container in that Robinson-Patman compliance was not at issue in Container. Nevertheless, these decisions are difficult to harmonize with a literal reading of the modified per se standard of Container.

Gypsum is consistent, however, with the rule of reason standard. Unlike Wall Products, the Gypsum inquiry did not classify Robinson-Patman compliance as a controlling circumstance simply because it was lawful. Instead, the Gypsum court, in a fashion similar to that of Citizens & Southern, based its decision upon the overall effect on competition. Both cases permitted an exchange of information that resulted in a lack of price competition in order to foster other procompetitive results. In Citizens & Southern, the branch banking that led to the exchange of information was determined to be procompetitive. In Gypsum, the court felt that interseller price verification would encourage isolated price cuts that would erode the rigid price structure of concentrated industries. In addition, the Gypsum court, recognizing the dangers of interseller price verification, restricted its use to limited circumstances.

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274. 550 F.2d at 136 (Weis, J., dissenting); see Keefe, supra note 163, at 790-91.
275. The gasoline price war cases, discussed in pt. V(A)(2) supra, are troublesome in that the agreement requirement of § 1 of the Sherman Act was not satisfied. In addition, these cases did not find a stabilizing effect on prices and are therefore distinguishable from Container, Citizens & Southern, and the two gypsum industry cases. Because, however, the gasoline price war cases relied on Wall Products in permitting interseller price verification, the failure of Wall Products to satisfy either the rule of reason or modified per se standard seriously undermines the validity of these decisions. Furthermore, the Gypsum criticism of the gasoline price war cases based upon the failure of the defendants to exhaust all other means of verification, see text accompanying note 260 supra, is well founded. The inherent danger of interseller price verification makes these cases an unnecessary dilution of the Sherman Act. See pt. V(B)(3) supra.
276. 550 F.2d at 123.
277. See note 250 supra.
278. See text accompanying notes 189-93 supra.
279. See text accompanying notes 251-56 supra.
280. See text accompanying notes 257-62 supra.
c. Summary

It is evident that neither Wall Products nor Gypsum is reconcilable with a literal application of the modified per se standard of Container, and only Gypsum survives scrutiny under the Citizens & Southern rule of reason standard. It is regrettable that the Gypsum court, although using essentially the same approach, virtually ignored Citizens & Southern. By treating Container as the leading case in this area, the Gypsum court was forced to pigeonhole Robinson-Patman compliance as a controlling circumstance in order to avoid the harshness of Container's modified per se standard. Fortunately, the Gypsum result is the same as would have been reached had Citizens & Southern been followed. Nevertheless, it is hoped that courts in the future will eliminate this meaningless inquiry into controlling circumstances and openly follow the rule of reason standard of Citizens & Southern.

2. Gypsum and the Standard of Good Faith in Section 2(b)

Gypsum's conclusion is also based upon a misinterpretation of the standard of good faith necessary to obtain a meeting competition defense. Resort to interseller price verification is not a prerequisite of that defense. Thus, a prohibition of interseller verification would not have eliminated the availability of the defense for the Gypsum defendants.

Gypsum is correct in stating that a seller, unable to corroborate a buyer's report of a competing offer, must investigate the buyer's reliability, for the buyer is a commercial antagonist of the seller and should never be presumed to have given reliable information. Such an investigation either will or will not reveal good reason to doubt the buyer. If the investigation reveals good reason to doubt the buyer, then Gypsum states that the seller must verify the report with his competitor if he wishes to lower his price. But why should the seller be allowed to contact his competitor, a practice Gypsum admitted has significant anticompetitive effect potential, if he knows the report is unreliable? If the seller has good reason to believe that the buyer is lying, there is no need to meet a competing price since the competing price probably does not exist. Gypsum is in this respect illogical.

281. Gypsum has been criticized as contrary to the suggestion made in Automatic Canteen Co. v. FTC, 346 U.S. 61, 69, 74 (1953), that when the Sherman Act and Robinson-Patman Act conflict, the Robinson-Patman Act should give way. See 46 Geo. Wash. L. Rev. 113, 130 (1977); BNA Analysis, supra note 21, at B-3. See also LaRue, supra note 9, at 338. Such a wooden test is inferior to the Gypsum court's use of what was in essence a rule of reason standard. It should also be remembered that the Gypsum court was cognizant of Automatic Canteen and accordingly restricted the use of interseller price verification. See note 255 supra and accompanying text.

282. See note 247 supra.

283. See text accompanying notes 91-94 supra.

284. See text accompanying notes 263-65 supra.

285. See text accompanying notes 257-60 supra.

286. If the buyer's report turns out to be true, the seller will, of course, have lost a sale. But such a termination of sales could be used to infer the reliability of the buyer's report and the seller
Of course, a seller who has good reason to doubt the buyer's reliability may still wish to cut his price to the buyer in order to obtain an extra sale. But as Gypsum correctly points out, the seller who cuts his price on unreliable information would not be acting in good faith. Such a seller should not be permitted to maintain a meeting competition defense to a charge of price discrimination.

If the seller's investigation does not reveal good reason to doubt the buyer, then Gypsum states that the seller's duty is complete. Nothing else is required since the seller's good faith belief is that a competing offer exists. But if the seller knows that buyers have lied in the past, as was the case in the gypsum industry, then Gypsum again requires a seller wishing to lower his price to verify the reported price with his competitor. In this case, Gypsum in effect requires the seller to have positive proof of a competing offer, a standard clearly contrary to FTC v. A.E. Staley Manufacturing Co., which stated that section 2(b) "does not require the seller to justify price discriminations by showing that in fact they met a competitive price." The seller's burden is only to show that the discriminatory price cut was made in good faith to meet a competing price. A seller whose investigation of a buyer's report of a competing offer indicates no reason to believe the buyer is lying, despite the buyer's past reputation for misrepresenting competing offers, would seem to have acted in good faith if he lowers his price. As the FTC has noted, good faith "is a flexible and pragmatic, not technical or doctrinaire, concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity." This fair response should not be interpreted as requiring an exchange of price information among oligopolists, which, as discussed below, has a significant anticompetitive effect.

could subsequently make a price cut in order to regain his lost business. See International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976), discussed in pt. III(B) supra. Theoretically, in such circumstances the seller would only have lost one sale.

