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Price Discrimination—Section 2(c) of the Robinson-Patman Act—
The Liberation of the Functional Intermediary

The genesis of section 2(c),¹ the "brokerage clause" of the Robinson-Patman Act,² lay in the conviction that the mass purchasing power of large chain stores was being employed to coerce from suppliers the payment of brokerage or extension of discounts in lieu of brokerage which were not earned due to the absence of performance of any brokerage service by these direct buying purchasers.³ It was feared that such "dummy brokerage" would drive the small buyer, who was unable to obtain these illusory payments from a seller, to economic extinction. Recent judicial and administrative interpretations have worked at least a partial metamorphosis in the status of this section⁴ which at one time was considered to be the most settled area of this notoriously unsettled statute.⁵

Section 2(a),⁶ the general "price discrimination" provision of

¹ 49 Stat. 1527 (1936), 15 U.S.C. § 13(b) (1958). Section 2(c) declares it to be unlawful for "any person . . . to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods . . . either to the other party to such transaction or to an agent . . . or other intermediary therein where such intermediary is acting in . . . behalf . . . of any party to such transaction other than the person by whom such compensation is so granted or paid."

² The Robinson-Patman Act, the "price discrimination law," amends § 2 of the Clayton Act, 38 Stat. 730 (1914).

³ See FINAL REPORT OF THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. 85 (1935); H.R. REP. NO. 2287, 74th Cong., 2d Sess. 7 (1936); S. REP. NO. 1502, 74th Cong., 2d Sess. 7 (1936); 80th CONG. REC. 3114, 3116, 6281 (1936) (remarks by Senator Logan). On the legislative background of § 2(c) see ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 332-37 (1962); Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 516-20 (1940).

⁴ See *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960); *Thomasville Chair Co. v. FTC*, 306 F.2d 541 (5th Cir. 1962); Edward Joseph Hruby, *TRADE REG. REP.* ¶ 16225 (FTC Dkt. 8068, 1963).

⁵ Prior to the revolution in the construction of § 2(c), one commentator had said: "Section 2(c) is undoubtedly the most ambiguous and faultily drafted section of the Act. Yet, surprisingly enough, it is the only section as to which no important question of interpretation still remains unsettled." AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 106 (2d rev. ed. 1959).

changed, this would seem an insufficient reason to grant appraisal rights as

⁶ 49 Stat. 1526, 15 U.S.C. § 13(a) (1958). Section 2(a) provides: "That it shall be unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrim-

the act, requires for an actionable violation both a discrimination in price⁷ and a resulting competitive injury.⁸ Prima facie violations are subject *inter alia* to the defenses of (1) "cost justification,"⁹ based on a showing that the lower price was justified by lower costs of manufacture, sale or delivery and (2) a good faith meeting of a competitor's price.¹⁰ In contrast with section 2(a), section 2(c) was deemed to unqualifiedly prohibit receipt of payments by a buyer or his agent from a seller, thus eliminating the possibility of employing any of the defenses which section 2(a) provides,¹¹ and making such payments per se illegal.¹² The section contains one possible qualification, the "except for services rendered" clause, which seemed to present a defense to an illegal brokerage charge. This qualification,

ination 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."

⁷ *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960); *Atlas Bldg. Prod. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959); *cert. denied*, 363 U.S. 843 (1960). For a thorough discussion of the conflicting views as to what constituted a price discrimination prior to the *Anheuser-Busch* case, see ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 92-107 (1962).

⁸ *FTC v. Anheuser-Busch, Inc.*, *supra* note 7; *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). These two cases contrast the differing requirements for "injury to competition" at the seller's level and the customer's level.

⁹ See *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953); *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

¹⁰ This defense is derived from the § 2(b) proviso which declares: "That nothing herein contained shall prevent a seller rebutting the prima facie case thus made by showing that his lower price...to any purchaser... was made in good faith to meet an equally low price of a competitor." 49 Stat. 1527 (1936), 15 U.S.C. § 13(b) (1958). This section has created much controversy as to the extent of the defense allowed therein, but it has been construed to give an absolute defense to a charge of price discrimination, even though there exists a competitive injury in the transaction under consideration.

