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John R. Johnson

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The construction of the interstate commerce clause in 1938 in the Champlin case is also dubious authority for the proposition that the federal government is restricted from interfering with allowable orders. The theory that production is a mining operation and thus not a part of interstate commerce is an antiquated interpretation of the commerce clause. The full ramifications of the Northern case will depend on whether the court uses it (1) as a spring board to extend federal control under the Natural Gas Act to ratable production orders or (2) as authority for distinguishing between orders directed at purchasers and those directed at producers.

Robert C. Gist

Robinson Patman Act — Oil Suppliers’ Subsidies to Dealers During Price Wars

Sun Oil Co., a major integrated refiner and distributor of petroleum products, sold gasoline through thirty-eight independent lessee-operated stations in Jacksonville, Florida. Super Test Oil Co., a retail service station chain, opened a station across the street from one of Sun’s company-owned and lessee-operated retail outlets. In response to complaints from its dealer, McLean, that he was being forced out of business by Super Test’s recurrent price cutting activities, Sun reduced its wholesale price to McLean but not to its other retail outlets in the Jacksonville area. This action constituted a violation of the Robinson Patman Act’s prohibition against price discrimination between customers. Sun raised the defense that it had met, in good faith, the equally low price of a competitor. Held: Enterprises that do not operate on the same functional level are not competitors within the meaning of the good faith defense of the

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88 The change in the Courts’ interpretation of the interstate commerce clause since the Champlin case can be seen in the decisions subsequent to 1940. In one case, the Court said that the power of the federal government under the commerce clause “extends to those activities intrastate which so effect interstate commerce, or the exertion of the power of Congress over it, as to make regulation of them appropriate means to the achievement of a legitimate end.” Wickard v. Filburn, 317 U.S. 111 (1942); see also United States v. Darby, 312 U.S. 100 (1941); United States v. Wilshire Oil Co., 9 F. Supp. 396 (S.D. Cal. 1943), appeal dismissed, 77 F.2d 1022 (9th Cir. 1935), appeal dismissed, 295 U.S. 100 (1935).

1 The court of appeals assumed that Super Test was an integrated supplier-retailer. Sun Oil Co. v. FTC, 294 F.2d 465, 466-67, 474 (5th Cir. 1961). The Supreme Court noted that the record did not support this conclusion and assumed, alternatively, that Super Test was engaged solely in retail operations. FTC v. Sun Oil Co., 371 U.S. 103, 312 n.7 (1963). See text accompanying note 39 infra.

Robinson-Patman Act. Thus, a supplier of gasoline (Sun) is not a competitor of a purely retail outlet (Super Test). *FTC v. Sun Oil Co.*, 371 U.S. 505 (1963), reversing 294 F.2d 463 (5th Cir. 1961).

I. The Problem

The principal case has significance for the oil industry in that it partially defines how far and in what directions a major supplier can go in insulating its dealers from the effects of gasoline price wars.° Going beyond the specific fact situation of the principal case, the Court indicated that the good faith defense may be available to a supplier giving a price cut to its dealer if the competing outlet either is an integrated supplier-retailer or has received an enabling price cut from another supplier.¢ It also may be possible to avoid violation of the Act by granting discounts to all dealers in an area in such a manner that none of the supplier's customers (dealers) are injured.© Finally, there is an alternative course open to the supplier of either operating an outlet on a consignment basis or combining direct retailing with its other operations and thus directly competing with the price cutting retailer.© Each of these avenues involves serious legal questions which have not been fully resolved. The problem is to examine the legality of these various courses of action in the light of the *Sun Oil* decision.

II. Court Interpretation of the Robinson-Patman Act

A. Section 2(a)—Criteria To Establish A Violation

Section 2 (a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful for:

[A]ny person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.¹ (Emphasis added.)

The requisite discrimination exists if a seller charging different prices

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² 371 U.S. at 512.
³ Id. at 526-27.
is in competition with other sellers or if his customers who are in competition with each other are charged different prices for goods of like grade and quality. The term "may be" permits application of the statute to discriminations which, if continued, probably would have the effect of substantially lessening competition. Significantly, any perceptible lessening of competition has been held to the substantial. The circumstances indicating the probability of the adverse competitive effects can involve either the line of commerce in which the seller is engaged (primary line), the line of commerce in which the seller's customers are engaged (secondary line), or the line of commerce in which purchasers from the seller's favored customers are engaged (third line).

