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Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule be Retired

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ROBINSON-PATMAN ACT IN THE TWENTY-FIRST CENTURY: WILL THE *MORTON SALT* RULE BE RETIRED?

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I. INTRODUCTION

THE Robinson-Patman Act[1] was enacted as an antitrust law during the Great Depression of the 1930s in response to intensive lobbying by independent wholesalers, brokers, and retailers who complained of price discrimination by their suppliers, who favored the large chains. Since its enactment in 1936, the Act has been the object of unrelenting criticism by legal scholars and economists. Critics charge that the Act has been invoked to protect individual competitors and to deprive consumers of low prices, a course they view as in direct conflict with the basic goals of antitrust law: protecting competition, not competitors, and advancing the consumer welfare.[2] Indeed, during the period from 1955

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1. 15 U.S.C. § 13(a)-(f) (1988).

2. *See, e.g.*, ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382-401 (1978); Wesley J. Liebeler, *Let's Repeal It*, 45 ANTITRUST L.J. 18 (1976); Phil C. Neal, *Let's Reform It*, 45 ANTITRUST L.J. 52 (1976); Edward F. Howrey et al., *The Robinson-Patman Act: How—Not Whether—It Should be Amended*, 22 Rec. Ass'n B. City N.Y. 621 (1967). *But see*, Harry Ballan, Note, *The Courts' Assault on the Robinson-Patman Act*, 92 COLUM. L. REV. 634 (1992).

through 1979, various presidential, executive department, and bar association task forces recommended partial repeal or radical revision of the Act.[3] Despite the criticism and calls for repeal or revision, at the threshold of the twenty-first century, the Robinson-Patman Act remains structurally intact.

Most of the criticism has been aimed at the Federal Trade Commission ("FTC") and court determinations under section 2(a) of the Act of the likely effects on competition of price discrimination. Section 2(a) declares it unlawful for a seller to discriminate in price between different purchasers in interstate sales of commodities of like grade and quality "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition" with either the grantor or knowing recipient of the benefit of the discrimination, or with their customers.[4] Thus, two tests of competitive injury are used: a broad test which focuses on injury to competition in general (broad effects clause), and a narrow one which focuses on injury to competition with the grantor or knowing recipient of the benefit of a discrimination or their customers (narrow effects clause). Courts have held that both tests are satisfied upon a showing that there is a "reasonable possibility" of substantial injury to competition. Price discrimination cases also fall into either of two additional categories: those involving alleged injury to competition at the seller level (primary line injury), and those involving alleged injury at the customer level (secondary line injury).

The Supreme Court has repeatedly indicated that interpretations of the Robinson-Patman Act should seek to reconcile it with the nation's other

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3. *See, e.g.*, REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955); *White House Task Force Report on Antitrust Policy*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 411, at Pt. II (May 21, 1969); *Text of Report of Nixon Task Force on Productivity and Competition*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 413, at X-1 (June 10, 1969); U.S. DEPT. OF JUSTICE, REPORT ON THE ROBINSON-PATMAN ACT (1977); *Report to the President and the Attorney General of the National Commission for the Review of Antitrust Laws and Procedures*, [Jan.-June] Antitrust & Trade Reg. Rep. (BNA) No. 897, at Special Supplement (Jan. 18, 1979).

4. 15 U.S.C. § 13(a) (1988). Other sections of the Act forbid the payment or receipt of certain types of brokerage or discounts in lieu thereof (§ 2(c)); require that payments for services or facilities furnished by a customer or the furnishing of services or facilities to customers be provided on proportionally equal terms to all competing customers (§§ 2(d), (e)); and make it unlawful for a buyer knowingly to induce or receive a prohibited price discrimination (§ 2(f)). The Act provides several complete defenses to a prima facie case of price discrimination: A price differential is not illegal if it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" of sale or delivery (cost justification defense) (§ 2(a)); if the differential resulted from "price changes . . . in response to changing conditions affecting the market for or the marketability of the goods concerned" (changing conditions defense) (§ 2(a)); or if the "lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor" (meeting competition defense) (§ 2(b)). By judicial and administrative interpretation, the meeting competition defense also applies to payments for services or facilities furnished by a customer.

