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Arthur D. Austin

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Meeting Competition in Good Faith, and the "Premium" Product

Arthur D. Austin*

THE BROAD PURPOSE of the Robinson-Patman Act¹ is to prohibit sellers from granting price allowances, and other specified benefits which give competitive advantage to a purchaser and also discriminate against his competitors.² It came into existence largely because the Clayton Act³ had proven ineffective⁴ in dealing with the chain store,⁵ which made sizeable capital investments "in facilities for performing bulk storage, redelivery, and financing, so as to 'integrate' the retailing and wholesaling functions . . . and to eliminate middleman profits by dealing with the manufacturer directly."⁶ The claims generated such concern among the independents that they demanded and obtained legislative relief.⁷ Whether the Robinson-Patman Act neutralizes the economic power of the large chains is a question that has provoked heated controversy.⁸ However, there can be no argument that its application has given rise to many problems for businessmen and their legal advisors. The Act

* Asst. Prof., Dept. of Bus. Admin., Bowling Green State Univ.; member of the Virginia Bar.

¹ 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1952).

² See *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37, 43 (1948); H. R. Rep. No. 2287, 74th Cong., 2d Sess. 3 (1936); S. Rep. No. 1502, 74th Cong., 2d Sess. 2 (1935); Sawyer, *Business Aspects of Pricing Under the Robinson-Patman Act* 15-88 (1963).

³ 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1952).

⁴ *Automatic Canteen Co. of America v. Federal Trade Commission*, 346 U. S. 61, 64 (1953); Rowe, *Price Discrimination Under the Robinson-Patman Act* 6-7 (1962); Edwards, *The Price Discrimination Law* 6 (1959).

⁵ See F. T. C., *Chain Stores: Growth and Development of Chain Stores*, S. Doc. No. 100, 72d Cong., 1st Sess. 55, 80-81 (1932); F. T. C., *Final Report on Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1 Sess. 51, 96-97 (1935).

⁶ Rowe, *supra* note 4, at 4.

⁷ Rowe, *Id.* at 11-17. See also Stocking, *Workable Competition and Anti-trust Policy* 222-23 (1961).

⁸ For critical views of the Robinson-Patman Act see Blum, *The Robinson-Patman Act—An Introduction to Uncertainty*, 35 Conn. B. J. (1961); Rowe, *Price Discrimination, Competition, and Confusion: Another Look at Robinson-Patman*, 60 Yale L. J. 929 (1951); Simon, *Price Discrimination to Meet Competition*, 1950 U. Ill. L. F. 575. In defense of the Act and for a general summary of its purposes see Patman, *Complete Guide to the Robinson-Patman Act* (1963).

has been labeled a "hodgepodge"⁹ and "one of the most tortuous legislative pronouncements ever to go on the statute books."¹⁰

However, an alleged violator can assert either of two defenses: "cost justification,"¹¹ or "meeting competition in good faith." The latter defense reads as follows:

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.* (Emphasis supplied.)¹²

The Premium Product

Although the Robinson-Patman version of the "meeting competition in good faith defense" [hereinafter referred to as the Section 2(b) defense] was intended to eliminate the alleged deficiencies¹³ of similar language in the Clayton Act, its application has provoked sharp controversy. Its efficacy as a legally coherent defensive maneuver has been questioned many times,¹⁴

⁹ 80 Cong. Rec. 9419 (1936).

¹⁰ Dirlam and Kahn, *Fair Competition, The Law and Economics of Antitrust Policy* 119 (1954).

¹¹ 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1958). See generally Fuchs, *The Requirement of Exactness in the Justification of Price and Service Differentials Under the Robinson-Patman Act*, 30 Tex. L. Rev. 1 (1951); Sawyer, *Accounting and Statistical Proof in Price Discrimination Cases*, 36 Iowa L. Rev. 244 (1951); Shneiderman, *Cost Justification Under the Robinson-Patman Act—The FTC Advisory Committee's Report*, 25 Cinn. L. Rev. 389 (1956).

¹² 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(b) (1958).

¹³ *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231, 241-42 (1951). See H. R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936).