At least two types of primary line situations can arise in which there is a substantial lessening of competition. (1) One seller or several sellers may use discriminatory practices to destroy the smaller competitors, or one seller may systematically meet prices or establish punitive prices in reprisal for smaller sellers' independence in initiating price reductions. (2) With absence of predatory intent, a monopolistic or dominant seller may cause substantial dislocation in the market through discriminatory pricing maneuvers. Injury to competition on the secondary line occurs if one or some of a supplier's customers are favored to the detriment of other competing customers of the same supplier. The customers referred to must compete. The cases concerning injury at the secondary level often rely on broad inferences of injury from the existence of price differentials. Injury to competition on the third line can exist "when the supplier favors his distributors, whose customers compete with

11 Anheuser-Busch, Inc. v. FTC, 363 U.S. 536 (1960), remanded, 289 F.2d 835 (7th Cir. 1961). See also note 54 infra; see generally Rowe, Price Discrimination Under the Robinson-Patman Act 113-71 (1962).
14 Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945); Standard Oil Co. v. United States, 221 U.S. 1 (1911); Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945), cert. denied, 326 U.S. 734 (1945).
16 Rowe, op. cit. supra note 11, at 173-80. "Adverse competitive effects are most likely inferred from stable price differentials substantial in amount, in the supplier's sales of a standardized product, as between competing resellers to the same trade, which are in keen competition, and operate on tight profit margins." Id. at 181.
other purchasers from the supplier, whereby competition with the customer of the purchaser may be impaired."

B. Section 2(b)—The Good Faith Defense

Section 2(b) of the Act allows a supplier to rebut a prima facie case of discrimination by "showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . ." The burden of proof rests upon the party charged, but once good faith is proved, a complete defense to the price discrimination charge is established, even though it is shown that the price differential has injured competition or competitors. The good faith defense places emphasis on individual, competitive situations and is not established in cases in which price cuts are made automatically as part of a general pricing system or in cases in which an unlawful system is adopted merely because a competitor maintains the same system. The supplier must meet a "lawful" price of a competitor. The burden of proving the lawfulness of the competitor's price does not rest upon the supplier, but the question of whether such price is a lawful one is relevant in establishing good faith. The seller's ultimate purpose in granting the price reduction and the strength of his competitor are likewise revelant factors in determining good faith. The defense has been held to be available only to a defendant who cuts prices to retain old customers rather than to give new ones.

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17 Id. at 196 n.97. "An ordinary 'secondary line' problem arises if the supplier favors his retailer purchasers over his distributors, for then competition with the supplier's retail customers (rather than with customers of his customers) is affected." Ibid. The leading case exhibiting the possibility of third line injury is Standard Oil Co. v. FTC, 340 U.S. 231 (1951). The Court's theory behind the third line violation was that the seller's price discount to its wholesalers allowed them to underprice him in his sales to his retail customers, so that competition was adversely affected with the retailers receiving lower prices from the wholesalers. The detriment resulted to the retailers who purchased directly from the supplier at higher prices. Rowe, op. cit. supra note 11, at 196.


21 Ibid.


23 Standard Oil Co. v. FTC, 340 U.S. 231 (1951). A "lawful price" is one that does not itself violate the Act.

24 Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956). The FTC construes this requirement somewhat more harshly than the courts by requiring the seller to know the existence of such facts as would lead a reasonable and prudent person to believe that the price he is meeting is a lawful one. American Oil Co., 1961-1963 Trade Reg. Rep. ¶ 1196 (June 22, 1962). The seller may have to make a legal determination as to the lawfulness of the competitor's price even in the absence of clear and controlling case precedent. Discussion Note, ¶ 20789, at 55180 (Feb. 25, 1963).

25 Standard Motor Prods., Inc. v. FTC, 265 F.2d 674 (2d Cir. 1959). Contra, Sunshine
III. Marketing Structure of the Petroleum Industry

A meaningful application of the functional level theory of competition, as developed in the Sun Oil decision, can be made only after the marketing structure of the industry is examined. There are basically three types of retail gasoline outlets—company-owned and operated, company-owned and lessee-operated, and dealer-owned and operated. In the company-owned and operated stations, the pricing policy is the full responsibility of the supplier. Through this type of station, a company, no matter how completely integrated, can compete directly with retailers on their own functional level. In the company-owned but lessee-operated stations, the pricing policy is ultimately the responsibility of the operator, but this responsibility is shared by the supplier. This is the type of marketing arrangement Sun had with McLean. In the dealer-owned and operated stations, the pricing policy is the responsibility of the retailer, although the supplier may share it to some extent. These dealers, who comprise perhaps one-half of the total retail outlets, may be served either directly by the supplier or through independent jobbers. Vertical influences in price-making arise from two factors: (a) the supplier's price makes up a large proportion of the retail price and (b) suppliers have an important stake in the retail prices as a determinant of their sales volume. These factors become especially important during price wars because any supplier who attempts to influence retail price-making usually provides a system of subsidies to assist dealers in meeting the reductions of aggressive price cutters. Competition in the petroleum industry centers around competition among suppliers for jobbers, competition among suppliers for locations, and


In the company-owned and lessee-operated stations, the influences the supplier has over the retail price will reflect the terms of the lease and the services provided by the company to the dealer. Since the company ordinarily handles the advertising for the station and maintains certain equipment for it, the company's suggestions are likely to influence the dealer's selection of price. In the dealer-owned and operated station, the company's influence on price is ordinarily limited to education and persuasion of dealers. See id. at 244-46. For example, Sun's original price to McLean of 24.1 cents per gallon accounted for 83.3% of the 28.9 cents per gallon McLean set as his retail price. The effect of price on sales volume was vividly portrayed by the effect on gallonage of a 3 cent cut in McLean's retail price. Monthly volume before the cut ran between 5,900 and 7,400 gallons; monthly volume after the cut exceeded 32,000 gallons. 371 U.S. at 509 n.4; see National Petroleum News, Feb. 1963, p. 84.