¹¹ *E.g.*, *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39 (9th Cir. 1959); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1949); *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

¹² The words "other than brokerage" originally followed the words "differences in costs" in § 2(a), but they were stricken and this was construed to mean that § 2(c) was to be completely independent of § 2(a) with no § 2(a) defenses allowed. *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

however, was emasculated in the first cases to be presented to the courts charging a section 2(c) violation¹³ by holding, in effect, that as a matter of law a buyer or his agent could not render any services to a seller.

Perhaps the harshest of the earlier section 2(c) decisions arose not in the context of a direct buying chain or an independent intermediary but in a case dealing with a "buying broker."¹⁴ In *Southgate Brokerage Co. v. FTC*,¹⁵ defendant company which did a large brokerage business also purchased goods on its own account, reselling to wholesalers who paid the same price to the seller that they would have paid had they purchased through a broker. On its direct purchases Southgate received by way of discount the same commission which it received in its brokerage operations. Again it was held that under no circumstances could a buyer "render services" to a seller.¹⁶ The court further emphasized that lack of discriminatory effect among buyers was wholly irrelevant due to the independence of sections 2(a) and 2(c).¹⁷

Because violations of section 2(c) were interpreted to be illegal per se, it became a prime target for critics of the Robinson-Patman Act.¹⁸ The most repeated charge was that it fostered "soft compe-

¹³ *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir. 1940); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, *supra* note 12. The rationale of these cases is that true brokerage services can be rendered only by an agent of the party paying the fee, and that consequently a buying and selling service cannot be rendered by the same party in the same transaction. Thus when a brokerage fee reaches the buyer, it is nothing more than a rebate or discount in price. The basis of this rationale is grounded on the theory that the seller strives to sell at the highest possible price and the buyer to buy at the lowest—clearly neither is in any way attempting to render a service to the other.

¹⁴ The term "buying broker" is used to denote an intermediary who, in addition to acting as a "pure" broker, buys goods for his own account, taking title to them and assuming all risks commensurate thereto. This type of activity is particularly prevalent in the South where the "buying broker" resells as a distributor to low volume wholesalers or small retailers, neither of which have the requirements or credit status to enable them to directly buy substantial quantities. This mode of distribution has also been utilized to a great extent by packers of fish products. See generally EDWARDS, *THE PRICE DISCRIMINATION LAW* 140-47 (1959).

¹⁵ 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

¹⁶ *Accord*, *In re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959).

¹⁷ *Accord*, *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39 (9th Cir. 1959).

¹⁸ See EDWARDS, *THE PRICE DISCRIMINATION LAW* 150-52 (1959); ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 539 (1962);

tion"¹⁹ and created an island of immunity for independent brokers in that they had a monopoly in their distributive function. The effect was a legal disqualification of all but the "pure" broker's services resulting in an inhibition of new distributional methods²⁰ and actually placing the Robinson-Patman Act at odds with the broader antitrust objective of vigorous competition.²¹ Recommendations for remedial action²² ranged from complete legislative repeal of the section and allowance of this area to be treated under section 2(a)²³ to judicial overruling of the past precedents, based on a more perceptive approach to the realities of business.²⁴

Adleman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1335-37 (1948); Kelly, *Functional Discounts under the Robinson-Patman Act*, 40 CALIF. L. REV. 526, 553 (1952); Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 536-40 (1940).

¹⁹ ROWE, *op. cit. supra* note 18, at 539-40; Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1207 (1952).

²⁰ *E.g.*, *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945). Disallowance of discounts to the distributor in that case, as payments in lieu of brokerage, would lead one to conclude that the field of distributional intermediaries was forever pre-empted by the traditional wholesaler, jobber, and independent broker. This conclusion has happily had its foundations shaken by Edward Joseph Hruby, TRADE REG. REP. ¶ 16225 (FTC Dkt. 8068, 1963).

²¹ See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 190-93 (1955). This report emphasized that the essence of antitrust policy in distribution is to insure that the consumer benefits by vigorous competition along each step of the way. Yet, it noted, § 2(c) as then interpreted invalidated the genuine functions performed by business men who had invested capital and services in the middleman's phase of the marketing process unless they were "independent" brokers. This clogged competition in the channels of distribution by the creation of a legal monopoly for the "independent" broker.