¹⁴ See, e.g., Hall and Phillips, *Good Faith, Discrimination and Market Organization*, 30 So. Eco. J. 144 (1963); Simon, *Price Discrimination to Meet Competition*, 1950 U. Ill. L. F. 575; Tarpry, *What About the Good Faith Defense?* 25 J. Marketing 62 (1960); *The Robinson-Patman "Good Faith" Defense: New Departure, Revitalization, or Mere Strengthening?* 31 Cinn. L. Rev. 296 (1962); *The Good Faith Defense of the Robinson-Patman Act: A New Restriction Appraised*, 66 Yale L. J. 935 (1957).

and the scarcity of appellate review¹⁵ of Section 2(b) has compounded the problem of application. On the other hand, during the twenty-nine years that this defense has been available, broad areas of interpretation have crystallized into definite guidelines.¹⁶ But the dichotomy between the original intentions of the Section 2(b) proviso and the pricing policies that the courts allow has been widening.¹⁷

About the same time as the rise of the chain store and the passage of the Robinson-Patman Act, the nation's economy finally passed from a somewhat competitive structure to that of oligopoly.¹⁸ The latter is now "the major type of market structure found in American industry, and it is also found in transportation, finance, and other fields."¹⁹ This means that "a few large sellers account collectively for the whole or major part of pro-

¹⁵ The U. S. Supreme Court has been squarely faced with the Section 2(b) defense only four times: Federal Trade Commission v. Sun Oil Co., 371 U. S. 505 (1963); Federal Trade Commission v. Standard Oil Co., 355 U. S. 396 (1958); Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 (1951); Federal Trade Commission v. Staley Manufacturing Co., 324 U. S. 746 (1945).

¹⁶ Section 2(b) is effective against a Section 2(a) violation. Standard Oil Co. v. Federal Trade Commission, 340 U. S. 231 (1951). It is not a defense against Section 2(c). Federal Trade Commission v. Washington Fish and Oyster Co., 271 F. 2d 39 (9th Cir. 1959). It has been held to be a good defense against a Section 2(d) violation in Shulton, Inc. v. Federal Trade Commission, 305 F. 2d 36 (7th Cir. 1962), but the Commission came to a different conclusion in Re Henry Rosenfeld, Inc., 52 F. T. C. 1535 (1956). The Section 2(b) defense is good against Section 2(e). Ludwig v. American Greeting Corp., 282 F. 2d 917 (6th Cir. 1960). It is good against Section 2(f). Mid-South Distributors v. Federal Trade Commission, 287 F. 2d 512 (5th Cir. 1961).

¹⁷ Among the many problems as yet not satisfactorily resolved are: 1. The difficulty involved in identifying a pricing system. See Federal Trade Commission v. Standard Oil Co., 355 U. S. 396 (1958). 2. Is meeting competition in good faith compatible with attracting new customers? See Sunshine Biscuits, Inc. v. Federal Trade Commission, 306 F. 2d 48 (7th Cir. 1962). 3. How much knowledge of a competitor's pricing policy is necessary in order to effectively raise the Section 2(b) defense? See Balian Ice Cream Co. v. Arden Farms Co., 231 F. 2d 356 (9th Cir. 1955); Forster Mfg. Co., Inc., Docket 7207, Trade Reg. Rep. ¶16,243 (1963). 4. Must the accused violator establish that he was meeting a lawful price? See Standard Oil Co. v. Brown, 238 F. 2d 54 (5th Cir. 1956). See generally Edwards, The Price Discrimination Law (1959).

For efforts to amend the Robinson-Patman Act see *Strengthening Robinson-Patman Act and Amending Antitrust Law Prohibiting Price Discrimination*, S. Rep. 2010, 85 Cong. 2 Sess. 1-2 (1957).

¹⁸ See generally Chamberlin, The Theory of Monopolistic Competition (1948).

¹⁹ Carter and Snively, Intermediate Economic Analysis 76 (1961). A classic example of oligopoly is discussed in American Tobacco Co. v. United States, 328 U. S. 781 (1946). This case has added significance since it reflects an attempt to harmonize the law of monopoly with oligopoly. See Nicholls, *The Tobacco Case of 1946*, 39 Am. Econ. Rev. 284 (1949).

duction and sales" in a given industry.²⁰ It also means that the products offered for sale by the three or four dominant suppliers take on similar characteristics, *i.e.*, they are standardized or at least somewhat interchangeable. With an industry-wide similarity of products, manufacturers are faced with the problem of distinguishing their items from those offered by competitors.²¹ Such attempts are commonly known as "product differentiation."²² An effective method of establishing product differentiation is through the use of various promotional techniques, such as distinctive packaging.²³

As a result of the emphasis on product differentiation, products which are essentially the same can receive different consumer reaction.²⁴ This variance in consumer response is most often manifested by one product selling at a higher price than a competitor's item. This price differential between two competing items is often expressed by labeling the lower priced as *regular* and the higher priced as *premium*.