287. See text accompanying notes 263-65 supra.
289. Id. at 759; see Forster Mfg. Co. v. FTC, 335 F.2d 47, 55-56 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965). No case prior to Gypsum had required the seller to contact his competitors in order to establish a meeting competition defense. See Kuenzel & Schiffres, supra note 7, at 1243-44.
290. 324 U.S. at 759.
293. See pt. V(B) infra. It is also questionable whether the seller's competitor is in fact a reliable source of information. Competing sellers are, of course, commercial antagonists just as are the buyer and seller, and unreliable information is to be expected of commercial antagonists. See pt. III(A) supra. It would seem to the competitor's advantage to lie to another seller requesting verification and deny that he has offered a lower price to a buyer. By doing so the competitor will have prevented the seller from offering an equally low price, which could deprive
It should be noted, however, that the traditional meet not beat requirement of the meeting competition defense, which prohibits the seller from undercutting competition, complicates the problem. A seller, wary of this requirement, and despite his complete good faith, will still be inhibited from lowering his price unless he can obtain the exact amount of a competitor's price. Thus, a prohibition of interseller price verification, in the context of a strict meet not beat requirement, would increase price rigidity. The meet not beat requirement is not, however, "draconian." Recent decisions, emphasizing the seller's good faith effort to meet competition, have permitted meeting competition defenses even though the seller's price reduction in fact undercut competition. This liberal reading of the meet not beat requirement is to be encouraged, for an overly literal application permits sellers to match prices, thereby increasing price uniformity.

3. Interseller Price Verification and Competition

Once the erroneous conclusion of Gypsum—that interseller price verification is necessary to establish a meeting competition defense—is set aside, it becomes obvious that, even under the rule of reason standard, the practice should be prohibited. The possibilities for abuse of interseller price verification are substantial. The Department of Justice fears it is "becoming a cover for hard core price-fixing agreements." Even the Gypsum court noted that it could lead to "a broad range of data dissemination schemes and communications among competitors, which might provide camouflage for illegitimate agreements." Gypsum attempted to limit the possibilities of abuse by making its four-part test as "narrow" as possible. Despite this, the Gypsum test has already drawn unfavorable commentary. It is also difficult to imagine how the Department of

References:

294. See text accompanying notes 52-57 supra.
296. See cases cited note 57 supra.
297. Meeting Competition, supra note 3, at 1485-87.
298. See Eaton, supra note 9, at 427; Kuenzel & Schiffres, supra note 7, at 1243-44; 1977 Justice Dep't Report, supra note 2, at 58-63.
299. 1977 Justice Dep't Report, supra note 2, at 59.
300. 550 F.2d at 124. The Government's argument in Gypsum had focused on this point. It contended that the verification calls were made daily and involved broad discussions of present and future pricing. See text accompanying notes 241-42 supra.
301: See text accompanying note 265 supra.
302. 550 F.2d at 126; see id. at 134 (Adams, J., concurring) (sellers face a difficult task in proving that interseller price verification does not constitute price fixing).
303. One commentator feels that all sellers will claim that their sole purpose was to comply with the Robinson-Patman Act. BNA Analysis, supra note 21, at B-3. But see 46 Geo. Wash. L.
Justice could effectively monitor the legality of verification calls without wiretaps or some other form of continual surveillance, a result that should not be encouraged.

But even an interseller price verification system that meets the Gypsum test, as in Wall Products,\textsuperscript{304} is anticompetitive in an oligopolistic market. The off-list price discounts in the gypsum industry were a procompetitive force in that they disrupted the pricing discipline of the sellers. As each seller became uncertain of his rivals' pricing decisions, the price discounts spread and initiated a downward trend in prices.\textsuperscript{305} Interseller price verification, however, eliminated the uncertainty by enabling sellers to determine the exact amount of competitors' prices.\textsuperscript{306} The seller could confidently quote a price equal to that of this competitor.\textsuperscript{307} He would be foolish to name a lower price since this would only fuel the downward spiral of prices.\textsuperscript{308} That interseller price verification permits sellers to reinstall a uniform price structure is indicated by the stabilization of prices which occurred in the Wall Products situation.\textsuperscript{309}

Interseller price verification also has an anticompetitive effect at the secondary line of competition. A buyer who has received a secret price cut will be in a favored position relative to other buyers; normally, this discrimination would be only temporary.\textsuperscript{310} As the number of price cuts increases, the pricing discipline of the oligopolists will collapse.\textsuperscript{311} Eventually price discounts would be so wide-

\textsuperscript{304} Rev. 113, 134 (1977) ("Such singleness of purpose is extremely difficult to prove."). In addition, sellers could easily assert a lack of other means of corroboration and good reason to doubt the buyer's reliability. BNA Analysis, supra note 21, at B-3; 46 Geo. Wash. L. Rev. 113, 134 (1977). Sellers could also circumvent the limitation of the discussion in the calls to the one price and one buyer at issue by placing a series of verification calls that would in effect amount to a constant price monitoring system. For example, although the calls in Wall Products complied with this limitation, they were apparently made on a frequent basis. See note 224 supra.

\textsuperscript{305} The Wall Products court found that the purpose of the verification calls was to comply with the Robinson-Patman Act; that the defendants had exhausted other means of corroboration; that the defendants' previous experience gave them good reason to doubt the buyers' veracity; and that the calls were limited to the one price and one buyer at issue. See text accompanying notes 221-24 supra.

\textsuperscript{306} Cf. United States v. Container Corp. of America, 393 U.S. 333, 339-40 (1969) (Fortas, J., concurring) ("[T]he exchange of prices made it possible for individual defendants confidently to name a price equal to that which their competitors were asking.").

\textsuperscript{307} In fact, if the seller offered a lower price he would violate the meet not beat requirement of the meeting competition defense because he knew the exact amount of his competitor's offer. See text accompanying note 55 supra.

\textsuperscript{308} Testimony from Wall Products is evidence of this: "Mr. Harper, of Kaiser, when asked why he answered verification calls, said, 'If you don't tell him you are giving [the customer] $2 off, he might give [the customer] three.' And Mr. Atwell, of National, said he answered verification questions, so that a competitor would not meet an inaccurate price, thus forcing National to meet the new price . . ." Wall Prods. Co. v. National Gypsum Co., 326 F. Supp. 295, 311 n.8 (N.D. Cal. 1971).

