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SECTIONS 2(d) AND 2(e) OF THE ROBINSON-PATMAN ACT:
SELLER IN A QUANDARY

Jesse D. Miller

As a matter of common sense, a person engaged in the sale of goods who desires in complete good faith to establish pricing and merchandising policies which will maximize his sales efforts, as well as fully comply with existing law, should have no trouble doing so. But anyone who has attempted to reach this apparently modest goal has undoubtedly found the task of wending his way through the maze of legislation affecting the problem extremely difficult. Chief among the roadblocks is the Robinson-Patman Act. This Act has been described as “the most awkwardly drafted of all anti-trust legislation,” and various of its provisions have been euphemistically referred to as being “a legislative monster” and as containing “infelicitous language.”

The Robinson-Patman Act is, broadly speaking, an act which prohibits, absent certain conditions, discrimination in price among buyers of a seller’s goods. Section 2(a) of the Robinson-Patman Act refers to and regulates direct and indirect discriminations in price. Section 2(c)...

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1 Despite some popular opinion to the contrary, the writer is convinced that such sellers in fact exist. It is for them, and their attorneys, that this article is written.


3 VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 25 (2d ed. 1958).

4 Oppenheim, Should the Robinson-Patman Act be Amended?, CCH ROBINSON-PATMAN ACT SYMPOSIUM 141, 146 (1948).


6 The Robinson-Patman Act is actually an amendment of the Clayton Act, and what was actually Section 1 of the amendment became Section 2 of the Clayton Act. All references in this article to sections of the Robinson-Patman Act are to the number of the section as it appears in the Clayton Act, as amended. This is consistent with accepted legal parlance.

7 49 Stat. 1526 (1936), 15 U.S.C. §13(2) (a) (1958). The provisions of Section 2 (a), in full are:

"Sec. 2. (a) That 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, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only...
of the Act prohibits payment, in connection with the specific transaction of what may be generally called "brokerage commissions" by the seller to the buyer, or the buyer's agent, broker or other intermediary.\(^8\)

While Section 2(a) relates to discrimination in price, Section 2(d) relates to discrimination in \textit{payments by a seller to a customer for services}, including advertising, \textit{furnished by or through the customer}.\(^9\) Section 2(e) relates to discrimination in the \textit{furnishing of services},\(^10\) including advertising, \textit{by a seller} to the purchasers of his goods.\(^11\) Thus, due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are sold or delivered: Provided, however, that the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, that nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade; And provided further, that nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.”

\(^8\) This article does not consider Sections 2 (a) and 2 (c) in detail except where detail is necessary for a better understanding of Sections 2 (d) and 2 (e) here under analysis. Sections 2 (a) and 2 (c) have been the subjects of numerous commentaries and a good starting point for anyone interested in analyses of those sections is Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959) [hereinafter cited as Austin]. All persons interested in the Robinson-Patman Act generally are greatly indebted to Mr. Austin for this work.

\(^9\) 49 Stat. 1526 (1936), 15 U.S.C. §13(2) (d) (1958). Section 2 (d) provides in full as follows:

\begin{quote}
"2 (d) That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."
\end{quote}

\(^10\) The statutory language refers to “services or facilities” in Sections 2 (d) and 2 (e). In the interests of brevity the word “services” is used herein as including services and facilities. Actually, the furnishing of payment for facilities would seem to be a service.

\(^11\) 49 Stat. 1526 (1936), 15 U.S.C. §13(2) (e) (1958), Section 2 (e) provides in full as follows:

\begin{quote}
"2 (e) That it shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale,
Sections 2(d) and 2(e) are two sides of the same coin. The significant point is that the buyer ends up with the same thing—namely, a service for which he has not incurred any net expense—whether he first pays for it and is reimbursed by the seller, or whether the seller furnishes the service directly. Nevertheless, a close reading of the two sections reveals a number of differences in the language used, and, as will be discussed later, the two sections have not always received a uniform construction. Furthermore, a number of unanswered potential problems are posed by the apparently inconsistent language.

A seller must reckon with Sections 2(d) and 2(e) when he wishes to engage in what shall be termed “cooperative merchandising services” to promote the resale of his goods. This term is used since any service which promotes the resale of the goods benefits both the original seller and the reseller. The most common types of “cooperative merchandising services” are cooperative advertising, distribution of promotional materials such as window and counter displays, and providing or paying for demonstrators and other trained salespersons to assist the reseller to make sales of the seller’s products. It is a rare seller who has as customers a homogeneous group, each member of which will find suitable any one cooperative merchandising service. For example, a manufacturing firm which sells to retail outlets will undoubtedly number among its accounts some large stores, some medium sized stores and some small stores. The larger accounts might very well be able and willing to participate in a cooperative advertising program using large, metropolitan newspapers as the advertising medium. The small stores might not be able to afford such ads, or such ads might not be practical for them because of location or some other reason. If a seller engaged in commerce, had a program whereby he paid the larger customer part of the cost of such newspaper ads, and offered no alternatives which could be used by the small stores, he would undoubtedly be held to have violated Section 2(d) in that such payment would not be “available on proportionally equal terms” to all of his competing customers. This is but one limited example of the problems a seller must solve if his “cooperative merchandising” plan is to conform to the requirements of Sections 2(d) and 2(e). This article will certainly not solve the problems which sellers face; but it is hoped that it will delineate broad guide lines as to what transactions are covered by Sections 2(d) and 2(e), what defenses to charges of violation are available, what types of programs the Federal Trade Commission and various courts have held do or do not comply with the Sections, and what may be the consequences of violating Sections 2(d) and 2(e).
I. TRANSACTIONS COVERED BY SECTIONS 2(d) AND 2(e).

