

**A PLETHORA OF  
PRICING PERPLEXITIES**

By

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A paramount objective of the antitrust laws is the promotion and maintenance of free competition. In *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940), the United States Supreme Court observed that the goal of antitrust is to prevent restraints tending “to restrict production, raise prices or otherwise control the market” to the detriment of consumers, goods and services.

Price is a chief element of competition in the American economy. Low prices are a positive aspect of a competitive marketplace and are encouraged by the antitrust laws. See *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 478 (1992). Indeed, low prices are a goal of the antitrust laws, and competition is properly seen as a means to the end of low prices. This paper will provide a brief summary of some common price issues which arise under the federal and state antitrust laws.

## **I. STATUTES RELEVANT TO PRICING ISSUES**

There are numerous federal and Oklahoma statutes from which antitrust pricing issues emanate. The most common statutes include (a) Section 1 of the Sherman Act, 15 U.S.C. § 1, prohibiting, *inter alia*, conspiracies, combinations or agreements in restraint of trade; (b) Section 2 of the Sherman Act, 15 U.S.C. § 2, addressing monopolization and attempted monopolization; (c) the Robinson-Patman Act, 15 U.S.C. §§ 13 *et seq.*, addressing price discrimination; (d) Section 5 of the Federal Trade Commission Act (“FTCA”), 15 U.S.C. § 45; (e) the Oklahoma Anti-trust Reform Act, 79 O.S. Supp. 2002, §§ 201 *et seq.*, which comprises, in essence, mini-Sherman and Robinson-Patman Acts; (f) the Oklahoma Unfair Sales Act, 15 O.S. §§ 598.1 *et seq.*, prohibiting, *inter alia*, sales below cost in certain cases.

## **II. PRICE FIXING ISSUES**

### **A. Horizontal Versus Vertical Price Fixing.**

**Horizontal** price fixing occurs when firms at the same level of market structure, i.e., competitors, agree to fix, set or otherwise stabilize the prices that they will charge for their products or services.

Prices are **vertically** fixed when firms at different levels of any given market structure, i.e., a manufacturer and one of its dealers, agree to fix or stabilize prices at one or both market levels.

### **B. Horizontal Price Fixing Agreements.**

#### **1. Per Se Versus Rule of Reason.**

Horizontal agreements to fix or stabilize prices have long been held per se illegal, even if the prices are reasonable or necessary to eliminate perceived competitive abuses. *See Ariz. v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332 (1982); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940); *Ancar v. Sara Plasma, Inc.*, 964 F.2d 465, 470 (5th Cir. 1992) (“[P]rice-fixing agreements among competitors fall within the per se unreasonable category.”). Thus, it is important to distinguish between per se violations of the antitrust laws versus those judged by the rule of reason.

Since 1911, the Supreme Court has construed Section 1 of the Sherman Act to prohibit only those contracts, combinations or conspiracies that unreasonably restrain trade. *See Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911). This is known as the rule of reason. Certain practices are so “plainly uncompetitive” that they are conclusively presumed illegal without examination of market factors or

business reasons justifying their existence. These so-called “naked restraints” lacking any pro-competitive virtue are declared illegal per se. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). As the Court observed in *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958):

[A]greements or practices which because of their pernicious effect on competition lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

The rule of reason test is obviously less stringent than the per se rule in analyzing whether a violation of Section 1 of the Sherman Act has occurred. The rule of reason dictates that the judge and jury analyze the nature of the restraint, the market structure of the industry in question and other economic factors in determining whether the alleged anti-competitive act violates Section 1 of the Sherman Act. *See, e.g., Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

*Id.* at 238.

Under the rule of reason inquiry, a plaintiff bears the burden of proof to show that the challenged conduct has an adverse effect on competition in a relevant market. *See, e.g., Cal. Dental Ass’n v. FTC*, 224 F.3d 942, 957-58 (9th Cir. 2000); *Toys “R” Us, Inc. v. FTC*, 221 F.3d 928 (7th Cir. 2000).

## 2. Types of Illegal Horizontal Price Fixing Arrangements.

The rule of conclusive illegality has been applied to a variety of pricing practices. Some examples of pricing agreements declared illegal include:

(1) Agreements to set minimum pricing or “floors” (minimum price fixing). *See Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

(2) Agreements prescribing price ceilings, or maximum price fixing, are also deemed to be “per se” illegal. *See Ariz. v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332 (1982). Agreements to set maximum prices have been declared illegal despite the potential consumer benefits of such arrangements (*see*, however, discussion of vertical price fixing *infra*).