Cassady, op. cit. supra note 28, at 265-66. For example, in the instant case, Sun subsidized McLean to the tune of 1.7 cents per gallon, reducing its tankwagon price from 24.1 cents to 22.4 cents. McLean accordingly dropped his retail price 3 cents per gallon, from 28.9 cents to 25.9 cents, himself absorbing 1.3 cents of the cut. 371 U.S. at 508-09.
competition for customers through retail outlets. There is very little competition, on a short term basis, among suppliers for existing retail outlets.25

IV. THE COURT'S DECISION

A. Rationale Of The Holding

Because there was little case precedent bearing on the situation,33 the Court based its decision on the conviction that this interpretation of the word "competitor" was strongly suggested by a "reading in context of the § 2 (b) proviso to give its words their normal and usual meaning." Moreover, the Court felt that such interpretation

The nature of gasoline, the necessity for its bulk merchandising, the responsibility of the refiner or supplier for advertising, the dependent relation of the supplier on its dealers and the dealers on a single supplier make it a fiction, or something less substantial than a legal fiction, to speak of price competition at the oil company sale to the station level. An oil company's product competes with the products of other refiners or suppliers in the motorist's market through dealer outlets. . . . In gasoline marketing the supplier simply cannot be cut off from the filling station operator and treated as if it competed only for the business of filling stations; oil companies compete with each other for the customer's business. Sun Oil Co. v. FTC, 294 F.2d 465, 476-477 (5th Cir. 1961).

See Brief for Respondent, pp. 20-22, FTC v. Sun Oil Co., 371 U.S. 505 (1963); see also note 50 infra.

The Sun Oil decision seems consistent with what little authority exists defining the meaning of "competitor." In Enterprise Indus., Inc. v. Texas Co., 136 F. Supp. 420 (D. Conn. 1955), rev'd on other grounds, 240 F.2d 457 (2d Cir. 1957), the court, in deciding whether an oil supplier could be a competitor of a retailer, held: "[E]ven though it may be a fiction to speak of price competition at the oil company sale to the station level, the Act does not go so far as to allow discriminatory price cutting to enable a buyer to meet price competition, but only to enable the seller to meet a lawful price of the seller's competitor." In Bolick-Gillman v. Continental Baking Co., 206 F. Supp. 151 (D. Nev. 1961), it was decided that a retailer, who is not a customer but merely a competitor of a retail customer of the supplier, cannot recover for injury arising out of discrimination by the supplier among its customers. The court rejected a theory defining competitors as those who market the same product and adopted the theory that competitors are those who sell to the same class of customers and operate in the same market. See Note, 15 Stan. L. Rev. 547. Thus, no recovery can be had on a theory of injury to primary line competition since a plaintiff must allege and prove that it was in competition with the defendant. Furthermore, in order to recover for injury to secondary line competition, the plaintiff must allege and show that he was a purchaser from the defendant and that he was in competition with one or all of the favored dealers. On the other hand, the question of whether two parties are competitors cannot be resolved by reference to mere categories or labels. In Esso Standard Oil Co. v. Sectarone's, 246 F.2d 17 (1st Cir.), cert. denied, 355 U.S. 834 (1957), a manufacturer and a wholesaler who both sold directly to the same retailer were deemed competitors; in Ponca Wholesale Mercantile Co., 1961-1963 Trade Reg. Rep. ¶ 16365 (March 29, 1963), this rule was applied to let a wholesaler in competition with a manufacturer bring itself within the definition of competitor in order to assert the good faith defense to a charge of price discrimination. The basis for the Esso and Ponca holdings rests on the fact that the parties operated on two functional levels, one of which brought them into operation on the same functional level as the other party. This seems to be the same distinction intimated in the Sun Oil case between a supplier facing a retailer and a supplier facing an integrated supplier-retailer. For a further discussion of this question see Note, 15 Stan. L. Rev. 547.
was consistent with the basic policies of the nation's antitrust laws.\textsuperscript{34}

The restriction of the good faith defense to those operating either partially or solely on the same functional level tends to preserve the initiative of the small retailer, who seeks to reduce prices, by allowing him freedom of action without fear of a retaliatory action of a large supplier whose dealer competes with him.\textsuperscript{35} Lawful price reductions by a retailer are presumably a function of his own superior merit and efficiency. According to the Court, Congress, in light of this presumption, "intended [by the Act] to assure, to the extent reasonably practicable, that businessmen at the same functional level would start on equal competitive footing so far as price is concerned."\textsuperscript{36}

