Boston College Law Review

Volume 5 | Issue 2 Article 5

1-1-1964

Caveat Emptor: Liability of Buyers for Inducing Violations of Sections 2(d) and 2(e) of the Robinson-Patman Act

Jay H. McDowell

CAVEAT EMPTOR: LIABILITY OF BUYERS FOR INDUCING VIOLATIONS OF SECTIONS 2(d) AND 2(e) OF THE ROBINSON-PATMAN ACT

JAY H. MCDOWELL*

The recent successes enjoyed by the Federal Trade Commission before the Court of Appeals for the Second Circuit[1] and for the District of Columbia Circuit,[2] in cases where economically powerful buyers who had extracted illegal discriminatory promotional allowances from their suppliers were held to have violated Section 5 of the Federal Trade Commission Act,[3] strongly indicate that the virtual immunity enjoyed by buyers who induced violations of Sections 2(d)[4] and 2(e)[5] of the Robinson-Patman Act has come to an end. The Commission's new approach closes a gap that had developed in the enforcement of the Robinson-Patman Act.

The only provision of the Robinson-Patman Act aimed solely at buyers is section 2(f).[6] On its face, this provision applies only to dis-

* LL.B. 1963, University of Virginia Law School; Member of staff of Cadwalader, Wickersham & Taft, New York City.

[1] Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962).

[2] Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

[3] 38 Stat. 719 (1914), 15 U.S.C. § 45(a)(1) (1958). This section provides: "Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful."

[4] 49 Stat. 1527 (1936), 15 U.S.C. § 13(d) (Supp. IV, 1959-62) provides:

> It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[5] 49 Stat. 1527 (1936), 15 U.S.C. § 13(e) (Supp. IV, 1959-62) provides:

> It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

[6] 49 Stat. 1527 (1936), 15 U.S.C. § 13(f) (Supp. IV, 1959-62). This section provides: "It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section." The Robinson-Patman Act, which was known as the "Chain Store Act" at the time of its passage in 1936, was enacted primarily to protect the small,

criminations in price, and does not specifically cover such buyer tactics as the achievement of competitive advantage by inducing sellers to grant discriminatory merchandising allowances and services,[7] unless the allowances or services amount to discounts or rebates. It appears, however, that the failure of Congress specifically to include discriminatory merchandising allowances and services in section 2(f) was due to inadvertence,[8] so that arguably the issue of buyer liability under the Robinson-Patman Act for inducing violations of sections 2(d) and 2(e) turns upon whether this defect in section 2(f) can be cured by construction.[9]

In two early cases, the FTC was successful in applying section 2(f) to discriminatory advertising allowances, on the ground that they were equivalent to price discriminations.[10] In *Atlantic City Wholesale Drug Co.*,[11] the respondent published a magazine consisting largely of advertisements solicited from drug manufacturers. Respondent charged varying amounts for these advertisements, and accepted payment in the form of deductions from the purchase price of goods it bought from the advertisers. Less than 200 copies of the magazine were published, and, for the most part, these were distributed to the advertisers involved. The Commission found injury to competition in the secondary line and a tendency toward monopoly. The case was actually tried, but the discrimination consisted of practices which were so blatant that, once exposed, they could not survive. Similarly, in *Miami Wholesale Drug Corp.*,[12] the Commission, on the ground that a magazine owned by the respondent was a "subterfuge operated solely . . . for the purpose of obtaining . . . discriminations in price . . ."[13] issued an order barring respondent from

Inducing sellers to discriminate in price between either of

independent merchant against the encroachments of large buyers, who, through the use of their mass purchasing power, were able to obtain direct and indirect price concessions from sellers. Congress, however, chose to achieve this goal mainly through the imposition of a series of restrictions on sellers. See Rowe, Price Discriminations Under the Robinson-Patman Act 423-24 (1962).

[7] See Note, 61 Colum. L. Rev. 291 (1961).

[8] See Dunn, Sections 2(d) and 2(e), CCH Robinson-Patman Act Symposium 55, 61 (1946).

[9] It has been suggested that so to construe § 2(f) would require, in effect, reading out the words "in price" from the section. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act 165 (2d rev. ed. 1959). See also Steele & Coughlin, Buyer Responsibility Before the Federal Trade Commission, 2 B.C. Ind & Com. L. Rev. 257 (1961).

[10] Atlantic City Wholesale Drug Co., 38 F.T.C. 631 (1944); Miami Wholesale Drug Corp., 28 F.T.C. 485 (1939); cf. National Tea Co., 46 F.T.C. 829 (1950), modified, 47 F.T.C. 1314 (1951) (buyer reimbursed for cash coupons distributed to customers redeemable in seller's merchandise).

[11] Supra note 10.

[12] Supra note 10.

[13] Miami Wholesale Drug Corp., supra note 10, at 487

> the said parties respondent and other purchasers of commodities of like grade and quality, by granting, allowing, and paying to either of the said parties respondent herein, in connection with the purchases of either of said parties respondent, any advertising allowances, or anything of value in lieu thereof, which are not granted by such sellers to all of their customers on proportionately equal terms.[14]

In effect, the FTC's order treated discriminatory advertising allowances as equivalent to discrimination in price.[15]

In addition to the above cases, section 2(f) has been applied to a variety of discriminatory arrangements involving trade and quantity discounts and variations in the terms of sale.[16] Moreover, despite Section 4 of the Robinson-Patman Act[17] which permits a co-operative association to distribute to its members savings achieved through co-operative buying, the Commission has been successful recently in using section 2(f) against automotive parts co-operative buying associations, on the ground that these buying setups are really no more than bookkeeping devices without functional utility.[18]

An examination of the section 2(f) cases to date indicates that its scope has never been determined either judicially or by the FTC. It has been suggested that section 2(f) covers all violations of section 2.[19] In 1955, the Attorney General's Committee took the position that:

---

[14] Id. at 491-92.