(3) Arrangements whereby competitors in a highly concentrated market regularly exchange pricing information concerning prices currently being quoted to particular customers, thereby causing prices to stabilize at a uniform level even though there was no explicit “agreement to adhere to a price schedule.” *See*, e.g., *United States v. Container Corp.*, 393 U.S. 333 (1969). *See*, however, *Wallace v. Bank of Bartlett*, 55 F.3d 1166, 1169, 1995-1 Trade Cas. (CCH) ¶ 71,016 (6th Cir. 1995) (competing bank’s adoption of vertical identical fees for certain types of transactions after publicly announcing that the fees that each intended to charge was insufficient proof of price fixing conspiracy to survive a defense motion for summary judgment. “The exchange of price information among competitors is not a per se violation of the antitrust laws.”).

(4) Agreements to indirectly control prices. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).

(5) Agreements to fix a final element of the final price or terms and conditions of the sale. *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980).

(6) Agreements to adhere to specified price formulas. *In re Plywood Antitrust Litig.*, 655 F.2d 627, 634 (5th Cir. 1981).

(7) Bid rigging arrangements such as agreements to allocate bids or submit noncompetitive bids. *United States v. Reicher*, 983 F.2d 168, 172 (10th Cir. 1992).

(8) Agreements to establish uniform markups, surcharges or price differentials among categories of customers or products. *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987) (mandatory surcharges).

(9) Agreements not to give away premiums. *United States v. Gasoline Retailers Ass'n*, 285 F.2d 688 (7th Cir. 1961).

(10) Agreements to limit production. *Westinghouse Elec. Corp. v. Gulf Oil Corp.*, 588 F.2d 221 (7th Cir. 1978).

(11) Agreements to limit the quantity of the product to be sold. *United States v. Nat'l Ass'n of Broadcasters*, 536 F. Supp. 149 (D.D.C. 1982).

(12) Agreements to limit the period of time during which business may be conducted. *Int'l Ass'n of Interpreters*, 5 Trade Reg. Rptr. (CCH)

¶ 24,235 (FTC 1997) (per se unlawful for interpreter association to set maximum daily hours and minimum number of interpreters for any one job).

The exchange of price information is not itself a per se violation of the Sherman Act, *N.W. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985), because it can serve both pro-competitive and anti-competitive purposes. Thus, it is merely evidence relevant to a price fixing claim.

**C. Vertical Pricing Restraints.**

Most vertical price fixing arrangements are considered per se violations of Section 1 of the Sherman Act. *See Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), *but see Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). While minimum vertical price fixing is per se illegal, a competitor lacks standing to challenge a non-predatory maximum resale price maintenance agreement between a manufacturer and its authorized dealers. In *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Supreme Court applied a per se standard to a system of resale price schedules posted with a state agency by wine producers binding upon their wholesale customers. In so holding, the Court stated, “[t]his Court has ruled consistently that resale price maintenance illegally restrains trade.” *Id.* at 102.

The court, however, has drawn a distinction between horizontal price fixing and vertical price fixing confining the per se rule for vertical situations to those situations in which prices are directly fixed, as opposed to both direct and indirect situations. *See, e.g., Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717 (1988). In *Business Electronics*, a manufacturer and one of its dealers agreed to terminate a

dealer known for its price cutting activities. The court held that this did not amount to per se illegal vertical price fixing absent evidence of a further agreement on the prices to be charged by the remaining dealer or dealers. The court characterized the agreement as a vertical “non-price” restraint governed instead by the rule of reason because, at most, it had an indirect pricing effect.

For many years, retail price maintenance where a supplier seeks to limit the prices its distributors may charge were also declared per se illegal. Unlike resale price maintenance involving minimum prices, the establishment of maximum prices often is directly beneficial to consumers by causing a reduction in the prices they must pay. Thus, in *State Oil Co. v. Khan*, 522 U.S. 3 (1997), the Supreme Court unanimously overruled its decision in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), holding that the rule of reason should apply to vertical maximum price restraints. In so doing, the Court observed that in an industry where there is vigorous competition, a per se rule against vertical maximum price fixing may actually be anti-competitive. *Id.* at 18. The Supreme Court in *State Oil* did not hold that vertical maximum price fixing is per se lawful but rather determined that in future cases, it would apply the rule of reason.

