ANTITRUST—ROBINSON-PATMAN ACT NOT LIMITED TO CASES IN WHICH PRICES UNDERCUT THOSE OF COMPETITOR; SUPREME COURT INTERPRETS STATUTORY TEST AS PROTECTING COMPETITORS AS WELL AS COMPETITION. *Utah Pie Co. v. Continental Baking Co.* (U.S. 1967).

In 1957, faced with declining volume and substantial loss in the fresh pie trade, Utah Pie Company—a family business which had been in existence for thirty years—entered the frozen pie market in the Salt Lake area. Using its existing facilities, Utah began to manufacture frozen pies for Safeway under Safeway's label, "Belair." In addition, its pies were sold under the labels "Utah," "Frost 'N' Flame," "Mayfresh," and "Sonny Boy." By 1961, the company was selling frozen pies in Utah, Idaho, Washington, Colorado, and Wyoming. Throughout this period, Utah's competitive emphasis was on price, and, with few exceptions, its pies were sold at lower prices than those of competitors. As a result, Utah's sales volume and dollar sales substantially increased.

In order to counter Utah's competitive force, three other firms initiated price reduction policies. Pet Milk Company, selling and distributing pies throughout the United States, began to differentiate prices in the Salt Lake area in December, 1959. In nine of the forty-four months in question, Pet's prices were lower in Salt Lake than in its other market areas. Yet at no time were Pet's prices lower than Utah's. In addition, Continental Baking Company, marketing its frozen pies under the "Morton" label, twice made two-week offers of price concessions in order to increase its share of the Salt Lake market. These concessions rendered Continental's prices lower in the Salt Lake area than elsewhere; moreover, such prices were lower than the cost of manufacture. In response to Continental's price reductions, Utah cut its prices. Lastly, Carnation sold its pies for a period of eight months at a lower price in the Salt Lake area than in its Los Angeles market. Carnation's pricing policy brought its price level below cost throughout 1961.

Utah Pie Company brought suit for treble damages and injunction against Continental, Carnation and Pet, charging that the defendants had entered into a conspiracy to restrain interstate commerce and to monopolize commerce in violation of Sections 1 and 2 of the Sherman Act.[1] Allegedly, this injury to commerce was to be effected by:

[1] 15 U.S.C. §§ 1, 2 (1964).

(1) selling frozen pies at below cost in the Salt Lake City area; and (2) selling pies at lower prices in that area than in markets in other Western States—these being price discriminations in violation of Section 2(a) of the Clayton Act as amended by the Robinson-Patman Act.[2] The result of these methods would be the weakening of Utah's capital structure and destruction of its profits. At trial, the jury found for the defendants on the Sherman Act conspiracy charge and for the plaintiff on the Clayton Act price discrimination charge. Continental had also counterclaimed, charging Utah with a section 2(a) violation. The jury found for Continental on the counterclaim, but a judgment notwithstanding the verdict was entered for Utah.

Upon appeal, the Court of Appeals for the Tenth Circuit, addressing itself only to the section 2(a) question, reversed, holding that there was insufficient evidence to support a finding of probable injury to competition under section 2(a).[3] On *certiorari* to the Supreme Court,[4] *held*, reversed: There was evidence sufficient to support a finding that the defendants' activities resulted in a probable injury to competition. In light of a statutory test, which tends to look to the probable consequences of price discrimination, such injury to competition is reasonably possible even where, after a course of price-cutting, sales volume continues to expand, and some or all competitors continue to operate at a profit. Consequently, the Robinson-Patman provisions are not limited to cases in which prices consistently undercut those of a competitor; there can be a violation of the Act even where the prices of the injured competitor are consistently lower than those of the defendant. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

In reversing the findings of the court below, the Court of Appeals for the Tenth Circuit held that to establish a violation of section 2(a) there must be evidence sufficient to show that the lower price either substantially lessened competition, tended to create a monopoly, or injured competition or that such injury in the future is a reasonable

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2 15 U.S.C. § 13(a) (1964). The relevant portion of the Code states:

> 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 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.