[15] See Rowe, op. cit. supra note 6, at 430. The courts have also entertained private damage suits under § 2(f) against buyers who received discriminatory merchandising allowances and services, on the theory that excessive advertising allowances were equivalent to price discrimination. American Co-op. Serum Ass'n v. Anchor Serum Co., 153 F.2d 907, 913 (7th Cir. 1946); Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230, 237 (D.N.J. 1956). See also Kainz v. Anheuser-Busch, Inc., 194 F.2d 737, 739, 744 (7th Cir. 1952) (§ 2(f) suit based on receipt of discriminatory "services and facilities").

[16] See, e.g., Shell Oil Co., 54 F.T.C. 1274 (1958) (purchases of gasoline by cab companies at lower prices than standard retailer prices for resale to public); Curtiss Candy Co., 44 F.T.C. 237 (1947) (manipulation of price guarantees); Associated Merchandising Corp., 40 F.T.C. 578 (1945) (cumulative annual rebates to buying association based on its members' combined purchases); A.S. Aloe Co., 34 F.T.C. 363 (1941) (special price discounts to preferred buyers); Golf Ball Mfrs'. Ass'n, 26 F.T.C. 824 (1938) (special discounts for a professional golfer's association in return for the privilege of stamping their name on golf balls); Pittsburg Plate Glass Co., 25 F.T.C. 1228 (1937) (quantity discounts to members of trade association); Bird & Son, Inc., 25 F.T.C. 548 (1937) (mail order house price discounts).

[17] 49 Stat. 1528 (1936), 15 U.S.C. § 136 (1958).

[18] American Motor Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960); accord, Mid-South Distributors v. FTC, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961). For a thorough discussion of these cases, see Steele & Coughlin, Buyer Resonsibility Before the Federal Trade Commission, 2 B.C. Ind. & Com. L. Rev. 257, 263-68 (1961).

[19] See, e.g., Rowe, op. cit. supra note 6, at 428-29, 432-33; Att'y Gen. Nat'l Antitrust Comm. Rep. 197 (1955).

> Doubtless many complexities will attend full development of the buyer's liability, since section 2(f) in effect enacts a derivative liability subject to every interpretive vagary of each subsection defining discriminatory practices forbidden to sellers.[20]

Other writers, however, take the position that section 2(f) relates only to price discriminations forbidden by Section 2(a) of the Robinson-Patman Act[21] and that it includes inducement of 2(d) and 2(e) violations only if they also constitute indirect price discriminations in violation of 2(a).[22]

It has been suggested that the above divergence of opinion may be partially explained by inconsistent Supreme Court dicta.[23] In *FTC v. Simplicity Pattern Co.*,[24] the Court, commenting that sections 2(c), 2(d) and 2(e) make certain business practices other than price discriminations unqualifiedly unlawful, added in a footnote that:

> Subsection (f) is a corollary to § 2(a), making it unlawful "knowingly to induce or recieve" a price discrimination barred by the latter. See *Automatic Canteen Co. v. Federal Trade Comm'n.* . . .[25]

A few years earlier, however, in *Automatic Canteen Co. v. FTC*,[26] a section 2(f) case, the Court, after stating that 2(f) should be read as "making it unlawful only to induce or receive prices known to be prohibited discriminations,"[27] added in a footnote that:

> We of course do not, in so reading § 2(f), purport to pass on the question whether a "discrimination in price" includes the prohibitions in such other sections of the Act as §§ 2(d) and 2(e).[28]

---

[20] Att'y Gen. Nat'l Comm. Antitrust Rep. 197 (1955).

[21] 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (Supp. IV, 1959-62). This section provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition 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. . . .

[22] See e.g., Austin, op. cit. supra note 9, at 164-66; Stedman, Twenty-Four Years of the Robinson-Patman Act, 1960 Wis. L. Rev. 197, 215; cf. Edwards, The Price Discrimination Law 486-87 (1959).

[23] See Note, 13 Stan. L. Rev. 657, 658 n.3 (1961). Compare FTC v. Simplicity Pattern Co., 360 U.S. 55, 65 n.6 (1959) (dictum), with Automatic Canteen Co. v. FTC, 346 U.S. 61, 73 n.14 (1953) (dictum).

[24] 360 U.S. 55 (1959).

[25] Id. at 65 n.6.

[26] 346 U.S. 61 (1953).

[27] Id. at 73.

[28] Id. at 73 n.14.