Problems Posed by the Premium Product

The Robinson-Patman Act aims at overall equality of market opportunity for both purchasers and sellers.²⁵ Generally speaking, where "commodities of like grade and quality"²⁶ are

²⁰ National Industrial Conference Board, *Antitrust in an Expanding Economy* 10 (1962). See Carter and Snavely, *supra* note 19, at 214-46. For a refined and comprehensive analysis of oligopoly see Fellner, *Competition Among the Few* (1949). See also Kaysen and Turner, *Antitrust Policy, An Economic and Legal Analysis* 27 (1959).

²¹ For articles dealing with the problems of reconciling antitrust laws with the contemporary economy see Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 Mich. L. Rev. 1139 (1952); Smith, *Effective Competition: Hypothesis for Modernizing the Antitrust Laws*, 26 N. Y. U. L. Rev. 405 (1951).

²² "Product differentiation is propagated by differences in the design or physical quality of competing products by efforts of sellers to distinguish their products through packaging, branding, and the offering of auxiliary services to buyers, and by advertising and sales promotional efforts designed to win the allegiance and custom of the potential buyer." Bain, *Barriers to New Competition* 114 (1956).

²³ The impact of effective packaging has been judicially recognized: "With increasing standardization of products generally, consumer appeal through attractive packaging has become a developing aspect of competitive activity." *Gerber Products Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 922 (S. D. N. Y. 1958).

²⁴ See Lippincott and Margulies, *Packaging in Top Level Planning*, Harv. Bus. Rev. 46 (Sept.-Oct. 1956).

²⁵ See note 2, *supra*.

²⁶ 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1958).

involved, a seller cannot charge one customer less than he charges another similarly situated customer.²⁷ On the other hand, as has been pointed out, the Act allows a price reduction to be made so as to meet "an equally low price of a competitor." But these words do not indicate the degree of product resemblance and similarity that is envisioned in the "good faith meeting of competition" defense. There is no mention of guideline words such as "like grade and quality."²⁸ Hence the crucial question is—what type of product similarity between competitors is required by Section 2(b)?

This question is significant when a premium product is pitted against a lower priced regular product. Thus, suppose a seller with a "premium" product reduces his prices to the level of those of a competitor with a "regular" item? Has he *met* competition in good faith or has he, as a practical matter, *undercut*²⁹ the prices of his competitor? Rowe states the problems in the following manner:

. . . a price quotation for a heavily advertised national brand or product of superior quality which nominally matches the price of an unknown entity or "dog" can in reality undercut it in the market place.³⁰

If price discrimination exists when "premium" product price levels are the same as the "regular" product levels, it means that a penalty is attached to the firm which is able to stimulate strong consumer backing for its product. Of course before any con-

²⁷ Federal Trade Commission v. Standard Brands, 189 F. 2d 510 (2d Cir. 1951).

²⁸ Although the "like grade and quality" requirement is applicable only to the seller's own products sold at different prices and not to a comparison between competitor's goods there is no reason why the same definitions should not also apply to the § 2(b) defense and the premium-regular product conflict. For support of this attitude see *Borden Co. v. F. T. C.*, 1964 Trade Reg. Rep. ¶71,308. See generally Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 Yale L. J. 1 (1956); Cassady and Grether, *The Proper Interpretation of "Like Grade and Quality" Within the Meaning of Section 2(a) of the Robinson-Patman Act*, 30 So. Calif. L. Rev. 241 (1957).

²⁹ The Section 2(b) proviso does not protect an accused violator who undercuts his competitor's prices. *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231 (1951); *Atlas Building Products Co. v. Diamond Block and Gravel Co.*, 269 F. 2d 950 (10th Cir. 1959); *Gerber Products Co. v. Beech-Nut Life Savers, Inc.*, 160 F. Supp. 916, 921 (S. D. N. Y. 1958); *Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (2d Cir. 1951); *Samuel H. Moss, Inc. v. Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1948).

³⁰ Rowe, *supra* note 4, at 242.

clusions can be drawn, the major problem is identification: if two products contain essentially the same ingredients and have similar qualities except for externals, how can one be identified as "premium"? Then, assuming that the premium item can be identified (a tenuous assumption at best), a price differential that realistically reflects the actual market distance between the regular and premium items must be established.