²² One writer has eulogized the Commission and the courts for their interpretations of the brokerage clause on the ground that they have followed the Congressional intent to the letter. 100 U. PA. L. REV. 107, 118 (1951). However, Rowe takes a contrary stand in that the Commission has in the "run-of-the-mine" § 2(c) case "hoisted puny respondents from the back waters of business," rather than pursuing mass purchasing, direct buying, firms of national stature, which were originally the targets of the section's restrictions. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 539-40 (1962).

²³ EDWARDS, THE PRICE DISCRIMINATION LAW 643-45 (1959); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 192-93 (1955); Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1206-07 (1952). The Attorney General's Committee's recommendation for legislative change was based on the fact that it deemed judicial reconsideration impossible due to numerous appellate adjudications which affirmed the Commission's previous restrictive holdings.

²⁴ See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN

After years of conscientious enforcement of section 2(c) and unanimity of interpretation by the Commission and the lower courts, what ultimately has proved to be the first breakthrough in the per se construction of section 2(c) came in the 1960 decision of *FTC v. Henry Broch & Co.*,²⁵ the first section 2(c) case to reach the Supreme Court. There an independent broker reduced his fee to a supplier in order to enable the supplier to meet the buyer's offered price. In a five to four decision the court held that section 2(c) applied under these circumstances²⁶ and that the reduction in price amounted to an allowance in lieu of brokerage. In the course of the opinion the court stated:

This is not to say that every reduction in price coupled with a reduction in brokerage automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. Whether such a reduction is tantamount to a *discriminatory* payment of brokerage depends on the circumstances of each case.²⁷

The court held that this reduction in brokerage was made to obtain the particular order involved and, therefore, was discriminatory.²⁸ The thread of qualifying language running throughout the majority opinion provoked the dissent into concluding that the majority had created a fusion between section 2(a) and section 2(c)

Act ch. 17 (1962), for a comprehensive comment on the administration of the Act where he recommends a judicial harmonization of the Robinson-Patman Act and the antitrust laws via a more flexible approach by the courts and a "quarantine" of the absolute liabilities of the brokerage provision. *Cf.*, Edwards, Book Review, 111 U. PA. L. REV. 258 (1962).

²⁵ 363 U.S. 166 (1960).

²⁶ The dissent was of the opinion that § 2(c) did not apply to this transaction because it did not in any way involve a payment or allowance for services claimed to have been performed by the buyer or his intermediary. It was felt that the reduction involved should be tested under § 2(a) thereby permitting it to be cost justified. *Id.* at 182-84.

²⁷ *Id.* at 175-76. (Emphasis added).

²⁸ It is important to note that the majority expressly disclaimed any fusion of §§ 2(a) and 2(c) in requiring a "discrimination" before a reduction in price in brokerage coupled with a reduction in price would compel the conclusion that there had been an allowance in lieu of brokerage. *Id.* at 176. The dissenting commissioner in Edward Joseph Hruby, TRADE REG. REP. ¶ 16225 (FTC Dkt. 8068, 1963) apparently agreed with this disclaimer in arriving at his conclusion that §§ 2(c) and 2(a) were not fused as a result of the dictum in *Broch*. He was of the opinion that the only purpose that the *Broch* majority had in pointing out that the reduction in commission was there effectuated to obtain that particular order, was merely to emphasize the fact that there was "an allowance in lieu of brokerage."

thereby weakening the per se thrust that Congress had intended that section 2(c) should have.²⁹

The dissenters in *Broch* proved to be prophetic, for in *Thomasville Chair Co. v. FTC*³⁰ the Court of Appeals for the Fifth Circuit seized upon that conditioning dictum of the *Broch* majority to further enfeeble the per se illegality approach to section 2(c). There a furniture manufacturer classified its customers into two accounts. The jobber accounts consisted of those who purchased at least 50,000 dollars worth of merchandise a year while those who bought less than that amount were classified as carload accounts. Over a period of some thirty-five years the jobber accounts had received an over-all five per cent discount from the price paid by the carload accounts. This discount was due partly to the fact that salesmen's commissions were three per cent less on jobber accounts than on carload accounts. The court held that the Commission was in error in holding that a reduction in price coupled with a reduction in commissions was a conclusive violation of section 2(c) unless the entire five per cent reduction could be justified by a cost savings exclusive of the commission differential.³¹ It was concluded that in addition to inquiring into the matter of correct customer classification,³² the Commission should consider whether the difference in commission rates was justified by savings in costs *to the salesmen* in selling to

²⁹ The dissent was not alone in this conclusion, for several writers commented upon the possible unsettling effects that the language of the majority might have on the past § 2(c) interpretation. See ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 331, 344-45 (1962); Michael, *Brokerage and the Robinson-Patman Act*, 10 LOYOLA L. REV. 165, 175 (1960-61); 46 IOWA L. REV. 700 (1961); 13 STAN. L. REV. 133 (1960).