It should be noted at the outset that under the law the seller has a right to select his customers, but having done so he must treat them with proportional equality. And it is likewise well settled that the de minimis rule applies to actions under Sections 2(d) and 2(e).

Section 2(d) is expressly applicable to persons engaged in commerce. Section 2(e) does not mention commerce. And Section 2(a) applies where "either or any of the purchases . . . are in commerce." Thus, if the literal interpretation is followed, the stage is set for some inconsistent rulings. But, when the constitutionality of Section 2(e) was challenged because it purported to affect intrastate sales, two Courts of Appeals have read Section 2(e) as if it contained the words "engaged in commerce" and "in the course of such commerce." And, it has been held under Section 2(e) that an interstate purchaser may complain because of advertising furnished to an intrastate purchaser. And Section 2(e) was properly invoked where an intrastate retailer complained of services furnished to interstate retailers. Section 2(d) by its express terms clearly applies to the latter-type transaction. But, there is some question as to whether or not it applies to the former. Section 2(a), by its terms, applied to both situations but 2(d) and 2(e) are to be construed independently from 2(a). A respectable argument can be made, based on the literal terms of Section 2(d), that it does not apply when

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12 Section 2 (a) expressly provides "That nothing herein contained shall prevent persons engaged in selling goods . . . in commerce from selecting their own customers in bona fide transactions and not in restraint of trade . . . ." As will be seen later, the provisions of §2 (a) do not necessarily apply to §§2 (d) and 2 (e). However, there is no question but that this is the law applicable to §§2 (d) and 2 (e) of Chicago Seating Company v. S. Karpen & Bros., 177 F. 2d 863 (7th Cir. 1949).

13 "In other words, manufacturers will have a right to select their customers but when selected they must deal with them equally and fairly." 80 Cong. Rec. 7759 (1936) (remarks of Congressman Patman).

14 Skinner v. United States Steel Corporation, 233 F. 2d 762 (5th Cir. 1956). The plaintiff operated a retail hardware store and defendant's counsel contended that the record showed plaintiff's only purchase from defendant which moved in commerce was one dozen nails which cost plaintiff 85c. The court noted that this "perhaps" approached the de minimis level, but the question was not decided since the court found on other grounds that §2 (e) was not violated.

15 Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d (8th Cir.), cert. denied, 326 U.S. 773 (1945); Elizabeth Arden, Inc. v. Federal Trade Commission, 150 F. 2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947). There the court also noted that the service furnished (advertising) was also itself frequently in commerce. See, also, Bowman Dairy Company v. Hedlin Dairy Company, 126 F. Supp. 749 (N.D. Ill. 1954).

16 Sun Cosmetic Shoppe, Inc., v. Elizabeth Arden Sales Corporation, 178 F. 2d 150 (2d Cir. 1949).

17 Federal Trade Commission v. Simplicity Pattern Co., Inc., 360 U.S. 55 (1959); Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132, 135 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947): "We see no reason why the limitations contained in (a), or their equivalent, should be read into (e)." See, also, Henry Rosenfeld, Inc., No. 6212, F.T.C., June 21, 1956.
the discrimination favors an intrastate purchaser. But, it is considered very likely that broader scope will be given to Section 2(d) and that it will apply where "either or any" of the competing customers were engaged in commerce.

A further question arises because Section 2(d) prohibits discriminatory payments to "a customer of [the seller]" while Section 2(e) is literally broader in prohibiting the furnishing of discriminatory services to "purchasers" without any words limiting the prohibition to purchasers from the seller. Thus, Section 2(e) was held in Elizabeth Arden to prohibit discrimination in furnishing services to retailers who purchase directly from the seller, on the one hand, and retailers who purchase indirectly from intervening wholesalers. In that case, however, the manufacturer furnished demonstrators directly to both direct—and indirect—buying retailers. A later case interprets Elizabeth Arden as applicable, in a 2(e) case, only when there is a direct relationship between the retailer and both types of purchasers, either through direct sales or direct furnishing of services.

But, should the words "customer of such person" in 2(d) be construed to relate only to direct-buying customers? It is suggested that Sections 2(d) and 2(e) be construed uniformly, since, as noted above, Sections 2(d) and 2(e) are actually "twins," in the sense that they seek to prevent the same ultimate evil—the realization by the buyer of a service without cost. Therefore, these sections should be interpreted as prohibiting discrimination in furnishing of services or payment for services by a manufacturer or between a direct and an indirect purchaser as well as between direct purchasers and between indirect purchasers. This has been indicated as the "safe course" for a counsellor on the subject to follow. And further support is lent to the conclusion by a decision that a violation of Section 2(d) may occur when a manufacturer gives a retailer an allowance not given to a wholesaler whose customers compete with such retailer.