While the above quoted dicta can scarcely be argued as determinative of the issue under discussion, it should be noted that the dictum from the *Automatic Canteen* case by implication permits the Commission's original approach to section 2(f) as illustrated by the *Atlantic City Wholesale Drug Corp.* and *Miami Wholesale Drug Corp.* decisions of the Commission.[29]

Under both of the above approaches, if section 2(f) governs the transaction, the FTC must, under the rules announced by the Supreme Court in the *Automatic Canteen* case not only show a violation of sections 2(d) and 2(e) from the seller's viewpoint, but also must further show that the buyer knew or had reason to know that the merchandising allowances or services it was receiving were illegal.[30] The Automatic Canteen Company is a large buyer of candy and other products for resale through automatic vending machines located in at least thirty-three states. In the proceedings before the Commission, the FTC's attorneys introduced evidence that the company received, and sometimes solicited, from 80 of 133 of its suppliers prices that it knew to be as much as thirty-three per cent lower than prices quoted to other purchasers. The FTC's attorneys did not attempt to show that the company knew that the price differentials were not cost justified, on the theory that when a buyer knowingly receives a price concession of sufficient size to cause "injurious" discrimination, a prima facie violation of section 2(f) is established.[31] This approach, which essentially equates a prima facie case against a buyer under section 2(f) with a prima facie case against a seller under section 2(a),[32] was affirmed by the Court of Appeals.[33]

The Supreme Court, however, rejected the FTC's construction of section 2(f), on the ground that it ignored that section's requirement of *knowing* inducement or receipt of an *illegal* price concession. Under the Supreme Court's holding, the FTC has not made out a prima facie 2(f) violation until it has shown that a reasonable buyer would have known that the price concessions were unjustified.[34] The Court's concept of a prima facie 2(f) case, based on grounds of "fairness" and

[29] See text accompanying notes 11-14, supra.

[30] Rowe, op. cit. supra note 6, at 430.

[31] Automatic Canteen Co., 46 F.T.C. 861, 896 (1950). The company took the position before the FTC that the Commission's attorneys had to prove that the discriminations were not only injurious but also illegal in order to make out a violation of § 2(f), and that, therefore, the Commission had the burden of showing that the price concessions were not cost justified. The Commission's attorneys, relying upon the holding in FTC v. Morton Salt Co., 334 U.S. 37 (1948), that a seller discriminating in price has the burden of showing cost justification, reasoned that the same burden should be on a buyer who induced a violation.

[32] See Rowe, op. cit. supra note 6, at 439; see generally, id. at 438-42.

[33] Automatic Canteen Co. v. FTC, 194 F.2d 433 (7th Cir. 1952).

[34] See e.g., Handler, Recent Anti-Trust Devolpments, 71 Yale L.J. 75 (1961); Note, 53 Colum. L. Rev. 1009 (1953).

"convenience", placed on the FTC the burden of going forward with evidence to make out all the elements of such a violation.[35] On the burden of proof issue, however, the Court expressly declined to decide that section 2(b)[36] applies to 2(f). Rather, the Court stated that if it did, it could be invoked only after the FTC showed that a reasonable buyer would have suspected that the price concession was unjustified.[37]

The *Automatic Canteen* case can reasonably be read to require that the FTC show only approximate knowledge by the buyer of the illegality of a price concession. The first FTC interpretations of the decision, however, took the position that the burden of proof placed on the Commission was so onerous as to put an end, virtually, to the usefulness of the section under most circumstances.[38] This position was supported by several writers.[39]

Since 1957, the FTC has sought to reanimate section 2(f) enforcement by evolving new methods of proof which are compatible with *Automatic Canteen*, yet which are feasible in practice.[40] The Second Circuit Court of Appeals in *American Motor Specialties v. FTC*,[41] approved the Commission's reassessment of *Automatic Canteen*:

> Automatic Canteen held that, despite the provisions of Section 2(b), the Commission did not establish, prima facie, a violation of Section 2(f) merely by introducing evidence that the buyer had received prices lower than its competitors,

---

[35] Automatic Canteen Co. v. FTC, supra note 26, at 81 (dictum).

[36] 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (Supp. IV, 1959-62). This section provides:

> Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *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.

[37] Automatic Canteen Co. v. FTC, supra note 26, at 65; see Note, 53 Colum. L. Rev. 1009, 1010 (1953).

[38] See Borden-Aicklen Auto Supply Co., 50 F.T.C. 952, 953 (1954), to the effect that the FTC's attorneys were required to

> assume the burden of showing that the discriminatory prices allegedly knowingly induced and received by the respondents were not within one of the sellers' defenses and that respondents knew or should have known that the lower prices were not within one of those defenses.

[39] See, e.g., Austin, op. cit. supra note 9, at 148; Edwards, op. cit. supra note 22, at 513-14.

[40] See text accompanying notes 16-17, supra; see generally, Rowe, op. cit. supra note 6, at 442-46.

[41] 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960). This decision is the FTC's first § 2(f) victory before the reviewing courts.