Note that there are a number of actions a supplier may take unilaterally under the federal antitrust laws to influence distributor prices. Examples include certain forms of agency or consignment arrangements to establish prices at which their products will be sold without engaging in unlawful vertical price fixing. Suppliers may also suggest resale prices and state their policy of refraining to do business with distributors who refuse to adhere to such prices without necessarily violating the

antitrust laws. Further, while Section 1 of the Sherman Act requires an agreement, combination or conspiracy to restrain trade, the Oklahoma Antitrust Reform Act also prohibits unilateral activity, i.e., any “act” which unreasonably restrains trade. *Harolds Stores v. Dillard Dep’t Stores*, 82 F.3d 1533 (10th Cir. 1996).

Suppliers also from time to time engage in price promotions, competitor allowances and customer rebates. The use of such a system to encourage distributors to reduce their resale prices will be viewed under the rule of reason after *State Oil v. Khan* and should generally be found lawful.

It is sometimes difficult to find common threads in various decisions as to what constitutes lawful versus unlawful activity in connection with vertical price fixing cases. Thus, difficult judgment calls are required as to whether an arrangement is merely a lawful price suggestion or an illegal vertical price fixing agreement.

### **III. PRICE DISCRIMINATION**

#### **A. Prima Facie Section 2(a) Price Discrimination Cases.**

Section 2(a) of the Robinson-Patman Act prohibits discrimination in price between purchasers of goods of like grade and quality where the effect may be to substantially lessen competition or tend to create a monopoly. 15 U.S.C. § 13(a). There are a number of separate requirements to establish a *prima facie* case of price discrimination under Section 2(a):

- (1) The transaction must involve an actual sale as opposed to refusals to deal, terminations or cutoffs. *See, e.g., Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676 (10th Cir.), *cert. denied*, 469 U.S. 854

(1984); *Ralph Kearney & Sons, Inc. v. Emerson Elec. Co.*, 1996 WL 502315 (E.D. Pa. Aug. 29, 1996).

(2) In addition to an actual sale, it must also be a legal “sale” and not an agency, consignment or lease. *See Rebel Oil v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998) (swap transaction not subject to statute); *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (6th Cir. 1993).

(3) The transaction must result in a completed sale and not merely an offer, bid or quote. *Crossroads Cogeneration Corp. v. Orange & Rockland Utils.*, 159 F.3d 129 (3d Cir. 1998) (offer to sale not subject to statute); *Robertson’s Battery Terminal, Inc. v. Pac. Chloride, Inc.*, 961 F.2d 1578 (6th Cir. 1992) (where bids not accepted, no sales occurred); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676 (10th Cir.), *cert. denied*, 469 U.S. 854 (1984) (Act not applicable to refusal to deal); *Gillette Tire Jobbers, Inc. v. Appliance Indus., Inc.*, 596 F. Supp. 1277 (E.D. La. 1984).

(4) The seller must be “engaged in commerce,” the price discrimination must occur “in the course of such commerce” and at least one whose sales constitute the discrimination must itself be “in commerce.” *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626, 644 (S.D. Tex. 1999); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.), *cert. denied*, 519 U.S. 927 (1996).

(5) There must be at least two different purchasers. *See, e.g., Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985) [2-1 *per curiam* decision holding *Copperweld* doctrine [*Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984)] applies to Robinson-Patman Act and transfers to wholly-owned subsidiary cannot constitute sales within Section 2(a)]; *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338 (W.D. Pa. 1998) (division of corporation could not be deemed different seller).

(6) Different sales must occur reasonably contemporaneously in time. *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380 (10th Cir. 1985).

(7) The items involved in the sale are required to be a “commodity.” *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co.*, 153 F.3d 938 (9th Cir. 1998) (real estate discrimination not covered); *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (6th Cir. 1993) (cellular telephone services not covered); *Advo, Inc. v. Philadelphia Newspapers*, 51 F.3d 1191 (3d Cir. 1995); *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989).

(8) The commodities must be of “like grade and quality.” *DeLong Equip. Co. v. Wash. Mills Abrasive Co.*, 887 F.2d 1499, 1516 (11th Cir. 1989); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

(9) The seller's prices must be "discriminatory." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993) (reiterating that a "price discrimination within the meaning of [this] provision is merely a price difference."); *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578 (2d Cir. 1987).

(10) The price discrimination prohibition includes credit terms, freight terms and delivery terms. *See Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3d Cir. 1998).

(11) Discrimination must "affect" competition. Section 2(a), and its Section 2(f) counterpart, are the only sections requiring competitive injury. The other sections dealing with promotional allowances and service have no requirement of probable or actual injury to competition as an essential element. In this regard, there is a difference between those cases involving primary line injury (between a seller and its competitor), secondary line injury (between seller and its customers), and tertiary line injury (between customers of customers of the sellers).