\textsuperscript{309} See id. at 311.

\textsuperscript{310} See Meeting Competition, supra note 3, at 1482 n.39. But see text accompanying notes 395-97 infra.

\textsuperscript{311} See note 4 supra.
spread that prices will be lower to all buyers.\textsuperscript{312} Interseller price verification, however, allows sellers to match price cuts and freeze the downward trend of prices. If the prices are frozen at a level where some buyers are still in a favored position, the initial discrimination will become permanent,\textsuperscript{313} perhaps forcing some buyers out of the market.

\textit{Gypsum} then, despite its restriction of interseller price verification, did not go far enough. The practice has an anticompetitive effect at both the primary and secondary lines of competition. Moreover, as noted before,\textsuperscript{314} the good faith standard of the meeting competition defense does not require interseller price verification. The seller should be allowed to lower his price if his investigation does not reveal good reason to doubt the buyer's reliability. As is always the case with the good faith standard, however, the seller's investigation may not always detect the unreliability of a particularly shrewd buyer.\textsuperscript{315} This problem is discussed below.

\section*{VI. Buyer Reliability}

\textbf{A. Section 2(f) of the Robinson-Patman Act}

The previous discussion has focused on the liability of the seller. Yet it is the buyer who creates most of the seller's problems. By playing different sellers off against each other, perhaps even lying about competing offers, the buyer causes great uncertainty on the seller's side of the marketplace. This uncertainty gives rise to the interseller price verification systems which enable sellers to obtain positive proof of competing offers before discriminating in price.\textsuperscript{316} As noted above, these systems are inherently anticompetitive and unnecessary to the seller wishing to obtain a meeting competition defense to a price discrimination charge.\textsuperscript{317} If the seller's good faith investigation does not indicate good reason to doubt the buyer's report of a competing offer, he should be permitted to lower his price to the buyer. But if the seller's investigation fails to detect that a buyer has misrepresented a competing offer, then the seller who cuts his price will have undercut competition and not merely met it. By obtaining a lower price, the lying buyer will have placed himself in a favored position relative to other buyers, creating a discrimination at the secondary level of competition.\textsuperscript{318} Thus, a prohibition of interseller

\textsuperscript{312} See Meeting Competition, supra note 3, at 1481. For example, in the gypsum industry prior to the price verification calls, buyers were able to obtain numerous price discounts, triggering a general downward trend in prices. See text accompanying note 220 supra.
\textsuperscript{313} See Meeting Competition, supra note 3, at 1486, 1493-94.
\textsuperscript{314} See pt. V(B)(2) supra.
\textsuperscript{316} See text accompanying note 288 supra.
\textsuperscript{317} See pts. V(B)(2), (3) supra.
\textsuperscript{318} Theoretically, this discrimination should only be temporary. See text accompanying notes 395-97 infra.
price verification, which forces the seller to rely solely on his own investigation, has anticompetitive ramifications.

In order to alleviate this problem and yet avoid the anticompetitive dangers of interseller price verification, several commentators have suggested an increased use of section 2(f) of the Robinson-Patman Act,\(^\text{319}\) which provides that it is unlawful for the buyer "knowingly to induce or receive a discrimination in price" prohibited by section 2(a) of the Robinson-Patman Act.\(^\text{320}\) At first glance such a suggestion has considerable merit. Increased enforcement of section 2(f), with the concurrent increase in deterrence of fictitious reports of competing offers, could lend added credence to a buyer's report of a competing offer.\(^\text{321}\) Buyer liability also seems more equitable than seller liability. Since it is the buyer who creates the discrimination at the secondary line of competition, it is only fair that he be held responsible for it.\(^\text{322}\)

As is often the case with the Robinson-Patman Act,\(^\text{323}\) however, section 2(f)'s protection of competition at the secondary line has an anticompetitive effect at the primary line. A buyer fearful of section 2(f) liability will bargain less aggressively, encouraging inflexible and high prices by oligopolists.\(^\text{324}\) By exerting pressure for price discounts, aggressive buyers introduce a disruptive element into the pricing patterns of oligopolists.\(^\text{325}\) Because section 2(f) hinders the beneficial effect of aggressive bargaining on rigid prices in oligopolies, several proposed reforms of the Robinson-Patman Act have eliminated section 2(f) entirely.\(^\text{326}\)

\(^{319}\). *See Meeting Competition, supra* note 3, at 1495-97; 46 Geo. Wash. L. Rev. 113, 134 (1977). The Gypsum court recommended increased use of § 2(f) in addition to permitting interseller price verification in certain circumstances. *See* text accompanying note 262 *supra.*


\(^{322}\). For a discussion of the seller's difficulties in bringing a tort action against the buyer to recover the damages previously assessed against the seller under § 2(a) of the Robinson-Patman Act, see Campbell & Emanuel, *supra* note 3, at 147 n.90.

\(^{323}\). *See* Kuenzel & Schiffres, *supra* note 7, at 1214.

\(^{324}\). *See 1977 Justice Dept Report, supra* note 2, at 63.


\(^{326}\). *See 1977 Justice Dept Report, supra* note 2, at 63-64, 293; Campbell & Emanuel, *supra* note 3, at 208; *cf. Neal Report,* *supra* note 6, app. C, at 23-25 (restriction of § 2(f) in interests of hard bargaining). The Department of Justice finds it "anomalous that a statute designed to protect small businessmen has the effect of governing the competitive relationships between giant companies for the benefit of those with oligopoly selling power." *1977 Justice Dept Report, supra* note 2, at 63.
B. Judicial Interpretation of Section 2(f)

1. Automatic Canteen Co. v. FTC

The Supreme Court recognized the potential danger in section 2(f) in its only interpretation of the statute, Automatic Canteen Co. v. FTC. In Automatic Canteen, the FTC asserted that proof that the buyer knew the price received was discriminatory established a prima facie violation of section 2(f). The Court rejected this contention, stating:

[T]he Commission's view . . . might . . . help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation.

