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RECENT JUDICIAL EFFORTS TO RECONCILE THE ROBINSON-PATMAN ACT WITH THE SHERMAN ACT

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I. INTRODUCTION

Antitrust commentators and task forces long have scored the Robinson-Patman Act[1] (Act) as being in conflict with Sherman Act[2] policy favoring vigorous price competition.[3] Much of the criticism has been directed at Federal Trade Commission and court proceedings under the Act involving sellers' price discriminations challenged as injurious to competition with other sellers. Such cases were known as "primary line cases."[4]

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[1] The Robinson-Patman Act, enacted in 1936, amended the Clayton Act. 15 U.S.C. § 13 (1976). The Act prohibits a seller from discriminating in price between different purchasers in interstate sales of commodities of like grade and quality "where the effect of such discrimnation 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" either the grantor or knowing recipient of the discrimination or with their customers. *Id.* § 13(a). The Act provides several complete defenses to a prima facie case of price discrimination. A price differential is not illegal if it makes "only due allowance for differences in the cost of manufacture, sale, or delivery" resulting from "differing methods or quantities" of sale or delivery; if the differential resulted from "price changes . . . in response to changing conditions affecting the market for or the marketability of the goods concerned;" or if the "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." *Id.* § 13(a),(b). Other sections forbid the payment or receipt of certain types of brokerage or discounts in lieu thereof, *id.* § 13(c); require that payments for services or facilities furnished by a customer or the furnishing of services or facilities to customers be provided on proportionally equal terms to all competing customers, *id.* § 13(d); and make it unlawful for a buyer to knowingly induce or receive a prohibited price discrimination. *Id.* § 13(f).

[2] 15 U.S.C. § 1 (1976).

[3] The basic policy promoted by the Sherman Act in the area of pricing finds expression in the rule against pricefixing. Under the restraint of trade provision in § 1, any "interference with the setting of price by free market forces is unlawful *per se*." United States v. Container Corp., 393 U.S. 333, 337 (1969). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." Northern Pac. R. Co. v. United States, 356 U.S. 1, 4 (1958).

[4] The Act protects competition at the seller level (which includes the discriminator and its competitors) (primary line) and at the buyer level as between competing purchasers from the discriminator (secondary line). The Act's protection of secondary line competition has been interpreted as reaching down to the fourth level of distribution, *i.e.*, customers of customers of customers of the seller. Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

The decisions in these cases were often attacked as condemning the very kind of procompetitive pricing conduct which the Sherman Act seeks to promote.[5] At the heart of the criticism was the failure of the Commission and the courts, in making their competitive effects analyses, to distinguish between procompetitive and anticompetitive price discriminations.

Conflict with Sherman Act pricing policy has also been perceived in other Robinson-Patman contexts. A line of court decisions interpreting the Act's meeting competition defense as warranting exchanges of price information among sellers[6] was criticized as encouraging price fixing.[7] And enforcement of the Act against buyers in bidding situations was said to have impeded "hard bargaining" between the seller and buyer.[8]

Attributing the conflicts to a Robinson-Patman protectionist philosophy at odds with antitrust's main thrust, and believing the Act fundamentally irreconcilable with Sherman Act policy, some critics have urged its repeal or amendment.[9] However, Congress has shown no inclination to repeal or reform the Act due to the fervent support Robinson-Patman traditionally has received from small businessmen, who regard it as their Magna Carta.[10] Three recent judicial developments indicate, however, that a substantial reconciliation of the Act with Sherman Act pricing policy may indeed be achieved through reinterpretation and without the need for congressional intervention.

The major breakthrough toward reconciliation is the line of decisions from three federal courts of appeals adopting a marginal-cost test for iden-

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[5] *See, e.g.*, UNITED STATES DEPARTMENT OF JUSTICE REPORT ON THE ROBINSON-PATMAN ACT 64-74 (1977) [hereinafter cited as JUSTICE REPORT]; REPORT OF THE WHITE HOUSE TASK FORCE ON ANTITRUST POLICY, 411 ATRR, Special Supplement—Part II (May 27, 1969) [hereinafter cited as NEAL REPORT]; REPORT OF THE TASK FORCE ON PRODUCTIVITY AND COMPETITION, 413 ATRR X-1 (June 10, 1969) [hereinafter cited as STIGLER REPORT]; R. BORK, THE ANTITRUST PARADOX, 382-94 (1978) [hereinafter cited as R. BORK]; Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967) [hereinafter cited as Bowman]; Liebeler, *Let's Repeal It*, 45 ANTITRUST L.J. 14, 27-31 (1976) [hereinafter cited as Liebeler].

[6] *See* Gray v. Shell Oil Co., 469 F.2d 742 (9th Cir. 1972); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972); Webster v. Sinclair Ref. Co., 338 F. Supp. 248 (S.D. Ala. 1971); Wall Prod. Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971); Di-wall, Inc. v. Fibreboard Corp., 1970 TRADE CAS. ¶ 73,155 (N.D. Cal. 1970).

[7] *See* JUSTICE REPORT, *supra* note 5, at 60-61 (testimony of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). *See also* United States v. United States Gypsum Co., 98 S.Ct. 2864 (1978) (Court rejected defense argument that interseller price verification undertaken to establish meeting competition defense could not be basis of § 1 Sherman Act price fixing charge); text accompanying notes 13-16 *infra*.

[8] *E.g.*, Kroger Co. v. FTC, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); Great Atl. & Pac. Tea Co. v. FTC, 557 F.2d 971 (2d Cir. 1977), *rev'd*, 99 S.Ct. 925 (1979).

[9] JUSTICE REPORT, *supra* note 5, at 260-93; NEAL REPORT, *supra* note 5, at x-3, 9-10, App. C; STIGLER REPORT, *supra* note 5, at x-1, 8; R. BORK, *supra* note 5, at 395; Liebeler, *supra* note 5, at 43.

[10] RECENT EFFORTS TO AMEND OR REPEAL THE ROBINSON-PATMAN ACT, A REPORT OF THE AD HOC SUBCOMMITTEE ON ANTITRUST, THE ROBINSON-PATMAN ACT, AND RELATED MATTERS OF THE COMMITTEE ON SMALL BUSINESS, HOUSE OF REPRESENTATIVES, H.R. REP. No. 94-1738, 94th Cong., 2d Sess. 1 (1976).

tifying anticompetitive price discriminations.[11] This standard, first proposed in 1975 by Professors Areeda and Turner of the Harvard Law School,[12] addresses the principal source of the statutory conflict, the determination of a price discrimination's probable effect on competition in primary line cases.