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19 Austin, 127.
21 Skinner v. United States Steel Corporation, 233 F. 2d 762 (5th Cir. 1956).
22 "To the fullest extent Sections 2 (d) and 2 (e) should be interpreted to reconcile their basic purposes. I see no reason why a distinction should be made between these twins of the Robinson-Patman Act." Exquisite Form Brassiere, Inc., No. 6966 F.T.C., Nov. 25, 1960 (Commissioner Tait, dissenting). The dissenting Commissioner was vindicated when the majority opinion was reversed in Exquisite Form Brassiere, Inc. v. Federal Trade Commission, CCH 1961 Trade Reg. Rep. (1961 Trade Cases) 70,157 (D.C. Cir. Nov. 22, 1961).
23 Austin, 135. For an argument that the Commission ought to apply the indirect purchaser concept only in circumstances where the wholesaler is little more than a conduit through whom the goods pass, see, Sniderman, Collateral Discrimination Under the Robinson-Patman Act—Section 2(c), (d), and (e), 17 A.B.A., Antitrust Section 410, 417 (1960).
24 Krug v. International Telephone & Telegraph Corporation, 142 F. Supp. 230
A very practical question is in order at this point. Must a seller, whose sales in question are subject to Sections 2(d) and 2(e), and who has put into effect a proper cooperative-merchandising plan on some of his products make the services or payments under the plan available with respect to other of his products? The question is meaningful because Sections 2(d) and 2(e) do not contain the limitation contained in Section 2(a) prohibiting discrimination in price "between different purchasers of commodities of like grade and quality." Products are often competitive (at a differential in price) although they differ somewhat in grade and quality. Under the words of Sections 2(d) and 2(e) it would have been possible to interpret the sections as requiring a seller who wanted to establish a cooperative-merchandising program for product A to extend the promotional benefits to buyers of other of his products which might be considered competitive with product A, even though of different grade and quality. However, the question has been squarely passed upon in the Atalanta Trading Corporation case. There Atalanta granted promotional allowances on its canned hams, pork shoulders and pre-cooked bacon. The Federal Trade Commission sought a ruling that Section 2(d) required Atalanta to offer proportionally equal allowances on its entire line of pork products. The Court of Appeals relied upon earlier precedent under Section 2(d) and held that "such products" in Section 2(d) means products of like grade and quality. Thus, even though the other pork products of Atalanta were to some extent competitive with the bacon, ham and pork shoulder on which allowances were given, Section 2(d) did not require "proportionally equal" allowances as to the other pork products. There can be little doubt that Section 2(e) will be similarly interpreted, especially because there is no difference of substance between the language used in 2(d) and 2(e) on this subject and because of the desirability of a uniform construction of the two sections.

The provisions of Sections 2(d) and 2(e) are ambiguous and inconsistent in the respect that Section 2(e) refers to "a commodity bought for resale" and to services connected with the "processing, handling, sales, or offering for sale of the commodity so purchased," and Section 2(d) refers to payments for services in connection with the "processing, handling, sale or offering for sale" of products made, sold or offered for sale by the seller paying for the services. Thus, 2(d) may

include payment for services in connection with the sale of other goods to other customers. The Commission has so construed Section 2(d) in the U.S. Rubber Company case. There, the Rubber Company sold tires to certain oil companies. These oil companies were paid a commission on sales of tires by the Rubber Company to gasoline stations handling the oil companies' products. The Commission found that the sales commissions were paid in return for services furnished by the oil companies, which services were the exercise of influence and giving of sales assistance. These payments were in no way connected with the resale of the tires sold to the oil companies. It is to be hoped that this decision will not be followed, since the result does not seem to effectuate the purpose of 2(d) which is directed at evils connected with the resale of the original goods. Furthermore, it results in a conflict of interpretation with Section 2(e), the language of which limits it to services connected with resale. And 2(e) has been so applied by the Fifth Circuit Court of Appeals. And in the General Foods case, the Commission applied Section 2(d) in a manner consistent with the "resale" theory. There, General Foods sold its food products direct to hotels and other institutional buyers. It also sold to distributors who resold to others. In some cases, when sales were made directly to the institutional buyers, the seller directed a distributor to make delivery to the institution out of the distributor's own stock. The distributor was reimbursed for the product delivered by a stock credit and a cash payment for the service of storage and delivery. This payment for storage and delivery was not available to other competing General Foods distributors. It was held that 2(d) was not violated since it was not made to the distributor as a customer or in conjunction with the resale of goods bought by him from the seller. It is believed that Sections 2(d) and 2(e) will be interpreted uniformly in this respect and that they will apply only to services connected with resale.

It is significant to note, in passing, the provisions of Section 2(f) of the Robinson-Patman Act. By its terms it does not apply to discriminations under Sections 2(d) and 2(e), but it makes it unlawful for a buyer to knowingly induce or receive a discrimination in price

30 Skinner v. United States Steel Corporation, 233 F. 2d 762 (5th Cir. 1956). In this case the service in question was withholding by the seller from its employee's wages the price of goods purchased by the employees of the seller from the buyer. This was held not to be a merchandising service and hence not prohibited by 2(e).
32 Austin, 136, 137.
33 49 Stat. 1526 (1936), 15 U.S.C. §13(2) (f) (1958). This section provides in full as follows:
"2 (f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section."
under Section 2(a). Although, a buyer may not be guilty of a violation of Section 2(f) for knowingly inducing or receiving a discrimination in violation of Sections 2(d) or 2(e), it has been held that he has engaged in an unfair method of competition\textsuperscript{34} under Section 5 of the Federal Trade Commission Act.\textsuperscript{35}

II. DEFENSES AND JUSTIFICATIONS FOR DISCRIMINATION UNDER SECTIONS 2(d) AND 2(e).

If it is assumed that a seller has discriminated by paying for services under Section 2(d) or furnishing services under Section 2(e) to one customer without making the same terms available to all competing customers on proportionally equal terms, the question arises: Are there any defenses or justifications available to the seller which will preserve the legality of his conduct? By way of answer, it is well to examine \textit{seriatim} certain defenses or justifications which have come to be associated with offenses under the Robinson-Patman Act.