Identification of the Premium Product

Any worthwhile endeavor to reconcile the Section 2(b) defense with the so-called premium product must necessarily begin with a judicial announcement that two products selling at different prices have sufficiently similar qualities so that it can be said that they are being marketed on the same competitive level. Hence the price reduction of one of the products affects the competitive position of the other. The market place environment for such an announcement would ordinarily include three factors: (1) a price spread between two "competing" products; (2) a reduction in price of the higher priced item to a level at or near the competition's prices; (3) an allegation by the seller of the lower priced item that his prices have been undercut. If the court recognizes the presence of an established price differential below which the seller of the higher priced product cannot go and still retain the protection of the Section 2(b) proviso, it means that the existence of the premium product has been acknowledged. But the question still remains: how do courts in fact identify a premium product?³¹

The only thorough analysis of the premium product ramifications of Section 2(b) by the courts is in *Gerber Products Co. v. Beech-Nut Life Savers, Inc.*³² The facts can be summarized as follows: Beech-Nut Life Savers, Inc. is a baby food seller who marketed their products in glass containers. A competitor in the California market, Gerber Products Company, packaged its baby food in tin containers. Glass-contained baby food sold at a higher price than the same item packaged in tin. When

³¹ The problem of the "premium" product is restricted to alleged violations of Section 2(a) which reads in part as follows: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition. . . ."

³² 160 F. Supp. 916 (S. D. N. Y. 1958).

Beech-Nut first entered the California market they commanded around 5 per cent of the baby food market in that state. They ultimately increased this to a peak of 6.6 per cent. Gerber's share of the market was around 75 per cent.³³ Subsequent to its 6.6 per cent peak, Beech-Nut's share began to decline, eventually reaching a low of 4.3 per cent. At this point Beech-Nut, confronted with what they interpreted as possible market extinction, reduced prices to match those charged by Gerber. Thereafter a series of price reductions by both Beech-Nut and Gerber prevailed until Gerber instituted action³⁴ under the Robinson-Patman Act. The Court immediately perceived that the intrinsic problem involved in the conflict was a price contest between "premium" and "regular" products. Judge Weinfeld summarized the issues by saying:

At the outset it should be noted that neither party makes any substantial claim that the food content of its product is superior to or more costly than the other's. However, each urges, and has stressed in its advertising, that its container has qualities not possessed by the other. Thus the hard core of the controversy revolves about the packaging of their respective products—tin against glass containers.³⁵

In suggesting that the protection of the Section 2(b) defense³⁶ was inapplicable because of the premium status of Beech-Nut's baby food, Gerber advanced an argument that, although necessary to their case, illuminates the complexities involved in making a distinction between premium and regular products. It was alleged that "marketwise the products are not comparable."³⁷ There is a certain amount of inconsistency in this argument. Apparently Gerber did feel that Beech-Nut's

³³ The baby food market is a classic example of oligopoly. Gerber controlled more than 47% of the national market, Beech-Nut had 21%, while Heinz and Company had around 16.5% of the total market. In other words, three sellers controlled around 85% of the national market. 160 F. Supp. at 917.

³⁴ The Court was actually confronted with Gerber's motion for a preliminary injunction ordering Beech-Nut to raise its prices so as to reach the price differential that had existed between the competing products before September 4, 1957. 160 F. Supp. at 917.

³⁵ 160 F. Supp. at 919.

³⁶ In hearings before the Commission whether the § 2(b) defense has been established is a fact question to be resolved by that body. *Federal Trade Commission v. A. E. Staley Manufacturing Co.*, 324 U. S. 746 (1945). In a civil action for damages the jury resolves the facts. *Atlas Bldg. Products Co. v. Diamond Block and Gravel Co.*, 269 F. 2d 950 (10th Cir., 1959).

³⁷ 160 F. Supp. at 920.

baby food was sufficiently "comparable" so that it was being marketed on the same competitive level as their products. Moreover, the products were "comparable" enough so that when Beech-Nut reduced their prices to Gerber's level, the latter felt that it was necessary to protest that their prices had been undercut. This then is the conundrum that is produced by the attempt to reconcile the language of the Section 2(b) proviso with the blurred distinction made between "regular" and "premium" products.³⁸ How different can products be and still be similar as far as Section 2(b) is concerned?

However, the Court was not primarily concerned with the possible theoretical inconsistencies that might flow from the plaintiff's pleadings. Instead the court directed its attention to determining whether the fact situation actually did involve a confrontation between regular and premium products. This necessarily involved a finding³⁹ that a premium product existed. And the method by which the identification of a premium item can be made was stated as follows: "*The ultimate test . . . is whether a substantial part of the public is prepared to pay a greater price for the glass contained product.*" (Emphasis supplied.)⁴⁰ In other words, if the public is willing, whatever the reason, to pay a higher price for one item than for another, the higher priced product has premium status!⁴¹

The main attraction of the "public acceptance" test is its apparent simplicity. But such simplicity is deceptive because of the abstract quality of its language. Movement from the general to the particular always generates problems. Moreover, viewed strictly from a pragmatic viewpoint, significant questions remain unanswered. For example, how *long* must the public be willing

³⁸ See note 30, *supra* and accompanying text.