3 Continental Baking Co. v. Utah Pie Co., 349 F.2d 122 (10th Cir. 1965).

4 Utah Pie Co. v. Continental Baking Co., 382 U.S. 914 (1965).

possibility. The court stated that there are two elements of a violation of section 2(a): price discrimination, and either a substantial lessening of competition or the reasonable possibility thereof. Thus, the fact that a seller lowers his price in one market area without lowering his price in other markets is not, alone, a violation of section 2(a). Applying these principles to the facts in *Utah*, the court found that there was no lessening of competition due to the defendants' pricing policies, and that such result was unlikely in the future, since throughout the four-year period, Utah had remained prosperous and had retained a substantial share of the market.[5] To hold that Utah was entitled to retain its 66.5 percent share of the market would be tantamount to giving carte blanche to a near-monopoly, a result which was not intended by Congress in enacting the Robinson-Patman Act.

The Robinson-Patman Act of June 19, 1936, which amends Section 2 of the Clayton Act, was designed to protect small businesses against competing operations of large interstate concerns. Its primary objective was to afford protection to small buyers who were in competition with large "chain" buyers. Subsection (a) forbids price discrimination which results or may result in injury to competition. The Act contains, however, provisos making the proscription of price differentials less than absolute.

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5 386 U.S. 685 n.7. The volumes and market shares of competitors in the Salt Lake market from 1958 to 1961 were:

Company		*Volume (doz.)*	*Percent of Market*
	1958		
Carnation		5,863	10.3
Continental		754	1.3
Utah		37,969.5	66.5
Pet		9,336.5	16.4
Others		3,137	5.5
	1959		
Carnation		9,625	8.6
Continental		3,182	2.9
Utah		38,372	34.3
Pet		39,639	35.5
Others		20,911	18.7
	1960		
Carnation		22,371.5	12.1
Continental		3,350	1.8
Utah		83,894	45.5
Pet		51,480	27.9
Others		23,473.5	12.7
	1961		
Carnation		20,067	8.8
Continental		18,799.5	8.3
Utah		102,690	45.3
Pet		66,786	29.4
Others		18,565.5	8.2

Though the purpose of the Act was allegedly protection of competition, Congressman Celler attacked it, asserting that the Act deprives consumers of the benefits of free competition.[6] Professors Rowe[7] and Blackford[8] have also questioned the advisability of applying the price discrimination provision of the Act in such a manner that the public interest in the competitive process would be considered secondary to the protection of competitors.

In 1954, the FTC twice entertained the question of protection of competitors. In *Purex Corp.*,[9] Purex had discriminated in price in the form of special discounts in selected market areas. The discounts had been offered to all customers in the area without discrimination. The ruling here indicated that in enacting Robinson-Patman, Congress was concerned with large buyers forcing manufacturers to give favored price treatment, rather than with territorial price differences initiated by manufacturers for their own purposes.[10] In *General Foods Corp.*,[11] the manufacturer had offered special discounts in selected geographical areas. The ruling included a statement that the concern in primary line cases[12] is not whether a seller has lost business, but whether competition in an area has been, or is likely to be, substantially injured.[13] However, in *Moore v. Mead's Fine Bread Co.*,[14] where an interstate competitor had maintained prices in interstate competition while engaging in a price war with a purely

6 Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1071 (1957).

7 F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 130 (1962). Rowe stated that:

> A focus on detrimental effects on competition, rather than a concern with individual competitors, is fundamental to a reconciliation of the Robinson-Patman Act with over-all antitrust policies.

8 Blackford, *A Survey of Section 2(a) of the Robinson-Patman Act*, 41 NOTRE DAME LAW. 285, 303 (1966). It was Blackford's contention that, under the Act, "prices should be determined by the demands of the market rather than by businessmen's fear of violating" its proscriptions.

9 51 F.T.C. 100 (1954).

10 *Id.* at 111.

11 50 F.T.C. 885 (1954).

12 A primary line injury occurs where a seller discriminates in prices charged his buyers; thus, competition among sellers is endangered, since other sellers must respond to the price cuts or be faced with loss of buyers' business. Injury in the secondary line involves the seller's price cuts to some buyers but not to others. In this situation, a buyer receiving pricing benefits would be enabled to present more attractive pricing to his customers to the detriment of buyers who had not benefited from the price cuts. There is injury to competition in the tertiary line where a buyer differentiates in pricing between his customers, so that some customers are enabled to purchase from the buyer at costs below those charged other customers of the same buyer. *See* Rowe, *supra* note 6.

