

1979

Antitrust - Robinson-Patman Act - Section 2(f) Buyer Liability

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Recommended Citation

Michael J. Hennessy, *Antitrust - Robinson-Patman Act - Section 2(f) Buyer Liability*, 18 Duq. L. Rev. 173 (1979).

Available at: <https://dsc.duq.edu/dlr/vol18/iss1/15>

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ANTITRUST—ROBINSON-PATMAN ACT—SECTION 2(f) BUYER LIABILITY—The United States Supreme Court has held that, unless a seller can be found liable for granting illegal discriminatory prices, a buyer cannot be held liable for inducing or receiving such prices.

Great Atlantic & Pacific Tea Co. v. Federal Trade Commission, 99 S. Ct. 925 (1979).

In 1965, the Great Atlantic & Pacific Tea Company (A&P) decided to switch from the sale of "brand label" milk to the sale of "private label" milk¹ in order to reduce its costs for the product in the Chicago area.² To implement this plan, A&P contacted its long-time supplier, the Borden Company. After prolonged negotiations, Borden offered to supply A&P with milk and certain other dairy products under private label at an estimated savings to A&P of \$410,000 a year.³ A&P, however, was not satisfied with this offer and solicited offers from other dairies. A competitor of Borden, Bowman Dairy, responded with an offer that was substantially lower than Borden's.⁴ After A&P informed Borden of its competitor's lower bid and stated that a \$50,000 improvement in Borden's original offer "would not be a drop in the bucket,"⁵ Borden submitted a new bid which doubled the estimated annual savings to A&P from \$410,000 to \$820,000. Borden emphasized that this new offer was made in order to meet its competitor's bid, since A&P was one of Borden's largest customers.⁶ A&P accepted Borden's revised offer after concluding that their new bid was substantially better than Bowman's offer.⁷

Based upon these facts, the Federal Trade Commission (FTC or Commission) filed a complaint against A&P⁸ alleging that the chain

1. "Brand label" milk is sold under the brand name of the supplying dairy. The "private label" milk was to be sold under the A&P label. *Great Atl. & Pac. Tea Co. v. FTC*, 99 S. Ct. 925, 929 (1979).

2. *Id.* More than 200 A&P stores were in A&P's Chicago business sector, which included portions of Illinois and Indiana. *Id.*

3. *Id.* at 929. This offer was coupled with a proviso that A&P would accept limited delivery service. *Id.*

4. The Bowman bid would have produced an estimated annual savings of \$737,000, i.e., an incremental savings of \$327,000 over the first Borden bid. *Id.* at 929 n.2.

5. *Id.* at 929.

6. *Id.* at 929-30. An additional factor leading to its decision to re-bid was Borden's recent investment of more than five million dollars in a new facility in Illinois. The loss of the A&P account would have resulted in the under-utilization of this new plant. *Id.* at 929.

7. *Id.* at 930.

8. Section 5(b) of the Federal Trade Commission Act, 15 U.S.C. § 45(b) (1976) em-

store had violated section 5 of the Federal Trade Commission Act⁹ by misleading Borden during the negotiations.¹⁰ The charge was based upon A&P's failure to inform Borden that its second bid was lower than Bowman's bid.¹¹ The complaint charged that the same conduct also violated section 2(f) of the Robinson-Patman Act¹² by knowingly inducing or receiving price discriminations from Borden.¹³ The Administrative Law Judge found that A&P had violated both statutes as charged by the regulatory agency.¹⁴

On review, the FTC reversed the Administrative Law Judge's finding¹⁵ that A&P's conduct had violated section 5 of the Federal Trade Commission Act.¹⁶ Noting that the charge raised the legal question of disclosure requirements during contract negotiations, the Commission ruled that A&P did not have an affirmative obligation to disclose to Borden the terms of Bowman's bid during ongoing price negotiations, since imposition of such a duty would be contrary to normal business practices and the public interest.¹⁷ The Commission, however, upheld the Administrative Law Judge's ruling that A&P had violated section 2(f) of the Robinson-Patman Act since the company knew, or should have known, that it was the beneficiary of unlawful price discrimina-

powers the Commission to file a complaint against any person, partnership or corporation which it believes has been or is using any unfair method of competition.