> but that the Commission must also come forward with some evidence that the buyer *knew* that the prices it was receiving violated Section 2(a). [Italics in original.][42]

Although the court in *American Motor Specialties* did not delineate what would be required to rebut the new minimum section 2(f) prima facie case, the buyer presumably would be exonerated if he could show either that the challenged price concession was not in fact illegal, or, alternatively, that he had no knowledge of its illegality.[43]

Although successful against buyers for inducing and receiving a section 2(a) price discrimination, the Commission has not attempted to use 2(f) against buyers who induce violations of sections 2(d) and 2(e). Rather, in *Grand Union Co. v. FTC*,[44] the Commission utilized Section 5 of the Federal Trade Commission Act[45] against receipt by a buyer of discriminatory advertising allowances illegal under section 2(d). The Commission took the position that although not specifically prohibited by any provision of Section 2 of the Robinson-Patman Act, a knowing inducement of a violation of section 2(d)[46] violated the policy underlying that statute, and thereby constituted an unfair trade practice in violation of Section 5 of the Federal Trade Commission Act. The facts of the case were that in 1952 the Grand Union Company, a supermarket chain, organized a sign promotion program consisting of a "combined electric spectacular and animated cartoon display" located in Times Square in New York City. The sign was arranged by an advertising agency, and Grand Union, as its part of the bargain, secured advertisers for the program, most of whom were suppliers who distributed their products through Grand Union's stores. At first, Grand Union received advertising space on the sign for its services which it could exchange for radio and television advertising. Later, however, the terms of the contract were modified, and Grand Union received money payments. To sell space on the sign, Grand

---

[42] Id. at 228.

[43] See Automatic Canteen Co. v. FTC, 346 U.S. 61, 68, 70-71 (1953) (dictum).

[44] 300 F.2d 92 (2d Cir. 1962); accord, American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962). The complaint in the Grand Union case appears to have been drawn on the theory that buyer liability under § 2(f) applies only to direct or indirect price discriminations under § 2(a), and, therefore, does not cover violations of §§ 2(d) and 2(e). See Grand Union Co., FTC Dkt. No. 6973 (1960). Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1958), was used to bridge, in effect, the gap in jurisdiction the FTC has evidently concluded exists in § 2(f). See generally Steele & Coughlin, Buyer Responsibility Before the Federal Trade Commission, 2 B.C. Ind. & Com. L. Rev. 257 (1961).

[45] 38 Stat. 719 (1914), 15 U.S.C. § 45(a) (1958).

[46] The Second Circuit, in another case, held that one of the participating advertisers in Grand Union's promotional program had violated § 2(d). Swanee Paper Corp. v. FTC, 291 F.2d 833 (2d Cir. 1961).

Union gave a number of its suppliers specific assurances of promotional services for their products in Grand Union stores.

On appeal, the Second Circuit pointed out that, although the FTC conceded that Grand Union's practices were not specifically prohibited by the Robinson-Patman Act, the Commission had rejected Grand Union's argument that since Congress specifically prohibited conceptually related practices under section 2(f), its silence on inducements of section 2(d) violations implied Congressional assent to such practices. The Commission based its position on the ground that the omission of 2(d) offenses from section 2(f) resulted from legislative oversight, and that Congress did not intend to countenance practices that clearly violate the "spirit" of the Robinson-Patman Act. The Commission decided that it was duty-bound to "supplement and bolster" the policy behind the Act.[47]

The court, in a 2 to 1 decision, agreed with the Commission's approach, stating:

> Grand Union's activities are inconsistent with the purpose of § 2(d) of the Clayton Act, and one need not resort to metaphysical subtleties to denominate its conduct an unfair method of competition. . . . The Commission has found that Grand Union knowingly received the payments even though equivalent allowances were not made available to other retail grocers, large or small. Thus, by benefit of its size, Grand Union was able to secure competitive benefits . . . which Congress declared contrary to public policy. . . . Using the policies of § 2(d) as a yardstick, the Commission has declared Grand Union's conduct "unfair." The plain meaning of the word would seem to support this conclusion. . . . We see no reason to upset the Commission's determination. [Citations omitted.][48]

The court then went on to approve the FTC's *per se* application of section 2(d) to Grand Union Company, which relieved the Commission of the burden of proving a substantial injury to competition, on the ground that

> In making some, but not all, of the practices outlawed by the Robinson-Patman Act illegal *per se, Congress* indicated

[47] Grand Union Co. v. FTC, 300 F.2d 92, 95 (2d Cir. 1962). The court also stated at 95:

> We need not determine whether the payments made by the participating advertisers to or for the benefit of Grand Union are "a discrimination in price" within the meaning of § 2(f). The question whether or not that section outlaws activity such as petitioner's was left open in Automatic Canteen Co. of America v. United States. . . . This issue was not raised in the proceedings below.

[48] Id. at 99.

that those selected for *per se* treatment always led to the undesired effects on competition.[49]

Although the FTC's approach in *Grand Union* to buyer inducement of section 2(d) offenses was admittedly novel, the Commission was on reasonably firm ground in utilizing Section 5 of the Federal Trade Commission Act to proceed against "equivalent" types of practices which are just outside the jurisdiction of the Clayton Act.[50] The Attorney General's Committee took the position that the FTC may legitimately challenge under section 5 conduct which is economically equivalent to the anti-competitive practices forbidden by the Clayton Act, but which may not be reached thereunder due to the lack of technical prerequisites,[51] with the *caveat* that section 5 should not be used as a substitute for the Clayton Act to attack a transaction which is covered by the latter. A few years earlier, Mr. Justice Douglas stated for the majority in *FTC v. Motion Picture Advertising Service Co.*,[52] that:

> It is also clear that the Federal Trade Commission Act was designed to supplement and bolster the Sherman Act and the Clayton Act . . . to stop in their incipiency acts and practices which, when full blown, *would violate those Acts* . . . as well as to condemn as "unfair methods of competition" existing violations of them. [Emphasis supplied.][53]

Section 5 of the Federal Trade Commission Act authorizes the FTC to issue cease and desist orders when and if it finds that the methods of competition complained of are unfair, that the methods of competition are in commerce and that the order appears to be in the best interest of the public. Although the courts have given the Commission wide discretion in defining "unfair methods of competition," they have retained for themselves the final decision as to whether section 5 has been violated.[54] The Federal Trade Commission Act does not define the phrase "unfair methods of competition" nor does it establish standards to govern its interpretation.[55]

---

[49] Ibid.