³⁰ 306 F.2d 541 (5th Cir. 1962); 43 B.U.L. REV. 427 (1963); 51 CALIF. L. REV. 215 (1963).

³¹ See *Thomasville Chair Co.*, 55 FTC 2076, 2077 (1959). The Commission had based its opinion on well-engrained precedent in citing *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940); *Oliver Bros. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

³² The "quantity discount" given here to the larger volume customers is an approved method of differentiating prices charged, if such price differences can be cost-justified. The discount brackets into which customers are placed must be neither unreasonably broad nor unrelated to cost savings attributable to the size of shipments and must further be actually available to all customers. See *Bruce's Juices, Inc. v. American Can Co.*, 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951).

jobber customers. To substantiate this conclusion the court relied heavily on the *Broch* dictum and stated:

[A]s we read it, the court's opinion [in *Broch*] says that a reduction in price, giving effect to reduced commissions paid by the seller are violations of section 2(c) only if such reduction in price is "discriminatory." We read this to mean "without justification based on bona fide differences in the costs of sales resulting from the differing methods or quantities in which such commodities are sold or delivered."³³

Although done in a somewhat ambiguous manner, a court for the first time in a case involving section 2(c) required a finding of a "discrimination" and allowed the defense of cost-justification, both of which were heretofore applied exclusively to section 2(a) cases.³⁴

The third leg of the "new 2(c)" approach made its appearance in the recent FTC proceedings against *Edward Joseph Hruby*.³⁵ The facts of this case are essentially the same as those in *Southgate*. Like the respondent there, Hruby acted in some transactions as a broker, while in others he purchased goods on his own account. The initial order charged Hruby with receipt of allowances in lieu of brokerage,³⁶ however, the Commission ruled that his operations placed him at a functional level midway between the producer of the goods and the wholesalers to whom he sold. The lower price that he received reflected not a saving in brokerage, but rather the difference in the

³³ 306 F.2d at 545. In *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), the Supreme Court held that a mere price differential was tantamount to a "price discrimination." However, in the quoted language here the circuit court seems to be at variance with the Supreme Court's definition in that it has synonymized lack of discrimination with the defense of cost justification.

³⁴ The Commission has announced its non-acquiescence in *Thomasville Chair* and has stated that it now reads the decision "as holding that the Commission, in a case in which it is alleged that a seller has violated § 2(c) of the Clayton Act by passing on a reduction in brokerage to favored buyers in the form of a discriminatory price reduction, may not rely solely on the fact that the seller has paid less brokerage on the sales at the lower price, but must establish a causal relationship between the reduced brokerage and the reduced sales price. The Commission does not, however, acquiesce in the opinion of the Court of Appeals as such, which contains dicta with which the Commission does not necessarily agree. Since the Commission does not believe that the public interest would be advanced by a further proceeding to establish whether respondent has violated § 2(c), the complaint must be dismissed." BNA ANTITRUST TRADE REG. REP. A-11 (No. 120 Oct. 29, 1963).

³⁵ Edward Joseph Hruby, TRADE REG. REP. ¶ 16225 (FTC Dkt. 8068, 1963) (order dismissing the complaint).

³⁶ Edward Joseph Hruby, TRADE REG. REP. ¶ 15709 (FTC Dkt. 8068, 1962).

functional-competitive level at which he and his wholesaler customers operated. Being at a higher functional level than the wholesaler he received no more than the familiar functional discount,³⁷ which does not violate the Robinson-Patman Act in absence of a discrimination with an accompanying anti-competitive effect.³⁸ Although Commissioner Elman, writing for the majority, made no mention of *Southgate*, Commissioner McIntyre in his dissent was quick to point out that this case was on all fours with *Southgate*,³⁹ that the economic justification for such reduction in price had been answered negatively in *Southgate*,⁴⁰ and that by refusing to follow that decision the Com-