. . . [W]e are unable, in the light of congressional policy as expressed in other antitrust legislation, to read this ambiguous language as putting the buyer at his peril whenever he engages in price bargaining. Such a reading must be rejected in view of the effect it might have on . . . sturdy bargaining between buyer and seller.

The Court interpreted section 2(f) as requiring that a buyer also know that the price received was illegal. Thus, if the price received was "either within one of the seller's defenses . . . or not known by [the buyer] not to be within one of those defenses," no violation of section 2(f) had occurred.

The Court's imposition of a two-tiered scienter requirement greatly inhibited the use of section 2(f).

The Campbell and Emanuel proposal would retain buyer liability if the buyer knowingly makes misrepresentations in a signed writing that a seller relies upon to fulfill his duty to verify. Campbell & Emanuel, supra note 3, at 205-06. See also LaRue, supra note 9, at 340 (buyer affidavits).

328. Id. at 62-63.
329. Id. at 63, 73-74.
330. Id. at 74. The Court fashioned a rule of fairness and convenience to govern who had the burden of proving that the buyer did not know that the price was illegal. As to cost justification, because the FTC had better access to information concerning a seller's costs, it was the FTC's, rather than the buyer's, burden to prove that the buyer knew a price was not cost justified. Id. at 78-79. In addition, requiring the buyer to prove the seller's costs would "require a degree of cooperation between buyer and seller, as against other buyers, that may offend other antitrust policies." Id. at 69. The Court suggested, however, that as to the meeting competition defense, the burden of proving that a price was made to meet competition should be on the buyer since information on competing offers was more readily available to the buyer. Id. at 79 n.23 (dictum).
331. Following Automatic Canteen the FTC did not bring a § 2(f) charge against an individual buyer until Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341 (1968), some 13 years later. See Evolving Duty, supra note 320, at 357. Justice Douglas, dissenting in Automatic Canteen, had predicted that the majority's decision would have such an "enervating effect" on the statute. 346 U.S. at 82. (Douglas, J., dissenting). In Fred Meyer the court held that a knowledgeable buyer may be charged with notice of the illegality of the price if he receives a suspicious price and does not make inquiries as to its legality. 359 F.2d at 365-66; see Giant Food Inc. v. FTC, 307 F.2d 184, 187 (D.C. Cir. 1962) (same result under § 5 of the Federal Trade Commission Act for inducing payments in violation of § 2(d) of the Robinson-Patman Act).
2. Kroger Co. v. FTC

*Automatic Canteen* clearly suggested that a buyer could not have violated section 2(f) if the seller was absolved of liability under section 2(a). In *Kroger Co. v. FTC*, however, the Sixth Circuit carved out an exception to this rule in the case of a lying buyer. The court ruled that Kroger could be held liable for its misrepresentations even after the seller, Beatrice Foods, had obtained a meeting competition defense. Justice Clark, speaking for the court, stated:

[T]he seller's successful defense under § 2(b) cannot exculpate the buyer since Kroger knew that the prices offered by Beatrice and received by Kroger were not in fact within the defense of section 2(b). To hold otherwise in this case would put a premium on the buyer's artifice and cunning in inducing discriminatory prices. In order for the buyer to be sheltered through the exoneration of the seller under section 2(b) the prices induced must come within the defenses of that section not only from the seller's point of view but also from that of the buyer. To hold otherwise would violate the purposes of the Act, and frustrate the intent of the Congress.

The FTC decision below had used broad language in holding Kroger liable and suggested that hard bargaining and the failure "to convey any correct information about the price levels being quoted by others" may come within the scope of section 2(f). Justice Clark, however, took pains to base the circuit court's decision upon Kroger's misrepresentations:

The use by the Commission of the "hard bargaining" language as well as the failure of Kroger "to convey any correct information about the price levels being quoted by others" is but a warning, not a command. The controlling point here is not the "hard bargaining" nor the price levels [sic] but the misrepresentation of the [competing] bid, in order to induce a discriminatory price.

It is difficult to determine if other circuits have approved of Kroger's departure from the general rule of *Automatic Canteen* that acquittal of the seller immunizes the buyer from liability. In *United Fruit Co.*, the buyer, 334.

332. Many commentators had adopted this view of *Automatic Canteen*. See Galanti, supra note 295, at 975-76 & n.55.


334. Id. at 1377.

335. Id. (citation omitted).

336. The FTC had stated: "Kroger bargained too hard—. . . it did not have a sufficient regard for its Robinson-Patman obligations. If a buyer chooses to use its bargaining power to get favored treatment from its suppliers, it is permitted to do so under the law. . . . At some point, however, if the buyer continues to push, he must become liable if Robinson-Patman bounds are exceeded. . . . " . . . [Kroger] went beyond the bounds of permissible bargaining . . . when [it] failed to convey any correct information about the price levels being quoted by others." Beatrice Foods Co., 76 F.T.C. 719, 818-19 (1969), aff'd sub nom. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971).

337. 438 F.2d at 1378.

338. 82 F.T.C. 53 (1973), rev'd sub nom. Harbor Banana Distrb., Inc. v. FTC 499 F.2d 395 (5th Cir. 1974).
Harbor Banana, threatened its supplier, United Fruit, that it would change suppliers unless United delivered directly to Harbor's plant.\textsuperscript{339} After United refused, Harbor transferred fifteen-percent of its business to one of United's competitors, whereupon United provided a special delivery service to Harbor.\textsuperscript{340} The FTC found United in violation of section 2(a) for providing this discriminatory delivery service, and Harbor in violation of section 2(f) for inducing the service. On appeal, the Fifth Circuit, without mentioning \textit{Kroger}, set aside the FTC's finding of section 2(f) liability for the buyer after the court had ruled that the seller was entitled to a meeting competition defense.\textsuperscript{341} Citing \textit{Automatic Canteen}, the court stated that "[a] prohibited discrimination is a condition precedent to a finding of unlawful conduct under § 2(f)."\textsuperscript{342} Still, \textit{Harbor Banana} can be distinguished from \textit{Kroger} by reason of the absence of buyer misrepresentation.\textsuperscript{343}