[50] See Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821, 835 (1961):

> While alternative constructions may be gleaned from Congressional legislative history, it seems that, on balance, the Commission has authority under section 5 to proceed against equivalent types of practices not within the jurisdictional bounds of the coverage specified in the Clayton Act.

[51] Att'y Gen. Nat'l Comm. Antitrust Rep. 148-49 (1955); accord, Foremost Dairies, Inc., 52 F.T.C. 1480 (1956).

[52] 344 U.S. 392 (1953).

[53] Id. at 394-95.

[54] FTC v. Gratz, 253 U.S. 421, 427 (1920); see generally, Note, 12 Syracuse L. Rev. 246 (1961); Note, 8 U.C.L.A. L. Rev. 243 (1961).

[55] The Senate Report which accompanied the Federal Trade Commission Act at

The facts in *Grand Union* appear to make out a sufficiently strong case for the application of Section 5 of the Federal Trade Commission Act. The FTC's decision, however, was greeted with disapproval as representing an unwarranted extension of Robinson-Patman Act jurisdiction, with possible undesirable effects on the wider policies of the antitrust laws which are to foster competition.[56] This disapproval will, no doubt, be increased by the Second Circuit's affirmance of the Commission's decision.[57]

The major objection to the Commission's *Grand Union* decision appears to be that the application of section 5 to the *per se* liability of section 2(d), and, perhaps, sections 2(c) and 2(e), will create a "roving jurisdiction," impossible to "canalize" which will "overflow" into the area covered by the Clayton Act,[58] with the result that the Commission will in effect be in a position to rewrite the antitrust laws. This objection also underlies Judge Moore's dissents in *Grand Union* and *American News*, and was expressed by him a few years earlier in *Atalanta Trading Corp. v. FTC*:[59]

---

the time of its passage sheds some light on the absence of a definition of the phrase "unfair methods of competition." The report of the Committee on Interstate Commerce explained that:

> The Committee gave careful consideration to the question as to whether it would attempt to define the many and variable unfair practices which prevail in commerce and to forbid their continuance or whether it would leave it to the Commission to determine what practices were unfair. It concluded that the latter course would be the better. . . .

S. Rep. No. 59, 63d Cong., 2d Sess. 13 (1914). As Section 5 of the Federal Trade Commission Act has been interpreted by the Supreme Court, whether a particular trade practice is an unfair method of competition is ultimately for the courts, and not for the Commission, to determine. FTC v. Gratz, 253 U.S. 421, 427 (1920). The Court evidently considers section 5 as "a flexible concept with evolving content," FTC v. Bunte Bros. Inc., 312 U. S. 349, 353 (1941), which is sufficiently broad to permit the Commission to move against practices which run "counter to the public policy declared in the Sherman and Clayton Acts," Fashion Originators' Guild v. FTC, 312 U.S. 457, 463 (1941).

[56] See, e.g., Alexander, Section 5 of the Federal Trade Commission Act, A Deus ex Machina in the Tragic Interpretation of the Robinson-Patman Act, 12 Syracuse L. Rev. 317 (1961); Handler, Recent Anti-Trust Developments, 71 Yale L.J. 75 (1961); Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821 (1961); Rahl, Does Section 5 of the Federal Trade Commission Act Extend the Clayton Act?, 5 Anti-Trust Bull. 533 (1960); Note, 61 Colum. L. Rev. 291 (1961); Note, 49 Geo. L.J. 379 (1960); Note, 13 Stan. L. Rev. 657 (1961); Note, 12 Syracuse L. Rev. 657 (1961); Note, 8 U.C.L.A.L. Rev. 243 (1961).

[57] See Rowe, op. cit. supra note 6, at 435, suggesting that as both Grand Union and American News were 2 to 1 decisions, Judge Moore dissenting at length on the section 5 issue, the section 5 controversy is ripe for consideration by the Supreme Court. The Supreme Court, however, has denied certiorari in the American News case. American News Co. v. FTC, 371 U.S. 824 (1962).

[58] See Oppenheim, Guides to Harmonizing Section 5 of the Federal Trade Commission Act with the Sherman and Clayton Acts, 59 Mich. L. Rev. 821, 826 (1961).

[59] 258 F.2d 365 (2d Cir. 1958).