13 50 F.T.C. at 887.

14 348 U.S. 115 (1954).

local competitor, the Supreme Court found that the local competitor was protected against discriminatory price-cutting by the interstate competitor which had used its advantage of size to enable it to cut local prices.

Later, in the decision in *Ben Hur Coal Co. v. Wells*,[15] the court for the Tenth Circuit observed that it was "not within the scope or purpose of the antitrust laws to protect a business against loss in a competitive market . . . ";[16] rather, in cases of price-cutting, the intent of the firm making the cuts was of primary importance. In *Ben Hur*, companies had been competing in the same town. It was found that, although Ben Hur had cut prices, the cuts had not been motivated by malice, and that there had been no predatory intent.

There has been a series of decisions which seemingly indicate that, in price discrimination questions, the court will consider the entire competitive atmosphere. Indeed, the court for the Tenth Circuit, in *Atlas Building Products Co. v. Diamond Block & Gravel Co.*,[17] a leading case in this series, has explicitly indicated such an intention. There, Diamond Block had been selling cinder concrete building blocks at prices lower in the market in question than elsewhere. The court held that a jury could consider the size of the firm and its economic power in the area in determining the tendency of price discriminations to injure competition.[18] In *FTC v. Anheuser-Busch, Inc.*,[19] decided in 1960, the Supreme Court recognized that geographic price differences are price discriminations and again stated that the Robinson-Patman Act does not flatly prohibit price differentials, since price differences are only one element of a section 2(a) violation. Anheuser-Busch had lowered prices in the St. Louis area without making similar reductions in other areas. The Court found that there had been no overtones of "business buccaneering" on the part of Anheuser-Busch and that, while geographic price discriminations are subject to the criteria of section 2, there is no absolute prohibition of differentials.[20]

Yet, prior to 1964, there remained the question of whether, in primary line cases, price differentials constitute price discrimination.

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15 242 F.2d 481 (10th Cir.), *cert. denied*, 354 U.S. 910 (1957).
16 *Id.* at 486.
17 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).
18 *Id.* at 956.
19 363 U.S. 536 (1960).
20 *Id.* at 553.

In *FTC v. Morton Salt*,[21] the secondary line was involved. Morton Salt had discriminated in prices between different purchasers of like grade and quality of salt. Only five companies had bought sufficient quantities of salt to qualify for the discount. The Court held that an injury to a competitor was evinced where there was a price differential sufficient in amount to influence competitors' resale price.[22] Thus, a showing of injury to a competitor would justify a finding of injury to competition. In 1964, the Seventh Circuit, in *Borden Co. v. FTC*,[23] held the *Morton Salt* rule inapplicable in cases of area price discrimination where there is a requirement of primary line injury. By refusing to apply the *Morton Salt* rule to *Borden*, a primary line case, it is evident that the court deemed that in primary line cases, a finding of injury to competition would not necessarily be justified by a showing of injury to the competitor resulting from price differentials. Borden had sold milk in Ohio for a period of one week at prices which varied from community to community. The court distinguished primary and secondary line competition, holding that the finding in *Morton* must be limited to cases involving injury to competition between purchasers of the discriminating supplier.[24] The court further held that there must be substantial competitive injury, and that a judicial distinction must be drawn between injury to competitors and injury to competition.

However, courts continued to be plagued by the unanswered question of whether injury to competitors is injury to competition. It was this question which was approached in the *Utah* case and which the Court has somewhat clarified. In remanding the case to the court of appeals pursuant to the case made against the defendants, the Court indicated that any price differentials, which bring about a general decline in prices over a considerable period of time, may have a lasting impact upon competitors. Such impact may tend to make a competitor less effective as such, and may eventually injure competition through erosion. It is evident that the Court will, in the future, find prospective injury to competition whenever it is possible to find a protracted course of price-cutting in which prices are reduced below cost, or in which there is price differentiation upon a geographic basis without regard to primary versus secondary areas of competition.

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21 334 U.S. 37 (1948).
22 *Id.* at 49-50.
23 339 F.2d 953 (7th Cir. 1964).
24 *Id.* at 957.