In rejecting the theory that a supplier is a competitor of a retail service station simply because its own dealer operates as a conduit through which it competes on the retail level, the Court stated: "[E]very retailer is but a 'conduit' for the goods which it sells and every supplier could be considered a competitor of retailers selling competing goods."\textsuperscript{37} The Court evidently felt that the conduit idea, as presented, did not contain sufficient limitations and that its acceptance would so expand the good faith defense as to effect a return to the broader "meeting competition" proviso of the Clayton Act.\textsuperscript{38} On the other hand, the Court recognized that the supplier who prefers to compete for customers through independent dealers must be allowed to insulate these dealers, on the retail level, from price cutting effects generated by other suppliers. As the Court pointed out: "If it appeared that Super Test were an integrated supplier-retailer, or that it had received a price cut from its own supplier—presumably a competitor of Sun—we would be presented with a different

\textsuperscript{34} 371 U.S. at 515, 518-23.

\textsuperscript{35} Id. at 522.

\textsuperscript{36} Id. at 520. The Court further stated: "We discern in § 2 neither a purpose to insulate retailers from lawful and normal competitive pressures generated by other retailers, nor an intent to authorize suppliers, in response to such pressures created solely at the retail level, to protect, discriminatorily, sales to one customer at the expense of other customers." Id. at 523.

\textsuperscript{37} Id. at 524.

\textsuperscript{38} Id. at 525. Section 2 of the Clayton Act allowed as one defense to prohibited price discriminations a showing that the price concession was "made in good faith to meet competition." Act of Oct. 15, 1914, ch. 323, § 2, 38 Stat. 730. "This proviso was found to make the section practically unenforceable as a means of preventing injurious price discriminations between customers of the same seller, partly because the nature of the competition that might be met was not limited..." Austin, Price Discrimination 93 (1959). The present § 2(b) of the Act was explained by the House Judiciary Committee Report, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936), "as a contraction of an exemption now contained in section 2 of the Clayton Act which permits discrimination without limit when made in good faith to meet competition...the proviso permits the seller to meet the price actually previously offered by a local competitor. It permits him to go no further." See Rowe, \textit{op. cit. supra} note 11, at 208-15; Austin, \textit{op. cit. supra} at 93-95.
This apparently noncommittal note finds its significance in the fact that the Court bothered at all to distinguish the situations. Mr. Justice Harlan and Mr. Justice Stewart went even further in a separate memorandum noting that they would have preferred to remand the case to the FTC to afford an opportunity for the introduction of further evidence concerning the nature of Super Test's supply arrangements.

B. FTC Interpretation Of Sun Oil

The FTC interprets the Sun Oil decision as limiting the defense to cases involving the meeting of direct, as distinguished from indirect, competition. Direct competition exists only when a competitor operating on the same functional level as the supplier actually makes an offer to the customer of that supplier. The Commission supports its interpretation with two factors present in the Court's opinion: (1) the theory that enterprises can be competitors only if operating on the same functional level and (2) the argument that it makes no linguistic or practical sense to talk about a supplier being able to meet the "equally low" price of a retailer. The FTC's analysis, however, neglected equally important factors. Acceptance of the direct competition theory renders meaningless the distinction the Court drew between competition on the purely retail level and competition by suppliers through their dealers or by integrated supplier-retailers through their outlets. The distinction has meaning only if it is recognized that either an integrated supplier-retailer or a supplier giving aid to its dealer competes on the same functional level with the supplier attempting to assert the defense, at least to the extent that the resulting retail price is not a function of the retail outlet's own "superior merit and efficiency." Furthermore, the "equally low price" the supplier attempts to meet

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38 371 U.S. at 512 n.7.
40 Id. at 529. At publication, the Fifth Circuit has granted Sun's petition for a reopening of the case and remanded it to the FTC for further proceedings. 1963 Trade Reg. Rep. 16654 (Nov. 12, 1963). In the petition, Sun attempts to show that Super Test (1) was a supplier-retailer and (2) drew supplies from a major. In support of the first proposition, Sun cites a number of instances in which Super Test distributed gasoline to stations with brand names other than Super Test, giving it an aura of a wholesale distributor. To prove the second proposition, Sun exhibits records that show Super Test was supplied by Orange State Oil Co. (controlled by Cities Service) and was given price aid by the supplier during the period in question. National Petroleum News, May 1963, pp. 67-68.
41 According to the FTC, the seller must have specific advance knowledge of a competitor's actual offer to his purchaser before he may meet that offer in good faith. Forster Mfg. Co., 1961-1963 Trade Reg. Rep. 16243, at 21082 (Jan. 3, 1963).
42 See also Discussion Note, 5 Trade Reg. Rep. 50189 (May 14, 1963).
44 371 U.S. at 515.
46 Id. at 512 n.7.
is not the price at which the retailer sells, but the price at which the retailer buys from another supplier or the internal price within an integrated enterprise at which goods are transferred from one level to another. Though this interpretation requires a somewhat liberal construction of the phrase "equally low price," the cases dealing with private brand competition provide evidence that the courts are willing to interpret this phrase liberally.\(^4\)