> The expertise possessed by an administrative agency, however, does not empower it to rewrite the laws which it has been charged with enforcing. This is the function of Congress.[60]

Concurrently with the *Grand Union* case, the FTC employed section 5 against the "knowing receipt" of a variety of merchandising allowances which in effect gave the buyers favored treatment from their suppliers.[61]

The Commission's victories in *Grand Union* and *American News* were crowned by another success in *Giant Food Inc. v. FTC*,[62] this time before the Court of Appeals for the District of Columbia. Giant Food operates a chain of supermarkets. In 1954, 1955 and 1956, Giant sponsored "Anniversary" and "Candy Carnival" sales, in connection with which it sent to its suppliers "contracts of participation." These contracts were an arrangement whereby each participating supplier would pay a specific sum of money to Giant, in return for which Giant agreed to promote the participating supplier's products throughout the period alloted for the sale. The Commission held that Giant had violated Section 5 of the Federal Trade Commission Act and issued a cease and desist order. On appeal, Giant argued that Section 2(d) of the Robinson-Patman Act made it unlawful only for sellers to make discriminatory payments, thus reading section 2(d) in connection with 2(f). Giant interpreted 2(f) as applying only to price discrimination, and concluded that the Commission was powerless to proceed against it under Section 5 of the Federal Trade Commission Act. The court did not agree, basing its decision on the view that "the Commission is merely declaring to be an unfair method of competition a practice which is plainly contrary to the policy of the Clayton Act as amended by the Robinson-Patman Act."[63] The court, however, did hold that the Commission's order, which banned "inducement" of discriminatory promotional allowances, was too broad. The court advised the Commission that:

> Specifically, the order should be directed toward the prohibition of a knowing inducement *and* receipt of, receipt of, or contracting for the receipt of discriminatory display and promotional allowances. [Italics in original.][64]

---

[60] Id. at 374. See also statement of Mr. Justice Black in FTC v. Morton Salt Co., 334 U. S. 37, 48 (1948): "Since Congress has not seen fit to give carload discounts any favored classification, we cannot do so."

[61] See, e.g., Food Fair Stores, Inc., 54 F.T.C. 392 (1957) (dismissed on other grounds); United Cigar-Whelan Stores Corp., 53 F.T.C. 102 (1956); ATD Catalogues, Inc., FTC. Dkt. No. 8100 (Aug. 25, 1960) (complaint); Benner Tea Co., FTC Dkt. No. 7866 (April 19, 1960) (complaint).

[62] 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).

[63] Id. at 186.

[64] Id. at 187.

The Second Circuit's *Grand Union* and *American News* decisions, followed by the District of Columbia Circuit's *Giant Food* decision, give the FTC a potent and flexible weapon to use against buyers who induce violations of section 2(d), and, very likely, section 2(e). The courts in these cases did not, however, go very deeply into the defenses available to a buyer to rebut the Commission's new section 5 prima facie case, except that the court in *Grand Union* did state that the Commission was correct in limiting the complaint to "knowing receipt or inducement" of disproportionate allowances,[65] citing *Automatic Canteen* as analogous. This position was seemingly accepted by the District of Columbia Circuit in *Giant Food*. Since the final definition of what constitutes an unfair trade practice rests with the courts, knowledge may fairly be said to be an element of a *Grand Union* type offense.

It would seem to be possible to question the applicability of the *Automatic Canteen* doctrine to the Commission's *Grand Union* prima facie case, on the ground that in *Grand Union* the buyer's liability does not rest on section 2(f) of the Robinson-Patman Act, which, under the *Automatic Canteen* doctrine, requires "knowing" inducement or receipt to complete a violation. In *Grand Union*, the buyer's liability rested on the Commission's finding under Section 5 of the Federal Trade Commission Act that inducement and receipt of non-proportional advertising allowances was an "unfair trade practice." Thus, although the FTC framed its *Grand Union* complaint in the language of Section 2(f) of the Robinson-Patman Act, claiming that Grand Union knowingly induced or received illegal payments, the narrow question decided by the Second Circuit was:

> Does § 5 extend to petitioner's activity which, while an integral part of a transaction outlawed by § 2(d) of the Clayton Act, nevertheless is not expressly proscribed by that statute or indeed by any other antitrust statute?[66]

The Second Circuit further pointed out that "[n]either party . . . [discussed] the possibility that § 2(f) might be held to apply here."[67] The Second Circuit based its approval of the "knowledge" requirement essentially on grounds of fairness, stating that:

> It would be a harsh burden to hold that any buyer who induces or receives a payment later found to be disproportionate has engaged thereby in unfair competition. The Commission in this case has correctly limited the complaint to "knowing receipt or inducement" of disproportionate payments. . . .[68]

[65] Grand Union Co. v. FTC, 300 F.2d 92, 100 (2d Cir. 1962) (dictum).
[66] Id. at 96 (dictum).
[67] Id. at 95.
[68] Id. at 100.

As the Second Circuit viewed the Commission's prima facie case in *Grand Union*, therefore, "knowing receipt or inducement"[69] was an element of the section 5 unfair trade practice.

The analogy to *Automatic Canteen*, however, appears to be very strong. Part of the rationale behind the FTC's use of section 5 against the Grand Union Company was that Congress, apparently due to legislative oversight, did not include inducement of 2(d) violations within the ambit of section 2(f), making the use of section 5 necessary to cure what amounted to a technical jurisdictional flaw. It would seem, therefore, that so far as applicable, the prima facie 2(f) case set out by the Supreme Court in *Automatic Canteen* would apply whenever the Commission uses section 5 against a buyer for inducing a 2(d) violation.[70] It is reasonable to conclude, on the basis of the above, that lack of knowledge on the part of the buyer that the 2(d) allowances it received were disproportionate is a valid defense to a *Grand Union* type complaint.