The Court in *Utah Pie* considered the charges against each of the defendants separately. In ruling against Pet, it held that there was evidence from which a jury could find price discrimination over a period of nearly two years. The burden of proving cost justification[25] in the sales to Safeway was on Pet, and Pet had presented statistics which related only to 24 percent of the Safeway sales. This was insufficient to take the question from the jury. In addition, a jury could have found predatory intent from Pet's use of an industrial spy and from the management's statements that Utah was an unfavorable factor in Pet's economic picture. Thus, the evidence as a whole established a reasonable possibility of injury to competition.

Continental had employed below-cost pricing to increase its share of the market. Utah had met Continental's reductions and had continued to increase its sales volume. The Court adjudged that the jury was entitled to consider the impact of Continental's reductions as if Utah had not met them with corresponding price cuts. Consequently, the jury might have concluded that Continental's pricing, if continued for a period of time, would have resulted in Continental's receiving Safeway's trade and the patronage of other buyers. Continental itself would, however, have begun to feel the effects of below-cost pricing, and the continued reductions would have rendered it a less effective competitor. In addition, such pricing policies and Utah's response would have had an adverse impact upon others in competition with Continental and Utah. Since a jury could have determined both actual and possible injury to competitors, it would be possible to find a violation of section 2(a).

There were elements in the case against Carnation which were similar to those in the other two cases. Like Pet, Carnation had engaged in geographic price differentials; like Continental, Carnation had made below-cost sales. Again, it was held that, as with the other defendants and for the same reasons, a jury could find possible injury to competition.

The Court has read the Robinson-Patman Act to forbid conditions which will injure competitors, even where such conditions are created in an attempt to injure a competitor who enjoys a near-monopolistic

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25 Defenses to a charge of violation of section 2(a) include cost justification and good faith meeting of competition. These defenses are asserted after the prima facie case has been made. Since the issue before the Court was the sufficiency of evidence to support a finding of possible injury to competition, the question of defenses was not considered. *See* Blackford, *supra* note 8.

situation.[26] However, it must be borne in mind that *Utah Pie* dealt only with the prima facie showing of price discrimination, and that the Court noted that the discrimination is only one element of a section 2(a) violation.

The decision in *Utah Pie* is consistent with decisions in other price discrimination cases. *Utah Pie* simply clarifies the relationship between injury to competition and injury to competitors under Robinson-Patman. However, in situations such as that of *Utah Pie*, the lowering of prices by sellers results in lower prices to consumers, and a consequent benefit to the consumer. In the debate on the bill that later become the Robinson-Patman Act, Congressman Celler stated that "the consumers owe no business a living; laws like the instant one intended to preserve any business at the expense of the consumer will in the end prove harmful."[27] Twenty years later, Professor Galbraith wrote of the Act: "Even those who are unwavering in their belief in competition have been inclined to doubt whether this legislation does much to protect competition."[28]

Robinson-Patman was not designed to benefit the consumer. Its primary object was the protection of smaller firms from larger suppliers and larger customers. It is questionable whether the Act was originally intended to protect competitors in the primary line. Yet *Utah Pie* indicates that the Court will find injury to competition where there is a possible injury to competitors in the primary line.[29] If it is desirable to protect the public interest by means of legislation that will preclude the sheltering of individual competitors in a vigorously competitive market, it will be necessary to seek new legislation and possibly to repeal Robinson-Patman.

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26 386 U.S. at 704. Mr. Justice Stewart, in a dissent in which Mr. Justice Harlan joined, argued that the actual effect of the price cuts upon competition was beneficial. He contended that it is error to read Robinson-Patman as protecting competitors rather than competition. For discussion of the point raised by the dissent and also for graphic representation of pricing in the Salt Lake market, see Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70 (1967).

27 Rowe, *supra* note 6, at 1071, 1072.

28 J. K. GALBRAITH, AMERICAN CAPITALISM 144 (1956).

29 See National Dairy Products Corp., TRADE REG. REP. ¶ 17,656, ¶ 17,704 (FTC 1967). The FTC found a violation of section 2(a) under circumstances somewhat like those of *Utah Pie*. National Dairy had offered discounts on purchases of jellies and preserves to retailers in selected market areas. The Commission ruled that National Dairy's offer was a price discrimination which resulted in possible injury to competition in the primary line.