The motive force behind the FTC's theory of direct and indirect competition is the Commission's assertion that there must have been an actual offer to the supplier's customer before it may in good faith meet the competition.\(^4\) Although in Sun Oil the Court was very careful to avoid deciding this issue,\(^4\) it is in this area that the conduit theory becomes a very useful tool of analysis. The real objection to the theory as presented by Sun was that no distinction was made between the situation in which the retailer's price reflected merely his efficiency as a retailer from that in which his price reflected a subsidy from a supplier. This distinction, however, can be adequately made through an application of the functional level theory of competition.\(^4\) In this sense, the retailer operates as a conduit only to the extent that his prices reflect the prices at which he acquires goods from his supplier. The conduit theory, in its proper application, concerns only the question of whether there must be an actual offer to a supplier's customers before aid can be given. In industries in which such offers are seldom made;\(^4\) i.e., those in which retailers act at certain times as mere conduits through which suppliers compete with one another for customers rather than industries in which suppliers compete against one another for retail outlets; the acceptance of such a theory makes the section 2(b) defense unavailable to the members of that industry. Under these circumstances, the conduit


\(^{46}\) See note 42 supra.

\(^{47}\) 371 U.S. at 529 n.19.

\(^{48}\) Thus, a supplier is a competitor of an integrated supplier-retailer on the same functional level to the extent that the retail price is not a function of the superior merit and efficiency of the purely retail operation. Similarly, a supplier is a competitor on the same functional level of other suppliers to the extent that, through price aids, he enables his retailer to set a price which is not a function of its own efficiency.

\(^{49}\) See note 32 supra and accompanying text; see also Rowe, op. cit. supra note 11, at 230-33.
theory recognizes economic reality,\textsuperscript{20} retains the validity of the Sun Oil result, and makes the defense available to competitors regardless of the market structure in which they operate.

V. ALTERNATIVE METHODS OF DEALER AID

A. AREA PLANS OF FEATHERED PRICE REDUCTIONS

While denying the legality of Sun's attempt to render aid to its retailer through selective price reductions which discriminated against other Sun retail dealers, the Court suggested that other alternatives are open to gasoline suppliers, even in the narrow situation in which the response is directed at a purely retail operation. The Court directed the FTC to be tolerant toward the use of properly feathered price reduction systems within carefully defined area submarkets,\textsuperscript{31} while nevertheless making it clear that improperly designed or too sharply drawn feathering graduations fall within the same ban as outright illegal discrimination.\textsuperscript{33} Four difficulties attend this approach to the problem: the inherent difficulty in designing properly graduated feathering, the possible injury to primary line competition, the possible injury to the competitor of the customer (dealer), and the inevitable tendency to spread price warfare from an individual competitive situation to a regional submarket. It is very doubtful that any workable set of guidelines defining an area submarket can be formulated. By its very nature the area submarket concept lends itself only to case by case evaluation of competitive circumstances. Perhaps the best the FTC will be able to do is to abandon rigid formulas and attempt to evaluate realistically relevant effects on competition and competitors.\textsuperscript{35} In attempting to aid his

\textsuperscript{20} "Most of the evidence seems clearly to demonstrate that a company offers discounts to its dealers because its dealers are losing business to price-cutting competitors; since the major suppliers compete among themselves and with independents primarily through their dealers, the concessions are made in a very real sense in good faith to meet competition." De Chazeau & Kahn, Integration and Competition in the Petroleum Industry 480 (1959) (Emphasis added.)

\textsuperscript{31} 171 U.S. at 527.

\textsuperscript{33} Perhaps a partial clarification of this area will come from American Oil Co., 1961-1963 Trade Reg. Rep. § 15961 (June 27, 1962), reversed, American Oil Co. v. FTC, 1963 Trade Cases § 70,948 (7th Cir. 1963). During a local price war, American gave its independent dealers in Smyrna, Georgia larger discounts than were granted to competing dealers in the adjacent town of Marietta. Pursuant to the plan, dubbed CPA (Competitive Price Allowances), the prices at which American sold to its dealers were designed to allow each dealer to meet the competitive price in his own locality. Throughout the two week price war, the differential between the Smyrna and Marietta dealers ranged from $5 to $11 per gallon. The Commission found sufficient competitive injury to American's customers (dealers) in Marietta to uphold the complaint. In a dissenting opinion, Commissioner Elman criticized the decision on the ground that the Commission applied a rigid formula that "competition between buyers" plus "substantial difference in price" equals "significant competitive ad-
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retailer, the oil supplier runs the risk that his area reduction constitutes an illegal discrimination causing injury to primary line competition. The Court specifically pointed out that nothing it said involving secondary line competition was to be considered inconsistent with the principle that a difference in price even among non-competing purchasers may be a “discrimination” under section 2 (a) of the Act. There is also the possibility that the company using

vantage” to the favored buyers, which in turn equals “probable injury to competition.” Id. at 20790. The Commissioner further stated:

My main difficulty with the majority opinion springs from its failure to recognize and bring to bear an expert evaluation of the special and distinctive effects on competition of a local, limited gasoline price war. The Commission . . . has transformed a hard case into an easy one by applying an old well worn formula taken from a different economic context which . . . is out of place as applied to the facts of this situation. Id. at 20792.