A. Cost Justification

In Section 2(a),\textsuperscript{36} a proviso permits a seller to justify what would otherwise be an unlawful price discrimination by showing that the lower price charged one purchaser was based upon savings in the cost of manufacture, sale or delivery brought about by differing methods or quantities in which the goods are sold or delivered. This is described in shorthand as "cost justification." There is no such proviso in Sections 2(d) and 2(e). However, Section 2(b)\textsuperscript{37} places upon the person charged the burden of rebutting a prima facie case of discrimination in "price


\textsuperscript{36}See supra note 7 for the full text of §2 (a).

\textsuperscript{37}49 Stat. 1526 (1936), 15 U.S.C. §13(2)(b) (1958). Section 2 (b) provides in full as follows: "2 (b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."
or services or facilities” by showing “justification.” What is meant by “justification” in Section 2(b) was until recently an open question. The definition has now been supplied by the United States Supreme Court in Simplicity Pattern. In this case, among the defenses urged to a charge of violating Section 2(e) by Simplicity was “cost justification.” It was argued on behalf of Simplicity that this defense was available for two reasons: (1) The proviso in Section 2(a) should be read into Section 2(e); (2) the word “justification” in Section 2(b) has a substantive content and what constitutes “justification” is a matter to be determined upon the facts of each case as it arises. The Court of Appeals for the District of Columbia ruled that this defense was available on the second ground advanced, but not on the first. One judge dissented on the ground that the proviso of 2(a) should be read into 2(e).

The Supreme Court reversed the ruling of the Court of Appeals, holding that the only defenses available under 2(e) are those, if any, contained in Section 2(e) itself and those in 2(b) expressly applicable to 2(e). There are no built-in defenses set forth in Section 2(e) itself and therefore the Court looked to Section 2(b). There, a proviso permits the seller to show that his furnishing of services to a purchaser was made in good faith to meet services furnished by a competitor. This is the so-called “meeting competition” defense. Thus this defense is expressly applicable to Section 2(e) and it is the only defense in 2(b) so applicable. The Supreme Court construed the word “justification” in 2(b) to be limited to the defense of “meeting competition” expressly set forth in 2(b) and any defenses built into the particular section under which the seller is charged (such as “cost justification” in Section 2(a)).

This, then, is the law—the defense of “cost justification” is not available for a 2(e) offense (and by implication, neither is it available for an offense under 2(d)). Though it must now be accepted as the law, the Supreme Court’s holding seems unduly restrictive. It seems anomalous that a direct discrimination in price prohibited by Section 2(a) may be “cost justified” while a discrimination in allowances and services under Sections 2(d) and 2(e) cannot be so justified. It is difficult to see what policy is advanced by such a result. The only reason advanced by the Supreme Court is feeble:

... In allowing a ‘cost justification’ for price discriminations and not for others, Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.

It would also seem that the position taken in the Report of the Attorney General's National Committee to Study the Antitrust Laws is much sounder. It was there concluded that a "cost justification" defense should be available under 2(d) and 2(e) in view of the "broader antitrust objectives" to be served by these Sections.

B. Absence of Competitive Injury

Section 2(a) prohibits price discrimination, the effect of which is to injure competition. Sections 2(d) and 2(e) do not expressly require that there be an adverse effect on competition resulting from a discrimination in paying for or furnishing services. Can a seller defend against a charge of violation of Section 2(d) or Section 2(e) on the ground that there has been no injury to competition? The Supreme Court of the United States answered "No" in Simplicity Pattern. In that case, Simplicity sold tissue patterns to two types of buyers: variety stores, called "Red Fronts," which resold the patterns for a profit; and, fabric stores, which sold the patterns at a small profit or even a loss only as an accommodation to its fabric purchasers. Simplicity made available at no charge to the "Red Fronts" catalogs and cabinets for filing patterns for which the fabric stores were required to pay. The Court held that the two types of buyers competed with each other, but accepted the Examiner's finding that there was "no showing of competitive injury." Nevertheless, the Court held that Simplicity violated Section 2(e), since unlike Section 2(a), that Section did not require a showing of injury to competition.

Thus, it is settled that Section 2(e) defines a per se offense, and it is certain that Section 2(d) will be similarly construed. At the same time, Section 2(a) requires proof of injury to competition. As one leading commentator had put it:

... There seems to be little logic in making disproportionate but bona fide allowances or services to competing purchasers (which may not amount to a discrimination in price) create, in effect, a conclusive presumption of injurious effect upon competition, whereas the charging of different prices to competing purchasers is only prima facie evidence of such injury.
It seems clear that logic and "broader antitrust objectives" would be better served by a contrary holding.47

C. Meeting Competition.

As discussed under the "Cost Justification" heading above, the language of Section 2(b) expressly states that a seller who has discriminated under Section 2(e) may justify the discrimination by showing that he furnished services to "meet . . . the services or facilities furnished by a competitor." This is the so-called "meeting competition" defense. Section 2(b) does not, by its terms, apply to offenses under 2(d). The Commission has consistently held, reading the sections literally, that the "meeting competition" defense is not available to a charge of violation under Section 2(d).49 However, first a Federal District Court50 in a private suit for damages, and more recently the Court of Appeals for the District of Columbia,51 have held that the close interrelationship between Sections 2(d) and 2(e) requires that the "meeting competition" defense is available under 2(d) as well as under 2(e). These rulings would seem to be sound in serving to treat violations under 2(d) the same as violations under 2(e) and thereby reconciling their basic purposes. However, the Commission has indicated that it will not accept the court's ruling in Exquisite Form Brassiere, Inc. v. Federal Trade Commission52 without a fight. It will seek a ruling from the Seventh Circuit Court of Appeals in a case now pending there53 that "meeting competition" is not a defense under 2(d), and it has contended in its brief that the Exquisite Form ruling "ignores the plain purpose of Congress in enacting the Robinson-Patman Act."54