Another significant step toward a judicial reconciliation of the statutes is the Supreme Court's landmark decision in *United States v. United States Gypsum Co.*[13] accommodating Robinson-Patman's meeting competition defense to Sherman Act price-fixing doctrine. A line of lower court decisions had held that sellers charged with price fixing under the Sherman Act for exchanging price information could avoid liability by showing that the exchanges were made for the purpose of complying with the Robinson-Patman Act.[14] In these cases such an exchange allegedly took place when a seller seeking to come under the Act's meeting competition defense requested verification of a customer's report of a lower price offer directly from the competitor who had made the offer. The courts held that in certain circumstances direct verification was warranted and constituted a "controlling circumstance" precluding liability under the Sherman Act. This "Robinson-Patman defense to a Sherman Act charge" was sharply criticized as encouraging sellers to exchange price information for the purpose of fixing prices.[15] Agreeing with the government as to "the proper accommodation of the Sherman and Robinson-Patman Acts," the Supreme Court in *Gypsum* rejected the defense, holding that price verification could be obtained by means short of contacting competitors.[16]

Finally, the Supreme Court has just relaxed Robinson-Patman's restraints on seller-buyer price bargaining by holding that if the seller be-

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[11] Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied*, 99 S.Ct. 103 (1978); Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); International Air Indus. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

The *Janich Bros.* decision was preceded in the Ninth Circuit by Hanson v. Shell Oil Co., 541 F.2d 1352 (9th Cir. 1976), which dealt only with a Sherman Act claim against predatory conduct. The *Hanson* case furnished the basis for the government's abandonment of companion monopoly suits in the tire industry. *See* Memorandum for the Attorney General, Re: United States v. Firestone Tire & Rubber Co., Civ. C-73-836; United States v. Goodyear Tire & Rubber Co., Civ. C-73-835 (N.D. Ohio 1976), *reprinted in* 5 TRADE REG. REP. (CCH) ¶ 50,259 (Feb. 23, 1976).

Several district courts also have applied the marginal-cost test in Robinson-Patman and Sherman Act litigation involving claims of predatory pricing. *E.g.*, Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410 (N.D. Cal. 1978) (Robinson-Patman Act); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978) (Sherman Act); Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N. D. Cal. 1978) (Sherman Act); Weber v. Wynne, 431 F. Supp. 1048 (D.N.J. 1977) (Sherman Act).

[12] Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) [hereinafter cited as Areeda & Turner].

[13] 98 S.Ct. 2864 (1978).

[14] *See* note 6 *supra*.

[15] *E.g.*, JUSTICE REPORT, *supra* note 5, at 60-61 (testimony of Thomas E. Kauper, Assistant Attorney General, Antitrust Division).

[16] 98 S.Ct. at 2879-84.

lieves its price is only meeting competition, the buyer cannot be liable under the Act if it knew the seller's price undercut competitors' offers.[17] The Commission and the Second Circuit had ruled that in such situations the seller, but not the buyer, was protected by the meeting competition defense.[18]

This article will focus on recent decisions adopting the marginal-cost rule as the appropriate standard for identifying anticompetitive price discriminations in Robinson-Patman primary line cases. The principal objectives will be to demonstrate the prior failure of competitive effects analysis in primary line cases, and to describe and analyze judicial application of the marginal-cost test in the specific factual settings presented by the cases. While no attempt will be made to evaluate the new standard under economic criteria, a task far better left to the economists, it will be argued that in terms of Robinson-Patman administration such a standard offers both an appropriate and workable route to the desired reconciliation with the Sherman Act.

II. Relevant Background

Price discrimination in sales of commodities was first singled out for express prohibition as an antitrust violation in the Clayton Act of 1914.[19] That statute represented a congressional response to perceived inadequacies in the Sherman Act following the Supreme Court's historic decisions in *Standard Oil Co. v. United States*[20] and *United States v. American Tobacco Co.*[21] A widespread belief existed at the time that the great trusts had employed the predatory practice of localized below-cost price cuts, subsidized by higher prices in other areas, to drive smaller, local competitors into bankruptcy.[22] Believing the Sherman Act inadequate to stop the practice before monopoly was achieved or imminent, Congress enacted the Clayton Act to reach such predatory price discriminations "in their incipiency" before actual harm to competition had resulted.[23] In section 2 of

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[17] Great Atl. & Pac. Tea Co. v. FTC, 99 S.Ct. 925 (1979).

[18] Great Atl. & Pac. Tea Co. 87 F.T.C. 962 (1976), *aff'd*, 557 F.2d 971 (2d Cir. 1977), *rev'd*, 99 S.Ct. 925 (1979).

[19] Clayton Act, ch. 323, 38 Stat. 730 (1914).

[20] 221 U.S. 1 (1911).

[21] 221 U.S. 106 (1911).

[22] According to the House Report on the bill which became the Clayton Act, "Section 2 of the bill" was "expressly designed with the view of correcting and forbidding . . . [a] . . . common practice of great and powerful combinations engaged in commerce — notably the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence — to lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. . . ." H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914). The Clayton Act background and the legislative history of the Robinson-Patman Act are extensively treated in F. Rowe, Price Discrimination Under the Robinson-Patman Act, 3-23 (1962) [hereinafter cited as F. Rowe].

[23] *See* Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 738 (1945).

the Clayton Act, Congress made it unlawful for a seller to discriminate in price between different purchasers in interstate sales 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."[24]

While section 2 of the original Clayton Act was primarily aimed at price discriminations injurious to competition at the seller line of commerce (primary line competition), it also applied to discriminations harmful to competition at the buyer line (secondary line competition), although it took a Supreme Court decision to establish the Act's coverage of secondary line competition.[25] But even then the Act contained serious deficiencies which greatly reduced its effectiveness.[26] When during the 1920's and 30's the Act proved inadequate to stem the rapid growth of the retail food chains, which were believed to be the beneficiaries of preferential prices from suppliers, the independent wholesalers and retailers which were threatened by the chains' expansion looked to Congress for relief. In 1936 Congress responded with passage of the Robinson-Patman Act.[27] Amending section 2 of the Clayton Act, the new Act strengthened that section's prohibition of price discrimination by, among other things, adding a second competitive effects clause.[28] The new Act also added sections forbidding "concealed" price discriminations in the form of allowances, services or brokerage, and added a section imposing liability on buyers who knowingly induce or receive prohibited price discriminations. While the Robinson-Patman Act was mainly oriented toward the protection of secondary line competition, it also continued the Clayton Act's prohibition of price discriminations injurious to primary line competition.[29] Most of Robinson-Patman's clashes with the Sherman Act have occurred in cases involving price discriminations alleged to be injurious to primary line competition.

III. CONFLICT AND ACCOMMODATION

A. *The Conflict*

Economists are generally agreed that some types of price discrimination promote competition. Indeed, it has been said: "In the vast majority

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[24] F. ROWE, *supra* note 22, at 6 n.9.

