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Price Discrimination Under The Robinson-Patman Act: Fourth Line Injuries

CASE COMMENTS

PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT: FOURTH LINE INJURIES

The Robinson-Patman amendments to the Clayton Act[1] rendered unlawful any price discrimination[2] which would produce injury to competition. The amendments were the result of efforts to preserve the traditional distributional marketing system. Congress deemed essential the protection of the small independent merchant from anticompetitive activities of mass distributors and chain stores, whose low-price attraction to buyers was enchanced during the business crisis of the 1930's.[3] Since the passage of the Robinson-Patman Act in 1936, price discrimination practices of suppliers, in order to be actionable within the purview of the statute, must have produced injuries to

[1]Robinson-Patman Act, 15 U.S.C. § 13 (1964), *formerly* Clayton Act § 2, ch. 323, § 2, 38 Stat. 730 (1914). Section 1 of the Robinson-Patman Act is an amendment of section 2 of the Clayton Act. References to sections 2(a) and 2(d) are references to 15 U.S.C. §§ 13(a), 13(d) (1964). Discussion of congressional intention with respect to the Robinson-Patman Amendments provides that

> As originally conceived, the purposes of the Clayton Act's price discrimination provision was to forbid "great and powerful combinations... [from lowering]...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. 8-9 (1914) *as quoted in* Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing*, 13 ANTITRUST BULL. 767, 785-86 (1968).

[2]Describing Robinson-Patman price discrimination, the Supreme Court has said:

> ...there are no overtones of business buccaneering in the § 2(a) phrase "discriminate in price." Rather, a price discrimination within the meaning of that provision is merely a price difference....
>
> ..."selling the same kind of goods cheaper to one purchaser than to another."

FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). *See also* FTC v. Morton Salt Co., 334 U.S. 37, 45 (1948); Armour & Co. v. United States, 402 F.2d 712, 719 (7th Cir. 1968); Dean Milk Co. v. FTC, 395 F.2d 696, 702 (7th Cir. 1968); Borden Co. v. FTC, 381 F.2d 175, 177 (5th Cir. 1967); Scott Publishing Co. v. Columbia Basin Publishers, Inc., 293 F.2d 15, 24 (9th Cir. 1961); Shore Gas & Oil Co. v. Humble Oil & Refin. Co., 224 F. Supp. 922, 925 (D.N.J. 1963); Bolick-Gillman Co. v. Continental Baking Co., 206 F. Supp. 151, 158 (D. Nev. 1961); Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353 (E.D.N.Y. 1960).

[3]F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3 (1962).

competition within three lines of distribution.[4] Hertofore, the so-called "fourth line" injury[5] has neither been defined, nor as a matter of law, been held to be within the scope of the Act.[6]

However, in *Perkins v. Standard Oil Co.*,[7] a private treble damage suit, the Supreme Court reinstated a judgment against Standard Oil Company of California (Standard) for price discrimination and its injurious effect upon the competitive strength of its customer, Clyde A. Perkins. The factual context in which this case arose gave definition and legal status to the fourth line injury.

The parties indicated in their briefs[8] that from 1945 to 1957 Perkins, an "independent" dealer, had purchased substantially all of the gasoline for his service stations from Standard.[9] Standard's gasoline price during the specific period in question, 1955-1957, was higher to Perkins than it was to Standard's own branded dealers, who were in direct competition with Perkins. But more importantly, the price was higher to Perkins than to Signal Oil & Gas Co. whose subsidiary's subsidiary, Regal Stations Co. (Regal), was also in competition with Perkins. The issue was whether a Robinson-Patman action for price discrimination was obstructed by the remoteness of Regal from Standard in the distributional chain.[10] (See Figure I, page 106.) The level of dis-

[4]*I.e.,* (i) competition with the supplier, (ii) the favored purchaser, or (iii) customers of either of them. See discussion of the three lines of injury in text accompanying notes 41-64 *infra*.

[5]A fourth line injury is the anticompetitive effect on the business of a supplier's disfavored purchaser which is manifest in a certain way. The supplier's price discrimination benefits to its favored purchaser are passed on to allow the customer of the customer of the favored purchaser (the fourth line distributor) to offer a lower price than the disfavored purchaser can offer.

[6]*See* Standard Oil Co. v. Perkins, 396 F.2d 809, 812-813 (9th Cir. 1968).

[7]395 U.S. 642 (1969). The official citation is given here for future reference; however, inasmuch as the official report has not yet appeared, further references will be made to the *Supreme Court Reporter* for specific pagination. 89 S. Ct. 1871 (1969).