Salutary as it is, it is probable that the ruling in Exquisite Form will be short-lived. The literal reading given to the various sections of Robinson-Patman in Simplicity Pattern55 indicates that the Supreme

47 For an argument that the legislative history of §2(e) points toward a contrary holding, see Note, The Simplicity Pattern Case: Robinson-Patman Con-
48 founded, 68 YALE L. J. 808, 824-25 (1959). See, for a similar contention, 72 
51 makes it clear in dictum that the "meeting competition" defense is available 
52 under §2(e).
53 Delmar Construction Company v. Westinghouse Electric Corporation, CCH 
55 Exquisite Form Brassiere, Inc. v. Federal Trade Commission, CCH 1961 
57 Ibid.
58 Shulton, Inc. v. Federal Trade Commission, (7th Cir., No. 13508), appeal 
59 from Shulton, Inc. supra note 49. But see J. A. Folger Co., 1962 CCH Trade 
60 Reg. Rep. No. 19, January 22, 1962 (to be reported) where an F.T.C. Ex-
61aminer seemed to recognize that the "meeting competition" defense is avail-
62able under §2(d).
Court would likely rule that since Section 2(d) contains no built-in defenses, and since Section 2(b) does not expressly refer to 2(d), "meeting competition" is not a defense under 2(d).\(^{56}\)

D. Summary of Defenses.

The only defense available to a charge of violation of Section 2(d) or Section 2(e) is that of "meeting competition." No other defenses are built into these sections. Section 2(b) does not add any substantive "justifications" to discriminations under 2(d) or 2(e) and the provisos of Section 2(a) are not to be read as applying to 2(d) or 2(e).\(^{57}\) And the availability of the "meeting competition" defense under 2(d) is by no means settled, so that all that can be said with safety is that a charge of violation of Section 2(e) is subject to the defense that the seller in good faith met services furnished by a competitor.

III. Cooperative-Merchandising Programs—Requirements for Compliance.

If a seller decides to make payments for services to some of his customers, he must make payments "available on proportionally equal terms" to all other customers, under Section 2(d). If he decides to furnish services to some customers, he must "accord" all other customers "proportionally equal terms." For a clearer understanding of these terms, it is desirable to examine them separately.

A. Available—Accorded.

Section 2(d) uses the word "available" while 2(e) says "accorded." There is nothing in the legislative history which suggests a difference in meaning between the two terms,\(^{58}\) and they have been treated as having the same meaning.\(^{59}\) Therefore, the word "available" is used herein as if it applied to both Sections 2(d) and 2(e).

The first step in making a cooperative-merchandising program available is for the seller to notify all his customers of the program and to offer it to them.\(^{60}\) The notification and offer can probably be accomplished by any means reasonably calculated to reach all customers. For example, publication of the offer in trade journals to which all customers subscribe would probably constitute proper notice, while such publication would be insufficient in an industry where many customers never read trade journals.\(^{61}\) However, notification of all customers may not be nec-

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\(^{56}\) At the time of this writing, no application for certiorari has been filed in connection with the \textit{Exquisite Form} case. However, it seems inevitable that this question will shortly be presented to the Supreme Court.


\(^{58}\) \textit{Austin} 140.

\(^{59}\) \textit{Att'y Gen. Comm.} 189.

\(^{60}\) \textit{Henry Rosenfeld, Inc.}, No. 6212, F.T.C., June 29, 1956.

essary if the seller can show that it would have been a futile act to notify those customers who were not notified, since they would not have participated in the program.62 However, it would seem that in almost all cases, all customers should be notified, and they, not the seller, should determine whether or not they are interested in participation.63 And, it is important to note that terms upon which merchandising payments or services are granted may not be justified by subsequent events; they must be openly offered and available to all customers from the outset of the program.64

It is not enough to offer the program to all competing customers, but the terms must be such that all competing customers can accept, if they so desire. It is said in State Wholesale Grocers v. Great Atlantic & Pacific Company,

an offer to make a service available to one, the economic status of whose business renders him unable to accept the offer, is tantamount to no offer to him.65

In that case, the sellers sold products to A & P as well as to the plaintiffs. The sellers purchased advertising in Woman's Day magazine (as a result of which the case is commonly referred to as the Woman's Day case), which magazine had wide circulation and was published by a wholly owned subsidiary of A & P. The plaintiffs published no magazines, but since the sellers paid A & P (through its subsidiary) for advertising, and since they did not make such payments "available" to plaintiffs on

(D.C. Cir. Nov. 22, 1961). The Commission held that the plan was not made available when publicized in trade journals in view of the testimony of witnesses who had evidently not read the publications. There the publication was not made until some sixteen months after the plan was put into effect. The Commission seemed to treat the time lag as an additional reason why the plan was not available, apparently holding that the fact that some buyers had not read the trade journals was a sufficient independent ground.

63 Liggett & Myers Tobacco Co., Inc., No. 6642, F.T.C., Sept. 9, 1959. "The question of whether the gesture would be futile is one of fact. Where it is disclosed that a seller [sic] generally does not want promotional allowances, it may be shown by the party charged with the violation that in such a case to offer an allowance would be a futile act."