antitrust laws.[5] In 1993, the Court, in *Brooke Group v. Brown & Williamson Tobacco Corp.*,[6] effected such a reconciliation as to the Act's primary line coverage. The Court first observed that a claim for primary line price discrimination under the Robinson-Patman Act and a claim for predatory pricing under section 2 of the Sherman Act[7] are essentially the same.[8] Accordingly, the Court held that the prerequisites for recovery under both statutes are the same: there must be a showing of below-cost prices and of a "reasonable prospect" (under the Robinson-Patman Act) or "dangerous probability" (under the Sherman Act) that the seller, after destroying or disciplining its competitors, will recoup more than its losses through sustained supracompetitive prices.[9] These standards supplanted the primary line injury criteria of *Utah Pie Co. v. Continental Baking Co.*,[10] which had been almost universally condemned as anti-competitive.[11]

Although a reconciliation with the other federal antitrust laws has been achieved as to Robinson-Patman's primary line coverage, that is not the case with respect to its secondary line coverage. The principal obstacle is a court-made rule, known to the cognoscenti as the *Morton Salt* doctrine, derived from the Supreme Court's opinion in *FTC v. Morton Salt Co.*[12] Under the rule, likely injury to particular competitors and competition is inferred from proof of "a substantial price discrimination between competing purchasers over time"[13] without more. It is a rigid rule which has taken the place of the market facts even when they tended to dispel the inference of competitive injury. In such cases, competitors, rather than competition, have been protected, and consumers may have been deprived of legitimate low prices.

Even before *Brooke Group*, the *Morton Salt* rule appeared to be in conflict with antitrust's competition and consumer welfare goals. It received, however, remarkably little criticism from the courts and commentators. This may be because of a belief, expressed by then Judge Mikva in his dissenting opinion in *Boise Cascade Corp. v. FTC*,[14] that certain as-

5. *See, e.g.*, Brooke Group v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2586 (1993); Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979); United States v. United States Gypsum Co., 438 U.S. 422, 450-51, 458-59, *cert. denied*, 438 U.S. 915 (1978), *and cert. denied*, 444 U.S. 884 (1979); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 63-74 (1953); Standard Oil Co. v. FTC, 340 U.S. 231, 248-50 (1951).

6. 113 S. Ct. 2578 (1993).

7. 15 U.S.C. § 2 (Supp. V 1993).

8. *Brooke Group*, 113 S. Ct. 2587 (1993).

9. *Id.* at 2587-89. Although noting the different standards under the two statutes, a "dangerous probability" under the Sherman Act and a "reasonable possibility" under the Robinson-Patman Act, the Court made little of the difference, stating: "But whatever additional flexibility the Robinson-Patman Act standard may imply, the essence of the claim under either statute is the same." *Id.* at 2587.

10. 386 U.S. 685 (1967), *cert. denied*, 393 U.S. 860 (1968).

11. *See, e.g.*, Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

12. 334 U.S. 37 (1948).

13. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983).

14. 837 F.2d 1127 (D.C. Cir. 1988).

pects of the Act's legislative history "set Robinson-Patman apart from the rest of antitrust law"[15] and there is an "inherent tension" between them.[16] Now, however, any difference between the purposes of that statute and the rest of antitrust law may have been narrowed or eliminated by *Brooke Group's* attribution of antitrust's competition and consumer welfare goals to the Robinson-Patman Act itself. As a result, the *Morton Salt* rule now appears to be incompatible with the Robinson-Patman Act as well as with the antitrust laws in general. This raises the possibility that in a future case the Court will re-examine the *Morton Salt* rule and possibly discard it in favor of a market analysis, thus further harmonizing the price discrimination provisions of the twenty-first century Robinson-Patman Act with the nation's other antitrust laws.

This essay will sketch the implications of the *Brooke Group* decision for the *Morton Salt* rule and secondary line injury analysis under the Robinson-Patman Act. First, however, it is necessary to take a closer look at the opinion which produced the rule.

II. THE *MORTON SALT* CASE

Morton Salt started as an administrative proceeding by the Federal Trade Commission challenging Morton's quantity and volume discounts on table salt.[17] Finding that the discounts had resulted in price discriminations between competing purchasers in violation of the Robinson-Patman Act, the Commission entered a cease and desist order.[18]

The case eventually came before the Supreme Court, which upheld the Commission's order except as to certain provisos.[19] The Court first noted that few of Morton's customers bought its products in sufficient annual volumes to qualify for the top volume discount, and that small customers did not buy in carload quantities so as to qualify for the quantity discount. Focusing on those customers who had not earned discounts and thus had paid a higher price, the Court opined that it appeared "obvious" that the competitive opportunities of such customers were injured,[20] and observed that the evidence showed that the less-than-carload purchasers "might" have been handicapped in competing with carload purchasers.[21] The Court then declared:

> It would greatly handicap effective enforcement of the Act to require testimony to show that which we believe to be self-evident, namely, that there is a "reasonable possibility" that competition may be adversely affected by a practice under which manufacturers and

15. *Id.* at 1153 (Mikva, J., dissenting).
16. *Id.* at 1158.
17. Morton Salt Co., 39 F.T.C. 35 (1944), *modified*, 40 F.T.C. 388 (1945).
18. *Id.* at 45.
19. FTC v. Morton Salt Co., 334 U.S. 37 (1948).
20. *Id.* at 46-47.
21. *Id.* at 49-50.

> producers sell their goods to some customers substantially cheaper than they sell like goods to the competitors of these customers.[22]

Having determined that the possibility of competitive injury in secondary line cases is "self-evident" from proof of a price difference alone, the Court made the following statements of relevance to the discussion herein: The fact that salt is a small item in most wholesale and retail businesses did not render unjustified the Commission's finding of substantial injury to competition between the purchasers who were granted and those were denied the discount.[23] Nor was it a reason for upsetting the Commission's findings that enforcement of the cease and desist order entered against Morton might lead it to raise table salt prices to its carload purchasers.[24]

As succinctly stated by the Supreme Court in *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, competitive injury is established under the rule "by proof of a substantial price discrimination between competing purchasers over time."[25] In the majority of secondary line cases over the years, once the inference of injury was made, it was given virtually conclusive effect. However, in *Falls City Industries*, the Court held that "[i]n the absence of direct evidence of displaced sales, this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits."[26] Although in the District of Columbia Circuit, "the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman,"[27] the Court has not so ruled.

The *Morton Salt* rule has not been applied in every secondary line case. Generally, it has not been applied where the discrimination was insignificant in size or duration,[28] where a product component was involved and no correlation was shown between the difference in prices paid for the component and the different prices charged for the end product,[29] where regular and private brands of the same product were involved and the higher price of the former merely reflected its additional value to the consumer,[30] or, as the Supreme Court held in *Texaco Inc. v. Hasbrouck*,[31] where the discrimination resulted from a "legitimate" functional discount

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22. *Id.* at 50-51. *Morton Salt*'s "self-evident" competitive injury inference is to be contrasted with the Court's approach in classifying restraints as illegal per se under the Sherman Act only after it has, through experience, acquired sufficient knowledge as to the restraint's actual impact on competition. *See* White Motor Co. v. United States, 372 U.S. 253, 263 (1963).

23. *Morton Salt*, 334 U.S. at 48-49.

24. *Id.* at 50.

25. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 435 (1983).

26. *Id.* at 435.

27. Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1144 (D.C. Cir. 1988) (emphasis omitted).

28. American Oil Co. v. FTC, 325 F.2d 101, 104 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

29. Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 791 (7th Cir. 1951), *cert. granted*, 342 U.S. 940, *and cert. dismissed*, 344 U.S. 206 (1952).

30. Borden Co. v. FTC, 381 F.2d 175, 180-81 (5th Cir. 1967).

31. 496 U.S. 543 (1990).

"that constitutes a reasonable reimbursement for the purchasers' actual marketing functions . . . ."[32] In such cases, an analysis is made of various factors, such as the nature of the discrimination, the functions performed by the purchasers, and actual competitive conditions.

The Supreme Court has frequently reaffirmed the *Morton Salt* rule, most recently in *Falls City Industries* and *Hasbrouck*. As the District of Columbia Circuit said in *Boise Cascade*, the rule is "alive and well in the law."[33]

Volume discount schedules are particularly vulnerable to the *Morton Salt* rule, as they generally meet the rule's requirements of a substantial price discrimination between competing purchasers over time, and while reflecting cost savings to the seller, are difficult to cost justify under the rigid standards of the Act's cost justification defense. Because the use of volume discount schedules is widespread, the rule exposes many businesses to potential Robinson-Patman liability.

III. *BROOKE GROUP*'S ATTRIBUTION OF COMPETITION AND CONSUMER WELFARE CONCERNS TO THE ROBINSON-PATMAN ACT

Brooke Group reaffirmed what the Court had often said, that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."[34] Having done this, the Court stated, "That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured: it is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.' "[35] Clearly, the Court was speaking of the effect of a price discrimination on competition, and not of its effect on competitors. In a secondary line context, such an interpretation of the Robinson-Patman Act would seem to render of no consequence any effects of the discrimination on individual competitors if competition remained healthy and vigorous.