[25] George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).

[26] The principal deficiencies were the Act's inapplicability to price differentials based on quantity differences and its requirement of a showing of general injury to competition in the proof of a prima facie case of price discrimination. *See* F. ROWE, *supra* note 22, at 7, 14-15.

[27] *See id.* at 8-23.

[28] With the addition of the second competitive effects clause, a price discrimination became *prima facie* illegal where either the effect "may be substantially to lessen competition or tend to create a monopoly in any line of commerce" (the original § 2 language) *or* where the effect may be "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) (1976).

[29] *See* FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 544 (1960).

of situations, discriminatory price-cutting — insofar as primary line competition is concerned — will be profitable to the firm concerned and procompetitive."[30]

Two types of price discrimination — sporadic, selective price concessions to retain or gain customers and localized, areawide price cut to gain entry in a new market — are regarded as particularly effective means of stimulating competition. Yet both types have been condemned as to particular sellers and rendered legally hazardous as to all sellers in decisions under the Robinson-Patman Act.

The competitive aspects of selective price concessions were described in the 1969 Report of the White House Task Force on Antitrust Policy:

> In highly concentrated markets, prices may be rigid and a seller may hesitate to announce price reductions which would be met immediately by competitors, thus minimizing the seller's increase in sales. But he may be prepared to make concessions to make sales to particular buyers. Where such price reductions are sporadic and not part of a systematic pattern favoring large purchasers, they may be the first step toward more general price reductions.[31]

Professor Adelman has said of this type of price discrimination: "*Sporadic, unsystematic* discrimination is one of the most powerful forces of competition in modern industrial markets. Like a high wind, it seizes on small openings and crevices in an 'orderly' price structure and tears it apart."[32] In Professor Elzinga's view:

> To the extent the cartelist is prevented by the antitrust laws from cutting a price to a selected buyer, for fear of the Robinson-Patman Act violation, the cartel has a simpler job of maintaining internal discipline stability, to the benefit of the price-fixers and the detriment of the industry's consumers.[33]

This was essentially the kind of selective price cutting condemned by the Seventh Circuit in *Holleb & Co. v. Produce Terminal Cold Storage Co.*[34] Plaintiff Holleb was a new entrant in the Chicago wholesale frozen food distribution market, while the defendant Produce Terminal was the leader in the market. Two years after entry, Holleb's sales had increased from 0 to $1.3 million, almost 40% beyond its initial projection. However, Holleb experienced substantial out-of-pocket losses and failed to attract away from Produce Terminal some large customers to whom the latter had granted rebates. Holleb brought suit against Produce Terminal alleging various antitrust violations, including price discrimination in violation of

[30] Areeda & Turner, *supra* note 12, at 728.

[31] NEAL REPORT, *supra* note 5, at 9.

[32] Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1331-32 (1948) (emphasis in original).

[33] JUSTICE REPORT, *supra* note 5, at 50-51 (statement of Professor Kenneth G. Elzinga).

[34] 532 F.2d 29 (7th Cir. 1976).

the Robinson-Patman Act.[35]

The record and briefs show that the rebates to particular customers challenged by Holleb ranged from 1% to 2% (Holleb's catalog prices were lower than Produce Terminal's). Produce Terminal's prices were not shown to be below cost; more favorable purchasing arrangements with suppliers apparently were responsible for its ability in some instances to undersell Holleb. As a new entrant with heavy start-up costs, Holleb's initial losses were not unusual and, in fact, had been anticipated by Holleb. While Holleb enjoyed substantial sales and market share growth during the first two years after entry, during the same period Produce Terminal's sales declined by nearly $3 million.

After trial, the Robinson-Patman and various other claims were submitted to a jury, which failed to reach a verdict. Subsequently, the district court dismissed the claims.[36] On appeal, the Seventh Circuit reversed as to the Robinson-Patman claim, holding:

> From the evidence in the record, a jury could conclude that where Holleb and Produce Terminal were competing for the same customers and where the defendant violated the Clayton Act to obtain and retain customers, an injury to primary line competition would result.[37]

Thus, price competition between sellers "to gain and retain customers," the very market condition which Sherman Act pricing doctrine seeks to promote, was held to be a Robinson-Patman violation.

Localized, area-wide price-cutting by a seller seeking to expand into new markets, has been described as "one of the most efficient means of competitive promotion."[38] Indeed, as explained in the Neal Report, such limited price cutting may be necessary to gain entry.

> A new or potential entrant to a market may find it necessary to reduce prices below those of his competitors in particular cases in order to overcome the inertia of established trade relationships. But the prospective seller may be reluctant to do so if he must make corresponding reductions to all other purchasers, and he may decide not to enter.[39]

To the extent the Robinson-Patman Act is interpreted to forbid or discourage such geographically limited price reductions, the Act becomes a barrier to entry. Yet, the Supreme Court so interpreted the Act to sustain a jury's finding of Robinson-Patman violation in *Utah Pie Co. v. Continental Baking Co.*[40] There, the plaintiff Utah Pie Co., a maker of baked pies

[35] *Id.* at 33-34.
[36] *See id.* at 31.
[37] *Id.* at 35.
[38] Cooper, *Price Discrimination Law and Economic Efficiency*, 75 MICH. L. REV. 962, 975 (1977).
[39] NEAL REPORT, *supra* note 5, at 9.
[40] 386 U.S. 685 (1967).

in Salt Lake City, added frozen pies to its product line and quickly achieved a 66.5% share of the Salt Lake City market. The defendants, three national concerns, had minor shares of that market and were substantially in the position of new entrants. In an effort to improve their shares of the market, the defendants reduced their prices to levels below their prices in other areas. During the relevant period, Utah Pie's market share declined to 45.3%, but it increased its sales, continued to be profitable, and remained the leader in the market.[41] Despite enhanced competition in the frozen pie market due to the defendants' pricing tactics, the Supreme Court held that the jury was warranted in finding competitive injury.[42]

This is not to suggest, however, that price discrimination can never be harmful to primary line competition. Where entry barriers are high, a powerful multi-market seller could drive smaller, local rivals out of the market with drastic, below-cost price reductions, and thereafter raise its prices to non-competitive levels. But economists generally are agreed that proven cases of predatory price discrimination of this kind are extremely rare.[43] A number of economic studies have shown that reputed predators either had not engaged in such conduct or, where they had, it had produced no significant anticompetitive effects. For example, in a celebrated study of the 1911 *Standard Oil* case, Professor McGee found that Standard Oil had not actually employed predatory, localized price cuts in achieving monopoly power.[44]

Nevertheless, many economists believe that the danger of predatory price discrimination does exist, and that this danger is a proper concern of antitrust legislation and policy.[45] On the other hand, they view price discriminations which are not predatory, that is, discriminations which do not involve drastically below-cost prices intended to cripple or destroy a smaller competitor, as usually more beneficial than harmful to competition.[46]

B. *Source of the Conflict: The Failure of Robinson-Patman Primary Line Injury Analysis*

In construing Robinson-Patman's competitive effects language, the courts have stressed that "the statute does not require that the discriminations must in fact have harmed competition, but only that there is a

[41] *Id.* at 689.