65 Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d 988 (8th Cir.), cert. denied, 326 U.S. 773 (1945). Here the seller paid a demonstrator's full salary to one buyer and one-half of the salary of a demonstrator to the plaintiff, a competing buyer. The seller had not notified the plaintiff in advance that the percentage of the demonstrator's salary paid would depend on volume of purchases. The seller sought to show that the plaintiff purchased only one-half as much as the other buyer and that he was thus entitled only to one-half as much in payment of demonstrator services. The court said at 994:

That which was discriminatory under the statute when done, because wholly unrelated to any proportionalized basis or standard, cannot subsequently, in order to enable the seller to escape damages for the discrimination, be artificially tailored into proportionally equal terms by fitting it to some imaginary basis or standard that has never in fact existed.

66 258 F. 2d 831, 839 (7th Cir.), cert. denied, 358 U.S. 947 (1958).
proportionately equal terms, they violated Section 2(d). Thus, to offer large and small buyers alike a service which the small buyer cannot possibly use is to fail to make the service available to him. However, as will be considered later, it may be that alternative services, which the small buyer can use may be made available to him so as to fulfill the requirement of availability of proportionally equal terms.

Frequently, a seller will establish a cooperative-merchandising program which fully complies with Sections 2(d) and 2(e), but which is to be in force only until a budgeted amount of money is exhausted. In such cases, customers are served or paid on a first-come, first-serve basis. The latecomer may thus be denied participation in the program. Obviously, such a program is subject to abuse, since a small buyer whose request for services may actually pre-date the request of a large buyer may be turned down as a matter of business expediency and told that his request came too late. It is probable that a plan under which a customer may be denied requested participation because the budget has been exhausted is not available to such customer, unless a deadline date for requesting participation is established and announced to all at the outset of the program and is strictly adhered to by the seller. Rather than tying such program to a rigid budget, it is suggested that the budget be kept flexible by relating the services or payments to be made by the seller to a maximum percentage of the buyers’ purchases during a defined period rather than an overall fixed dollar maximum. Then, if requests for cooperative services are justified by sales, the money is available. If sales are down, so is the upper limit on cooperative expenditures. Tying the program to sales, of course, presents the disadvantage of having less funds available for promotions at times when sales are down and greater promotions are most needed.

B. Proportionally Equal Terms.

“Proportionally equal terms” must be available to competing customers in order that there be compliance with Sections 2(d) and 2(e). The vagueness of this standard has been an unsuccessful ground for attack upon the constitutionality of Sections 2(d) and 2(e). Although

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66 This holding is surprising since the sellers obtained full advertising value for the money paid, the same as if they had advertised in any independent magazine. It is interesting to ponder how they could have made proportionally equal terms “available” to the plaintiff when plaintiff published no magazine. But, perhaps the result is justified if §2(d) is viewed as condemning discriminatory benefits to buyers regardless of the value received by the sellers.

67 See Elizabeth Arden Sales Corporation v. Gus Blass Co., 150 F. 2d 988, 994-95 (8th Cir.), cert. denied, 326 U.S. 773 (1945). See also Elizabeth Arden, Inc., 39 F.T.C. 288 (1944), where 90% of the customers offered services by the defendant could not afford or qualify for them, and it was held that §2(e) was violated.

68 “We reject the contention that the standard in §2(e) is so indefinite that men of common intelligence cannot adequately grasp its meaning...” Elizabeth Arden, Inc. v. Federal Trade Commission, 156 F. 2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 866 (1947).
held to be sufficiently definite to avoid a constitutional attack, the standard nevertheless is difficult to apply. Obviously, precise equality of treatment of customers is not required, but "proportional" equality is sufficient. It has long been established that one proper basis for proportionalization is the quantity of goods purchased.\textsuperscript{69} But, one attorney for the Federal Trade Commission indicated that:

Although volume of purchases alone is clearly proportionable and the reasoning of [the] cases clearly indicates that its use as terms would satisfy the statute, the decisions should not be construed to mean that volume of purchases alone, as a matter of law, can be the only terms for furnishing or paying for services or facilities. They go no further than to require that terms (and services or facilities) must be capable of being proportionalized and that they must be proportionalized so as not to exclude any competitive customer who desires to participate; but there can be little doubt that they do go that far.\textsuperscript{70}

Other valid bases for proportionalizing terms have been suggested as: the number of stores, with allowances granted at a stated amount per store;\textsuperscript{71} and payment for or furnishing services in proportion to specified services furnished,\textsuperscript{72} such as payment of a certain amount per square foot of window space devoted to display of the seller's goods.

The Federal Trade Commission has issued several very significant pronouncements which have gone a long way toward establishing an understandable and practical definition of "proportionally equal terms." The most significant of these is found in the Commission's opinion in what may be called the Soap cases.\textsuperscript{73} There the Soap Companies offered two alternative contracts to their customers under one of which the customer agreed to conduct a minimum of nine feature sales of the soap products to be promoted by the buyer in newspapers, handbills or radio advertising. Each buyer who so promoted the products was paid a specified allowance per case of the soap products purchased during a designated period. The payments ranged from \$12\frac{1}{2}c to 20c per case for newspaper advertising and from 8c to 9c per case for handbill or radio advertising. Under the alternative plan, customers who did not elect to advertise, were to be paid 6c per case purchased in return for a feature sale supported by a store display. This plan which provided for different rates of payment for different alternative services was approved by the Commission as complying with Section 2(d) because there was a difference in cost and in the merchandising value of the services rendered, even

\textsuperscript{69} Elizabeth Arden Sales Corporation v. Gus Blass Co., \textit{supra} note 67, impliedly approving the standard established in Elizabeth Arden, Inc., \textit{supra} note 67.

\textsuperscript{70} Layton, \textit{Demonstrators on Proportionally Equal Terms}, CCH ROBINSON-PATMAN ACT SYMPOSIUM 38, 44 (1948).