³⁷ Sellers who market their products through numerous channels normally classify buyers as to the distributional function performed; consequently, prices to these classes, traditionally ranging from retailers through jobbers to wholesalers, are scaled in accordance with the functions discharged by each of the groups. For extensive discussion of functional discounts see Kelly, *Functional Discounts under the Robinson-Patman Act*, 40 CALIF. L. REV. 526 (1952). The author notes that functional discounts are not mentioned in the Robinson-Patman Act by name, which leads to the assumption that their validity will depend not on their characterization as such, but on the prohibitive effect of the legislation on price discrimination in general. *Id.* at 529. They are, therefore, subjected to the same tests as other price differences, in determining whether or not they amount to an unlawful discrimination in price. See *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952); *Standard Motor Prod., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959). Usually there will be an absence of any competitive relationship among those at the different functional levels, thereby precluding the possibility of a price discrimination. However, even where an active discrimination is established, the defense of cost-justification will be available to the party charged therewith, if the functional discounts correctly reflect such cost savings.

³⁸ *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786 (7th Cir. 1951), *cert. dismissed*, 344 U.S. 206 (1952).

³⁹ *Edward Joseph Hruby*, TRADE REG. REP. ¶ 16225 at 21054 (FCT Dkt. 8068, 1963).

⁴⁰ Actually the respondent in *Southgate* did not base his economic justification on the fact that as a distributor he warranted a functional discount. Rather he took the position that since he performed the same services as a broker, he was entitled to the compensation of a broker. 105 F.2d at 611. The suggestion has subsequently been made that perhaps he sealed his doom by calling the allowance that he received "brokerage." If the parties to the sales of goods had exercised their semantical ingenuity and labelled the allowance a "distributor's discount," it very possibly would have been adjudged lawful in that it would have fallen under § 2(a) and thus qualified as a functional discount. AUSTERN, CCH ROBINSON-PATMAN ACT SYMPOSIUM 45 n.41 (1946); 100 U. PA. L. REV. 107, 117 (1951). *Cf.*, *In re Whitney & Co.*, 273 F.2d 211, 215 (9th Cir. 1959). In *Hruby* the respondent's suppliers described the payments or discounts granted to him as "brokerage" or "discounts in lieu of brokerage." The majority found that these payments, despite their labels, were in fact functional discounts designed to permit Hruby to resell to wholesalers and were not barred by § 2(c). TRADE REG. REP. ¶ 16225 at 21051 (FTC Dkt. 8068, 1963).

mission had in effect fused sections 2(c) and 2(a).⁴¹

The graphic appraisal of the economic exigencies made by the majority in *Hruby*⁴² is the approach that commentators have pleaded for since the creation of the *Southgate* doctrine.⁴³ In particular it places the "buying broker" under the general price discrimination provisions of section 2(a) and removes him from the more restrictive section 2(c) area.⁴⁴ This is a welcomed consequence for it will allow intermediaries and distributors of the less conventional type to solidify their place in the marketing structure, their functional utility now having been recognized and legally approved. In general it seems to push wider the already open door in allowing section 2(a) principles to be applied to section 2(c) violations and thus extending the *Broch-Thomasville Chair* "new 2(c)" construction. Those who have maintained that the older rulings and decisions limited the growth of intermediary functions by giving the independent broker the preferred position in the distributional hierarchy may now point to this triumvirate of cases as at least partially reversing the former disqualifying effect.

One possible argument against interpreting *Hruby* as furthering

⁴¹ The dissenter in his enthusiasm to criticize the majority's fusion of §§ 2(c) and 2(a) seems to have overlooked (or purposely avoided) the *Thomasville Chair* decision which was handed down in August of 1962, some three months before the final order in *Hruby* was issued. Had this case been brought to his attention (assuming he innocently overlooked it), there might well have been no dissenting opinion.

⁴² For another price discrimination case, involving problems totally unrelated to those in *Hruby*, in which Commissioner Elman in a losing cause took an equally pragmatic approach to the "conviction" of a major oil company involved in a gas price war, see *American Oil Co.*, TRADE REG. REP. ¶ 15961 (FTC Dkt. 8183, 1962). However, the Commission's finding that American violated § 2(a) when it reduced prices during the seventeen day gas war to its dealers in one town without granting similar reductions to its dealers in an adjoining town was reversed where the evidence showed that the injury to competition was only minimal and temporary, and that any economic injury suffered by the nonfavored dealers was not attributable to price cuts by American, but to price reductions already in effect by other major brand gasoline suppliers. *American Oil Co. v. FTC*, TRADE REG. REP. (1963 Trade Cas.) ¶ 70948 (7th Cir. Nov. 19, 1963).