9. Section 5(a) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(1) (1976) provides in relevant part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful."

10. The complaint did not allege that Borden's second bid was induced by any misrepresentation by A&P. The Commission, however, did argue that A&P had made a false statement after receiving Borden's second bid, but this statement was regarded by the Court as irrelevant since it did not induce the second bid. 99 S. Ct. at 934 n.15.

11. *Id.* at 927.

12. Section 2(f) of the Robinson-Patman Act provides: "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." 15 U.S.C. § 13(f) (1976).

13. 99 S. Ct. at 930. The FTC's complaint also alleged that Borden and A&P had violated § 5 of the Federal Trade Commission Act by combining to stabilize and maintain the retail and wholesale prices of milk and other dairy products. The Administrative Law Judge dismissed this charge on the ground that the FTC had failed to meet its burden of proof. *Id.*

14. *Id.*

15. An adjudicative proceeding is commenced when an affirmative vote is taken by the Commission to issue a complaint. The case then proceeds to a hearing before an Administrative Law Judge, whose decision may be appealed to the Commission. The Commission's decision, in turn, may be reviewed in the court of appeals of the United States. 15 U.S.C. § 45(c) (1976). *See also* 16 C.F.R. § 3 (1979).

16. 99 S. Ct. at 930.

17. *Id.*

tion. The Commission then rejected A&P's defenses that Borden's second bid had been made to meet competition and was cost justified.¹⁸

On review, the United States Court of Appeals for the Second Circuit upheld the Commission's decision.¹⁹ The court found that the Commission had met its burden of proof under section 2(f) by showing that A&P had knowingly induced or received illegal price discrimination from Borden.²⁰ The court of appeals rejected A&P's argument that, based upon the United States Supreme Court's ruling in *Automatic Canteen Co. of America v. FTC*,²¹ a buyer may rebut a prima facie case of section 2(f) liability by raising either of two statutory defenses available to sellers under sections 2(a) and (b) of the Robinson-Patman Act.²² As a result, the court denied A&P's assertion of both the cost justification²³ and the meeting competition defenses. Instead, the court

18. *Id.*

19. *Great Atl. & Pac. Tea Co. v. FTC*, 557 F.2d 971 (2d Cir. 1977).

20. *Id.* at 980-81.

21. 346 U.S. 61 (1953).

22. 557 F.2d at 982. Section 2(a) of the Robinson-Patman Act provides in pertinent part:

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 due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered

15 U.S.C. § 13(a) (1976). Section 2(b) of the Robinson-Patman Act provides:

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.

15 U.S.C. § 13(b) (1976).

23. The court of appeals rejected A&P's cost justification defense upon finding that A&P's cost studies were flawed in several respects, many of which were attributable to the preparer's unfamiliarity with Borden's operations in the Chicago area. 557 F.2d at 984.

held that in a section 2(f) case the meeting competition defense must be viewed from the buyer's perspective, and since A&P knew that Borden's bid was lower than Bowman's bid, A&P could not assert the defense regardless of its potential availability to Borden.²⁴ The United States Supreme Court granted certiorari²⁵ and, upon review, reversed the court of appeals.²⁶

Justice Stewart, speaking for the majority, acknowledged that the Robinson-Patman Act was in part a response to the increased market power and coercive practices of big buyers.²⁷ However, Justice Stewart stated that Congress was primarily concerned with the discriminatory pricing practices of sellers when they drafted this remedial legislation.²⁸ Noting that section 2(f) was a congressional afterthought,²⁹ the Court examined the language of section 2(f) which proscribes a buyer's receipt or inducement of price discrimination "prohibited by this section."³⁰ Although the phrase "this section" refers to the entire section 2 of the Act, the court reasoned that since the only subsections specifically referring to price discrimination were the seller liability provisions of sections 2(a) and (b),³¹ there was a necessary linkage between seller liability and buyer liability.³² It followed that a buyer, in this case A&P, could not be held liable if a prima facie price discrimination case could not be established against the seller or if the seller could successfully assert an affirmative defense.³³

In reaching this conclusion, the Court relied upon its decision in *Automatic Canteen Co. of America v. FTC.*³⁴ In *Automatic Canteen*,

Further, the court held that the Commission need not, in all cases, show as part of its prima facie case that prices induced or received by the buyer were not cost justified. *Id.* at 985.