[8]Brief for Respondent at 7-22, Brief for Petitioner at 4-24, Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

[9]Competitive rivalry between Perkins and Standard could have been expected, for the FTC assumes that the supplier-refiner competes with its own independent customers and further that "the Commission constructs a model of the [gasoline] industry in which the character of rivalry 'is largely shaped by competition flowing from the producing level—the refiner'." FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE, 3 TRADE REG. REP. ¶ 10,373 (1967) *as quoted in* Dixon, *The FTC Report on Gasoline Marketing: A Comment*, 13 ANTITRUST BULL. 105, 109 (1968).

[10]Regal Stations Co. (Regal) purchased its gasoline from Western Hyway Oil Co. (Western Hyway), which in turn had purchased it from Signal Oil & Gas Co. (Signal) which had originally purchased from Standard. The price to Signal which was lower than that to Perkins was passed on to Regal. A "close community of interest" mentioned in Press Co. v. NLRB, 118 F.2d 937 (D.C. Cir. 1940), *cert.*

CHAIN OF DISTRIBUTION & LINES OF COMPETITION
in Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

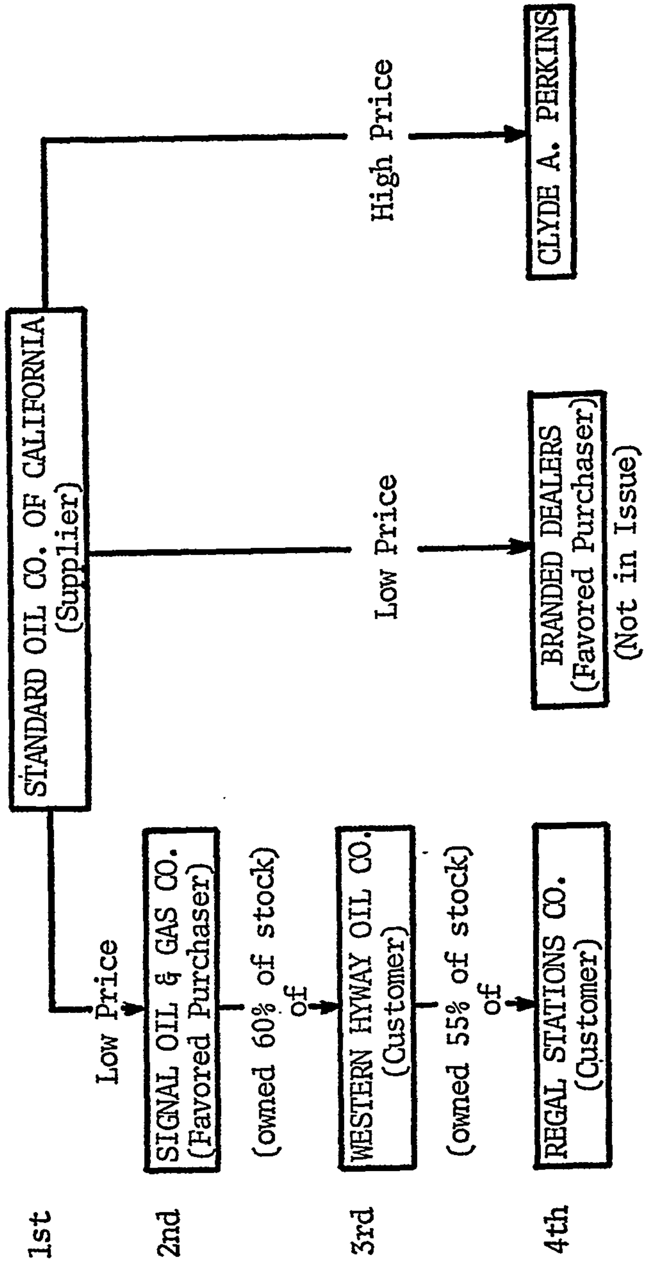

FIGURE I

tribution which Regal occupied in relation to the price discriminator, Standard, was the fourth line.[11]

Although formerly "one of the largest independent distributors of gasoline in [the states of] both Washington and Oregon,"[12] Perkins alleged that he was forced out of business as a consequence of his inability to compete in a price war[13] situation with Regal and the branded dealers, who also had price benefits from Standard sufficient to undercut Perkins' prices and attract his customers. Thus, Perkins had to leave the market and sell out to Union Oil Co., one of the "major" oil companies in the market area. However, not only did Standard's price discrimination cause Perkins' ruin,[14] but Perkins had repeatedly notified Standard of its discrimination and his alleged injury. Also,

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denied, 313 U.S. 595 (1941), existed between the three corporations below Standard: during the relevant period Signal owned 60% of the stock of Western Hyway, and similarly the latter corporation owned 55% of the stock of Regal. Thus Signal was in a position to exercise control over Regal. Standard Oil Co. v. Perkins, 396 F.2d 809, 813 & n.6 (9th Cir. 1968). See Figure I, page 106.