The Court also made it clear that the consumer welfare is enhanced by low prices, and, albeit speaking with respect to predatory pricing liability, stated that it would be ironic indeed if "antitrust suits themselves became a tool for keeping prices high."[36] The Court quoted an earlier decision, *Atlantic Richfield Co. v. USA Petroleum Co.*,[37] as stating, "[l]ow prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition . . . . We have adhered to this principle regardless of the type of antitrust claim

32. *Id.* at 571.
33. *Boise Cascade*, 837 F.2d at 1139.
34. Brooke Group v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2586 (1993) (quoting Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979)).
35. *Id.* at 2588 (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962)).
36. *Id.* at 2590.
37. 495 U.S. 328 (1990).

involved."[38] The Court thus made it plain that the benefit of low prices to consumers is not to be disregarded in enforcing the Robinson-Patman Act.

The dissenting justices appear to agree with this aspect of the Court's opinion. Justice Stevens, the Court's leading antitrust scholar, wrote the dissenting opinion, joined by Justices White and Blackmun.[39] After referring to the majority's reminder that "the Robinson-Patman Act is concerned with consumer welfare and competition, as opposed to protecting individual competitors from harm; . . . [and] [f]or that reason, predatory price-cutting is not unlawful unless the predator has a reasonable prospect of recouping his investment from supracompetitive profits,"[40] Justice Stevens added, "No one questions that proposition here."[41]

Although the Court's statements regarding the Robinson-Patman Act's concerns with competition and consumer welfare were made in a primary line case, the statements would appear also to apply to the Act's secondary line coverage. It would be incongruous, indeed, were the Act to be interpreted as concerned with competition and the consumer welfare as to primary line competition, but not as to secondary line competition, especially when the same competitive effects language applies to both levels of competition. Such an interpretation would result in legal schizophrenia.

Moreover, as support for imputing such concerns to the Robinson-Patman Act, the Court relied on buyer liability cases requiring proof of a price discrimination likely to injure secondary line competition.[42] The Court quoted them to the effect that "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws."[43]

To attribute to the Robinson-Patman Act's secondary line coverage a concern with competition, as opposed to competitors, as *Brooke Group* expressly has done with respect to the Act's primary line coverage, might appear to be contrary to congressional intent, as indicated by the narrow competitive effects clause of the Act, and the explanation given the clause in the Senate Judiciary Committee's Report.[44]

The narrow effects clause renders a price discrimination prima facie unlawful where its effect is likely "to injure, destroy, or prevent competition with any person who either grants or receives the benefit of such

38. *Id.* at 340.

39. *Brooke Group*, 113 S. Ct. at 2598 (Stevens, J., dissenting).

40. *Id.* at 2604.

41. *Id.*

42. Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979); Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 63-74 (1953).

43. *Brooke Group*, 113 S. Ct. at 2586 (quoting *Great Atlantic & Pacific Tea Co.*, 440 U.S. at 80 n.13).

44. S. REP. NO. 1502, 74th Cong., 2d Sess. (1936), *reprinted in* FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 578 (S. Chesterfield Oppenheim ed., 1962).

discrimination, or with customers of either of them."[45] The Senate Judiciary Committee Report explained:

> The [original effects clause, which was retained] has in practice been too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is in injury to the competitor victimized by the discrimination. Only through such injuries, in fact, can the larger general injury result, and to catch the weed in the seed will keep it from coming to flower.[46]

As explained by the Senate Report, the clause in question appears to be concerned with the effect of price discrimination on competitors instead of competition. However, the clause does not speak of injury to a competitor, but of injury to competition with the grantor or recipient of the benefit of a discrimination. Hence, the Senate Report's explanation is not supported by the statutory language itself. In *Hasbrouck* the Court rejected an argument of the defendant, which the Court conceded was supported by an excerpt from the legislative history of the Robinson-Patman Act, because the argument was "foreclosed by the text of the Act itself."[47] Although some members during congressional debates spoke of injury to a competitor, the statute that was enacted does not.