24. 557 F.2d at 982. A&P had argued that it could not be held liable for inducing or receiving discriminatory prices unless Borden was liable for offering such prices.

25. 435 U.S. 922 (1978).

26. 99 S. Ct. 925, 935 (1979). Justice White concurred in part and dissented in part and Justice Marshall dissented in part. Justice Stevens did not participate in the decision.

27. *Id.* at 931.

28. *Id.*

29. *Id.* at 931 n.8.

30. Section 2(f) of the Act limits buyer liability to conduct prohibited in general by § 2 of the Act. Sections 2(a) and (b) define price discrimination from the seller's standpoint and provide for two affirmative defenses: meeting competition and cost justification. Therefore, a seller whose conduct falls within the scope of prohibited price discrimination but also within the scope of one or both of the affirmative defenses can escape liability. See notes 12 & 22 *supra*.

31. See note 22 *supra*.

32. 99 S. Ct. at 931.

33. *Id.*

34. 346 U.S. 61 (1953). See also text accompanying notes 51-55 *infra*.

the Court held that a buyer does not violate section 2(f) of the Act if the prices he receives are either within one of the seller's statutory defenses,³⁵ or if the buyer receives prices without knowing that the prices are indefensible from the seller's standpoint.³⁶ The court in *Atlantic & Pacific* rejected the FTC's argument that, under the rule of *Automatic Canteen*, the defenses in sections 2(a) and (b) should be judged from the buyer's point of view, and that A&P was therefore not entitled to assert the meeting competition defense since the company knew that the final Borden bid was lower than the Bowman bid.³⁷ The Court reasoned that by the plain language of section 2(f), Congress did not provide for buyer liability if the seller has a valid defense. Therefore, if the seller has a valid meeting competition defense, there is no prohibited price discrimination for which the buyer is liable.³⁸

To justify its construction of the Robinson-Patman Act, the majority considered the effects of a contrary holding that a buyer has a duty of affirmative disclosure whenever it receives a lower bid from one of the competing sellers. According to Justice Stewart, such a policy would frustrate competitive bidding, lead to price uniformity and rigidity, and conflict with the purposes of other antitrust legislation.³⁹ Justice Stewart emphasized that the FTC itself recognized that a duty of affirmative disclosure would have an anticompetitive effect when it dismissed the charge against A&P under section 5 of the Federal Trade Commission Act.⁴⁰ Based upon this reasoning, the Court held that a buyer who had done no more than accept the lower of two prices competitively offered would not violate section 2(f) provided the seller has a meeting competition defense.⁴¹

35. See note 22 and accompanying text *supra*.

36. 346 U.S. at 70-71. See 99 S. Ct. at 931-32.

37. *Id.* at 932.

38. The Court reasoned that any contrary rule would have the effect of judicially amending the Act. This approach was previously rejected by the Court in *FTC v. Simplicity Pattern Co.* 360 U.S. 55 (1959). In that case, Simplicity Pattern Co., a manufacturer of dress patterns, was charged with violating § 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (1976), which forbids discrimination in services offered to purchasers. Simplicity Pattern Co. defended the charge by contending that its acts had not injured competition, and further, that its actions were cost justified. However, § 2(e) does not restrict liability to instances involving competitive injury or lack of cost justification. Stating that it "cannot supply what Congress has studiously omitted," the Court refused to accept the pattern company's construction of the Robinson-Patman Act. 360 U.S. at 67.