³⁹ The Court resolved the immediate issue confronting them (the case was never decided on its merits) in favor of the defendant on the following grounds: 1. doubt as to the existence of a premium product; 2. lack of sufficient proof of irreparable injury that is necessary for the granting of the extraordinary relief desired by Gerber; 3. the dominant market position occupied by Gerber in California; 4. lack of proof that competition would be lessened or that Gerber would be eliminated from the California market.

⁴⁰ 160 F. Supp. at 922.

⁴¹ It is interesting to note that the "ultimate test" as stated by Judge Wiinfeld parallels his summary of Gerber's argument. "It [Gerber] argues that despite higher prices for glass packed baby food many consumers prefer to buy it because of a belief (right or wrong) that its contents are better preserved and of greater nutritional value—that in effect, it is a premium product which commands a higher price in competition with tin." 160 F. Supp. at 920.

to pay "a greater price" before a product can be said to be premium? Certainly any meaningful answer to this question would depend on the facts, such as the type of product, the complexion of the industry, the actions of competitors, the possible attempts of a new competitor to enter the market, and the overall behavior of the economy. In addition, the test does not acknowledge, except perhaps by implication, the degree of control that a firm can exert in respect to public acceptance of its products.

On the other hand, Judge Wienfeld did expressly exclude advertising from his test even though it is used by nearly all firms to shape and encourage consumer acceptance of their products. In the contemporary business world, advertising has a major role in determining commercial success of a given venture.⁴² Yet when prefacing its statement of the public acceptance test, the court indicated that merely because Beech-Nut "in its advertising 'puffs' the alleged virtue of glass containers [such action] does not make it a premium product as against tin—any more than plaintiff's advertising claim of unique qualities of tin make its product a premium product."⁴³ To exclude the market consequences of advertising from any type of test has some attractive advantages. Possibly the central advantage is the avoidance of the difficulty in accurately measuring and gauging the effect advertising has on the consumer's buying habits.⁴⁴ However, packaging is a form of advertisement.⁴⁵ Therefore, to exclude advertising⁴⁶ and simultaneously to acknowledge that packaging does play a paramount role in influencing the consumer⁴⁷ seems to be a rather obvious contradiction. Public acceptance of a given product represents the totality of many and varied influences⁴⁸ upon the consumer. One of these influences

⁴² In 1900 the volume of both national and local advertising expenditures was estimated at \$542,000. By 1959 it had increased to an estimated figure of \$11,090,000. Frey, *Advertising* 22 (1961). See also Borden, *The Economic Effects of Advertising* (1942).

⁴³ 160 F. Supp. at 922.

⁴⁴ See Rowe, *Price Discrimination Under the Robinson-Patman Act* 244, 45 (1962).

⁴⁵ See note 24, *supra*.

⁴⁶ 160 F. Supp. at 922.

⁴⁷ *Ibid.*

⁴⁸ Among some of the more pronounced influences operating on the consumer are his economic position, his ethnic background, his education, and the impact of external forces such as his particular "reference group."

certainly is advertising. Hence it can be argued with some cogency that effective advertising can create a "premium" product.

The "public acceptance" test announced in *Gerber Products* was nothing more than the articulation of the general attitude toward the premium product that had already been promulgated by the Federal Trade Commission. When the *Standard Oil* case was remanded⁴⁹ with instructions to make findings in conformity with the Supreme Court's opinion, the Commission⁵⁰ was faced with resolving a price war between a major brand of gasoline and a non-major brand.⁵¹ In a peripheral discussion⁵² the Commission said that "in the retail distribution of gasoline *public acceptance* rather than chemical analysis of the product is the important competitive factor." (Emphasis supplied.)⁵³ However, unlike the court in the *Gerber* case, the Commission did acknowledge the impact of advertising by saying that "well advertised brands of gasoline have come to be known as major brands . . ." ⁵⁴ Furthermore, the Commission expressly recognized that factors other than the ingredients of the product play the prominent role in defining public acceptance.

The dealer's overall success or failure may be governed largely by the extent to which his merchandise is acceptable to the public, and in the case of gasoline *public acceptance is determined in large measure by factors other than actual grade and quality.* (Emphasis supplied.) ⁵⁵

⁴⁹ 340 U. S. 231 (1951). This decision gave the § 2(b) defense full substantive force. See generally McGee, *Price Discrimination and Competitive Effects: the Standard Oil of Indiana Case*, 23 U. Chi. L. Rev. 398 (1956).

⁵⁰ In the Matter of Standard Oil Co., 49 F. T. C. 923 (1953).