[42] *Id.* at 702-03.

[43] *See, e.g.*, Areeda & Turner, *supra* note 12, at 699.

[44] McGee, *Predatory Price Cutting: The* Standard Oil *(N.J.) Case*, 1 J. OF L. & ECON. 137 (1958).

[45] R. POSNER, THE ROBINSON-PATMAN ACT 15 (1976) [hereinafter cited as R. POSNER]; Areeda & Turner, *supra* note 12, at 697.

[46] R. BORK, *supra* note 5, at 395, 398; R. POSNER, *supra* note 45, at 12-15; Areeda & Turner, *supra* note 12, at 728.

reasonable possibility that they 'may' have such an effect."[47] What is required of the FTC and the courts, then, is a prediction of a discrimination's likely future effects on competition. The process of prediction involves the drawing of inferences from contemporary data pertaining to the discrimination. The difficulty of the task was explained in *United States v. Philadelphia National Bank*[48] with respect to the similar competitive effects language of section 7 of the Clayton Act pertaining to mergers:

> Clearly, this is not the kind of question which is susceptible of a ready and precise answer in most cases. It requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future. . . .[49]

For nearly forty years, from 1936 to 1975, the FTC and the courts struggled to make the required prediction of the competitive consequences of challenged price discriminations. Their effort was severely handicapped by the absence of meaningful and workable standards for distinguishing between pro and anticompetitive price discriminations in a primary line context.

Most of the primary line cases resulting in ultimate liability involved price discriminations found to be predatory.[50] Predation was found either by direct evidence of the discriminator's intent or inferentially from below-cost prices. Cases of the latter type involved a double inference: "From below-cost pricing, predatory intent is inferred; from the finding of predation, injury to competition is inferred."[51] This line of cases failed to produce, however, any well-defined meanings for the terms "predatory" and "below-cost."

Standards applied by the FTC in cases involving discriminations which were not predatorily motivated proved faulty or unworkable. At one time the Commission equated the temporary diversion of business from competitors to the discriminator with injury to competition. Commission findings of injury based on this standard were made in *Minneapolis-Honeywell Regulator Co.*[52] and *Anheuser-Busch, Inc.*,[53] but the findings were set aside on appeal.[54] In *Anheuser-Busch*, the court noted that diversion of business

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[47] *See* Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 738 (1945).

[48] 374 U.S. 321 (1963).

[49] *Id.* at 362.

[50] *E.g.*, Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97 (10th Cir.), *cert. denied*, 414 U.S. 975 (1973); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957); E.B. Mueller & Co. v. FTC, 142 F.2d 511 (6th Cir. 1944); Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied*, 279 U.S. 858 (1929).

[51] Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[52] 44 F.T.C. 351 (1948).

[53] 54 F.T.C. 277 (1957).

[54] Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), *cert.*

from one seller to another is inevitable in the competitive process and, indeed, is the very essence of competition.[55]

A more elaborate formula for assessing the injury potential of a discrimination was devised by the Commission in the 1965 *Dean Milk Co.* case.[56] There, the Commission stated that a finding of possible injury to primary line competition is warranted in the absence of predation upon a showing of significant diversion of business from competitors or a reduction in their profits, provided that these portend a financial crippling of competitors or structural changes in the market.[57] But findings of the Commission based on the application of this complex and speculative test did not hold up on appeal.[58]

The failure of primary line injury analysis during the pre-1975 period is dramatically demonstrated by the Supreme Court's opinion in *Utah Pie Co. v. Continental Baking Co.*[59] Plaintiff Utah Pie was a local maker of baked pies in Salt Lake City which added frozen pies to its line. The defendants, three national concerns, were already in the market. With entry prices lower than the defendants', and the advantage of being a local concern, plaintiff quickly achieved dominance with a 66.5% share of the market. The defendants, who had been reduced to minor market shares, sought to improve their positions by reducing their prices. Vigorous price competition ensued in which each party took the initiative in cutting prices, although plaintiff's prices were the lowest most of the time. The defendants' reductions made their prices in Salt Lake City lower than in other areas in which they did business, which formed the basis of plaintiff's claim of geographic price discrimination. With a substantial increase in the total volume of frozen pie sales during the relevant period, plaintiff's sales more than doubled, it realized a profit each year, and its net worth doubled. Although its market share declined to 45.3%, plaintiff remained the leader in the market.[60]

Desite this evidence of competitive health in the market, the Supreme Court upheld a jury verdict finding defendants in violation of the Robinson-Patman Act. The Court held that the jury's finding that defendants' price discriminations had the requisite ill-effect on competition was supported by the evidence. First, the Court said there was evidence from which the jury could attribute a predatory intent to each defendant, including evidence of below-cost sales by each of them.[61] Second, the Court held that, even absent the element of predation, the jury's finding of competitive injury was supported by the evidence of a "drastically declining

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dismissed, 344 U.S. 206 (1952); Anheuser-Busch, Inc. v. FTC, 289 F.2d 835 (7th Cir. 1961) (decision after remand from Supreme Court).

[55] Anheuser-Busch, Inc. v. FTC, 289 F.2d 835, 840 (7th Cir. 1961).

[56] 68 F.T.C. 710 (1965).

[57] *Id.* at 750.

[58] Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968).

[59] 386 U.S. 685 (1967).

[60] *Id.* at 692-701.