**a. Secondary Line Discrimination.**

Secondary line price discrimination occurs when a seller's discrimination among competing purchasers/resellers impacts competition among those purchasers. *See, e.g., Mathias v. Daily News L.P.*, 152 F. Supp. 2d 465 (S.D.N.Y. 2001); *George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 141 n.2 (2d Cir. 1998). In essence, a secondary line claim posits that plaintiffs are part of a competing group of purchasers/resellers and that the seller has unfairly discriminated in price between

plaintiffs and other similarly situated favored purchasers of the seller. *See, e.g., Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 137 n.1 (S.D.N.Y. 2000) (“[S]econdary-line price discrimination occurs when a seller’s price discrimination impacts competition among the seller’s purchasers, i.e., there are favored and disfavored purchasers.”); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182, 188 (1st Cir.), *cert. denied*, 519 U.S. 927 (1996) (“[T]he theory of injury is generally that the defendant’s lower price sales to the plaintiff’s competitor (the favored purchaser) placed the plaintiff at a competitive disadvantage and caused it to lose business.”).

Typically, in order to establish a secondary line price discrimination claim, plaintiff must prove that (1) the sales at issue were made in interstate commerce, (2) the seller discriminated in price between two purchasers, (3) the products or commodities sold to the competing purchasers were of the same grade and quality, and (4) the price discrimination had a prohibitive effect on competition. Of course, as a predicate to establishing a prohibitive competitive effect, plaintiffs must also show that they were actually in competition with a favored purchaser. *Best Brands Beverage v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987).

The dual reference in the effects proviso of Section 2(a) of the Robinson-Patman Act to “lessen competition or tend to create a monopoly in any line of commerce” and “prevent competition with any person” has generated considerable debate as to whether Section 2(a) prohibits price discrimination that injures a single competitor or that impairs competition as a whole.

Many recent Supreme Court decisions have emphasized a need to harmonize the dictates of the Act with the broader competitive goals of the Sherman Act. This would seem to indicate a construction that focuses on competition as a whole as opposed to injury to a single competitor. *See, e.g., Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 221 (1993). However, several appellate courts have come to the view that the Act is intended to protect competitors and have treated injury to a single firm in secondary line cases as sufficient to support a finding of competitive injury. *See, e.g., George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 144 (2d Cir. 1998) (no showing of injury to competition required); *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir. 1997) (“Section 2(a) ... expresses Congressional intent to protect individual competitors not just market competition, from effects of price discrimination.”); *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626, 652 (S.D. Tex. 1999) (predicting that the Fifth Circuit would follow the First, Second, Third and Ninth Circuits and not require evidence of harm to competition). Thus, unlike a rule of reason analysis under the Sherman Act, the focus is on intra-brand competition and lost sales by one competitor and not competition as a whole. There still must be causation between the discrimination and the claimed injury. *Walker v. Hallmark Cards*, 992 F. Supp. 1335, 1339-40 (M.D. Fla. 1997).

Of course, in order to move forward in a secondary line case, one must focus on whether the so-called favored and disfavored customers compete at the same functional level or were “after the same dollar.” *See DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp.*, 990 F.2d 1186, 1201-02 (11th Cir. 1993), *amended by*

997 F.2d 1340 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993). However, even if a plaintiff does not compete with the favored purchaser, there may be times where its injury with customers of the favored purchaser or injury derived from sales taken away from customers by the favored purchaser will suffice. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 567 (1990). In *Hasbrouck*, a disfavored direct buying retailer successfully obtained relief under Section 2(a) as a result of lower prices to a wholesaler. The Court held that a price difference to wholesalers and retailers was a discrimination and may violate Section 2(a) when the lower price to the wholesaler is not reasonably related to the value of services it performs for its supplier and “enable[s him] to price aggressively” to retail customers that compete with the “disfavored” direct buying retailer. *Id.* at 570. Under that situation, the manufacturer’s prices to the wholesaler must be sufficiently low to allow the wholesaler to resell and turn to its customers at such low prices that those firms are likely to draw sales away from the disfavored direct buying retailer.