Interpreting the narrow effects clause as concerned with competition, as opposed to a competitor, is consistent with the interpretation given the clause in *Brooke Group*. The narrow effects clause applied to that primary line case, as it protects competition with the grantor of the benefit of a price discrimination as well as with the recipient. In that case, the target of Brown & Williamson's discriminatory below-cost pricing, Liggett, suffered losses that it was unwilling to sustain, after which it raised its prices.[48] Despite the Senate Report's statement that the narrow effects clause is concerned with "injury to the competitor victimized by the discrimination,"[49] the Court did not find a violation because, in its view, the evidence did not show that injury to competition was likely.[50]

The *Brooke Group* Court's interpretation seems consistent with the fact that Congress chose to enact the Robinson-Patman Act as an antitrust law. As such, the Act should be viewed as possessing the attributes of an antitrust law, which include the maintenance of competition, not the protection of competitors, and promotion of the consumer welfare.

In the discussion which follows, it will be assumed that Robinson-Patman's secondary line coverage has the same competition and consumer welfare concerns as its primary line coverage.

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45. 15 U.S.C. § 13(a) (1988).
46. ROWE, *supra* note 44, at 582.
47. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556-57 (1990).
48. *Brooke Group*, 113 S. Ct. at 2592.
49. S. REP. No. 1502, *supra* note 44, at 582.
50. *Brooke Group*, 113 S. Ct. at 2593.

IV. THE *MORTON SALT* RULE IS INCOMPATIBLE WITH COMPETITION AND CONSUMER WELFARE CONCERNS

The *Morton Salt* rule's incompatibility with Robinson-Patman's competition and consumer welfare concerns needs little exposition. In speaking of the former, the *Brooke Group* Court said, "It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.' "[51] The premise underlying the axiom is that injury to competitors and injury to competition are not the same. Yet, the *Morton Salt* rule equates the two; from presumed effects on particular competitors, the likelihood of injury to competition is inferred. But an effect on a competitor does not necessarily portend substantial injury to competition, as, among other things, the competitor may remain a viable force (increasing sales and earning profits), or compete on terms other than price (e.g., convenience food stores, specialty clothing stores), or be a minor factor in such competition. In *Brooke Group* the Court stated that in antitrust cases "mistaken inferences. . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."[52] Where the rule's inference is mistaken, arguably, it acts to protect competitors, not competition, and is thus at odds with Robinson-Patman's competition concern.

The *Morton Salt* rule seems to be equally at odds with the Act's concern for the consumer welfare. The *Brooke Group* Court repeatedly stated that low prices benefit consumers, and plainly indicated that antitrust suits should not be used to deprive consumers of this benefit. Yet, in its *Morton Salt* opinion, the Court stated that the possibility that enforcement of the FTC's cease and desist order might lead Morton to increase its prices "could afford us no reason for upsetting the Commission's findings. . ."[53] As the *Morton Salt* inference has been drawn in the face of evidence which, arguably, tended to negate a reasonable possibility of substantial injury to competition,[54] its effect can be to deny consumers the benefit of legitimate low prices. It can only be surmised how many times invocation of the *Morton Salt* rule has resulted in the protection of competitors at the expense of consumers.

Based on *Brooke Group's* teaching, the *Morton Salt* rule appears to be too solicitous of competitors, too little concerned with competition, and not at all concerned with the consumer welfare. Should the Supreme

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51. *Id.* at 2588 (citation omitted).

52. *Id.* at 2589-90 (citations omitted). Volume rebate schedules, which as previously noted (*See supra* Part II) are particularly vulnerable under the *Morton Salt* rule, often are initiated and maintained by the seller in response to forces of competition in the primary line, although they may not be defensible under the rigid standards of the meeting competition proviso. This was true of the Brown & Williamson volume rebate schedule at issue in *Brooke Group*.

53. *Morton Salt Co.*, 334 U.S. at 50.

54. *See infra* notes 57 & 58 and accompanying text.

Court so conclude, presumably it would require that competitive injury findings in all secondary line cases be based on a market analysis.