[11]89 S. Ct. at 1874; *see* note 5 *supra.*

[12]89 S. Ct. at 1872.

[13]The Federal Trade Commission has said that "price wars"

> can be important instruments with which to secure price changes within the industry and, *as such,* can be regarded as a sign of effective price competition. Price wars, however, can be started for predatory purposes, and during such disturbances, anticompetitive practices can develop.

FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE, 3 TRADE REG. REP. ¶ 10,373 (1967). A comment on the FTC Report has outlined some causes of price wars:

> First, there is an ample supply of crude oil available and cost structures in both refining and marketing are dominated by fixed expense so that additional sales are often sought to reduce average costs.
>
> Second, because of supply pressures and inelastic total demand, prices tend to be forced down, sometimes by new entrants, or independents who purchase the "distress" product. Independents are becoming more important in the marketplace because of the public's greater acceptance of private brand gasoline.
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> Third, major companies often reduce prices to gain sales volume, or to prevent losses in volume; some have also introduced new products to compete directly with the low price offerings of others.

Dixon, *The FTC Report on Gasoline Marketing: A Comment,* 13 ANTITRUST BULL. 105, 110 (1968). *Cf.* Judge Learned Hand's decision authorizing price reductions in "gas wars" in Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457, 458 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957). *But see* FTC v. Sun Oil Co., 371 U.S. 505 (1963).

[14]Discriminatory pricing practices in price war situations, violative of § 2(a) of the Robinson-Patman Act, result in elimination, despite their efficiency, of competitively important, independent dealers and destruction of free and open competition. FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE, 3 TRADE REG. REP. ¶ 10,373 (1967). Independent and major dealers are closely related, for

Perkins had made numerous requests for price concessions from Standard in line with those given to his competitors. Standard did not respond to these requests.

The jury in the United States District Court for the District of Oregon determined that Standard's price discrimination and Perkins' destruction were causally connected and, in spite of the remote situation of Regal, awarded $336,404.57 in actual damages, which were trebled and to which attorneys' fees were added to total $1,298,213.71.[15] However, apparently impressed with the "fourth line" nature of the transaction, the Court of Appeals for the Ninth Circuit reversed the judgment on the theory that the verdict against Standard was "tainted" by the inclusion of those damages occasioned by the competitive activities of Regal on the fourth line of competition.[16] The court of appeals held that the part of the injury, which was effected through such a distant distributor was not actionable.[17] Because one of the favored purchasers (Signal) did not resell the gasoline directly to its retail customer (Regal), but instead resold to a subsidiary (Western Hyway) which, in turn, resold to its subsidiary, Regal, the injury occasioned by the transaction was a fourth line injury[18] and beyond the scope of the Robinson-Patman Act.[19] Certiorari was then granted by the Supreme Court to consider whether a fourth line injury was within the scope of the Robinson-Patman Act.[20]

The Court, through Mr. Justice Black, held that it was not significant that Regal was on the so-called fourth line. As long as causation could be established[21] between price discrimination and injury, the discriminating supplier could be held liable for injury to competition regardless of the number of levels through which the discrimination

> any attempt by a major to "discipline" independents in a market will have repercussions upon other majors because of the interlacing of market areas ....it is difficult to imagine that major companies would attempt to drive out the independent firms which were their customers.

Dixon, *The FTC Report on Gasoline Marketing: A Comment,* 13 ANTITRUST BULL. 105, 120-121 (1968).

[15]Perkins v. Standard Oil Co., 29 F.R.D. 16 (D. Ore. 1961).

[16]Standard Oil Co. v. Perkins, 396 F.2d 809, 813 (9th Cir. 1968).

[17]*Id.* at 816.

[18]Note 5 *supra.*

[19]Standard Oil Co. v. Perkins, 396 F.2d 809, 814, 816 (9th Cir. 1968).

[20]393 U.S. 1013 (1969).

[21]The Court stated, "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury." 89 S. Ct. 1871, 1875 (1969). Causation must be established between the price differential and the injury to competition, "...where the *effect* of such discrimination may be *substantially* to lessen competition...." Robinson-Patman Act, 15 U.S.C. § 13(a) (1964) (emphasis added).

passed.[22] In reaching this conclusion, the Court gave weight to the argument that statutory interpretation should not exalt form (the remote distributional level of Regal) at the expense of economic reality and the purposes of the Clayton Act.[23] The district court was therefore correct in submitting the question of causation to the jury.