⁵¹ The distinction between so-called major and non-major brands of gasoline is not always clear. In the Matter of American Oil Co., 60 F. T. C. 1786 (1962), Commissioner Elman, dissenting, states the problem as follows: "How was respondent in October, 1958 to know that 'Paraland,' owned by a 'major' producer (Phillips), would be regarded by the Commission in June 1962 as a 'private' brand entitled, apparently as a matter of law, to a 'normal' differential of 2 cents a gallon lower than 'major' brands?" 60 F. T. C. at 1825.

⁵² The Commission concluded that Standard Oil had violated § 2(a) in that price discrimination had been made pursuant to an established system. It was also concluded that the burden of proof necessary for the § 2(b) defense had "not been sustained." 49 F. T. C. at 955. The Court of Appeals vacated the order of the F. T. C. and held that the § 2(b) defense had been made out. 233 F. 2d 649 (1956), *affirmed*, Federal Trade Commission v. Standard Oil Co., 355 U. S. 396 (1958).

⁵³ 49 F. T. C. at 952.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

Apparently, almost every industry is susceptible to the division between regular and premium products.⁵⁶ In condemning Anheuser-Busch for reducing prices in St. Louis of its nationally known Budweiser beer to the level of brands only known on a regional basis, the Commission again indicated a commitment to the public acceptance theory by stating:

The test in such a case is not necessarily a difference in quality but the fact that the public is willing to buy the product at a higher price in a normal market. Clearly, therefore, respondent's reduction from the premium price to match the prices of the regional beers on the market was not a meeting of competition. The effect was to undercut competition.⁵⁷

The use of public acceptance as a means of identifying the premium product has been firmly established.⁵⁸ The *Gerber Products* case is undoubtedly the most precise articulation of the "public acceptance" test. But because there has been no attempt to define and delineate the forces that operate within and inspire "public acceptance," it is impossible to forecast accurately whether a given product is, or is not, "premium." This inadequacy is due to the fact that, with the possible exception of the *Gerber*⁵⁹ case, there have been no cases that have given a meaningful analysis of the premium product as it relates to the Section 2(b) proviso.

Effect of a Reduction in Price of a Premium Product

Suppose an alleged violator relies upon the Section 2(b) defense when it has been established that his product is "premium." Can he successfully allege "meeting competition in good

⁵⁶ In addition to gasoline and baby food the distinction between premium and regular products has been applied to temperature controls, In the Matter of Minneapolis-Honeywell, 44 F. T. C. 351 (1948); beer, In the Matter of Anheuser-Busch, 54 F. T. C. 277 (1957); bakers yeast, Federal Trade Commission v. Standard Brands, Inc., 189 F. 2d 510 (2d Cir. 1951). This list is by no means exhaustive of the products to which the distinction has been made.

⁵⁷ In the Matter of Anheuser-Busch, 54 F. T. C. 277, 302 (1957), *set aside*, Anheuser-Busch v. Federal Trade Commission, 289 F. 2d 835 (7th Cir. 1961).

⁵⁸ *E.g.*, Gerber Products Co. v. Beech-Nut Life Savers Inc., 160 F. Supp. 916 (S. D. N. Y. 1958); In the Matter of Anheuser-Busch, 54 F. T. C. 277 (1957), *set aside*, Anheuser-Busch v. Federal Trade Commission, 289 F. 2d 835 (7th Cir. 1961); In the Matter of Standard Oil Co., 49 F. T. C. 923 (1953), *set aside*, Standard Oil Co. v. Federal Trade Commission, 233 F. 2d 649 (7th Cir. 1956), *affirmed*, 355 U. S. 396 (1958).

⁵⁹ The force of the *Gerber* case is weakened by the fact that the conflict was never resolved on the merits.

faith" when he reduces his prices near to, or even with, a competitor's "regular" product? The answer is an unequivocal "no." It is well settled that such action constitutes undercutting the prices of a competitor.⁶⁰ The cases most often cited for this view are *Porto Rican American Tobacco Co. v. American Tobacco Co.*⁶¹ and the more recently decided *Federal Trade Commission v. Standard Brands, Inc.*⁶² The former case, decided under Section 13 of the Clayton Act,⁶³ involved the premium "Lucky Strikes" cigarettes competing against a regional "regular" cigarette manufactured in Puerto Rico. There was an established price differential of 3 cents—"Lucky Strikes" sold at 15 cents per pack while the regular item sold at 12 cents. The charge of price discrimination was generated by the defendant's lowering the price of "Lucky Strikes" to 12 cents per pack.⁶⁴ It was held that this action did not constitute meeting competition in good faith⁶⁵ because "Lucky Strikes" was a much more expensive cigarette than appellee's brand, and, if sold at a low or lower price, it would be practically impossible for a weaker competition to continue.⁶⁶ The failure of the court in this case to expand on the reasons for

⁶⁰ *Porto Rican American Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929); *Federal Trade Commission v. Standard Brands*, 189 F. 2d 510 (2d Cir. 1951); *In the Matter of Minneapolis-Honeywell Regulator Co.*, 44 F. T. C. 351 (1948); *In the Matter of American Oil Co.*, 60 F. T. C. 1786 (1962); *Callaway Mills Co.*, 37 Trade Reg. Rep. ¶16800 (F. T. C. Feb. 10, 1964).