V. *BROOKE GROUP'S* IMPLICATIONS FOR SECONDARY LINE COMPETITIVE INJURY DETERMINATIONS

Competition and consumer welfare concerns would seem to demand that before the FTC or the courts interfere with a seller's pricing system, the evidence adduced by FTC counsel or the plaintiff demonstrate a *reasonable* possibility of *substantial* injury to competition. This would require that the market analysis involve, as the Supreme Court said in *FTC v. Sun Oil Co.*,[55] "realistic appraisals of relevant competitive facts."[56]

A. REASONABLE POSSIBILITY OF SUBSTANTIAL INJURY

Although the FTC and the courts give lip service to the standard that there be a reasonable possibility of substantial injury to competition, the *Morton Salt* inference has been drawn in the face of evidence which tended to negate the inference or which indicated that the possibility of injury was remote and its extent insubstantial. As noted, the inference has been drawn in some cases where there was testimony by unfavored customers that they had not been injured.[57] It has also been drawn where the defendants presented evidence showing that competition and competitors were healthy, as the number of unfavored customers had increased, and they had increased their sales and profits, had sometimes undercut the prices of favored customers, and had gained accounts from the favored customers as well as lost accounts to them.[58] As one court of appeals put it, "[m]ini injury" has been the test.[59]

B. REALISTIC APPRAISALS OF COMPETITIVE FACTS

In keeping with the scope of the narrow effects clause, the market analysis in a secondary line price discrimination case should be limited to determining whether there is a reasonable possibility that competition between the unfavored customers and the recipients of the benefit of a discrimination will be substantially injured. As noted, this requires "realistic appraisals of relevant competitive facts."[60]

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55. 371 U.S. 505 (1963).
56. *Id.* at 527.
57. *See, e.g.*, United Biscuit Co. of Am. v. FTC, 350 F.2d 615, 621-22 (7th Cir. 1965), *cert. denied*, 383 U.S. 926 (1966); Whitaker Cable Corp. v. FTC, 239 F.2d 253, 255 (7th Cir. 1956), *cert. denied*, 353 U.S. 938 (1957).
58. *See, e.g., Boise Cascade Corp*, [1983-1987 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,330 (1986); *Boise Cascade Corp.*, [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,902 (1990).
59. National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 521 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968) (quoting Frederick M. Rowe, *Section 2(a) of the Robinson-Patman Act: New Dimensions in the Competitive Injury Concept*, 37 ANTITRUST L.J. 14, 16 (1968)).
60. *Sun Oil Co.*, 371 U.S. at 527.

Two examples help illustrate the failure of the courts and the FTC to meet the standards of realistic fact appraisals and a reasonable possibility of substantial competitive injury. The first example relates to the treatment of evidence showing that the unfavored customers could have obtained the lower price by joining a buying group. Availability of the lower price to unfavored customers generally is deemed to break the causal connection between the price discrimination and any injury suffered by the customers.[61] However, the FTC and some courts have held that if the customer is required to join a buying group, the lower price is not "practically available," as a buyer is not required to alter its purchasing status in order to get price equity.[62] One may well ask why the buyer should not be required to alter its purchasing status. A cardinal rule of nature and business is, "Adapt or perish." Businesses have had to adapt in other respects in order to survive. To cite but a few examples, most or all retail food stores have had to install electronic scanning devices and cash registers, some retail food stores have chosen to convert to the convenience food store format, and retail gasoline stations have had to switch from full to self-service. The Department of Justice has stated:

> The development of contractual marketing systems is perhaps the most important development in the retailing market in terms of evaluating the need for Robinson-Patman, because such contractual systems permit their member businessmen, often small firms, to achieve marketing power, a group identity and a consequent ability to compete more effectively with large enterprises. A 1970 study suggests "That 35 to 40% of all retail trade is accounted for by some form of voluntary chain, cooperative, or franchising organization." Indeed, in the food industry, the percentage of independent retailers affiliated with some wholesaler group or cooperative has expanded from forty-six percent to eighty-three percent during the period from 1947 to 1964.[63]

The Report also states: "[T]he so-called convenience food store is able to compete at unabashedly higher prices, sometimes immediately adjacent to a large supermarket, because it offers the convenience of a small selection of frequently purchased goods, coupled with longer hours and quick check-out time."[64]

Another study found that, due to food wholesalers who sponsor voluntary groups of retailers, "U.S. independent grocers have been able to sur-

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61. *See, e.g.*, FTC v. Borden Co., 383 U.S. 637 (1966); Shreve Equip., Inc. v. Clay Equip. Corp., 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 120-21 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981); FLM Collision Parts, Inc. v. Ford Motor Co., 543 F.2d 1019, 1025-26 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977).

62. *See, e.g.*, *In re* Dayton Rubber Co., 66 F.T.C. 423, 470-71 (1964), *rev'd on other grounds sub nom*, Dayco Corp. v. FTC, 362 F.2d 180 (6th Cir. 1966); *National Dairy Prods.*, 395 F.2d at 523.