39. 99 S. Ct. at 933. The Court also noted that a duty of affirmative disclosure might be difficult to enforce since, if the competing bids were not based on identical quantities, terms and conditions of sale, a buyer might not be able to determine when disclosure would be required. *Id.* at 933 n.14.

40. *Id.* at 933.

41. 99 S. Ct. at 934. Although the Court found that derivative liability was the correct standard to apply in determining § 2(f) liability, the Court specifically withheld judg-

After concluding that A&P could be held liable under section 2(f) only if Borden had violated the Act, the majority analyzed the facts to determine whether Borden, and therefore A&P, had a valid meeting competition defense.⁴² Since Borden had a longstanding business relationship with A&P, the Court concluded that Borden was justified in believing A&P's representations,⁴³ and that the dairy had acted reasonably and in good faith when it made its second bid.⁴⁴ Accordingly, the Court reversed the judgment against A&P.⁴⁵

Justice Marshall dissented from that portion of the majority opinion which held that a buyer is not liable under section 2(f) of the Act unless the seller has also violated the Act.⁴⁶ He contended that the language of section 2(f) simply means that the elements of a prima facie case against a buyer are the same as in a prima facie case against a seller, and that the same statutory defenses are available to both parties.⁴⁷ In Justice Marshall's view, a buyer could claim the meeting competition defense if it had acted in good faith to induce the seller to meet a competitor's price, regardless of whether the seller's price happened to beat that of his competitor. A buyer who induced the lower bid by misrepresentation, however, could not escape Robinson-Patman liability.⁴⁸

Section 2(f) of the Robinson-Patman Act was first construed by the United States Supreme Court in *Automatic Canteen Co. of America v. FTC.*⁴⁹ For more than a quarter of a century, this remained the sole

ment on the application of its ruling with respect to a buyer who has lied to a seller about bids from the seller's competitors. *Id.* at 934 n.15.

42. Since both the FTC and the court of appeals held that a buyer could be liable under § 2(f) even if the seller had a valid meeting competition defense, neither adjudicative body determined whether or not Borden had such a defense. 99 S. Ct. at 934.

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

44. 99 S. Ct. at 934-35. The Court recently held that a seller did not have to be "absolutely certain" that an offer of a price concession was necessary if the seller was attempting to meet an equally low price offered by one of his competitors. Section 2(b) requires only that a seller have a "good faith belief" that such a price concession is necessary. *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978).

45. 99 S. Ct. at 935. Since the Court held that A&P was not liable under § 2(f) due to its successful assertion of a § 2(b) defense of meeting competition, it did not examine A&P's cost justification defense under § 2(a). 99 S. Ct. at 935 n.18. Justice White concurred with the majority in all aspects except the finding that Borden had a meeting competition defense. *Id.* at 935 (White, J., concurring in part and dissenting in part). He would have remanded to the Commission to decide the questions of fact. *Id.* at 936 (White, J., concurring in part and dissenting in part).

46. 99 S. Ct. at 936 (Marshall, J., dissenting in part).

47. *Id.*

48. *Id.* at 937 (Marshall, J., dissenting in part).

49. 346 U.S. 61, 62 (1953).

United States Supreme Court decision dealing with the relationship between section 2(f) of the Act, which defines buyer liability, and the bulk of the statute which emphasizes prohibited seller pricing activity.⁵⁰ Thus, when *Atlantic & Pacific* came before the Court, the Court looked to *Automatic Canteen* for guidance. In *Automatic Canteen*,⁵¹ the Court addressed the question of whether proof of the unavailability of a cost justification defense⁵² was a necessary element of a prima facie case under section 2(f) if a buyer was charged with knowingly soliciting prices lower than those quoted to the buyer's competitors.⁵³ As a prerequisite to deciding that question, the Court examined the relationship between section 2(f) of the Act and the affirmative defenses provided in other subsections. In its consideration of this issue, the *Automatic Canteen* Court relied upon the legislative history of the Robinson-Patman Act. The majority opinion noted that section 2(f) was explained in Congress as a provision under which a seller, by informing the buyer that a proposed discount was unlawful under the Act, could discourage undue pressure from the buyer.⁵⁴ Given this congressional intention that section 2(f) was to be an offen-