The defense of meeting competition in good faith provided by Section 2(b) of the Robinson-Patman Act appears to be available to a buyer in a *Grand Union* type proceeding. The Supreme Court in *FTC v. Simplicity Pattern Co.*[71] construed section 2(e) as an "absolute ban" on discriminatory promotional services which did not require proof of competitive injury, with the result that the usual section 2(a) defenses such as absence of competitive injury or the existence of cost justification do not apply. The Court concluded that "the only escape Congress has provided for discriminations in services or facilities is the permission to meet competition as found in the 2(b) proviso."[72] Regarding section 2(d), the FTC took the position after the *Simplicity Pattern* case that the 2(b) meeting competition proviso did not apply to 2(d) violations.[73] This position, however, was rejected by the Court of Appeals for the District of Columbia in *Exquisite Form Brassiere, Inc. v.*

---

[69] Ibid. The Court, however, reserved opinion on whether:

> *inducement* might be read as not requiring receipt, and hence a buyer could violate § 5 even though the seller did not violate § 2(d). Thus § 5 might be read to apply to the buyer's attempts to have the seller violate § 2(d). We need not decide this question, as receipt was shown here.

Grand Union Co. v. FTC, 300 F.2d 92, 96 n.4 (2d Cir. 1962) (dictum).

[70] Perhaps one might say that when the "spirit" of the Clayton Act, which is said to haunt the antitrust laws as a result of the Grand Union case, emerges "wraithlike when the Commission utters the incantation 'section 5' ", the "spirit" of *Automatic Canteen's* prima facie § 2(f) case also emerges to protect the erring buyer. See Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

[71] Supra note 24.

[72] Id. at 67.

[73] See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, Trade Reg. Rep. ¶ 14, at 6072, 6076 (1960); Henry Rosenfeld, Inc., 52 F.T.C. 1535, 1540, 1541 (1956).

FTC,[74] with the result that good faith meeting of competition is now available in 2(d) cases.

Since the FTC's *Grand Union* type case depends upon the inducement or receipt of an illegal merchandising allowance, the section 2(b) proviso would appear to be available to permit the buyer to show that the merchandising allowance it induced and received was given by the seller for the purpose of "meeting competition" to retain the buyer's trade in an individual competitive situation and therefore was not illegal. It would seem, however, that the buyer could not use as a defense the fact that the seller gave the disproportionate allowance for the purpose of obtaining the buyer's trade, under the FTC's current approach to the meeting competition proviso.[75]

For the aggressive buyer, the 2(b) meeting competition proviso may prove to be almost a complete defense. A buyer who informs one seller of the price offers of another, and who as a result obtains a disproportionate merchandising allowance will probably have gone far to protect himself against a *Grand Union* type charge in the process of bargaining for the concession. Such a buyer has supplied the seller with knowledge of competitive offers, thus laying the ground work for a claim that the seller was merely meeting lawful competitive offers in good faith by granting the disproportionate allowance.[76] The difficulties of proof that such a maneuver would pose for the Commission are obvious. The Commission's problems in this regard, of course, are to some extent a result of the fact that no advertising allowance is illegal when initially granted by the seller. It is the *seller's* failure to make the allowance available on substantially proportionate terms to other buyers that completes the offense.

Following its successes in *Grand Union*, *American News*, and *Giant Food*, the Commission apparently has devoted its energies to defining the new violation and considering the factual criteria necessary to make out a prima facie case. Buyers are now charged with

> violating Section 5 of the Federal Trade Commission Act by knowingly inducing and receiving payments from suppliers for services and facilities in connection with respondents' offering for sale or sale of goods not available to all of their competitors on proportionally equal terms.[77]

In another decision, the Commission stated that the following four basic factual elements are necessary to prove that Section 5 of the

[74] 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962); see Note, 48 Va. L. Rev. 574 (1962).

[75] See Rowe, op. cit. supra note 6, at 420.

[76] Cf. Edwards, op. cit. supra note 22, at 513-14.

[77] Foster Publishing Co., FTC Dkt. No. 7698, Trade Reg. Rep. ¶ 16,015, at 20,846 (July 26, 1962).

Federal Trade Commission Act has been violated by the knowing inducement and receipt of a discriminatory promotional allowance:

> 1. The solicitation and receipt by respondent in commerce of payments for promotional services in connection with the resale of a supplier's product.
> 2. That at approximately the time of the solicitation and receipt, other customers of the supplier were competing with the recipient in the distribution of the grantor-supplier's goods of like grade and quality.
> 3. The payments received by respondents were not affirmatively offered by the suppliers to such competing customers on proportionally equal terms.
> 4. That respondent possessed information sufficient to put upon it the duty of making inquiry to ascertain whether the granting suppliers were making such payments available to its competitors on proportionally equal terms.[78]

Regarding the first of the four criteria, the Commission in an earlier case held that section 5 is violated if a buyer solicits and receives outright gifts or donations.[79] In this case a large department store solicited contributions from some 780 of its 20,000 suppliers in connection with a sales promotion campaign centering around its 100th Anniversary. In each instance the contribution sought was $1000, and some $540,000 was ultimately collected. The Commission took a dual approach, first finding a violation of section 5 on what may be described as "traditional" grounds, and next supplying an alternative basis for its decision on the grounds of *Grand Union* and *American News*.