The dissenting opinion did not accept the fourth line concept,[24] but preferred a second line interpretation on the facts in the instant case. Justices Marshall and Stewart concurred in the holding to reverse the court of appeals, but dissented as to the grounds and as to the conclusion to reinstate the verdict.[25] They viewed the facts as constituting no more than a second line injury and found no fourth line injury at all.[26] They believed that the competitive injury should be treated as if it were directly between Signal, the favored purchaser, and Perkins, because the chain of distribution (Standard, Signal, Western Hyway, and Regal) included subsidiary companies whose acts were attributable to each other on principles of agency.[27]

In deciding *Perkins,* the Court was faced with the same problems of interpretation of the Robinson-Patman Act that have led invariably to confusion for the bench, the bar, the affected supplier, and the legal writer.[28] Enacted by Congress to prevent strangulation of small, inde-

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[22]It was not even necessary to prove supplier *control* over terms of sale to the fourth line. An actionable claim was perfected by presenting evidence that Standard only *knew* of the passing-on of the price benefit and of Perkins' imminent destruction caused by the price discrimination. 89 S. Ct. 1871, 1875 (1969). *But cf.* FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968); American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert. denied,* 371 U.S. 824 (1962). *Contra,* Purolator Prod., Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965).

[23]89 S. Ct. at 1874-75. In support of this proposition it has been stated that

> ...the determinants of enforcement policies must always lie centrally in the intent and purpose of the statute, the facts of the market place and the court decisions applying the statute to these facts.

Address by FTC Commissioner Mary Gardiner Jones, ABA Nat'l Inst. on Antitrust Prob. in the Sale and Distrib. of Goods, Los Angeles, Calif., Nov. 9, 1967, *as quoted in* Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing,* 13 ANTITRUST BULL. 767, 791 (1968).

[24]89 S. Ct. at 1876; *see* note 5 *supra.*

[25]It should be noted that Mr. Justice Harlan took no part in the consideration or decision of this case.

[26]Note 5 *supra;* text accompanying notes 52-56 *infra.*

[27]They reasoned that the jury verdict should be sustained but preferred to "explicitly limit the holding to the facts of the case." 89 S. Ct. at 1876.

[28]*See* Rowe, *Current Developments in Robinson-Patman Law,* 21 BUS. LAW. 499 (1966); Backman, *An Economist Looks at the Robinson-Patman Act,* 17 ABA ANTITRUST SECTION 343 (1960).

pendent merchants[29] by the predatory pricing practices[30] of some mass distributors and "chain stores,"[31] section 2(a)[32] of the Act allows the courts to prohibit "price discrimination"[33] when 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 the customers of either of them. . . .[34]

These confusing phrases are the statutory tools which the courts have interpreted as delineating the proper scope of supplier liability in "price discrimination" litigation. The word "discrimination" has been applied in broader areas of commerce as litigation continues to shape the law,[35] so that when, as in *Perkins,* suppliers find new ways to diversify their distributive marketing techniques or integrate the functions of distribution,[36] they often find that business practices which they consider advantageous are being adjudged illegal.[37]

The traditional three lines of distribution (interpreted from the phrase, "with any person who . . . grants or knowingly receives . . . or with the customers of either of them,")[38] have been well defined.[39] A

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[29]*See generally* REPORT OF THE SENATE COMMITTEE ON THE JUDICIARY, S. REP. No. 1502, 74th Cong., 2d Sess. 1-8 (1936).

[30]*See Hearings Before the House Committee on the Judiciary on Bills to Amend the Clayton Act,* 74th Cong., 1st Sess. 144, 239 (1935).

[31]Describing the outcry during the depression years against the anticompetitive activities of the chain stores, it was said of Robinson-Patman that, "...one certain big concern had really caused the passage of this act, the A&P Tea Co.," Representative Patman, *Hearings Before the Antitrust Subcommittee of the House Committee on the Judiciary on Bills to Amend Section 2 and 3 of the Clayton Act,* 84th Cong., 2d Sess. 57 (1956).