50. See notes 12 & 22 and accompanying text *supra*.

51. *Automatic Canteen Co.*, a large buyer of candy and other confectionary products, was charged with violating § 2(f) of the Act for soliciting prices it knew were substantially lower than prices quoted to other purchasers. It was shown that *Automatic Canteen Co.* knew what the list prices to other buyers were and that it received, and in some instances solicited, prices as much as 33 percent below the prices quoted other buyers. *Id.* at 67. The FTC entered a cease and desist order, 46 F.T.C. 861 (1950), which was upheld by the court of appeals. 194 F.2d 433 (7th Cir. 1952). The United States Supreme Court then granted certiorari. 344 U.S. 809 (1952).

52. Cost justification is an affirmative defense provided sellers by section 2(a) of the Robinson-Patman Act.

53. 346 U.S. at 63.

54. *Id.* at 73. The only congressional statement explaining § 2(f) of the Act and its purposes consists of two brief paragraphs. Congressman Utterback, in presenting the conference report to the House, briefly explained § 2(f) of the proposed legislation:

The closing paragraph of the Clayton Act amendment, for which section 1 of this bill provides, makes equally liable the person who knowingly induces or receives a discrimination in price prohibited by the amendment. This affords a valuable support to the manufacturer in his efforts to abide by the intent and purpose of the bill. It makes it easier for him to resist the demand for sacrificial price cuts coming from mass-buyer customers, since it enables him to charge them with knowledge of the illegality of the discount, and equal liability for it, by informing them that it is in excess of any differential which his difference in cost would justify as compared with his other customers.

This paragraph makes the buyer liable for knowingly inducing or receiving any discrimination in price which is unlawful under the first paragraph of the amendment

80 CONG. REC. 9419 (1936) (remarks of Rep. Utterback).

sive weapon for sellers, the *Automatic Canteen* Court held that a buyer is not liable under section 2(f) if the lower prices it induces are within one of the seller's defenses or if the buyer does not know the prices are not within one of those defenses.⁵⁵

Although the *Automatic Canteen* majority cautioned that the Robinson-Patman Act should be narrowly construed because of its imprecise wording,⁵⁶ the decision itself was ambiguous. Thus, *Automatic Canteen* was subsequently interpreted to set two divergent standards for imposing buyer liability. On one hand, the holding was construed as a derivative liability rule, under which a buyer could not be liable unless the seller was first found to have violated the Act.⁵⁷ On the other hand, the *Automatic Canteen* decision was read as allowing the buyer the opportunity to raise the same affirmative defenses as the seller could raise under sections 2(a) and (b) of the Act, but the defenses were to be viewed from a buyer's perspective.⁵⁸ Applying this latter approach, a buyer could be liable under section 2(f) regardless of the seller's liability.⁵⁹

Following *Automatic Canteen*, the lower federal courts that faced the issue preferred the derivative liability standard. In *Rutledge v. Electric Hose and Rubber Co.*,⁶⁰ the court held that, since the plaintiff had failed to establish that a manufacturer violated section 2(a), it was

55. 346 U.S. at 74. The *Automatic Canteen* court concluded that "a buyer is not liable under § 2(f) if the lower prices he induces are either within one of the seller's defenses such as the cost justification or not known by him not to be within one of those defenses." This means that the buyer must know that the seller cannot successfully assert one of his affirmative defenses in order for buyer liability to attach. *Id.* The Court also held that proof that a buyer knew the price he induced or received was lower than the price offered to other buyers is not sufficient to shift the burden of introducing evidence to show cost justification to the buyer. *Id.* at 81.

56. *Id.* at 65.

57. See, e.g., *Rutledge v. Electric Hose and Rubber Co.*, 511 F.2d 668 (9th Cir. 1975); *Harbor Banana Distribs., Inc. v. FTC*, 499 F.2d 395 (5th Cir. 1974). See also notes 60-71 and accompanying text *infra*.