The Ninth Circuit's position is similarly unclear. In \textit{Rutledge v. Electric Hose and Rubber Co.},\textsuperscript{344} another case distinguishable from \textit{Kroger} because of the absence of active misrepresentation on the part of the buyer,\textsuperscript{345} the district court, citing \textit{Automatic Canteen} and not \textit{Kroger}, stated that since the seller had not violated section 2(a), it "must logically follow that . . . [the buyer has] not violated § 2(f)."\textsuperscript{346} The Ninth Circuit affirmed with neither qualification nor reference to any authority,\textsuperscript{347} an odd result considering the fact that in an earlier case the Ninth Circuit itself had stated that a buyer who "knowingly manipulate[s] the competitive bidding through false or disingenuous reporting of competitor's [sic] bids" can be held liable under section 2(f) even if the seller has obtained a meeting competition defense.\textsuperscript{348}

\textsuperscript{339} \textit{Id.} at 146.  
\textsuperscript{340} \textit{Harbor Banana Distribs., Inc. v. FTC}, 499 F.2d 395, 398 (5th Cir. 1974).  
\textsuperscript{341} \textit{Id.} at 399.  
\textsuperscript{342} \textit{Id.} Judge Griffin Bell wrote the \textit{Harbor Banana} opinion, which places the Attorney General and the Solicitor General, Wade McCree, Jr., who participated in the \textit{Kroger} decision while serving on the Sixth Circuit, on opposite sides of this issue.  
\textsuperscript{343} An argument could be made that buyer misrepresentation was present in \textit{Harbor Banana}. In finding § 2(f) liability the FTC had relied, \textit{inter alia}, on Harbor's threat to switch suppliers unless it was granted the discriminatory concession. The FTC classified this threat as "an effort to procure a price concession . . . rather than a bona fide statement of its intentions." United Fruit Co., 82 F.T.C. 53, 146 (1973), rev'd sub nom. \textit{Harbor Banana Distribs., Inc. v. FTC}, 499 F.2d 395 (5th Cir. 1974). This would seem, however, closer to hard bargaining than the active misrepresentation of a competitor's bid that was present in \textit{Kroger}. \textit{Evolving Duty}, supra note 308, at 362. Unfortunately, the Fifth Circuit's opinion does not discuss this point.  
\textsuperscript{344} 327 F. Supp. 1267 (C.D. Cal. 1971), aff'd, 511 F.2d 668 (9th Cir. 1975).  
\textsuperscript{345} In \textit{Rutledge}, the plaintiffs alleged that the defendant seller sold to the defendant buyers at a price less than the plaintiffs were charged. \textit{Id.} at 1274. \textit{Rutledge} is also distinguishable from \textit{Kroger} in that the plaintiffs failed to establish a prima facie case in their § 2(a) allegation against the seller. \textit{Id.} at 1275-76.  
\textsuperscript{346} \textit{Id.} at 1276.  
\textsuperscript{347} \textit{Rutledge v. Electric Hose & Rubber Co.}, 511 F.2d 668, 678 (9th Cir. 1975).  
\textsuperscript{348} \textit{Cadigan v. Texaco, Inc.}, 492 F.2d 383, 386 n.2 (9th Cir. 1974) (dictum). For reasons best known to itself, the court did not cite \textit{Kroger}. It did, however, cite the FTC decision below.
3. Great Atlantic & Pacific Tea Co. v. FTC

Kroger stated that “[i]n order for the buyer to be sheltered through the exoneration of the seller under [a meeting competition defense] the prices induced must come within the” defense from the buyer's point of view in addition to the seller's point of view. Thus, if the buyer knew that the seller's price beat rather than met competition, the buyer could still be held liable under section 2(f). In Great Atlantic & Pacific Tea Co. v. FTC, the Second Circuit extended the buyer's point of view rule from the buyer in Kroger who misrepresented competing offers to a buyer who merely failed to inform a seller that its bid beat, rather than met, a competitor's bid. In A & P, the seller, Borden Co., offered A & P a bid for the supply of private label milk that would have reduced A & P's dairy costs by $410,000. Unsatisfied, A & P sought and received a bid from another supplier which would have resulted in a savings of $737,000. A & P then notified Borden that its bid was “not in the ball park” and that a $50,000 increase “would not be a drop in the pocket.” Borden, offered to double A & P's savings to $820,000 emphasizing that the only way it could justify the bid was on the basis of meeting competition, i.e., the bid could in no way satisfy the cost justification defense of section 2(a). A & P regarded this bid as “substantially better” than the competing bid and accepted it.

A & P was charged with violating section 5 of the Federal Trade Commission Act, as well as the policy of the Robinson-Patman Act, for failing to inform Borden that its second bid had substantially beaten the competing bid when it knew that Borden was relying upon the meeting competition defense. The FTC, stating that the allegation was “directed to the question of what must legally be disclosed during contract negotiations,” dismissed the charge. The FTC feared that the “imposition of a duty of affirmative

349. Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), cert. denied, 404 U.S. 871 (1971); see text accompanying note 336 supra.


351. 557 F.2d at 975.

352. Great Atlantic & Pacific Tea Co., 87 F.T.C. 962, 995 (1976), aff'd 557 F.2d 971 (2d Cir. 1977), petition for cert. filed, 46 U.S.L.W. 3323 (U.S. Nov. 15, 1977) (No. 77-654). The Second Circuit's opinion does not indicate the amount of the competing bid, a serious omission considering that without this figure it is impossible to determine if A & P's description of the competing bid to Borden was true or false. See note 353 infra.

353. 557 F.2d at 976. These statements were true. The competing bid was $327,000 better than Borden's bid.

354. Id. Borden's decision is understandable considering that A & P was a major customer of Borden. A loss of the A & P account would have reduced Borden's gross profit by $1,600,000 and created substantial excess capacity at Borden's new $5,000,000 plant. 87 F.T.C. at 978.

355. 87 F.T.C. at 1049. A & P requested a letter from Borden stating that its prices were proportionally available to other buyers. Borden's reply stated only that it felt its prices were legal and that it was prepared to defend them. Id.