[32]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964); *see* note 1 *supra.*

[33]A price discrimination within the meaning of section 2(a) is merely a price differential. FTC v. Anheuser-Busch, Inc., 363 U.S. 549 (1960); cases cited note 2 *supra.*

[34]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[35]*E.g.,* FTC v. Sun Oil Co., 371 U.S. 505 (1963); FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); United Biscuit Co. v. FTC, 350 F.2d 615 (7th Cir. 1965), *cert. denied,* 383 U.S. 926 (1966). *See generally,* Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy,* 50 MICH. L. REV. 1139 (1952). Note Oppenheim's discussion of the "Rule of Reason" as one standard for antitrust litigation.

[36]For analysis of "integration of distribution" see M. DE CHAZEAU & A. KAHN, INTEGRATION AND COMPETITION IN THE OIL INDUSTRY (1959); J. MCLEAN & R. HAIGH, THE GROWTH OF INTEGRATED OIL COMPANIES (1954); Kessler & Stern, *Competition, Contract, and Vertical Integration,* 69 YALE L.J. 1 (1959).

[37]*See* A. NEALE, THE ANTITRUST LAWS OF THE U.S.A., 244-45 (1960).

[38]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[39]*E.g.,* FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960).

discussion of their elements, however, will be helpful in understanding distribution and competitive injury and will serve as further background to understanding the fourth line injury.[40]

"Primary line" (". . . any person who . . . grants . . . the benefit of such discrimination . . .")[41] injury is the result of "zone pricing" and presents the question as to whether a supplier's price differentiation is a fair competitive tactic or a predatory geographical pricing scheme intended to destroy competition.[42] Discriminantly undercutting prices in one geographical section,[43] while maintaining higher prices and profit margins elsewhere,[44] frustrates local competition by impairing the competitive strength of independent businesses which cannot afford to sell so cheaply or indeed below cost.[45] Predatory intent is often an important element.[46] The indicia of primary line injury include monopoly power of the supplier in wide markets,[47] aggressive underselling

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[40] *See generally* von Kalinowski, *Price Discrimination and Competitive Effects,* 17 ABA ANTITRUST SECTION 360, 362-87 (1960).

[41] Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[42] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1957); Volasco Prods. Co. v. Lloyd A. Fry Roofing Co., 346 F.2d 661 (6th Cir. 1965), *cert. denied,* 382 U.S. 904 (1966).

[43] Local price under-cutting has been viewed as anticompetitive if there were some indication of intent to injure. The "diversion theory," although on the decline, held that a seller's diversion of business from his rivals, through increased quantity discounts, produced injury. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 151-63 (1962). *See also* Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir. 1969); Dean Milk Co. v. FTC, 395 F.2d 696 (7th Cir. 1968); National Dairy Prod. Corp. v. FTC, 395 F.2d 517 (7th Cir. 1968); Borden Co. v. FTC, 381 F.2d 175 (5th Cir. 1967); Safeway Stores, Inc. v. FTC, 366 F.2d 795 (9th Cir.), *cert. denied,* 386 U.S. 932 (1966); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965).

[44] The practice of price differentiation in different localities indicates that the majors "dump" products with the intent of injuring independents, and that the losses thus incurred "are subsidized by sales at higher prices outside the zone or by profits secured from non-gasoline production where price competition is either minimal or non-existent."

Dixon, *The FTC Report on Gasoline Marketing: A Comment,* 13 ANTITRUST BULL. 105, 116 (1968).

[45] Predatory intent to expel a rival is the makeweight in the balance between the desire to promote all possible healthy price competition and the wish to avoid the sort of competition which is characterized as a local pricing war, the victor of which is always the competitor with the deepest pockets. *See* Note, *Competitive Injury Under the Robinson-Patman Act,* 74 HARV. L. REV. 1597, 1602 (1961).

[46] Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Vance v. Safeway Stores, 230 F.2d 144 (10th Cir. 1956); *cf.* Balian Ice Cream Co. v. Arden Farms Co., 104 F. Supp. 796 (S.D. Cal. 1952), *aff'd,* 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

[47] Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960); Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied,* 279 U.S. 858 (1929).

of weak rivals,[48] deep and sustained undercutting of rival's prices,[49] persistant sales below supplier's cost,[50] and actual or impending demise of the supplier's sole rival in the market.[51]

"Secondary line" competitive injury (". . . with any person who . . . knowingly receives the benefit of such discrimination . . .")[52] occurs when the supplier rewards different customers with scaled price benefits according to their rank in the distributive hierarchy.[53] When the favored jobber, who is the grantee of the price discrimination sells to consumers in competition with the unfavored retail merchants of the supplier, the jobber undercuts prices on the same distributive line by taking unfair advantage of the "favored purchaser" position he occupies.[54] When the supplier's discrimination produces the effect of two different prices to two of his customers who function on the same line, then with a showing of profit impairment on the part of the disfavored customer, the injury is actionable.[55] Price differential is *prima facie* evidence of injury to competition unless the causal connection between the injury and the discrimination is vitiated by some defense.[56]

"Tertiary or third line" injury (". . . with the customers of either of them")[57] is actionable with evidence of the use of a "dual distribution"[58] tactic. A supplier grants a lower price to its wholesalers who

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[48]Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Maryland Baking Co. v. FTC, 243 F.2d 716 (4th Cir. 1957).