63. U.S. DEPT. OF JUSTICE, *supra* note 3, at 184 (1976) (citations omitted).

64. *Id.* at 187.

vive competitively against huge food chain store operations throughout this century."[65]

Buying groups help small companies compete with chains and large enterprises, and in the food industry and other industries, many small companies have found it to their advantage to join such groups. A realistic appraisal of evidence in a secondary line case which showed that the lower price was available to members of buying groups, but that the unfavored customers had failed to take advantage of the opportunity by joining such a group, should lead to the conclusion that the alleged injuries of the customers were not caused by the price differential but by their own inertia.

The second example involves the treatment of evidence showing that the unfavored customers had increased their sales and profits during the period of alleged discriminatory pricing. Increased sales and profits enjoyed by an unfavored customer during the period of alleged discriminatory pricing ordinarily would be regarded as demonstrating that the customer remained a viable competitor. However, in its after-remand decision in *Boise Cascade*, the FTC found that, because Boise's evidence showed the unfavored customers' sales and profits on all the products they handled instead of just on the products they had purchased at discriminatory high prices, the evidence was "not persuasive."[66] In support of this position, the Commission cited the *Morton Salt* holding that the Robinson-Patman Act must be applied to "each individual article" sold to competing purchasers at discriminatory prices.[67] *Morton Salt* does indeed support the Commission's position. However, should the Supreme Court in a future case reexamine the *Morton Salt* rule in light of *Brooke Group*, for the reasons stated below, the Court should also consider the appropriateness of this specific holding.

In *Morton Salt*, Morton argued that its price differentials were incapable of substantially lessening competition because "salt is a small item in most wholesale and retail businesses and in consumers' budgets."[68] In rejecting this argument, the Court did not dispute Morton's contention. Instead, it simply stated that, "[s]ince a grocery store consists of many comparatively small articles, there is no possible way effectively to protect a grocer from discriminatory prices except by applying the prohibitions of the Act to each individual article in the store."[69] However, where the price differential relates to but one of many items handled by the unfavored customer, any possible injury to the unfavored customers, let alone to competition, seemingly would be minimal and would not meet the Act's requirement of substantial injury. Moreover, it is overall sales and profits which determine the competitive viability of a business.

65. PHILIP FITZELL, PRIVATE LABEL MARKETING IN THE 1990s 40 (1992).
66. *Boise Cascade Corp.*, [1987-1993 Transfer Binder] Trade Reg. Rep. (CCH) ¶ 22,902, 22,588 (1990).
67. *Id.*
68. *Morton Salt Co.*, 334 U.S. at 48-49.
69. *Id.* at 49.

VI. CONCLUSION

In addition to their incompatibility with Robinson-Patman's competition and consumer welfare concerns, a number of incentives might persuade the Supreme Court to reexamine the *Morton Salt* rule and present secondary line injury standards.

1. Not all of the lower federal courts have faithfully applied *Morton Salt*'s secondary line injury inference. Moreover, there is some confusion among the courts, and there is a conflict among the circuits.[70]

2. The Supreme Court has often stated that there is a need to reconcile the Robinson-Patman Act with the rest of the nation's antitrust laws.[71] Although the *Brooke Group* decision has effected such a reconciliation with respect to the Act's primary line coverage, the *Morton Salt* rule remains an obstacle to such reconciliation as to the Act's secondary line coverage.

3. In recent years, the Supreme Court has whittled away at the *Morton Salt* rule. In *Falls City Industries* the Court held that the *Morton Salt* "inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits."[72] Later, in *Hasbrouck*, the Court held that in the case of a "legitimate" functional discount, i.e., a discount that constitutes a reasonable reimbursement for the purchasers' actual marketing functions, the *Morton Salt* inference "will simply not arise."[73] When an appropriate case comes before it, the Court may well decide to make the final cut.

70. *Compare* J.F. Feeser, Inc. v. Serv-A-Portion, Inc. 909 F.2d 1524, 1535 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (stating "evidence of injury to a competitor may satisfy the competitive injury" in a secondary line case) *with* Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984) (holding "injury to a specific competitor without more is not sufficent to show that a price discrimination 'may' substantially lessen competition . . . .").

71. *See supra* note 5 and accompanying text.

72. Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 435 (1983).

73. Texaco Inc. v. Hasbrouck, 496 U.S. 543, 571 (1990).