The Supreme Court’s admonishment in the Sun Oil case was that the “FTC and the courts must make realistic appraisals of relevant competitive facts” in appraising the effects of any price cut or the response to it, coupled with its statement that the “invocation of mechanical word formulas cannot be made to substitute for adequate probative analysis,” seems to be a repudiation of the formula applied in American Oil. 371 U.S. at 527 n.15 (citing Commissioner Elman’s dissent).

Whether or not discriminatory prices have an illegal effect upon primary line competition depends on whether the facts and circumstances indicate that there is likely to be substantial injury to competition among sellers. A price system that diverts trade to the seller from his competitors, because sales are made to different customers at different prices, has been condemned (Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir. 1945)), but the mere capacity of the seller’s system to divert trade is not proof per se of unlawful injury, especially if other factors are involved. Blount Mfg. Co. v. Yale & Towne Mfg. Co., 166 Fed. 515 (D. Mass. 1909). The fact that other competitors have fared well in the face of the discrimination, (Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), cert. denied, 344 U.S. 206 (1972)), the aggressive or defensive nature of the price cut, (H. J. Heinz Co. v. Beech-Nut Life Savers, Inc., 181 F. Supp. 412 (S.D.N.Y. 1960)), and the relative market power of the competitor and the price cutter (Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (7th Cir. 1959)) have all been deemed relevant in determining whether there has been injury to competition on the primary line. The Seventh Circuit reversed primarily on this basis.

53 FTC v. Anheuser Busch, Inc., 363 U.S. 536 (1960), reversing 265 F.2d 677 (7th Cir. 1959), remanded, 289 F.2d 835 (7th Cir. 1961). In this case, Anheuser-Busch reduced its prices in the St. Louis area to the level at which local and regional beer was sold while not making such reductions elsewhere. The Supreme Court held that such action could have unlawful effects on primary line competition (between sellers on the same functional level) even though there was no price discrimination between competing customers of the company. Thus, if Sun had followed the Court’s suggestion and granted feathered reductions within an area submarket in order to meet the competition of the Super Test station, it might well have found itself facing a charge of price discrimination involving injury to primary line competition. In Forster Mfg. Co., 1961-1963 Trade Reg. Rep. § 16243 (Jan. 3, 1963), the FTC laid down guidelines to determine in what cases area pricing may not cause injury to primary line competition. Attempting to avoid injury to secondary line competition, Forster met offers made to several of its purchasers by extending the lower price to all buyers in the area. The Commission felt that this was an improper approach for several reasons. (1) A meeting by Forster of actual offers to the purchasers who had received them could not have possibly caused any additional secondary line injury, since those purchasers were already buying at the lower price from another source. (2) A counteroffer that simply matches someone else’s offer and is restricted to those particular buyers who have in fact received that offer adds nothing to the sum total of primary line injury. (3) An area-wide response to individual competitive offers widens the impact area and increases the likelihood of competitive injury.
area pricing may be charged with an illegal act because injury has been sustained by the competitors of its customers to whom it gave price reductions. Moreover, the difficulty with the feathered area response is that it tends to spread what might have been an individual competitive situation into a regional price war. When a supplier gives reductions to dealers in the area, other suppliers by necessity must respond with aid to their dealers, and they in turn face the problem of defining submarkets and designing a proper feathering at both the primary and secondary level. In regard to the likelihood of injury to secondary line competition the Commission stated:

On the secondary level, there would always remain the likelihood that a few buyers located on one side of the 'zone' line would compete with buyers located on the other side. Respondents would have to continue widening the circle of favored customers, perhaps until they encountered some natural physical barrier to protect the non-favored from the favored buyers. On the primary level injury can be expected to increase in direct proportion to the number of customers receiving the spurious 'counteroffer.' Id. at 21086-87.

In an industry such as the oil industry, in which direct offers to a supplier's customer are seldom made (see note 32 supra), the difficulty with this approach is immediately obvious. In the Sun Oil case, the secondary level injury supposedly arose out of the fact that Sun's nonfavored purchasers were subjected to the competition from a dealer carrying their own brand, in addition to the competitive threat already present from Super Test. The Court dwelled upon the fact that some customers would not buy Super Test gasoline at the lower price, but would switch from one Sun station to the other when the Sunoco price was reduced. In other words, the additional injury arose out of the difference in brands rather than from the absence of an actual offer to the Sun station. In Forster, the FTC, by assuming that no additional injury resulted because Forster's customers could be supplied by another company at the equally low price, failed to take into account the fact that customers of Forster's other purchasers might have the same preference for brands supposedly exhibited by the customers of Sunoco. It is possible that there is a hidden distinction between the two situations revolving around the fact that in the Forster case the products of the competing suppliers were perfectly homogeneous, and thus no preference for one brand over another was possible, but to develop stable and accurate guidelines based upon this kind of distinction would be utterly impossible.