⁴³ See AUSTERN, CCH ROBINSON-PATMAN ACT SYMPOSIUM 45 n.41 (1946); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 115 (1959); EDWARDS, THE PRICE DISCRIMINATION LAW 144-45 (1959); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 359 (1962); 100 U. PA. L. REV. 107, 117 (1951).

⁴⁴ This decision echoed precisely the suggestion of two well-versed Robinson-Patman Act lawyers. See AUSTERN, *op. cit. supra* note 42; AUSTIN, *op. cit. supra* note 42.

the demise of section 2(c)'s per se illegality is that *Southgate* was "suspect in its inception."⁴⁵ A thoughtful analysis such as Commissioner Elman made in *Hruby* would seem to lead to the conclusion that distributors in the position of *Southgate* and *Hruby* should never have been placed under the canopy of section 2(c). Without the discount which this type of distributor receives he could not possibly remain in business because he is compelled to offer to his wholesaling customers a price that is competitive with that paid by them to suppliers who sell through brokers. So analyzed, the services rendered would qualify this intermediary for a functional discount.⁴⁶ This, of course, would mean that any violation of the Robinson-Patman Act occurring in dealings here would fall under section 2(a), not section 2(c), and that *Southgate* was incorrect in applying 2(c).⁴⁷

It is evident from the foregoing discussion that the *Hruby* decision is capable of at least two interpretations. The first and more narrow is reached by reading the decision as the majority saw it—a 2(a) case involving trade or functional discounts, 2(c) having no application whatsoever.⁴⁸ A narrow interpretation is also reached by reading *Hruby* as an isolated decision, unrelated to the more orthodox types of section 2(c) cases, that is, those involving independent brokers and direct buyers and their agents.⁴⁹ However, a broader application is achieved by interpreting the holding as the

⁴⁵ As pointed out in the dissenting opinion in *Hruby*, this was one of the arguments put forth by respondent in his brief. Impliedly, at least, the majority must have agreed with the statement. TRADE REG. REP. ¶ 16225 at 21054 (FTC Dkt. 8068, 1963).

⁴⁶ *Id.* at 21050.

⁴⁷ The dissenting commissioner in *Hruby*, conceding for the sake of argument that §§ 2(a) and 2(c) were fused, maintained that the respondent had still violated the Act inasmuch as he had made sales not just to wholesalers but also to direct buying chain stores. These sales to chains, he argued, created a price discrimination under § 2(a) because small retailers in competition with these large, direct buying, retailers bought from wholesalers who received no "discount in lieu of brokerage." *Id.* at 21055. This argument is based solely on a factual discrepancy and has no bearing on the more important §§ 2(c)-2(a) junction aspects of the decision.

⁴⁸ *Id.* at 21052.

⁴⁹ This view would form the basis of an argument that the buying broker type of § 2(c) case is sui generis and, therefore, a merger of §§ 2(c) and 2(a) for this class does not necessarily mean that the same applies in other types of § 2(c) cases. However, the qualifying dictum of *Broch* and the decision in *Thomasville Chair* stand to rebut any such deduction.

dissent saw it—a fusion of sections 2(a) and 2(c).⁵⁰ If this be true, it would seem to be a part of the natural sequence created by *Broch* and continued by *Thomasville Chair* of judicially repealing section 2(c) as it was originally intended to be construed, which intent was followed until the recent coup d'etat. Assuming that sections 2(a) and 2(c) have been fused—and certainly this is a supportable position to take—immediately the question is raised of what will be the ultimate result of such fusion. For example, it is conceivable that as a part of this natural sequence section 2(b),⁵¹ the “meeting competition” proviso, will also be united with section 2(c). This would seem to be a tenable prediction because section 2(b) is always applicable as a defense where a section 2(a) violation is charged,⁵² and if section 2(a) is now to be read with section 2(c), it would seem to follow that so should section 2(b).