58. This is essentially Justice Marshall's interpretation of *Automatic Canteen*. 99 S. Ct. at 936 (Marshall, J., dissenting in part). See also *Great Atl. & Pac. Tea Co. v. FTC*, 557 F.2d 971 (2d Cir. 1977); *Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

59. For example, if applied to the facts in *Atlantic & Pacific*, this interpretation would result in § 2(f) liability for A&P, since it knew that Borden's bid would not fall under the meeting competition defense because it was lower than that of Borden's competitor. See 99 S. Ct. at 936, 938 (Marshall, J., dissenting in part).

60. 511 F.2d 668 (9th Cir. 1975). *Rutledge* was a private treble damage antitrust action in which violations of §§ 2(a), (d), and (f), of the Act were alleged. The defendants were also charged with violating § 1 of the Sherman Act, 15 U.S.C. § 1 (1976). Private treble damage antitrust actions are provided for by § 4 of the Clayton Act, 15 U.S.C. § 15 (1976).

logically impossible under the *Automatic Canteen* rule to find a section 2(f) violation.⁶¹ Similarly, in *Harbor Banana Distributors, Inc. v. FTC*,⁶² a buyer was charged with inducing and receiving discriminatory prices from its supplier.⁶³ After finding that the supplier had granted the variance to meet his competition, the court set aside the section 2(f) charge against the buyer, stating that a prohibited discrimination is a condition precedent to a finding of unlawful conduct under section 2(f).⁶⁴

After the *Automatic Canteen* decision and before the court's consideration of *Atlantic & Pacific*, only one lower court held that derivative liability was not required by either *Automatic Canteen* or the language of the Act. In *Kroger Co. v. FTC*,⁶⁵ Kroger, a large buyer, was charged under section 2(f) with the inducement and receipt of discriminatory prices prohibited by section 2(a) of the Act.⁶⁶ In an attempt to elicit a better bid, Kroger had informed the lowest-bidding seller, Beatrice Food Company, that its bid was not the lowest that Kroger had received. In reliance upon Kroger's statement, Beatrice then submitted an even lower bid.⁶⁷ Beatrice was absolved of liability under section 2(a) because its bid was a good faith attempt to meet competition, which is an affirmative defense under section 2(b).⁶⁸ However, the court found that Kroger was liable under section 2(f) despite the discharge of Beatrice,⁶⁹ thereby indicating that section 2(f)

61. 511 F.2d at 678. The portion of the court of appeals' opinion dealing with the buyer liability issue is a brief affirmance of the district court's opinion. For the district court's discussion of the issue, see *Rutledge v. Electric Hose and Rubber Co.*, 327 F. Supp. 1267 (C.D. Cal. 1971).

62. 499 F.2d 395 (5th Cir. 1974).

63. *Id.* at 396.

64. *Id.* at 399. The court cited *Automatic Canteen* as supportive of a derivative liability standard. For an additional application of the derivative liability approach to § 2(f) liability, see *Aviation Specialties Inc. v. United Technologies*, 568 F.2d 1186 (5th Cir. 1978). In that case a purchaser of aircraft parts charged that the manufacturer of those parts had violated § 2(a) of the Act by selling the same parts to other purchasers at lower prices, and that one of those purchasers had induced the alleged discriminatory prices in violation of § 2(f) of the Act. *Id.* at 1189. The court stated that buyer liability depends upon a showing of seller liability under § 2(a) of the Act; and since it found that the seller had not violated that section, no buyer liability could attach. *Id.* at 1191. This holding was based upon the finding that the defendant had not sold parts directly to the plaintiff but had sold parts indirectly as part of a repair contract. *Id.* Repair contracts are contracts for services and not covered by § 2(a) of the Act. *Id.* See note 22 *supra*.

65. 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

66. *Id.* at 1373.

67. *Id.* at 1375-76.