Question. If the equally low price of a competitor applies to goods that normally sell at a lower price than that normally applicable to goods offered by the person charged, because of . . . less acceptance or different packaging, may such lower price be met in good faith?

Opinion. The usefulness of the good-faith defense in such a situation is doubtful. The Federal Trade Commission, on a remand of the *Standard Oil Co.* case, held that because of such circumstances the Standard Oil Co. was not in good faith in meeting the lower price or lower cost and grade of gasoline. Consequently, the Commission held that the good-faith defense was not made out. The Court of Appeals set aside the Commission's order to cease and desist based on that reason. The Supreme Court of the United States affirmed the decision of the Seventh Circuit Court of Appeals. Patman, *Complete Guide to the Robinson-Patman Act* 96 (1963). See also Edwards, *The Price Discrimination Law* 552-54 (1959).

⁶¹ 30 F. 2d 234 (1929).

⁶² 189 F. 2d 510 (1951).

⁶³ 38 Stat. 730 (1914), as amended, 49 Stat. 1526 (1936), 15 U. S. C. § 13 (1952). See note 13, *supra*.

⁶⁴ The plaintiff retaliated by lowering prices to 10 cents per pack.

⁶⁵ 30 F. 2d 234 (1929).

⁶⁶ *Ibid.* The Court seemed impressed with the fact that the defendant appeared to be "punishing" the plaintiff for not joining them in a campaign to prevent the enactment of new and higher tax legislation in Puerto Rico.

its conclusions dilutes its significance as authority. However, in the *Standard* case a more meaningful statement of purpose for requiring the maintenance of a price distance between premium and regular products was advanced.

(c) For more than nine years prior to January 2, 1945, respondent consistently sold bakers' yeast at prices higher than those of most of its competitors and yet retained more than 57% of the total volume of said yeast sold throughout the United States. A competitive situation or condition was thus established under which most competitors of respondent could normally expect to sell and did sell bakers' yeast at prices slightly below those of respondent. Also, buyers normally expected to purchase, and did purchase, said product from respondent at prices slightly in excess of those paid most of its competitors. Under these conditions it was unnecessary for respondent to meet or match exactly a lower price of a competitor in order to retain business or to get new business.⁶⁷

Determination of a Normal Price Differential

Assuming that the "premium" product has been identified, the next step is to determine a "normal" price distance between the "premium" item and the competing "regular" item. The "premium" product cannot be marketed below this differential and still have the protection of the Section 2(b) defense.⁶⁸ On the other hand, if the seller of the regular item reduces his prices below the normal differential, the premium seller should be allowed to retaliate by lowering his prices so as to maintain the spread.⁶⁹

The main difficulty is in establishing this "normal" price differential in such a manner that it will adequately reflect the complexities of the market place. If a stable and unvarying differential has prevailed for a long period of time, for example nine years,⁷⁰ there is no real problem. However, prices in any industry rarely remain completely static over extended periods

⁶⁷ 189 F. 2d at 514.

⁶⁸ See note 60, *supra*.

⁶⁹ The typical reaction would be to sue for treble damages. 49 Stat. 1526 (1936), 15 U. S. C. § 13(a) (1952). *E.g.*, *Moore v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954). See generally Doyle, *Treble Damages and Counsel Fees*, ABA Section of Antitrust Law Proceedings 142 (Aug. 1954); Clark, *The Treble Damage Bonanza, New Doctrines of Damages in Private Antitrust Suits*, 52 Mich. L. Rev. 363 (1954).