\textsuperscript{71} AUSTIN, 145.

\textsuperscript{72} FELDMAN & ZORN, ADVERTISING AND PROMOTIONAL ALLOWANCES (1948).

\textsuperscript{73} Lever Bros. Co. 50 F.T.C. 494 (1953), Procter & Gamble Co. 50 F.T.C. 513 (1953), Colgate-Palmolive-Peet Co. 50 F.T.C. 525 (1953).
though there was no showing that the cost or value of the services furnished differed in exact proportion to the different rates of payment.

The Commission assumed that newspaper advertising was not practical for some customers. But, every customer could use handbills or store displays. The Commission stated:

Nor does the law require that a comprehensive plan must be so tailored that every feature of it will be usable or suitable or suitable for every customer. In many cases that would be an impossibility. 74

The other Commission pronouncement of importance is found in the Trade Practice Rules for the Cosmetic Industry. 75 Though applicable only to the industry indicated, these Rules nevertheless demonstrate the latitude which the Commission is tending to employ in interpreting the "proportionally equal" standard.

It may well be that the "principal test with respect to the 'proportionally equal' payments of sellers is the good faith effort of the parties to live up to the nondiscriminatory objectives of [§§2(d) and 2(e)]." 76

At any rate, the Commission has said:

Consequently, every plan providing payment for promotional services and facilities should be carefully scrutinized to see that it does conform to the express Congressional intent. It must be honest in its purpose and fair and reasonable in its application. 77

In attempting to proportionalize terms, a seller can give no weight to the prestige value of advertising or promotions by certain customers. 78 Thus, even though a seller correctly feels that his product will be upgraded because it is associated with certain high grade customers, he

74 While the result reached seems laudable and desirable, one may wonder whether or not the Commissioner may not at some future time consider this ruling too permissive. It is considered quite possible that this liberal ruling will later be hedged in with some restrictions.


76 VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 25 (2d ed. 1958).

77 Lever Bros. Co., Procter & Gamble Co., Colgate-Palmolive-Peet Co., supra note 73. The Supreme Court in Federal Trade Commission v. Simplicity Pattern Co., Inc., 360 U.S. 61-62, n. 4 (1959), quoted the Commission's language set forth in the text. The Court said: "We note in passing, however, that the Commission has indicated a willingness to give a relatively broad scope to the standard of proportional equality under §§2(d) and 2(e). . . . [citing, Lever Bros. Co., supra note 73]." A reading of the Court's footnote leads to the observation that Simplicity might well have contended that its plan did not violate §2(e) because alternatives were available on proportionally equal terms to both the "Red Fronts" and the fabric stores.

78 Fisher, Sections 2(d) and 2(e) of the Robinson-Patman Act: Babel Revisited, 11 VAND. L. REV. 453, 471 (1958) : "In other words, a seller may not grant a greater proportional allowance to one buyer because he knows that his product will acquire 'snob appeal' if advertised by that buyer. Conversely, he may not grant proportionally less to another buyer because that buyer's store is on the other side of the tracks and he knows his product will be associated with cheapness if advertised there."
may not give that customer a greater proportional allowance than
others. It has been stated:

Any cooperative-merchandising plan considered for adoption
should be appraised and tested in terms of the benefits extended
to different competing purchasers, rather than by the seller's esti-
mate of the comparative value of the services rendered by one
purchaser as against those rendered by another. Subjective con-
siderations, such as the prestige value of displays and advertising
by certain stores, may be given little, if any, weight in propor-
tioning allowances and services among customers.

Thus, at a minimum, a proposed program of cooperative advertising
should be openly communicated to all customers, and if the program is
to offer services beyond the ability of some customers to supply, some
alternative service usable by and practical for such customers should be
offered. And if the rates to be paid for alternative services are to vary,
they should vary in some reasonable relation to the cost or value of the
service paid for. It is not essential that all customers actually participate
in the program, they may take-it-or-leave-it, but they must be given the
choice.

IV. CONSEQUENCES OF VIOLATING SECTION 2(d) OR SECTION 2(e).

The violation of Section 2(d) or Section 2(e) may result in pro-
cedings of four types, but consideration is here given only to the
action before the Commission resulting from the Commission complaint
which culminates in a cease and desist order and private treble damage
suits. And the Commission proceeding is discussed only to note that
the resulting cease and desist order can often be very difficult to live
with and may often hamper future legitimate conduct of business.
Incidentally, the cease and desist order does not become final or en-
forceable by the lapse of time, and before the Commission can enforce

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80 Austin, 146.
81 See CCH Trade Reg. Rep. §3980, F.T.C., Guides for Allowances and Services,
May 19, 1960. These guides are general but they may be of assistance in ap-
praising the legality of a proposed program. For a consideration of these Guides
in some detail, see, Shiderman, supra note 23, at 410-21, where it is stated
that the Guides "are destined to become an important part of the learning in
this field." Id. at 421.
82 These four types are:
(1) A suit by private parties injured by the discrimination for treble
(2) A proceeding before the Commission brought upon complaint of the
Commission resulting in a cease and desist order. (§11, Clayton
(3) An injunction suit by the United States, under direction of the
§25 (1958). This type is rarely used.
(4) A suit by a private person for an injunction against threatened
This type is frequently combined with a private treble damage claim.
such order, it must prove two subsequent violations of Section 2(d) or Section 2(e). 83

In a treble damage suit for violation of one of these sections, the plaintiff seeks to recover three times the damages he sustained in his business or property by reason of the violation. But, before a court can multiply by three, it must determine the damage figure which is to be multiplied. The determination of this figure is less than an exact science.