[49]Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied,* 279 U.S. 858 (1929).

[50]United States v. National Dairy Prod. Corp., 372 U.S. 29 (1963); Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Porto Rican American Tobacco Co. v. American Tobacco Co., 30 F.2d 234 (2d Cir.), *cert. denied,* 279 U.S. 858 (1929).

[51]Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967); FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960); Atlas Building Prod. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960).

[52]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[53]FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968); FTC v. Morton Salt Co., 334 U.S. 37 (1948); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965); General Auto Suppliers, Inc. v. FTC, 346 F.2d 311 (7th Cir.), *cert. dismissed,* 382 U.S. 923 (1965); Bain & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957); Klein v. Lionel Corp., 138 F. Supp. 560, *aff'd,* 237 F.2d 13 (3d Cir. 1956); Danko v. Shell Oil Co., 115 F. Supp. 886 (E.D.N.Y. 1953).

[54]Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir.), *cert. denied,* 382 U.S. 1009 (1965).

[55]Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir. 1955).

[56]FTC v. Borden Co., 383 U.S. 637 (1966); Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694 (9th Cir. 1964).

[57]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[58]*See* Gregory, *A Survey of the Price Discrimination Aspects of the FTC Report on Gasoline Marketing,* 13 ANTITRUST BULL. 767, 768, 792 (1968); *Effective Regulation of Dual Distribution: A Robinson-Patman Approach,* 1967 DUKE L.J. 996; SENATE SELECT COMM. ON SMALL BUSINESS, STUDIES OF DUAL DISTRIBUTION: THE FLAT GLASS INDUSTRY, S. REP. No. 1915, 86th Cong., 1st Sess. (1959).

pass the price differential on to their retailers, and those retailers compete with the retailers who purchase directly from the supplier at a much higher price. The price discrimination is not between two direct-purchasing customers of the supplier (as in secondary line) but affects competition between the directly disfavored retailer and the indirectly favored retailer who receives the benefit of a lower price which the supplier originated and the wholesaler passed on to him.[59] The rule with respect to liability for third line injury is found in *Standard Oil v. FTC*[60] where it was provided that a supplier "should not be required to police its wholesalers and to sell to them at [the supplier's] peril,"[61] but should only "be liable if it sells to a wholesaler it knows or ought to have known is engaging in or intends to engage in"[62] the price cutting in sales to the retail level.[63] Injury to competition on the "third line" assumes an actual passing-on of the supplier's price differential in the favored customer's resale price with knowledge by the supplier of the injurious effect.[64]

The newly conceived "fourth line" distributor is three levels removed from the supplier. He is the customer of the customer of the favored purchaser of the supplier. The fourth line injury affects competition as between the supplier's disfavored purchaser and the fourth line distributor, the beneficiary of the lower price to the favored purchaser. The supplier's lower price to his favored purchaser is passed on twice until it is reflected in the low competitive prices of the merchant on the fourth level. There is, therefore, one more link in the chain of distribution through which the goods are passed—one more middleman. Hence, as a matter of policy, the supplier should not be able to immunize himself from the Robinson-Patman Act by merely adding links to his distributional chain.[65]

Perkins may play a significant role in future litigation, for the Su-

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[59]Klein v. Lionel Corp., 237 F.2d 13 (2d Cir. 1956); Krug v. I.T.&T. Corp., 142 F. Supp. 230 (D.N.J. 1956). *See generally* C. AUSTIN, PRICE DISCRIMINATION 51-52 (1959).

[60]173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds,* 340 U.S. 231 (1951). For a discussion of the Standard Oil controversy and its relation to the rule of third line injuries see Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing,* 13 ANTITRUST BULL. 767, 769 (1968).

[61]173 F.2d at 217 (1949).

[62]*Id.*

[63]*Cf.* Secatore's Inc., v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959).

[64]Standard Oil Co. v. FTC, 173 F.2d 210, 216 (7th Cir. 1949); *cf.* Simpson v. Union Oil Co., 377 U.S. 13 (1964).