68. *Id.* at 1373-74. See note 22 *supra*.

69. 438 F.2d at 1374.

liability was not necessarily derivative. In his opinion, Justice Clark⁷⁰ stated that, for the buyer to successfully assert a 2(b) defense, the prices he induced must come within the defenses of that section, not only from the seller's point of view, but also from that of the buyer.⁷¹

The interpretations of section 2 reflected in the *Rutledge, Harbor Banana* and *Kroger Co.* decisions made it clear that the principles enunciated by the Supreme Court in *Automatic Canteen* needed clarification. The Court took the opportunity to clarify *Automatic Canteen* through its decision in *Atlantic & Pacific*. By construing the language of section 2(f) to require derivative liability, the Court applied the statute in a manner that is consistent with the broader policies of the antitrust laws.⁷² The Robinson-Patman Act, as the other antitrust laws, was passed to ensure the survival of small businesses. The goal was to prevent the development of monopoly-like structures by limiting the power of large competitors.⁷³ Since price discrimination might have an anticompetitive effect by allowing strong buyers to receive unjustifiably low prices, and thereby become even stronger, the Robinson-Patman Act is appropriately read in the context of the other monopoly laws.⁷⁴ The Court's decision in *Atlantic & Pacific* is consistent with anti-trust policy since a contrary decision would disallow buyer reliance on the seller's defenses and require affirmative disclosure, a result which would conflict with prior decisions of the United States Supreme Court applying section 1 of the Sherman Act.⁷⁵ In *United States v. Container*

70. Associate Justice Clark was a member of the United States Supreme Court majority in *Automatic Canteen*. At the time of the *Kroger* case, he had retired from his United States Supreme Court seat and was sitting by designation on the United States Court of Appeals for the Sixth Circuit.

71. 438 F.2d at 1377. Justice Clark recognized, however, that ordinarily there is not a violation of § 2(f) unless there is a violation of § 2(a), but stated this was a question that need not be decided because of the "peculiar circumstances" at hand, i.e., Kroger's misrepresentations to Beatrice. *Id.* at 1374.

72. 99 S. Ct. at 933.

73. See C. EDWARDS, THE PRICE DISCRIMINATION LAW 12 (1959).

74. The *Atlantic & Pacific* Court discussed the implications that a forced disclosure policy would have upon the broader anti-trust policy. Justice Stewart reasoned that unless a buyer could rely upon the seller's affirmative defenses, he would be precluded from further bargaining if he had received competitive bids since any attempt to continue bargaining might result in an even lower price and § 2(f) liability. The buyer's only option, therefore, would be to either accept the original low bid or to reveal its terms and allow another seller to match it. Since this process involved no real bargaining and would lead to price uniformity, Justice Stewart rejected such an interpretation of the Robinson-Patman Act. 99 S. Ct. at 933. The *Automatic Canteen* Court had previously warned against broad interpretations of the Robinson-Patman Act which would lead to price uniformity in open conflict with the purposes of other antitrust legislation. 346 U.S. at 63.

75. 15 U.S.C. § 1 (1976) provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal."

Corp. of America,⁷⁶ the defendant competitors exchanged information concerning the most recent prices they were charged or quoted. Each competitor complied with the requests for information in the expectation that they would be furnished reciprocal information when they requested it.⁷⁷ The Court found that such an exchange of price information led to price matching by competitors in the same industry. Since these practices precluded the setting of prices by free market forces, the Court held that they were unlawful per se.⁷⁸ Viewing the *Container* ruling in terms of the *Atlantic & Pacific* controversy, placing a burden of affirmative disclosure on a buyer would only have added a middleman to the exchange of price information. If buyers were required either to divulge to sellers specific information about competing bids or to accept artificially high prices, sellers could circumvent *Container* by obtaining pricing information from buyers. Thus, the *Atlantic & Pacific* decision is sound given the legislative policy of advancing the free operation of market forces.