[61] *Id.* at 702.

price structure" in the market, which could be attributed to the defendants' price discriminations.[62]

The decision evoked immediate and caustic criticism. One critic labeled the decision "the most anticompetitive antitrust decision of the decade."[63] The Court was faulted for failing to furnish an "intelligible rationale" of primary line injury,[64] and for resolving the injury issue on the basis of the discrimination's impact on an individual competitor.[65] The Court's failure to define a "below-cost" price, which it cited as evidence of predation, was criticized,[66] as was the Court's reliance on declining prices in the market (generally regarded as the hallmark of effective competition) as evidence of the anticompetitive potential of the discriminations.[67]

Utah Pie's legacy was conflict and chaos. Pricing tactics which had broken a local monopoly, while leaving the former monopolist a viable and effective competitor, were condemned as a Robinson-Patman violation. Lower courts were left free to infer predatory intent, and from that to infer competitive injury, from price discriminations involving prices below cost under any accounting standard. Sellers seeking to gain market entry through localized price reductions were placed in jeopardy whenever local competitors were likely to meet their prices and bring down the market price. As if to underscore the confusion, in a subsequent primary line case before the FTC,[68] the five commissioners split four ways on probable competitive effect, with all drawing "support from the *Utah Pie* opinion."[69]

C. *The Areeda and Turner Proposal*

Eight years after the *Utah Pie* decision, Professors Areeda and Turner published their article in the Harvard Law Review which applied the analytical tools of economics to the predatory pricing question in the context of both Sherman Act section 2 and Robinson-Patman primary line injury.[70] Observing that "[a] firm which drives out or excludes rivals by selling at unremunerative prices is not competing on the merits, but engaging in behavior that may properly be called predatory,"[71] they proposed cost-based rules with marginal cost as the touchstone for distinguishing between predatory and competitive pricing.[72]

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[62] *Id.* at 703.

[63] Bowman, *supra* note 5, at 84.

[64] Austern, *Presumption and Percipience About Competitive Effect Under Section 2 of the Clayton Act*, 81 HARV. L. REV. 773, 784 (1968) [hereinafter cited as Austern].

[65] Bowman, *supra* note 5, at 73.

[66] R. POSNER, *supra* note 45, at 38.

[67] JUSTICE REPORT, *supra* note 5, at 69 (statement of Paul H. LaRue).

[68] National Dairy Prod. Corp., 71 F.T.C. 1333 (1967), *modified*, 412 F.2d 605 (7th Cir. 1969).

[69] Austern, *supra* note 64, at 784.

[70] Areeda & Turner, *supra* note 12.

[71] *Id.* at 697.

[72] *Id.* at 732-33. Announcement of the Areeda and Turner marginal cost rules evoked a spirited debate in the pages of the Harvard Law Review. *See* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Areeda & Turner, *Scherer on*

Professors Areeda and Turner point out that "the classically-feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition."[73] Two prerequisites for successful predation, they note, are the predator's greater financial staying power than its rivals and the existence of very high entry barries.[74]

Professors Areeda and Turner conclude that "marginal-cost pricing is the economically sound division between acceptable, competitive behavior and 'below-cost' predation."[75] Because the worst case is thereby presented, the test is to be applied to a "monopolist."[76] Under the test, a monopolist should not be considered to be acting predatorily when pricing at or above marginal cost. Marginal-cost pricing is tolerable for the reasons, among others, that it "leads to a proper resource allocation and is consistent with competition on the merits."[77] On the other hand, "as a general rule, a monopolist pricing below marginal cost is engaged in a predatory or exclusionary practice."[78] Such a firm is incurring some out-of-pocket losses, it is wasting social resources "when marginal costs exceed the value of what is produced," and the possibility is greatly increased that "rivalry will be extinguished or prevented for reasons unrelated to the efficiency of the monopolist."[79] An exception is recognized when marginal cost exceeds average cost, in the unusual situation in which the monopolist is seeking to meet excess demand, since any adverse effect probably would be minimal.[80]

Predatory Pricing: A Reply, 89 HARV. L. REV. 891 (1976). Other criticism appeared in Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977) and R. POSNER, ANTITRUST LAW 189 (1976).

Professors Areeda and Turner subsequently published their marginal-cost rules, with some modifications, in their text on antitrust law. P. AREEDA & D. TURNER, III ANTITRUST LAW 150-91 (1978) [hereinafter cited as P. AREEDA & D. TURNER]. The subsequent discussion of the rules in this article is cited to this text.

[73] P. AREEDA & D. TURNER, *supra* note 72, at 151.

[74] *Id.*

[75] *Id.* at 172. "Marginal cost" is defined as "the increment to total cost that results from producing as additional increment of output." *Id.* at 155.

[76] Professors Areeda and Turner explain their use of the term "monopolist" on the basis that "without *both* greater staying power than potential victims *and* the prospect of achieving and exploiting a monopoly, predation would ordinarily be irrational and may therefore be presumed absent, unless a contrary showing is made." *Id.* at 153 n.11. Thus, Areeda and Turner conclude:

> If the Sherman Act is properly interpreted to permit a monopolist to discriminate in price so long as his lower price equals or exceeds marginal cost, such discrimination is a fortiori permissible for firms with lesser degrees of market power, and the Robinson-Patman Act should be interpreted no differently in primary-line cases unless the statutory language or compelling legislative history dictates otherwise.

Id. at 190. They see neither statutory language nor compelling legislative history which would dictate a different interpretation. *Id.*

[77] *Id.* at 168-69.

[78] *Id.* at 169.

[79] *Id.*

[80] *Id.*

In applying these rules, future costs rather than past accounting costs may be employed. Due to the difficulty of ascertaining a firm's marginal cost from ordinary business records, "average variable cost" is used as a substitute.[81] The test is then put as follows:

> (2)(A) A price at or above reasonably anticipated average variable cost should be presumed lawful.
> (B) A price below reasonably anticipated average variable cost should be conclusively presumed unlawful.[82]

Professors Areeda and Turner would apply the test to "price discrimination, whether between different geographic markets or in the same market, except that a monopolist should have the benefit of any defenses—such as 'promotional' pricing or 'meeting competition'—available to other sellers in any market in which he lacks monopoly power."[83]

D. *Judicial Adoption of the Test*

The courts have been quick to adopt the Areeda and Turner test both for Sherman Act section 2 and Robinson-Patman primary line injury analysis. To date, the courts of appeals of three federal circuits (Fifth, Ninth and Tenth)[84] and several district courts have applied the test.[85]

The rulings of the courts of appeals are revealing on a number of significant matters in evaluating the future course of primary line adjudications under the Act. First, there are differences among the circuits as to the force to be given proof, or the absence of proof, of sales below average variable cost. Second, the plaintiff in such a case is likely to have a difficult, but not impossible, task of obtaining the necessary cost data. Third, "direct evidence" of predatory intent, such as memoranda recommending action to reduce a competitor's profitability, will be given little or no weight by the courts. Finally, if the three circuit court decisions are typical, only

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[81] *Id.* at 153-54. "Variable costs" are defined as "costs that vary with changes in output. They typically include such items as materials, fuel, labor directly used to produce the product, indirect labor such as foremen, clerks, and custodial help, use-depreciation, repair and maintenance, and per unit royalties and license fees. The average variable cost is the sum of all variable costs divided by output." *Id.* at 155.

[82] *Id.* at 154.