[65]*See generally Effective Regulation of Dual Distribution: A Robinson-Patman Approach,* 1967 DUKE L.J. 996.

preme Court has extended the scope of the Robinson-Patman language so as to render the supplier accountable for remote effects of his pricing policy by making unlawful the injurious effects of *fourth line* and perhaps *any line*[66] of price discrimination and has called the traditional three-level limitation "wholly . . . artificial" and "completely unwarranted by the language of the Act."[67]

Prior to *Perkins,* it was suggested that, by making the supplier accountable for the possible injurious effects of passing on the lower price to distributors, the Act would require the supplier to control the discount and profit margins of all middlemen, to police the favored purchaser's resale tactics, or to condemn altogether any "dual distribution"[68] system.[69] The Federal Trade Commission's policy stated, however, that "[w]e cannot protect competitors to the detriment of competition itself."[70] The shift in emphasis to the *Perkins* theory, which makes the supplier liable for injury proximately caused by his pricing differentials, was forecast by another case, *FTC v. Fred Meyer, Inc.*[71]

Fred Meyer was an interpretation of Robinson-Patman section 2(d)[72] wherein the Court, through Mr. Chief Justice Warren, held that a retailer who buys through a wholesaler may be regarded as a direct "customer" of the supplier, not a third line distributor.[73] To give effect to the purposes of the Robinson-Patman Act, the decision imple-

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[66]89 S. Ct. at 1875.

[67]*Id.* at 1874. In addition, *Perkins* provides that causal connection must be shown "regardless of the level" in the chain of distribution on which the injury occurs.

[68]Dual distribution has been defined as the

> distributive technique by which the manufacturer sells its product to independent wholesale distributors while simultaneously competing with those purchasers through its own division distributors.

Note, *Effective Regulation of Dual Distribution: A Robinson-Patman Approach,* 1967 DUKE L.J. 996, 998.

[69]*See* Krug v. I.T.&T. Corp., 142 F. Supp. 230 (D.N.J. 1956). As late as 1962, it was thought that even third line injury orders were inherently incompatible with antitrust policies. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, 205 (1962).

[70]FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE, 3 TRADE REG. REP. ¶ 10,373 (1967).

[71]390 U.S. 341 (1968).

[72]Robinson-Patman Act, 15 U.S.C. § 13(d) (1964); note 1 *supra.*

[73]FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968); *cf.* Monroe Auto Equip. Co. v. FTC, 347 F.2d 401 (7th Cir.), *cert. denied,* 382 U.S. 1009 (1965); Gregory, *A Survey of the Price Discrimination Aspects of the Federal Trade Commission's Report on Gasoline Marketing,* 13 ANTITRUST BULL. 767, 774 & n.15 (1968).

mented the "indirect purchaser" doctrine[74] which imposes liability upon a supplier who, in effect supplants intermediary distributors and exerts control over his distributor's accounts. One is allowed to regard links in the distributional chain as if they were distribution members of an association performing an integrated function, so that in applying *Fred Meyer* to *Perkins,* lines of distribution may become meaningless and a fourth line distributor can be viewed as a second or third line distributor.

Whether a case involves one of the three traditional lines of distribution or not, causation between the supplier's price differential and the disfavored purchaser's competitive injury must be proved, as a matter of fact, in order to establish liability.[75] However, until *Perkins,* the plaintiff in a 2(a) action[76] had the burden of proving *both* a causal relationship and the appropriate line of distribution on which the injury occurred.[77] As a result of *Perkins,* causation is emphasized and proof of the distributional line is no longer necessary.

The Supreme Court has abolished the established three line interpretation of the language of the Robinson-Patman Act.[78] Proof of causation will not be affected by the level in the chain of distribution on which the injury occurs.[79] In addition, under the reasoning of *Fred Meyer,* the traditional three line interpretation remains valid, but all distributors, no matter how many lines removed from the supplier, will be treated as "customers" on the secondary line for the purposes of the Act.[80]

However, the Court seems to leave the business community without a clearly defined rule, in that while the three level limitation is now abolished, its vestiges still provide the basis of liability under the *Fred Meyer* principle. Although Mr. Justice Black did not directly concern the court with statutory interpretation, his discussion of the language

[74]The indirect purchaser doctrine was first formulated in American News Co. v. FTV, 300 F.2d 104 (2d Cir. 1962). *See also* Note, *Trade Regulation—Sect. 2(d) of the Robinson-Patman Act Requires Promotional Allowances to Direct Buyers to be Made Available to All Retailers Purchasing Through Wholesalers,* 21 VAND. L. REV. 1129, 1132 (1968).

[75]89 S. Ct. at 1874.