An equally important aspect of the *Atlantic & Pacific* decision is the Court's refusal to include the "lying buyer" within the derivative liability rule.⁷⁹ In *Automatic Canteen*, the Court recognized that the language of the Robinson-Patman Act did not lend itself to broad decisions but instead demanded very specific analysis.⁸⁰ The *Atlantic & Pacific* Court followed that logic in distinguishing *Kroger Co. v. FTC*, which involved a buyer who made deliberate misrepresentations to a seller in order to induce price concessions.⁸¹ The *Atlantic & Pacific* majority's exclusion of

76. 393 U.S. 333 (1969).

77. *Id.* at 335. The reciprocal nature of these requests was held sufficient to establish the combination or conspiracy ingredient of a violation of § 1 of the Sherman Act. *Id.*

78. *Id.* at 336-37. The defendant's conduct was held unlawful even though the practice did not raise prices or even maintain them. The price trend was downward over the period covered by the complaint. The practice merely had the effect of keeping declining prices "within a fairly narrow ambit." *Id.*

79. 99 S. Ct. at 934 n.15.

80. The *Automatic Canteen* Court stated that "[s]ince precision of expression is not an outstanding characteristic of the Robinson-Patman Act, exact formulation of the issue before us is necessary to avoid inadvertent pronouncement on statutory language in one context when the same language may require separate consideration in other settings." 346 U.S. at 65.

81. 438 F.2d at 1377. *See also* 99 S. Ct. at 931 n.6. A&P was not shown to have engaged in such practices, however. *Id.* at 934 n.15. A&P merely informed the high bidder, Borden, that its bid was not the lowest, that it was more than \$50,000 over the low bid, and gave Borden a chance to decide if it wished to submit another bid. *Id.* at 929. The *Atlantic & Pacific* Court found that the grocery chain's conduct was nothing other than the type of negotiation required in a competitive market system. The Court stated that "[i]n a competitive market, uncertainty among sellers will cause them to compete for business by offering buyers lower prices." *Id.* at 933.

the "lying buyer" from the protection of the derivative liability standard is in keeping with its implicit ruling on the issue in *United States v. United States Gypsum Co.*⁸² In that case, the defendants were charged with a Sherman Act violation involving price verification practices among competitors.⁸³ The defendants asserted that the Robinson-Patman Act required price discussions among competitors, since buyers were frequently less than honest about the bids they had received.⁸⁴ The Court rejected that argument, holding that the Robinson-Patman Act did not require communication among competitors.⁸⁵ However, the Court suggested that the solution to the "lying buyer" problem might be the enforcement of section 2(f) of the Robinson-Patman Act.⁸⁶ The Court hypothesized that a sustained enforcement of section 2(f) would bolster the credibility of the buyers' representations.⁸⁷ This indicated that the Court would protect sellers who had bid competitively in reliance upon the price representations of buyers by subjecting a "lying buyer" to section 2(f) liability. This approach is logically consistent with the concern for the uninterrupted operation of the competitive market since a "lying buyer" artificially affects the open bargaining market by deliberately misleading bidders. This being the case, a "lying buyer" cannot justifiably seek the shelter of an antitrust policy which promotes free bidding.

Great Atlantic & Pacific Tea Co. v. FTC clarifies the previous ruling of the Court in *Automatic Canteen*. The *Atlantic & Pacific* holding that a buyer incurs no liability for accepting a bid which is lower than the bids of other sellers, provided that the seller cannot be successfully prosecuted under sections 2(a) and (b) of the Act, promotes the policy of the antitrust laws by encouraging the free operation of the market place. The freedom given to the buyer to negotiate lower prices, without fear of 2(f) liability, will allow market forces to influence prices. Thus, the *Atlantic & Pacific* decision represents a sound, narrow decision by the United States Supreme Court which should put to rest any notions of imposing an anticompetitive affirmative disclosure obligation on negotiating buyers.

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82. 438 U.S. 422 (1978).

83. *Id.* at 427-28.

84. *Id.* at 429.

85. *Id.* at 453-54.

86. *Id.* at 455 n.30.

87. *Id.*