At first blush a potential criticism of the *Broch-Thomasville Chair-Hruby* rationale is that it impiously disregards the Congressional intent upon which section 2(c) is based, but the obvious answer to this is that the brokerage clause was enacted primarily to make illegal illusory and unearned brokerage payments and discounts in lieu thereof and not to so warp our economy as to stifle competition and produce conflicts with the broader antitrust principles embodied in the Sherman, Clayton and Federal Trade Commission Acts.⁵³ Against the backdrop of the recent decisions discussed here, it is likely that there will be an enlargement of the realistic pattern they have created, thereby giving legitimate distributional functions and services their deserved place in our economy without the ever

⁵⁰ TRADE REG. REP. ¶ 16225 at 21055 (FTC Dkt. 8068, 1963).

⁵¹ 49 Stat. 1527 (1936), 15 U.S.C. § 13(b) (1958). For the pertinent part of this section, see note 10 *supra*, and for a general discussion of the intricacies involved in the application of § 2(b) to prima facie violations of the Act, see EDWARDS, THE PRICE DISCRIMINATION LAW ch. 17 (1959); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT ch. 9 (1962); 66 YALE L. J. 935 (1957).

⁵² See, e.g., *Samuel H. Moss, Inc. v. FTC*, 148 F.2d 378 (2d Cir.), *cert. denied*, 326 U.S. 734 (1945).

⁵³ The case law, as it stands now, is in the process of judicially reconstructing § 2(c), which the Attorney General's Committee did not think was possible because of the unanimity of court decisions under the existing interpretations. See ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 192-93 (1955). Although the committee's opinion has proved to be incorrect, it would seem that its recommendation for legislation in this area is still sound, due to the uncertainties that remain in the wake of the recent decisions.

lingering, ominous cloud of illegality under the Robinson-Patman Act.

JAMES M. TALLEY, JR.

Sales—Implied Warranty—Cigarette Manufacturer's Liability for Lung Cancer

Plaintiff's decedent initiated suit in the United States District Court for the Southern District of Florida to recover damages for personal injuries resulting from lung cancer allegedly incurred by smoking Lucky Strike cigarettes. Shortly thereafter, he died from this condition and this claim¹ was consolidated with another brought under the Florida wrongful death statute.² The district court submitted the case to the jury on theories of negligence and breach of implied warranty.³ In addition to rendering a general verdict for defendant, the jury answered specific interrogatories⁴ to the effect that the fatal lung cancer was proximately caused by the smoking of Lucky Strikes and that, as of the time of the discovery of the cancer, defendant could not by the reasonable application of human skill and foresight have known of the danger to users of his product. Judgment was entered for defendant, and on appeal the Fifth Circuit Court of Appeals affirmed,⁵ holding defendant not liable as an in-

¹ Under Florida survival law, decedent's claim passed to the executor of his estate. FLA. STAT. ANN. § 45.11 (Supp. 1962).

² FLA. STAT. ANN. §§ 768.01, .02 (1959).

³ The complaint asserted liability under six separate counts: breach of implied warranty; breach of express warranty; negligence; misrepresentation; battery; and violation of the Federal Food, Drug and Cosmetic Act, 52 Stat. 1040 (1938), as amended, 21 U.S.C. §§ 301-392 (1958), the Federal Trade Commission Act, 38 Stat. 717 (1914), as amended, 15 U.S.C. §§ 41-77 (1958), and the Florida Food, Drug and Cosmetic Act, FLA. STAT. ANN. § 500.01 (1962). The trial court directed verdict for defendant on all except the implied warranty and negligence counts.

⁴ The questions submitted and answered were: "(1) Did the decedent Green have primary cancer in his left lung? [Answered, YES] . . . (2) Was the cancer in his left lung the cause or one of the causes of his death? [Answered, YES] . . . (3) Was the smoking of Lucky Strike cigarettes on the part of the decedent, Green, a proximate cause or one of the proximate causes of the development of cancer in his left lung? [Answered, YES] . . . (4) Could the defendant on, or prior to, February 1, 1956, by the reasonable application of human skill and foresight have known that users of Lucky Strike cigarettes, such as the decedent Green would be endangered, by the inhalation of the main stream smoke from Lucky Strike cigarettes, of contracting cancer of the lung? [Answered, NO] . . ." *Green v. American Tobacco Co.*, 304 F.2d 70, 71-72 (5th Cir. 1962).

⁵ *Green v. American Tobacco Co.*, 304 F.2d 70 (5th Cir. 1962).