[76]Note 1 *supra.*

[77]Standard Oil Co. v. Perkins, 396 F.2d 809, 812-13 (9th Cir. 1968).

[78]89 S. Ct. at 1874.

[79]*Id.*

[80]*Id.;* FTC v. Fred Meyer, Inc. 390 U.S. 341 (1968). The FTC foresaw the confusion and meaninglessness of lines of injury when it announced, "competitive levels and their functions are impossible of precise description and any attempt at definition necessarily requires frequent use of qualifying phrases." FTC, REPORT ON ANTICOMPETITIVE PRACTICES IN THE MARKETING OF GASOLINE, 3 TRADE REG. REP. ¶ 10,373 (1967).

of the Act leads one to infer a construction of the Robinson-Patman Act's coverage.

A diagramatic scheme of the language of the Robinson-Patman Act would categorize the first several clauses of section 1(a) as jurisdictional requisites,[81] and the second set, the scope of the Act. It is the second set of clauses that is crucial.

> ... 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 the customers of either of them. (emphasis added).[82]

The most difficult problem to resolve in construing the statute seems to be the significance of the word "or" (italicized above). The mentioned "effect" of discrimination must be present "in any line of commerce" *or* with "any person who . . . grants," "any person who . . . receives," or "the customers of either of them."

If the word "or" is an interpretive or expository qualifying conjunction which is used in the sense of "to wit," "*id est*," or "that is to say," then it introduces an explanation of what precedes and gives to that which precedes the same signification as that which follows.[83] In other words, the phrase "with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them" (which sets out the traditional three lines of commerce) limits and explains what "in any line of commerce" means. Therefore, the scope of the Act should be limited to three lines.

However, if "or" literally means "or," it is a disjunctive particle which denotes an alternative between the two phrases it connects.[84] In that situation, the line of proof that must be established to make an actionable claim under the Act would require proof of injury *either*

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[81]Jurisdictional elements of commerce, commodities, sales, and geographical scope are found in the following language of the Robinson-Patman Act:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States....

[82]Robinson-Patman Act, 15 U.S.C. § 13(a) (1964).

[83]*See* Benny v. Bell, 291 S.W.2d 369, 372 (Tex. Civ. App. 1956); W.S. Libbey Co. v. Johnson, 148 Me. 410, 94 A.2d 907, 910 (1953).

[84]*See* Central Standard Life Ins. Co. v. Davis, 10 Ill. App. 2d 245, 134 N.E.2d 653, 658 (1956); Gay Union Corp. v. Wallace, 112 F.2d 192, 196 (D.C. Cir. 1940).

"in any line" *or* "with any person who . . . grants, . . . knowingly receives . . . or . . . the customers of either of them." In that case, the broader and clearer phrase, "in any line of commerce" would allow an action for injury with respect to the fourth line or any other line.

Heretofore, the "or" has always been interpreted in the sense of "to wit," and the construction of the Act has thus provided for a three line limitation on Robinson-Patman actions.[85] It was thought that the framers of the Act intended a less burdensome proof than the Clayton Act required, and the cases followed Representative Utterback's 1936 conception of the coverage of the Act.[86] He thought that the limitation within which a price discrimination can reasonably be assumed to have an identifiable impact on competition extended only to the customers of the grantor or grantee.[87]

Apparently the Court in *Perkins* construed the word "or" as meaning literally "or" and wished to void the three-line rule as to the limitations of liability under the Act.[88] In fact, Mr. Justice Black sees the "to wit" interpretation as artificial and "completely unwarranted by the language or purpose of the Act."[89] The Court accepted the tenet that the interpretation should be governed by the economic realities of the market situation (for example, the apparent tendency of suppliers to attempt to immunize themselves from Robinson-Patman actions by adding a fourth rung to their distributive ladders).[90]

Perkins renders meaningless any Robinson-Patman discussion of the lines of distribution, no matter how remote, so long as price discrimination, causation, and seller's knowledge of injury are established. Since a cause of action requires no proof of lines, price discrimination litigation is remarkably simplified for plantiff's counsel.

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[85]*See, e.g.,* cases cited notes 2 and 35-40 *supra.*

[86]*Id.;* note 87 *infra.*

[87]80 CONG. REC. 9417 (1936) (remarks of Representative Utterback).

[88]Petitioner asserts in his brief (at p. 38) that the Court has never decided this issue with respect to the coverage of the Robinson-Patman Act and the meaning of the language. For a discussion of the meaning of "in any line of commerce" in a case decided upon the original Clayton Act see George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).

[89]89 S. Ct. at 1874.

[90]*Id.*