In discussing the implications for the primary line of an area response, the Commission stated that there would be a violation "where respondents, at the time, are selling in two or more trading areas and in the trading area in which such products are sold at the lower price are in competition with any other seller who then and thereafter enjoyed a substantially smaller volume of sales than the total volume of sales enjoyed by respondent." Id. at 21090-91. According to the Commission, price variations would not violate the order if (1) respondents had no weaker competitor in the area where the favored customer was located, (2) the lower price could be cost justified, or (3) the lower price had been offered to the favored customer in good faith to meet the equally low price offered to that particular customer by a competitor of respondents. A supplier in the position of Sun, attempting to use the feathered market approach to meet an individual competitive situation, could do so only in an area where there were no weaker competitors. This condition effectively emasculates any attempt at reliance upon area responses by gasoline suppliers, for within any area there will ordinarily be at least one supplier that can be classified as a weaker competitor.

56 Pure Oil Co., 1961-1963 Trade Reg. Rep. ¶ 16111 (Sept. 28, 1962). Pure had granted price aids to all its dealers in the area who agreed to a plan of posting prices within 1% of the independent dealers in the area. Pure avoided any secondary level violation by granting the reduction to all dealers who were in competition with one another. It was not charged with a primary line violation. Nevertheless, Pure's discrimination was found to be illegal because it caused injury to other retailers in competition with Pure's customers (dealers). The Commission stated:

The injury here was not to Pure's direct competitors, but to the retail
approach. With the existing tendency of price wars to spread, the avenue of action the Court presents is destined to increase this tendency markedly. Therefore, while the area submarket approach might be the appropriate response to area price wars in which there is neither chance to confine the price cutting to an individual competitive situation nor substantial danger of a primary line violation, the difficulties inherent in its application to individual isolated instances of price cutting preclude its general use.

One type of area plan approved by an FTA examiner is the SCRP (Suggested Competitive Retail Price) plan employed by the Standard Oil Company. The only question presented was whether the plan constituted an unfair method of competition under section 5 of the Federal Trade Commission Act. (Its legality under the Robinson-Patman Act has not been determined.) The examiner ruled that pursuant to the plan Standard had determined an appropriate differential between branded and unbranded products as a class. The differential reflected realistically the difference in public acceptance between the two classes and took into consideration the posted prices of unbranded resellers, discounts from those posted prices, and the value of stamps, premiums, and other give-aways. Standard then determined a "suggested competitive retail price," and the price to its dealers was determined by a percentage discount from this price. All dealers in a trading area were charged the same price, regardless of their resale prices. The Commission found no unfair trade

private brand operators, who were in direct competition with Pure's dealers and other major brand dealers. . . . section 2(a) clearly prohibits such discrimination where the effect may be to 'injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.' If the private brands be considered as Pure's competitors, the injury is to competition with the one who granted the discrimination. If the private brands be considered as Pure's dealer's competitors, the injury is to competition with its customers. Id. at 20930.

Clearly, according to the Sun Oil decision, the violation could not be classified as one of a primary line nature because retailers cannot be competitors of suppliers. The decision must stand on the basis that it was an illegal act for Pure to cause injury, by giving price aid to all its dealers in a submarket, to a retailer who, although not a customer of Pure, was a competitor of Pure's customers. Although Pure's action was not a response to meet the "equally low price of a competitor," the principle involved would equally affect a supplier faced with a situation similar to that which Sun Oil faced. A supplier in the position of Sun, by granting area price reductions to a number of its dealers in order to meet an individual competitive situation between one of them and a nearby retail outlet, would, almost by definition, injure retail competitors of its other dealers in the area. For a contrary view, see note 33 supra.


practice because the dealers were left with complete freedom to set their retail prices and the price they paid Standard was not conditioned on their choice. There still may be some question as to whether such a plan could result in either a primary line violation or injury to competitors of Standard’s dealers. Presumably, there would be no violation within the latter category since the price is designed merely to be competitive with those of unbranded products, taking into consideration the customary differential. But the very fact that Standard charged a lower price in one area than in another would lend support, under the “Anheuser-Busch doctrine,” to a claim of primary line injury, especially if some of the suppliers in the area could be classified as weaker competitors of Standard.  