⁷⁰ See note 67, *supra*.

of time. Instead, what often prevails is what one court labels "a bouncing ball pricing policy,"⁷¹ and in many cases there is a "nervous and erratic pattern of irregular prices."⁷² Another problem is that an ostensible price differential may not reflect the true situation. For example, it has been pointed out that as the result of the "practice of giving savings stamps, worth about one cent a gallon, the actual spread exceeded the apparent differential."⁷³ Not in all cases can such a bonus to customers be translated into specific monetary figures. Finally, there is always the possibility, admittedly remote, of the premium seller purposely manipulating or artificially inflating the differential so as to gain an advantage over his rivals.⁷⁴

There is oblique authority⁷⁵ to the effect that the premium seller's share of the market is the determinative factor in establishing a normal differential. The "normal" price differential is at that point where, if prices are reduced by the premium seller, his share of the market begins to increase at the expense of his competitors. Even excluding the paucity of authority for this approach, it has obvious faults. What if there are periodic token price reductions keyed to intensive advertising campaigns? It would be impossible to determine if the increased share of the market was attributable to advertising, a price reduction, or both.

The Attorney General's National Committee to Study the Antitrust Laws has adopted a more flexible approach:

An inflexible cent-for-cent rule would enable a seller of the preferred commodity in fact to undercut the price for a less desirable product, or conversely, deprive the seller of a less popular product of the full benefit of the "meeting competition" defense. We therefore urge a flexible rule which regards the nominal price of the rival product as only a presumptive boundary of a seller's permissible price reduction under the "meeting competition" proviso, adjust-

⁷¹ *Sun Oil Company v. Federal Trade Commission*, 294 F. 2d 465, 482 (5th Cir., 1961), *reversed*, 371 U. S. 505 (1963).

⁷² *Ibid.*

⁷³ *Ibid.*

⁷⁴ "A supplier may well try to push his price for an established product to a higher level, to exploit its supposed public acceptance, but then lose sales to a more obscure rival—so as to refute popular preference at *that* spread in price." Rowe, *Price Discrimination Under the Robinson-Patman Act* 245 (1962).

⁷⁵ *Federal Trade Commission v. Anheuser-Busch, Inc.*, 363 U. S. 536, 541-42 (1960).

able up or down upon satisfactory proof by the person questioning its reliability. In practical operation, such a test in some circumstances necessarily must permit a seller of a less accepted brand to cut substantially below the more popular product's price. Conversely, as the Commission has readily recognized, the seller of the premium commodity sometimes must not go down to the price level of the lesser product. In each case, the heart of the matter is whether actual competition, not merely a nominal price quotation, is equalized.⁷⁶

Conclusion

There is no escaping the conclusion that in the contemporary economy of this country there often exist discernible price differences between products containing similar ingredients. This is a reality of commercial life. And it is likewise true that "public acceptance," purposely fostered by product differentiation, frequently justifies designating one product "premium" while another product is labeled "regular." Frequently the "premium" and "regular" products are so similar that to allow the seller of the higher priced item to reduce prices to the level of the regular product would be inimical to the broad designs of the Robinson-Patman Act and also to the particular purpose of the Section 2(b) proviso. The reason that this is not always the case is that the premium item might possess certain qualities that substantially alter the totality of the impression that it exerts in the market place. Factors other than the chemical composition can cause a difference to exist between products. Sustained advertising or attractive packaging, for example, can cloak a product with a permanent image so far as the consumer is concerned. And this image, although perhaps not susceptible to precise measurement, has the net effect of erecting a substantial wall between the "premium" and the "regular" product. Simply stated, even though a chemical analysis of two products would produce the same results, advertising, packaging, brand names, etc., can have such "commercial significance"⁷⁷ as to preclude market identity between them. In such situations the firm selling the "premium" item should be given greater price policy free-

⁷⁶ *Report of the Attorney General's National Committee to Study the Antitrust Laws* 184 (1955).

⁷⁷ In *Borden Co. v. FTC*, 1964 Trade Reg. Rep., ¶71,308 the court held that the brand name "Borden" had such "commercial significance" as to negate the existence of "like grade and quality." Cf., *Hartley and Parker Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

dom—even to the extent of allowing a reduction of prices near or to the level of the regular product.

In light of the above discussion it is recommended that when a court is in the process of making a decision as to whether, for Section 2(b) purposes, the "premium" and "regular" products are similar (which would necessitate maintaining a price differential) or dissimilar (which would allow price policy freedom) the following factors should be considered:

1. The quality and length of the promotional campaign. If the advertising is sustained and of high quality the chances are enhanced that the image has crystallized into definite shape. And the stronger the consumer image of a given product, the greater the difference between it and other products.

2. Is the firm selling the premium product just entering the market? Product differentiation in such situations is often vital to the entrant seeking a toehold in a new market. To aid the premium seller in gaining access into a new market is in keeping with the grand purpose of all economic legislation, *i.e.*, to foster competition.

3. Would a refusal to allow the premium seller to lower prices with the impunity provided by the Section 2(b) defense stifle competition? If a reduction in price of a premium product produces no adverse competitive effects, then it seems clear that there is a vast dissimilarity between the premium and regular product.