Disfavored wholesalers have a secondary line Section 2(a) claim under circumstances where a supplier offers lower prices to a direct buyer retailer than to wholesalers who may resell to retailers competing with the direct buying retailer if they can show that the discrimination resulted in their losing sales to their customers unable to compete with the favored direct buying retailer. *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 419-20 (8th Cir. 1986). Of course, after the decision by the Supreme Court in *Brooke Group*, absent a showing of sales below cost to a direct buying retailer, it is unlikely that a disfavored wholesaler will be allowed to proceed with a primary line claim.

In the secondary line setting, a substantial price discrimination over time and the sale of a product resold in the same forum and industry in which competition is “keen” may give rise to an inference of competitive injury. *See FTC v. Morton Salt Co.*, 334 U.S. 37 (1948); *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983); and *Hasbrouck*, 496 U.S. at 559. Thus, after *Morton Salt*, many courts have permitted an inference when the evidence showed long term or chronic discrimination in an important consumer product or product line where there is intense competition in the resale market. If the discrimination is not substantial or unlikely to affect resale prices or shift sales to favored buyers, then the inference will not apply. *See Black Gold, Ltd. v. Rockwood Indus., Inc.*, 729 F.2d 676, 681 (10th Cir. 1984). Further, the inference will not arise when the discrimination, even if substantial, does not persist over time. Where the sale involves a product that is a component or ingredient of another product, the inference also does not apply.

**b. Primary Line Issues.**

Primary line discrimination occurs when a seller’s discriminatory pricing injures the seller’s direct competitors. *See Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). A primary line Robinson-Patman Act contemplates price discrimination by the defendant among its customers in an attempt to harm those competing with the defendant for the sales. *Id.*; *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 137 n.1 (S.D.N.Y. 2000).

To succeed on a claim of primary line discrimination, a plaintiff must generally prove (1) the alleged price discrimination meets the in-commerce require-

ment, (2) there has been discrimination in price between different purchasers of products of like grade and quality, and (3) the effect of the discrimination may be to substantially lessen competition or to create a monopoly. *See Mathias v. Daily News L.P.*, 152 F. Supp. 2d at 471. For a period of time, courts inferred primary line competitive injury from evidence of predatory intent. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 693-98 (1967). In *Brooke Group, Ltd.*, 509 U.S. at 221, the Court observed that it has become evident “that primary-line competitive injury under the Robinson-Patman Act is of the same general character as the injury inflicted by predatory pricing schemes actionable under Section 2 of the Sherman Act.” By harmonizing the competitive injury requirements under the Robinson-Patman Act and the Sherman Act, the Court effectively abrogated the inference of competitive injury permitted under *Utah Pie*.

In *Brooke Group*, the Court held that “by its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition.” *Id.* at 220. As discussed below, the *Brooke Group* Court established a two-part test for predatory pricing claims under Section 2(a) of the Robinson-Patman Act: (1) below-cost pricing and (2) a reasonable prospect that the defendant would recoup its losses from the predatory scheme, including the time value and money invested in it. In other words, a plaintiff must show that (1) competitive injury resulted from a rival’s prices that were below an appropriate measure of the rival’s costs and (2) the competitor had a reasonable prospect of later recouping its investment in the below-cost prices, i.e., a reasonable likelihood that a competitor could succeed in diminishing or limiting competition and subsequently raise prices in order to offset

its earlier expected losses. The Court found that the first prong of the competitive injury requirement was necessary because only below-cost pricing can inflict competitive injury. *Id.* at 223. Because above-cost pricing that remains below general market prices is more often competition enhancing, any condemnation of above-cost price cutting carries the risk of depriving consumers of lower prices while protecting weak competitors from lost profits. As the Supreme Court has noted, “to hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result.” *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 116 (1986).

A plaintiff must also show that the alleged predator had a reasonable prospect of recouping its investment in below-cost prices. *See Brooke Group*, 509 U.S. at 224. Thus, the predatory firm must succeed in eliminating would-be price cutters and in charging higher prices later to compensate for price cutting in the short run. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 592 (1986).

**c. The Role Of Functional Discounts.**

*See, e.g., Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 560 (1990) (describing a functional discount as a price difference that “merely accords due recognition and reimbursement for actual marketing functions” and holding that “such a discount is not illegal.”). The *Hasbrouck* court declared that when a discount represents reasonable reimbursement for actual marketing functions, an illegal inference “will simply not arise.” The amount of the discount lawfully may reflect alternatively the cost savings to the seller, the value of the services to the seller or the costs incurred

by the buyer. *Id.* at 562. *See, e.g., George Haug Co. v. Rolls Royce Motor Cars*, 148 F.3d 136, 142 (2d Cir. 1998) (factual question exists as to whether functional discounts offered to new car dealership but not authorized parts and service dealer “were in fact legitimate functional discounts or subterfuge to avoid Section 2(a)’s restrictions.”).