B. Consignment Agreements

One other practice that has been attempted by oil suppliers consists of consignment arrangements with their dealers. Traditionally, consignment agreements have been upheld as legally valid marketing arrangements, but recently they have been under attack from both the courts and the FTC. Consignment agreements with individual dealers, as well as blanket arrangements, have come under fire. In another Sun Oil Co. decision, the Commission held that Sun’s consignment arrangement with a group of dealers in the Norfolk, Virginia area was a fiction and a subterfuge by which an unlawful price fixing arrangement was implemented. Proof showed that it was both a vertical and a horizontal price fixing device in violation of the Federal Trade Commission Act. The evidence consisted of two factors. First, Sun had forced its dealers to accept the consignment plan by giving them an all or nothing proposition. Either they would accept the consignment arrangement or else continue to pay the present tankwagon price even though Sun reduced the retail price in its company-owned and consignee stations. Second, the consignment agreement had been negotiated with the dealers as a group rather than individually, allowing Sun to act as a clearing house through which the dealers among themselves and in each other’s presence could and did pledge to fix prices horizontally while Sun, in the presence of the dealers, pledged to fix prices vertically. A

59 See note 55 supra.
60 Ibid.
slightly different situation was presented in *Atlantic Ref. Co.*" In the area in which Atlantic offered its consignment plan, it employed a dual marketing system, selling to some dealers directly and to others through distributors. Being able to enter consignment agreements only with those to whom it sold directly, Atlantic granted discounts sufficient to equalize prices to those distributors who were able to induce their customers to follow the prices set by Atlantic in its consignee stations. The Commission ruled that Atlantic’s scheme was an illegal device to fix prices. The basis for the decision centered on three separate factors. Atlantic’s take it or leave it proposition offered to its dealers constituted economic coercion. The agreement with the distributors constituted an illegal price fixing arrangement. Finally, the consignment distribution program was not Atlantic’s regular method of selling its products, but was used only at irregular intervals and in certain markets during price wars. The temporary nature of the program and the shifting back and forth of customers from dealer status to agency stations emphasized that the plan was a device to fix prices rather than a good faith marketing method. Area consignment agreements constitute price fixing schemes if (1) elements of economic coercion enter into the negotiation, (2) agreements are made with dealers of an area en masse, and (3) they do not constitute the regular marketing procedure of the supplier, but are only entered into in times of emergency to meet the threat generated by a price war.

In the *Simplicity-Pattern* decision, the Supreme Court indicated that a consignee is a “purchaser” within the meaning of the law. This interpretation marks a change in the law which could have important implications for consignment agreements. Apparently, the Court treated a consignee as a purchaser within the meaning of section 2(e) of the Clayton Act. In effect, this would overrule an earlier decision that section 2(a) was inapplicable to claimed discrimination between a purchaser and a consignee of the same supplier. On the other hand, it lends force to the decision in *Ludwig*

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68 FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959). The Court’s rationale that a consignee is a “purchaser” indicates that a consignment agreement may violate § 2(e) of the Robinson-Patman Act by constituting a discrimination “in favor of one purchaser . . . by contract to furnish . . . any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.” 49 Stat. 1526 (1936), 15 U.S.C. § 13(e) (Supp. IV 1959-62).
v. American Greetings Corp.\textsuperscript{70} that the placing of former customers of a competing seller on a consignment basis in order to induce such customers to transfer their business to the seller constitutes a prima facie case of indirect price discrimination which section 2(a) covers. In \textit{Ludwig, on remand},\textsuperscript{71} it was established that consignment deliveries can be made in good faith to meet competition within the meaning of section 2(b) of the Robinson-Patman Act if offered in response to a similar offer by another supplier. The issue is still in doubt, but it appears that under existing law a gasoline supplier cannot enter into a consignment agreement with one or several of its dealers and then, within the meaning of "competitor" as defined in the \textit{Sun Oil} case, meet in good faith the price of a purely retail dealer if such agreement would constitute discrimination among its own purchasers. This is the result even if no economic coercion of the dealer were involved and no area agreement existed that could be construed as a conspiracy to fix prices. Once a consignee is called a purchaser, the consignment agreement itself (not the price that is set as the result of the agreement) constitutes a prima facie case of indirect price discrimination against the supplier's other purchasers. Since it is the price that is set afterwards that constitutes the meeting of the equally low price of a competitor, the good faith defense applies only to the injury that results from the supplier's activities pursuant to the consignment agreement and not to the actual formation of the agreement. The good faith defense would be available only in the case in which a competing supplier had offered a similar arrangement to the supplier's own dealer or perhaps a dealer in competition with its own dealer.

\textbf{C. Vertical Integration}

Other devices failing, the major oil companies, in order to protect their retail outlets from price cutting activities, might well be forced into combining direct retailing with their other operations. The main factor underlying the majors' failure to operate their marketing activities on this basis at the present time is the threat that chain store taxes might possibly be applied to such product distribution systems.\textsuperscript{72} However, once the advantages involved in being able to protect individual stations from the effects of price wars is judged to outweigh the disadvantages of the additional tax burden,

\textsuperscript{70} 264 F.2d 286, 288 (6th Cir. 1959).
\textsuperscript{71} 282 F.2d 917 (6th Cir. 1960).