[83] *Id.*

[84] Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848 (9th Cir. 1977), *cert. denied,* 99 S.Ct. 103 (1978); Pacific Eng'r & Prod. Co. v. Kerr-McGee Corp., 551 F.2d 790 (10th Cir.), *cert. denied,* 434 U.S. 879 (1977); International Air Indus. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), *cert. denied,* 424 U.S. 943 (1976).

[85] *See, e.g.,* Inglis & Sons Baking Co. v. ITT Continental Baking Co., 461 F. Supp. 410 (N.D. Cal. 1978); ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Murphy Tugboat Co. v. Crowley, 454 F. Supp. 847 (N.D. Cal. 1978); Weber v. Wynne, 431 F. Supp. 1048 (D.N.J. 1977). *But see* Borden's, Inc., 3 TRADE REG. REP. (CCH) ¶ 21,490 (Nov. 7, 1978) (where strength of Borden's ReaLemon trademark created high entry barrier, Borden prices could be predatory even though above marginal-cost). Significantly, the *Inglis* decision, rendered by the Northern District of California after the Ninth Circuit's adoption of the marginal-cost test in *Hanson* and *Janich Bros.*, overruled a prior ruling in that case rejecting the test. 461 F. Supp. at 417 n.5.

rarely will a defendant's prices be shown to be below average variable cost and primary line injury found.

The Ninth Circuit's decision in *Janich Bros., Inc. v. American Distilling Co.*[86] most closely embraces the Areeda and Turner test. Although the issue of the test's applicability was faced directly only with respect to a Sherman Act claim, the decision inferentially holds the test applicable in a Robinson-Patman primary line injury context. In *Janich Bros.* the plaintiff had charged the defendant American Distilling with having sold liquor at below-cost prices in violation of Sherman Act section 2, and at geographically discriminatory prices in violation of that section and the Robinson-Patman Act. Janich complained that as a result of these practices it had been precluded from selling private label liquor to large chain stores, and had suffered a loss of customers and reduced sales to existing customers. American Distilling won a directed verdict on the Sherman Act claim, and a favorable jury verdict on the Robinson-Patman claim. The Ninth Circuit affirmed.

On appeal, Janich attacked primarily the directed verdict on the Sherman Act claim. Insofar as the directed verdict was based on geographic price discrimination, the court ruled, any error of the trial judge was harmless. Stating that Sherman Act section 2 and the Robinson-Patman Act have the same competitive effects requirement, the Ninth Circuit pointed out that since the jury in deciding the section 2(a) issue had found no substantial effect on competition, it necessarily would have reached the same result had the section 2 claim been submitted to it.[87]

With respect to the directed verdict's application to the issue of below-cost pricing, the court found that Janich had not produced sufficient evidence to go to the jury. Adopting the Areeda and Turner formulation almost without reservation, the court explained: "[A]n across-the-board price set at or above marginal cost should not ordinarily form the basis for an antitrust violation."[88] Since the only evidence of costs produced by Janich were price lists showing "cost of merchandise sold," which did not differentiate between fixed and variable costs, it was not possible to determine if American Distilling's prices were below average variable cost. Accordingly, the court held that a directed verdict had properly been entered for defendant American Distilling.[89]

The Fifth Circuit's adoption of the Areeda and Turner test in *International Air Industries v. American Excelsior Co.*[90] was limited to the proof necessary to sustain a plaintiff's motion for a directed verdict. There, the plaintiff Vebco had been a distributor of the defendant AMXCO's air conditioner pads in the El Paso-Las Cruces market. Vebco decided to enter the market with cooler pads of its own manufacture, and shortly thereafter challenged AMXCO, the dominant conern in the market, by reducing its

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[86] 570 F.2d 848 (9th Cir. 1977).

[87] *Id.* at 855.

[88] *Id.* at 857.

[89] *Id.* at 858-59.

[90] 517 F.2d 714 (5th Cir. 1975).

price. AMXCO responded with two succesive price cuts, both of which were met by Vebco. Unable to sustain the low price, based on a discount of 32.5%, Vebco increased its price and AMXCO eventually followed suit. Vebco then filed suit under Sherman Act section 2 and the Robinson-Patman Act. The crux of Vebco's complaint under the Robinson-Patman Act was that AMXCO's El Paso-Las Cruces prices were lower than its prices in other areas, resulting in geographic price discrimination. A jury found for AMXCO on both claims. The Fifth Circuit affirmed.

On appeal, Vebco's principal contention was that the district court had erred in refusing to direct a verdict in its favor on the Robinson-Patman claim. The Fifth Circuit first concluded that, absent predation, injury to competition could not be found. Citing AMXCO's market share decline, and the growth of Vebco and other competitors, it viewed the market as "far more competitive after the discrimination than before."[91] The diversion of business and loss of profits claimed by Vebco were rejected as indicia of primary line competitive injury.[92] As to the latter claim, the court stated that "[m]ere loss of profits shows no more than that Vebco was forced to charge a competitive price because it faced competition."[93]

The court in *International Air Industries* was equally unable to find predation. An AMXCO memorandum indicating a policy of "stunting" Vebco's growth was deemed insufficient.[94] The court stated that since the allegedly harmful conduct involved pricing, it was necessary to examine the relationship between AMXCO's prices and costs in order to determine whether its price behavior was predatory. To determine whether there was predatory pricing, the court proceeded to apply the Areeda and Turner analysis. Athough it felt the Areeda and Turner test should be relevant in determining whether a prima facie case of price discrimination has been proved, the court was concerned that the Supreme Court might have set a lesser standard in *Utah Pie* by its reference in that case to a "deteriorating price structure." Accordingly, the court limited its holding to the elements necessary to sustain a motion for a directed verdict,[95] ruling that:

> . . . in order to prevail as a matter of law, a plaintiff must at least show that either (1) a competitor is charging a price below his average variable cost in the competitive market or (2) the competitor is charging a price below its short-run, profit-maximizing price and barriers to entry are great enough to enable the discriminator to reap the benefits of predation before new entry is possible.[96]

While evidence of AMXCO's costs had not been "cogently" presented at trial, upon a "thorough examination" of the record the court of appeals

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[91] *Id.* at 722 n.14.
[92] *Id.* at 721-22.
[93] *Id.* at 722.
[94] *Id.* at 723.
[95] *Id.* at 724 n.30.
[96] *Id.* at 724.

determined that the trial judge had access to much of the relevant cost data.[97] Finding that AMXCO's prices were far above even its average cost, and that barriers to entry in the southwestern cooler pad market were virtually nonexistent, the court concluded that AMXCO's pricing had been procompetitive.[98]

The impact of the Areeda and Turner test on Robinson-Patman primary line injury analysis can best be measured by contrasting the facts and result of *International Air Industries* with those of *Holleb & Co. v. Produce Terminal Cold Storage Co.*[99] The plaintiff in each suit was a new entrant in the market who complained of discounting by the defendant to gain or retain customers for whose patronage both companies were competing. Both plaintiffs enjoyed sales and market share gains during the complaint period. Both complained of "diversion of business" and reduced or lost profits. The defendant in each case experienced either a decline in sales volume or market share. Despite substantially similar facts in each case, however, opposite results were reached.