The early tendency of courts was to require only rather liberal and inexact proof of damages. In one case, 84 the court required only a showing that a discrimination in price enabled plaintiff's competitor to undersell plaintiff, and that plaintiff lost business as a result, in order to take the case to the jury. It did not require plaintiff to prove the amount of profits lost. The theory was that a "wrongdoer" could not take refuge behind the indefiniteness of plaintiff's proof of damages. Subsequent cases established that this decision is wrong.

However, Mr. Justice Jackson of the United States Supreme Court characterized the problem of the measurement of damages under the Clayton Act as "rather difficult." 85 His opinion in Bruce's Juices; 86 then went on to add to the difficulty. In \textit{dictum} he indicated that if there was proof of an illegal discrimination, that proof alone is sufficient to entitle plaintiff to recover and the amount of the discrimination is \textit{prima facie} the measure of damages. This \textit{dictum} has not been followed, however, the principle had earlier been applied in Elizabeth Arden Sales Corporation \textit{v. Gus Blass Co.}, 87 a suit for damages because of violation of Section 2(d). In \textit{Gus Blass} the court measured damages by the amount of the discrimination. The seller made payments toward the salary of a clerk employed by the buyer, who also demonstrated the seller's product. For one buyer, the seller paid the total salary—for plaintiff, only one-half. The court allowed the buyer on the short end to recover three times the difference in amounts paid by the seller as demonstrators' salaries. As will be shown later, however, the \textit{Gus Blass} decision is contrary to the trend of more recent cases requiring more strict and accurate proof of damages in discrimination cases, one of which was decided by the same court which decided \textit{Gus Blass}. 88 In the \textit{Russellville} case, the court held that there must be proof that the discrimination resulted in ascertainable damage to the plaintiff's business. 89

The most significant case in the determination of damages under 83 \textit{AUSTIN}, 169-170.
84 \textit{American Can Co. v. Ladoga Canning Co.}, 44 F. 2d 763 (7th Cir. 1930).
85 \textit{Bruce's Juices, Inc. v. American Can Co.}, 335 U.S. 743, 753 (1947).
86 \textit{Bruce's Juices, Inc. v. American Can Co.}, \textit{supra} note 85.
87 150 F. 2d 988 (8th Cir.), \textit{cert. denied}, 326 U.S. 773 (1945).
88 \textit{Russellville Canning Company v. American Can Co.}, 191 F. 2d 38 (8th Cir. 1951).
89 This case was decided under Section 2(a) but is applicable to §§2(d) and 2(e) as well.
Sections 2(d) and 2(e) is the *Sun Cosmetic* case. There the defendant furnished a demonstrator free of charge to plaintiff's competitor, but did not furnish any such service to plaintiff or pay any salary to a demonstrator in plaintiff's store. The court held that the only proper proof of damages is loss to the plaintiff's business. The salary of a demonstrator is not such a loss, since in and of itself it showed no loss to plaintiff. However, such salary was held to be the upper limit on plaintiff's recovery for,

if the loss caused by the diversion of its customers to favored 'agencies' was greater than the cost of employing a 'demonstrator,' it would be its [plaintiff's] duty to minimize the damages by employing one.\(^9\)

This principle of mitigation would seem to have wide application in suits for violation of Sections 2(d) and 2(e). As illustrated in the *Sun Cosmetic* case, the fact that customer A has a demonstrator and that customer B does not, does not establish that B has lost any sales or profits. The same thing would be true if customer A were furnished display cabinets while customer B was not, or A was reimbursed for advertising while B was not. Assume that B can prove he has lost profits in the amount of $1,000 because these payments or services were not furnished to him. If the cost of the services were $200, under the holding in *Sun Cosmetic*, B would not be entitled to recover three times $1,000 since he had a duty to spend the $200 and purchase the services himself in order to reduce his damages. If B could not prove that he lost any profits because of the lack of the services, he should recover nothing. Even though A would have received a $200 payment or $200 worth of services and is better off than B, B has nevertheless lost nothing.

In the *Gus Blass* case both plaintiff and his favored competitor had the demonstrator service available. So it cannot be contended that plaintiff lost sales because of the discrimination. But it cost plaintiff more than it cost his competitor since he was reimbursed for only one-half of the demonstrator's salary. The doctrine of *Sun Cosmetic* would require that plaintiff *Gus Blass* recover nothing.\(^9\)

Thus, it now appears from the more recent and better reasoned cases, that a treble damage plaintiff must prove with accuracy that a violation of Section 2(d) or Section 2(e) caused ascertainable damage to his sales and profits and that such damages cannot be shown merely by proving

\(^{90}\) *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corporation*, 178 F. 2d 150 (2d Cir. 1949).

\(^{91}\) Id. at 153.

\(^{92}\) "There only remains the question whether the measure of the plaintiff's damage can in any event be the salary of a 'demonstrator.' The Eighth Circuit by a divided court [in *Gus Blass*] held that it can, and we agree that it would be a proper limit upon the plaintiff's recovery; . . . but we do not think that it is otherwise relevant." *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corporation*, *supra* note 90, at 153.
a discrimination. And the extension of the "mitigation principle" announced by Judge Learned Hand in *Sun Cosmetic* would go far to minimize the impact of a treble damage suit upon the violating seller. This seems salutary, particularly because the intricacies of the Robinson-Patman Act create the possibility that even a seller acting in complete good faith will violate the Act. It is enough of a penalty to require such a seller to pay three times the damages he causes. It would be unconscionable to additionally relieve the plaintiff of his burden of proving that he was damaged.