The above cases are, of course, too few to provide a reliable insight into what the boundaries of the new violation of section 5 and the defenses available against it will eventually prove to be. It is reasonably clear that the offense consists of two elements. First, the *seller's* failure to make promotional allowances available to all competing customers on proportionally equal terms. Secondly, knowing solicitation *and*

---

[78] J. Weingarten, Inc., FTC Dkt. No. 7714, Trade Reg. Rep. ¶ 16,349, at 21,183 (March 25, 1963).

[79] R. H. Macy & Co., FTC Dkt. No. 7869, Trade Reg. Rep. ¶ 15,895 (May 15, 1962). The Commission stated at 20,710:

> We are also of the view that the same general principle which governed the *Grand Union* and *American News* cases should apply here. The mere circumstance that in this case there is no showing that any service or facility was furnished by the respondent for the contributions solicited and received is not a significant difference. The inequity in the use of size to obtain special concessions is the same in either case. If it is contrary to public policy for a large buyer by reason of its size to secure disproportionate advertising allowances, clearly public policy is contravened in the exercise of economic might to obtain outright gifts or donations.

receipt by an economically powerful buyer of allowances not made available to all competing customers on proportionally equal terms. Moreover, the Commission's insistence on detailed findings of fact with meticulous attention to minute details should reassure those who feared that the new *Grand Union* type violation of the antitrust laws would prove impossible to keep within reasonable bounds. Thus far the Commission's approach may be characterized as one of "cautious reasonableness," in which the Commission has attempted to consolidate its victories in *Grand Union*, *American News* and *Giant Food*.

Summary and Conclusion

Under the existing case law, the Commission appears to have available two and possibly three methods to attack inducement by buyers of violations of Sections 2(d) and 2(e) of the Robinson-Patman Act. The first method would be to charge the buyer under section 2(f) with knowing inducement and receipt of an indirect price discrimination violative of section 2(a). The *American Motor Specialties*[80] and *Mid-South Distributors*[81] cases, the Commission's first 2(f) victories before the reviewing courts, indicate that the Supreme Court did not place an impossible burden on the Commission in *Automatic Canteen*,[82] and that it is possible to establish a 2(f) case against a buyer in a reasonably straight-forward manner. To proceed against inducing violations of sections 2(d) and 2(e) would appear merely to add another comparatively simple element to the *American Motor Specialties* type of 2(f) proceeding: that of adducing some evidence to show that the disproportionate allowance amounted to an indirect price discrimination.

The major difficulty with this type proceeding, so far as the Commission is concerned, is that it makes available to the defendant buyer, and places upon the Commission the burden of meeting, all the defenses to a section 2(a) action, besides the added 2(f) requirement of "knowing" inducement and receipt. This consideration alone would probably be sufficient to interest the Commission, to the end of maintaining a good enforcement record, in devising a simpler approach to attack inducement of 2(d) and 2(e) violations.

The second method of attack now available to the Commission was established by its victory in *Grand Union*.[83] The prima facie case in this type proceeding, as outlined by the Second Circuit, appears to

[80] American Motors Specialties Co. v. FTC, 278 F.2d 225 (2d Cir.), cert. denied, 364 U.S. 884 (1960).

[81] Mid-South Distributers v. FTC, 287 F.2d 512 (5th Cir.), cert. denied, 368 U.S. 838 (1961).

[82] Automatic Canteen Co. v. FTC, 346 U.S. 61 (1953).

[83] Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962).

be considerably simpler than the *American Motor Specialties* type 2(f) proceeding. Moreover, the defenses of cost justification and absence of injury to competition, which would be available to the buyer under the *American Motor Specialties* approach, do not appear available to the buyer in the *Grand Union* type case. As indicated above, however, the defense of good faith meeting of competition will be available, and the careful buyer should be able to make good use of it.

The third possible approach is that, suggested by the early section 2(f) cases and the Attorney General's Committee, of considering 2(f) as establishing a form of derivative liability, applicable directly to sections 2(d) and 2(e). The legality of this approach was left open in *Automatic Canteen*, and the Second Circuit in *Grand Union* again commented on its availability.[84] The Commission, however, has taken the position that

> Under section 2(a) it is unlawful to discriminate in prices between customers under certain circumstances where the effect may be substantially to lessen competition or tend to create a monopoly; and under section 2(f) it is unlawful knowingly to induce and receive such a discrimination.[85]

In view of the Commission's success in the *Grand Union*, *American News*[86] and *Giant Food*[87] cases, it is unlikely that the Commission will consider adopting the derivative liability theory. Moreover, since the Supreme Court has denied certiorari in the *American News* and *Giant Food* cases, the FTC has added authority, in a negative sense, to continue to use its *Grand Union* approach.

A derivative liability theory, however, would appear to be more in keeping with the general scheme of enforcement of the antitrust laws, since it would avoid the danger inherent in the *Grand Union* type approach that Section 5 of the Federal Trade Commission Act will overlap into, or even obliterate, the other provisions of the Clayton Act in less extreme cases than *Grand Union*. The initial problem with the derivative theory, of course, is that it has never been judicially tested and approved, the question merely being regarded as open. In view of its signal success in the *Grand Union* case, this is a problem the Federal Trade Commission will undoubtedly have little interest in attempting to solve.

---

[84] Id. at 95.

[85] 1961 FTC Ann. Rep. 37.

[86] American News Co. v. FTC, 300 F.2d 104 (2d Cir.), cert. denied, 371 U.S. 824 (1962).

[87] Giant Food Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), cert. denied, 372 U.S. 910 (1963).