356. Id.

357. Id. at 1049-51.
disclosure . . . [would be] contrary to normal business practice and . . . public interest.\footnote{358} Such a rule would hinder aggressive bargaining and possibly "deprive the public of gains that under effective competition it has a right to expect."\footnote{359}

Despite this holding, the FTC found A & P liable under a separate charge of violating section 2(f) of the Robinson-Patman Act.\footnote{360} On appeal, A & P argued that the Borden bid was made to meet competition and that A & P was unaware that the bid was not within the meeting competition defense.\footnote{361} In such a case, \textit{Automatic Canteen} required that A & P could not be found liable.\footnote{362} The Second Circuit rejected this argument as inconsistent with \textit{Kroger}. While the bid might have been within the meeting competition defense from the seller's point of view,\footnote{363} it was not within the defense from the buyer's point of view, since A & P knew that the Borden bid had substantially beaten the competing bid.\footnote{364} The court declined to link \textit{Kroger} to affirmative misrepresentations of competing offers, finding the buyer's point of view rule equally appropriate to a buyer who, like A & P, remains silent on the terms of competing bids.\footnote{365} In addition, the court found the line between affirmative misrepresentation, and A & P's statements that Borden was not "in the ball park" and that a $50,000 reduction "would not be a drop in the pocket," a "fine one indeed."\footnote{366}

A & P also argued that a finding of liability under section 2(f) would impose an affirmative duty to disclose to a seller that its bid had not only met, but beaten, a competitor's bid, a duty inconsistent with the FTC's dismissal of the first charge on the ground that such a duty was contrary to the public interest in vigorous bargaining.\footnote{367} The court disposed of this argument by stating that

\footnote{358} Id. at 1050. \\
\footnote{359} Id. at 1051 (quoting 1955 Attorney General's Report, supra note 18, at 196). The FTC did not conclude that nondisclosure during bargaining was never actionable under § 5 of the Federal Trade Commission Act, but only that it was not A & P's responsibility to tell Borden whether a legal defense was available. \textit{Id.} at 1051 n.7. \\
\footnote{360} Id. at 1051-66. \\
\footnote{361} 557 F.2d at 977. A & P also argued that it could not be charged with a knowing inducement of an illegal price since it felt the bid was cost justified. The court rejected this claim in light of A & P's trade experience and Borden's statement that the bid was justified only on a meeting competition defense. \textit{Id.} at 981. An A & P cost study attempting to establish cost justification was rejected as defective and inadequate. \textit{Id.} at 984-85. \\
\footnote{362} Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953); see text accompanying note 331 supra. \\
\footnote{363} Unlike the seller in \textit{Kroger}, Borden was not charged with price discrimination. Thus, it is uncertain whether Borden could have established a meeting competition defense. The FTC stated that Borden probably did not have the defense. 87 F.T.C. at 1057 n.19 (dictum). \\
\footnote{364} 557 F.2d at 982. \\
\footnote{365} \textit{Id.} at 983. \\
\footnote{366} \textit{Id.} However fine it may be, there is nevertheless a line between the two cases. A & P's statements, although overstated, were undoubtedly true while Kroger's statements were false. \textit{See} notes 352-53 supra. \\
\footnote{367} 557 F.2d at 982.
section 2(f) liability had to be assessed independently of any other statute and found that the public interest would be best served by a finding of liability. Otherwise, large buyers would be permitted to play sellers off against each other and thereby acquire even greater market power to the detriment of small buyers. Such tactics, in the court's view, were also likely to endanger competition among sellers by inducing predatory price cutting.

C. Analysis of Kroger and A & P

1. The Effect on Competition

   a. Primary Line Effects

   There would seem to be little doubt that at the primary line \textit{Kroger} is anticompetitive. Because the decision discourages aggressive bargaining, an offsetting force to large, powerful sellers, it thereby encourages price rigidity. The \textit{Kroger} court was aware of the anticompetitive potential of section 2(f), but drew the line at lying buyers. From a competitive viewpoint, however, there is no reason to treat the lying buyer differently from any other aggressive buyer. In the gypsum industry, the lying buyers undermined the seller's pricing discipline and initiated a downward trend in prices. \textit{Kroger}'s misrepresentations similarly created uncertainty among sellers, causing them to reduce their prices. Although one commentator has attempted to distinguish the lying buyer, in that misrepresentations distort the bargaining process, such a contention seems misplaced in the rough-and-tumble atmosphere of the marketplace. A bluff is as essential to a shrewd bargainer as it is to a sharp poker player. Unreliable reports are to be expected in the marketplace. Indeed, the seller's duty to verify is based on this assumption.

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368. \textit{Id.} at 983-84. The court disapproved of charging that the same conduct violated both § 2(f) of the Robinson-Patman Act and § 5 of the Federal Trade Commission Act. \textit{Id.} The court overlooked, however, the suggestion in \textit{Automatic Canteen} that the Robinson-Patman Act is to be construed in light of other antitrust statutes. \textit{See Automatic Canteen Co. v. FTC}, 346 U.S. 61, 73-74 (1953).
369. 557 F.2d at 983.
370. \textit{Id.} at 982-83.
371. \textit{Id.} at 983.
373. \textit{See} text accompanying notes 336-37 \textit{supra}.
374. \textit{See} text accompanying notes 304-05 \textit{supra}.
376. \textit{Meeting Competition}, \textit{supra} note 3, at 1497 n.118, 1498.
A fortiori, A & P is also anticompetitive at the primary line. The Second Circuit ignored the Kroger court's emphasis on misrepresentations and extended the Kroger rationale to the buyer who “merely keeps quiet about the nature of the competing bid . . . “378 This extension is questionable considering that Kroger distinguished the lying buyer from one who fails “to convey any correct information about the price levels being quoted by others.”379 The danger in A & P is that the buyer, to avoid liability, must refuse the seller's bid or at least inform him that his bid has beaten competition. Ironically, the FTC itself, in dismissing the charge under section 5 of the Federal Trade Commission Act, described such an affirmative duty of disclosure as contrary to hard bargaining and the public interest.380 Its characterization of the duty as conflicting with “normal business practice” was also accurate since the buyer and seller are commercial antagonists and “neither expects the other, or can be expected, to lay all his cards face up on the table. Battle of wits is the rule.”381 Moreover, the imposition of a duty to disclose lower bids could induce price matching. By offering a series of increasing bids the seller could determine his competitor's price.382 Again, price rigidity at unnecessarily high levels is the result.