The Tenth Circuit in *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*[100] seems to have been the most hesitant in embracing the Areeda and Turner test, stating only that evidence of marginal cost or average varible cost is "extremely beneficial" in establishing predatory pricing and adding that it was not adopting "a solely cost-based test."[101] There, the plaintiff Pacific Engineering and the defendant AMPOT were the two remaining competitors in the ammonium perchlorate industry, which during the relevant period was experiencing falling demand and excess capacity.[102] Following a period of price decline, Pacific Engineering—the smaller producer—filed suit against AMPOT alleging violation of Sherman Act section 2 and the Robinson-Patman Act. The district court entered judgment for Pacific Engineering on both claims.[103] The Tenth Circuit reversed. With respect to the Sherman Act section 2 charge, the Tenth Circuit stated that the fundamental issue was whether AMPOT had engaged in predatory price-cutting. Referring to the Areeda and Turner article, and to Professor Sherer's criticism of their proposed rules, the court expressed its belief that "evidence of marginal cost or average variable cost is extremely beneficial in establishing a case of monopolization through predatory pricing."[104] Pointing out that the trial court had found that AMPOT's sales were always at prices above average variable and marginal

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[97] *Id.* at 725.

[98] *Id.*

[99] 532 F.2d 29 (7th Cir. 1976).

[100] 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

[101] *Id.* at 797.

[102] Ammonium perchlorate is a chemical used almost exclusively as an oxidizer in solid rocket fuel that is purchased by missile manufacturers for NASA and the Department of Defense. Demand fell off when NASA converted from solid to liquid rocket fuel and defense appropriations were diverted from missile programs to the Viet Nam war effort. *Id.* at 791-92.

[103] 1974-1 TRADE CAS. ¶ 75,054 (D. Utah 1974).

[104] 551 F.2d at 797.

cost, and that various other "predatory" practices employed by AMPOT had inflicted no independent harm, the court ruled that AMPOT had not engaged in predatory pricing.[105]

The Robinson-Patman claim related to discrimination resulting from AMPOT's lower bid prices to large purchasers than its list prices to small purchasers. In disposing of this claim, the court stated that as it applies to primary line injury, the Robinson-Patman Act should be interpreted no differently than the Sherman Act.[106] The court then referred to the "double inference test." "From below cost pricing, predatory intent is inferred; from the finding of predation, injury to competition is inferred," and concluded that since the first inference was lacking, there was no basis for the second.[107]

The court acknowledged that its ruling led "to the somewhat untoward result that the larger of two competitors will survive while the smaller may expire."[108] However, this made no difference, since "[t]he Robinson-Patman Act was intended to provide small businesses with protection from abuses by large, powerful business, but legitimate price competition is not such an abuse."[109]

As of the date this article was written, the Areeda and Turner test had not been rejected by any circuit which had considered it. In the three circuits which have adopted the test, despite the different analytical approaches taken, it seems clear that plaintiffs in Robinson-Patman primary line cases will have to be prepared to show that the defendants' prices were below average variable cost. A modification of plaintiff's burden in the Fifth Circuit,[110] and possible modification in the Ninth Circuit,[111] is a showing that the defendant's price, while above average variable cost, was below its short-run profit-maximizing price and that entry barriers were exceedingly high. In the Tenth Circuit, the plaintiff may as an alternative show "other relevant factors" than pricing below average variable cost to establish that the defendant's prices were anticompetitive.[112]

Several common themes were sounded by the three circuits in the cases reviewed which have profound implications for the future course of Robinson-Patman enforcement. All three circuits have adopted the Areeda and Turner view that where a price discrimination threatens primary line injury, the Robinson-Patman Act and Sherman Act section 2 are directed at the same evil and have the same substantive content. Therefore, in such situations the two statutes are to be construed similarly.

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[105] *Id.*

[106] *Id.* at 798.

[107] *Id.*

[108] *Id.* at 799.

[109] *Id.*

[110] International Air Indus., Inc. v. American Excelsior Co., 517 F.2d at 714, 724 (5th Cir. 1975); *see* text accompanying notes 90-99 *supra*.

[111] Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976); *see* text accompanying notes 86-89 *supra*.

[112] 551 F.2d at 797.

The three circuits also agree that the antitrust laws—including the Robinson-Patman Act—were not intended to subsidize the inefficient. They are not to be enforced to shelter individual competitors against competition. Where a seller is pricing at a remunerative price, therefore, it is no concern of the antitrust laws that a less efficient competitor may suffer financial or customer losses or even be driven from the market.

Finally, the three circuits apparently will give little or no weight to "direct" evidence of predatory intent. At least where the issue is whether a directed verdict was properly entered, memoranda and oral statements manifesting aggressive designs against the plaintiff probably will be disregarded as showing only what the defendant might have done and not what it actually did.

E. *The Case for a Marginal-Cost Test*

The adoption of the Areeda and Turner test by three circuits presently reflects only a trend. To be sure, it is a strong trend since to date all federal circuits which have considered the test have adopted it. Nevertheless, the issue has not yet reached the Supreme Court and that Court's *Utah Pie* decision remains its last word on the subject of primary line injury.

A number of policy considerations recommend adoption of the marginal-cost test for Robinson-Patman primary line injury analysis. They relate to reconciliation of the Act both with economic teachings and with over-all antitrust policy.

A Meaningful distinction between pro and anticompetitive discrimination

The marginal-cost test is, first of all, meaningful in that it employs the tools of economics to distinguish between pro and anticompetitive price discriminations and proscribes only the latter. FTC and court devised injury standards such as "predatory intent," "below-cost," "diversion of trade," and "deteriorating price structure," having been formulated without reference to specific economic principles, are not useful in distinguishing between pro and anticompetitive price discriminations. Thus, in employing these criteria the FTC and the courts often have been led to the anomalous result of condemning procompetitive pricing.