Curiously, the A & P court portrayed its decision as procompetitive at the primary line, since it would discourage predatory pricing.383 While the court's concern over this practice is understandable,384 its analysis is suspect. True predatory pricing is defined as pricing below marginal cost;385 the court simply refers to pricing below cost.386 In addition, a prospective predator

378. 557 F.2d at 983.
380. See text accompanying notes 358-59 supra.
381. Great Atlantic & Pacific Tea Co., 87 F.T.C. at 1050 (quoting Forster Mfg. Co. v. FTC, 335 F.2d 47, 56 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965)).
382. The FTC described this practice as follows: “We fear a scenario where the seller automatically attaches a meeting competition caveat to every bid. The buyer would then state whether such bid meets, beats, or loses to another bid. The seller would then submit a second, a third, and perhaps a fourth bid until finally he is able to ascertain his competitor's bid.” 87 F.T.C. at 1051. By encouraging this series of increasing bids A & P distorts the bargaining process; the seller's normal practice would be to make a series of decreasing offers.
383. 557 F.2d at 983.
384. Predatory pricing occurs when a seller lowers prices below his marginal cost of production. Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697, 712 (1975). At this point it becomes survival of the financially fittest. A large firm with strong financial backing may be able to drive a small firm, equally efficient, out of business. See Campbell & Emanuel, supra note 3, at 175. Commentators have suggested that a meeting competition defense should not be used to justify pricing below cost. Areeda & Turner, supra at 715-16; Campbell & Emanuel, supra note 3, at 178 (excepting sellers with an unsubstantial market share). It will be recalled that the original § 2 of the Clayton Act was directed at predatory pricing. See note 33 supra.
385. See note 384 supra.
386. 557 F.2d at 982-83; cf. Areeda & Turner, supra note 384, at 699 (footnotes omitted) (“Courts in predatory pricing cases have generally turned to . . . empty formulae [such as 'below cost' pricing . . . in adjudicating liability. These standards provide little, if any, basis for
faces substantial obstacles in successfully implementing a predatory pricing system. Thus, predatory pricing can seldom be used profitably and is rarely seen in practice.

b. Secondary Line Effects

The effect of the lying or aggressive buyer at the secondary line of competition is unclear. The aggressive buyer who successfully induces a lower price from a seller will be in a favored position relative to other buyers. But as long as all buyers can bargain aggressively and obtain lower prices, no one buyer would be able to gain a permanent advantage. Theoretically, this should be the case since the seller's duty under the meeting competition defense requires him to treat all buyers alike before granting a price cut. Nevertheless, the large buyer has an inherent advantage because of the volume of business he generates. The seller has more of an incentive to violate his duty under the meeting competition defense when dealing with a large buyer. For example, Borden, the buyer in A & P, was "desperate" to save the A & P account; its loss would have resulted in a significant loss of revenue. Borden probably would not have risked a price discrimination charge if it were dealing with a "Mom and Pop" store instead of A & P.

Unfortunately, the FTC's arbitrary enforcement policy adds another dimension to this problem. Some studies indicate that small businessmen are most often the target of FTC complaints under the Robinson-Patman Act, a policy which increases the large buyer's advantage. As noted above, the seller is likely to grant discounts to the large aggressive buyer more often than to the small aggressive buyer. Yet, if the FTC concentrates enforcement on small businessmen, the small aggressive buyer will be unfairly handicapped since only he, and not his larger competitor, has to worry about liability under section 2(f) for high-powered bargaining tactics.

On the other hand, the charge that the FTC concentrates on small businessmen is questionable, considering the size of the buyers in Kroger and A & P. If the FTC were to focus more heavily upon larger transactions analyzing the predatory pricing offense.

Pricing above marginal cost is justified on grounds of allocative efficiency, since only less efficient firms will drop out of the market. Admittedly, the loss of these firms could possibly have an anticompetitive effect. Campbell & Emanuel, supra note 3, at 135-36.

387. Areeda & Turner, supra note 384, at 698-99. In order for predatory pricing to be successful the predator must have financial strength superior to his competitors. Id. at 698. There must also be a substantial prospect that the losses incurred by the predator in driving out his competitors will be exceeded by the profits earned after they have been eliminated. Id.

388. Id. at 699; Leibler, supra note 6, at 42.


390. See 1977 Justice Dep't Report, supra note 2, at 97-99. This is ironic considering that the Robinson-Patman Act was designed to protect small businessmen. See note 7 and text accompanying notes 31-33 supra.

391. See also Kuenzel & Schiffres, supra note 7, at 1215.

392. In 1970 A & P's net sales amounted to approximately $5,800,000,000. Great Atlantic &
such as the Beatrice-Kroger and Borden-A & P deals rather than transactions with “Mom and Pop” stores, or continue not to enforce the Robinson-Patman Act aggressively, then the large buyer's advantage would, to this extent, be eliminated. Since the seller's risk of liability for offering a price cut to either a large or small aggressive buyer would be the same, he would grant lower prices to both the large and small aggressive buyer. Of course, the impact of the FTC enforcement policy is reduced somewhat by the ability of private plaintiffs to assert Robinson-Patman Act violations.

Even if the large buyer has an advantage in obtaining a lower price, the advantage theoretically would be only temporary. As word of the discount leaks out, other buyers would press for a similar discount. This would initiate a series of sporadic price discriminations, eventually resulting in an overall reduction of prices to buyers. In practice, however, this result has not always been observed. Thus, in some cases a large buyer may be able to use his bargaining power to obtain a permanent price advantage over a smaller competitor.

Assuming, then, that a large buyer can obtain a permanent advantage, Kroger and A & P would be in the best interest of the small buyer since they restrict the large buyer's bargaining power. But this does not mean that the decisions are procompetitive at the secondary line. That question can only be answered by deciding whether the small buyer's “injury and possible exit from the market [would have] harm[ed] competition.” Such an inquiry would require a structural analysis of the industries involved, an investigation beyond the scope of this Comment. Thus, all that can be safely said of

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393. See R. Posner, supra note 4, at 31-34; Yes, Virginia, There is Still a Robinson-Patman Act (But Should There Be?), 45 Antitrust L.J. 14, 62-64 (1976).

394. Cf. 1977 Justice Dep't Report, supra note 2, at 4 (“private suits under Robinson-Patman appear to have increased”). A private plaintiff injured by a discriminatory price will probably sue regardless of whether the buyer is small or large.

395. See note 4 supra.

396. Meeting Competition, supra note 3, at 1498.

397. See F. Scherer, supra note 3, at 248-50.

398. Campbell & Emanuel, supra note 3, at 131.

399. “The detrimental effect on competition at the secondary line resulting from a price discrimination will depend on (1) the competitiveness of the market in which the buyer resells the product, i.e., the number of buyers who obtain the lower price; (2) the portion of the buyer's total costs accounted for by the product in question; (3) the resiliency of the disadvantaged buyer's profit margins; and (4) the importance of the continued existence of the disadvantaged buyer as a competitive force in the relevant market. Without a thorough study of these factors it is not possible to predict with any certainty the amount of competitive harm at the secondary line resulting from a discriminatory pricing system.” Id. (quoting Report of the Department of Justice, Antitrust Division, Reform of the Robinson-Patman Act 8-9 (1975)).
Kroger and A & P at the secondary line is that they protect small buyers, but not necessarily competition. Given this uncertain effect on competition at the secondary line with the clear anticompetitive effect at the primary line, it is highly questionable whether the decisions are in the best interests of competition.

2. Noncompetitive Considerations

Unfortunately, a conclusion that Kroger and A & P are not in the best interests of competition does not end the analysis of these two decisions. As long as section 2(f) remains in force, it represents the intent of Congress with which courts must comply. Both the Kroger and A & P courts justified their decisions on the ground that a contrary result would have frustrated the intent of Congress. The Kroger court, for example, although cognizant of section 2(f)'s dangers, was forced to draw the line with a lying buyer. To allow a lying buyer to be immunized by a seller's good faith meeting competition defense would indeed make a "mockery" of the congressional desire, as reflected in section 2(f), to restrict the aggressive bargaining tactics of large buyers. Thus, Kroger can be viewed as properly decided, despite being anticompetitive, in that a contrary result would have violated congressional intent and generated disrespect for the law.

Nevertheless, Automatic Canteen points out that section 2(f) can and should be read narrowly in order to limit its anticompetitive effects. A & P's imposition of a duty on the buyer to disclose that a seller's bid has beaten rather than met competition is a significant extension of Kroger and thus improper. A & P can also be criticized in that it emphasizes the fact that the seller's bid beat competition. This fact alone does not preclude a meeting competition defense for the seller. An offer that undercuts competition is protected by the defense if it was made in good faith. Because Automatic Canteen requires that the buyer know that the price received was actually illegal, the inquiry should be whether the buyer reasonably thought the seller was acting in good faith and not whether the bid beat competition.

VII. Conclusion

The Robinson-Patman Act "continues to unfold like an accordion to produce legal dissonance, antithetical antitrust aberrations, new weird interpretations, and constantly dilating debate." Inter seller price verification

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402. See text accompanying notes 56-57 supra.

403. This test would be inappropriate for the lying buyer since it would allow him to avoid liability. Thus, for the lying buyer the Kroger rationale should be used.

and the Kroger-A & P restriction on robust bargaining are the two latest aberrations produced by the statute. Both encourage a uniform and rigid price structure in oligopolistic markets.\textsuperscript{405} Even ignoring its substantial anticompetitive effect, interseller price verification is particularly disturbing in that it is unnecessary. The use of indirect forms of verification\textsuperscript{406} would eliminate the need for interseller price verification in many cases. Moreover, the good faith standard of the meeting competition defense does not require competing sellers to verify prices with each other. Instead, the seller should be permitted to lower his price if his good faith investigation of the buyer's report of a competing price does not indicate good reason to believe that the report is untrue.\textsuperscript{407}

Of course, this good faith investigation will not always reveal that a buyer is misrepresenting a competing price. This does not, however, necessarily imply that enforcement of section 2(f) should be increased merely because of its supposed deterrent effect on lying buyers.\textsuperscript{408} Section 2(f) has a clear anticompetitive effect at the primary line, protects, if at all,\textsuperscript{409} only smaller competitors, and does not necessarily facilitate competition at the secondary line.\textsuperscript{410} As such, it is as unattractive as interseller price verification.

In lieu of section 2(f), it is submitted that the good faith element of the meeting competition defense be emphasized. A seller who can be charged with knowledge that the buyer's report or a competing price is untrue, and yet still lowers his price, should not be able to obtain a meeting competition defense. This should deter the seller from the natural inclination to grant better prices to large buyers in order to close a large sale.\textsuperscript{411} Such a solution is preferable to the use of section 2(f) in that it allows small and large buyers to compete on equal footing without restricting aggressive bargaining.

Admittedly, even this alternative could be criticized as having some tendency to promote price uniformity in oligopolies. But this necessarily results from any prohibition of price discrimination. To the extent that a good faith element restricts the availability of a meeting competition defense, sporadic price discrimination is inhibited. Nevertheless, the failure to observe the good faith element of the meeting competition defense would make a "mockery" of the Robinson-Patman Act.

Underlying this entire discussion is the fundamental question that must be asked of the Robinson-Patman Act: Is there an alternative method of protecting small buyers that would not harm competition at the primary line?\textsuperscript{412} The Department of Justice's recent study of the Act has observed that "[o]f all the factors favoring large enterprises, the factor that small businessmen can most

405. See pts. V(B)(3), VI(C)(1)(a) supra.
406. See pt. III(B) supra.
408. See text accompanying note 321 supra.
409. See text accompanying notes 392-93 supra.
410. See pt. VII(C)(1) supra.
411. See text accompanying note 389 supra.
412. See 1977 Justice Dep't Report, supra note 2, at 7.
easily counteract is that of quantity and other discounts which can be achieved through larger scale buying." The Department of Justice's study concludes that the formation of buying cooperatives by small buyers could overcome any advantages in favor of large buyers. Thus, methods of protecting small buyers, less harmful than the Robinson-Patman Act, would seem to be available. Of course, until Congress sees fit to modernize this outdated statute, it can only be hoped that courts will interpret it in the best interests of competition.

Gerald T. Ford

413. Id. at 247.
414. Id. at 247-48.