The marginal-cost test is compatible with Robinson-Patman primary line coverage. In focusing on price discriminations which can realistically be deemed predatory by virtue of the discriminator's market power and willingness to sustain short-run losses, the test singles out for condemnation the very type of predatory price discrimination which was the main concern of Congress in enacting the original section 2 of the Clayton Act in 1914. Concern with the predatory type of price discrimination was even behind Congress' inclusion of a second competitive effects clause in the Robinson-Patman amendment of 1936. As explained by a congressional sponsor of the amendment, that clause was intended to make the Act apply where a large concern "with the use of discriminatory prices destroys and replaces the local concern as the competitor in the local field. Competition in the local field generally has not been lessened, since one competitor has been replaced by another; but competition with the grantor of the discrimination has been destroyed."[113]

Robinson-Patman's "incipiency" injury standard does not preclude use of a standard which recognizes only "predatory" discriminations; that is, price discriminations involving prices below marginal or average variable costs, as harmful to competition. As explained by Professors Areeda and Turner, "[I]f marginal-cost pricing cannot reasonably be construed as a 'lessening of competition,' the 'may be' issue is never reached."[114]

It might be contended that the marginal-cost test is incompatible with Robinson-Patman's populist goals.[115] The question of competitive injury is resolved under the test on the basis of corporate efficiency; competitive injury is recognized only when the discriminator's price has reached a below-cost level which injures equally efficient rivals. Under the test, competitive injury is not recognized when only less efficient competitors are harmed. The Robinson-Patman Act has been characterized, on the other hand, as intended to protect the small and weak against the large and powerful in the interest of maintaining an economy consisting of a large number of individual entrepreneurs.[116] Whatever may be said for this viewpoint, the antitrust laws—including the Robinson-Patman Act—were not intended to penalize competitive gains achieved through greater efficiency. As Judge Learned Hand taught us in *United States v. Aluminum Co. of America*,[117] a company has not violated the antitrust laws if monopoly power has been "thrust upon" it "by virtue of [its] superior skill, foresight and industry."[118] The Robinson-Patman Act itself excludes from its prohibitions price discriminations which are cost justified.

To the extent there may be any incompatibility, the Robinson-Patman Act must be accommodated to the Sherman Act. Supplemental legislation cannot be permitted to override the legislation to which it is subordinate. In its most recent decision under the Act, the Supreme Court reminded: "More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the anti-trust laws."[119]

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[113] 80 CONG. REC. 9417 (1936) (remarks of Rep. Utterbach).

[114] P. AREEDA & D. TURNER, *supra* note 72, at 190.

[115] For an excellent discussion of the populist values said to underlie the antitrust laws, see *Antitrust Policy—Populist Philosophy of Economic Necessity?*, Remarks by Hon. John H. Shenefield, Assistant Attorney General, Antitrust Division, before the Los Angeles County Bar Ass'n (Jan. 30, 1978).

[116] This viewpoint was expressed with respect to Clayton Act § 7 (mergers) in Brown Shoe Co. v. United States, 370 U.S. 294 (1962) where Chief Justice Warren pointed out that in enacting § 7, Congress desired "to promote competition through the protection of viable, small, locally owned businesses." *Id.* at 344. This statement has been criticized as an example of protectionist thinking representing an attack on efficiency which has no place in antitrust. Liebeler, *supra* note 5, at 70-71.

[117] 148 F.2d 416 (2d Cir. 1945).

[118] *Id.* at 430.

[119] Great Atl. & Pac. Tea Co. v. FTC, 99 S. Ct. 925, 933 n. 13 (1979) (citations omitted).

The test is workable

The Supreme Court has recognized that predictions of future competitive conditions based on appraisals of economic data are "most ill-suited for ascertainment by courts," which are "unequipped for it either by experience or by the availability of skilled assistance."[120] The marginal-cost test proposed by Professors Areeda and Turner furnishes just such a simplified and practical test of illegality, eliminating the need for a complex market analysis. Although certain market data must be produced concerning the relative size and financial strength of the discriminator, its prices and costs, and ease of entry into the market, basically a double inference process is used. In general, proof that the discriminator's price was below average variable cost will establish predatoriness which, in turn, will permit an inference of probable competitive injury. To be sure, the burden of proving the discriminator's costs falls upon the plaintiff. But the cases to date indicate that this should not present an insurmountable obstacle.

The test will help effect the desired statutory reconciliation

In legitimatizing area price-cuts down to the level of marginal cost, the marginal-cost standard greatly enlarges the scope of the seller's pricing freedom. Bereft of the fear of a Robinson-Patman violation, sellers will be encouraged to compete more vigorously for new markets and customers. The dynamics of the marketplace, rather than the constraints of the Robinson-Patman Act, will determine prices. Thus, greater harmony with section 1 of the Sherman Act will be achieved.

Harmony will also be achieved with section 2 of the Sherman Act. The marginal-cost standard is for use in determining predatoriness under both statutes. Professors Areeda and Turner justify this on the ground that "[t]he basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical."[121] The resulting statutory overlap is not without precedent in our system of antitrust laws; partial or complete overlap presently exists between Sherman Act section 1 and Clayton Act section 3 (exclusive dealing and tying clauses)[122] and between Sherman Act section 1 and Clayton Act section 7 (mergers).[123] Section 5 of the Federal Trade Commission Act is interpreted as embracing all prac-

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[120] Standard Oil Co. v. United States, 337 U.S. 293, 310 n.13 (1949). In a later case, the Court admonished with respect to the competitive effects test of Clayton Act § 7 (mergers), that where it is possible to do so without doing violence to the congressional objectives embodied in the statute, the courts should "simplify the test of illegality . . . in the interest of sound and practical judicial administration." United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 362 (1963).

[121] P. AREEDA & D. TURNER, *supra* note 72, at 190.

[122] *See, e.g.*, Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969) (application of Sherman Act § 1 to tying of loans to purchase of prefabricated houses).

[123] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963) (tests of illegality for mergers under the Sherman and Clayton Acts said to be complementary).

tices violative of the Sherman and Clayton Acts.[124] Of course, no overlap would exist with respect to Robinson-Patman's application to price discriminations affecting secondary line competition and to the Act's sections relating to brokerage, allowances, services and buyer liability. The protection of competition at the buyer level was, of course, the main purpose for which the Act was passed in 1936.

IV. CONCLUSION

Conflict between the Sherman and Robinson-Patman Acts has been frequently and convincingly demonstrated. Sound public policy dictates that the two statutes be brought into harmony. As supplemental legislation, it is the Robinson-Patman Act which must bear the burden of change. Given the strong support the Act enjoys in Congress, repeal or amendment do not appear to be viable solutions. Twice recently the Supreme Court has resolved conflicts between the two acts with accommodating interpretations of the Robinson-Patman Act. Professors Areeda and Turner and the courts adopting their test for identifying anticompetitive prices have shown the way toward elimination of the major source of conflict between the two statutes. Hopefully, other courts and, ultimately, the Supreme Court will make this further accommodation necessary to the achievement of a harmonious and rational antitrust policy with respect to pricing.

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[124] *See, e.g.*, Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 466 (1941); FTC v. Motion Picture Advertising Serv. Co., 344 U.S. 392, 394 (1953).