**B. Defenses.**

**1. Meeting Competition Defense.**

Section 2(b) provides an express defense known as the “meeting competition” defense. Under this defense, it is not unlawful for a seller to lower his price “in good faith to meet an equally low price of a competitor.” 15 U.S.C. § 13(b). The burden of proof is on the seller with the relevant inquiry being whether he can demonstrate that a “reasonable and prudent” person would have believed that the granting of the lower price “would in fact meet the equally low price of a competitor.” *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 438 (1983). Good faith is the key, such that so long as the seller acts in good faith, he may even inadvertently undercut the competitor’s price without forfeiting the defense. *Id. See also Reserve Supply Corp. v. Owens-Corning Fiberglas Corp.*, 971 F.2d 37 (7th Cir. 1992).

The seller should use some verification to establish good faith, but it may come through documentation or statements obtained from a favored customer, a review of pertinent market factors indicating a likelihood that a competing offer has been made, or reports of similar offers to other customers. *See United States v. U.S. Gypsum Co.*, 438 U.S. 422, 454-55 (1978). *See also Hoover Color Corp. v. Bayer*

*Corp.*, 199 F.3d 160 (4th Cir. 1999), *cert. denied*, 530 U.S. 1204 (2000) (refusing summary judgment on the meeting competition defense, finding that such a defense is fact-sensitive); *Coastal Fuels, Inc. v. Caribbean Petroleum Corp.*, 79 F.3d 182 (1st Cir.), *cert. denied*, 519 U.S. 927 (1996).

## **2. Cost Justification Defense.**

The cost justification defense provides that price differentials are lawful which “make only due allowance” for cost savings and “manufacture, sale or delivery” resulting from “differing methods or quantities” in which the product is sold or delivered to particular customers. The burden of proving such a justification is on the seller and must be based upon actual cost savings to the seller. Courts have allowed the use of average cost comparisons between different customer classes, provided the classes selected are truly representative of individual class members. *See, e.g., Acadia Motors v. Ford Motor Co.*, 44 F.3d 1050, 1995-1 Trade Cas. (CCH) ¶ 70,879 (1st Cir. 1995); *Allied Accessories & Auto Parts Co. v. General Motors Corp.*, 825 F.2d 971 (6th Cir. 1987); *Americom Distrib. Corp. v. ACS Communications, Inc.*, 990 F.2d 223, (5th Cir. 1993) (affirming a district court’s finding in a non-jury trial that plaintiff’s Robinson-Patman Act claims lacked merit where the court found that discounts were justified by a larger forecasted order).

## **3. Changing Conditions Defense.**

Where there are “changed market conditions” that adversely affect the marketability of the defendant’s goods thereby justifying special price reductions, there is another defense expressly found in Section 2(a) of the Act. Special price reductions are not illegal where they arise in response to “changing conditions

affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.” See, e.g., 15 U.S.C. § 13(a). Cases involving the changing conditions defense include *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655 (10th Cir. 1991) (affirming a jury verdict for defendants that their changing condition defenses justified volume discounts where they had sold some of the telephone systems at a discount because they had become obsolete); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988), *aff’d*, 881 F.2d 1396 (7th Cir. 1989) (finding in part that an egg processor fell within the “perishability defense” of the Robinson-Patman Act; excluding liability, sales made in response to changing market conditions; since eggs are a perishable commodity with a short shelf life, sales made at special prices fell within the protection of the provision).

#### **4. Functional Availability Defense.**

This is a judicially-created defense providing that if the seller offers two prices, one normal and the other reduced, and if the reduced price is equally and realistically available to all customers, then a prohibited price discrimination simply does not occur. “Where a purchaser does not take advantage of a lower price or a discount which is functionally available on an equal basis, it has been held that ... no price discrimination has occurred.” *Shreve Equip. Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir. 1981). Cases applying this defense include *Precision*

*Printing Co. v. Unisource Worldwide Inc.*, 993 F. Supp. 338 (W.D. Pa. 1998) and *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 665 (10th Cir. 1991).

## **5. Government And Non-Profit Exemption.**

In *Jefferson Cty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150 (1983), the Court held that purchases of drugs by state and local government hospitals for resale to the public in competition with retail pharmacies were not exempt from the Robinson-Patman Act. The majority opinion assumed without deciding that state purchases for its own use were exempt.

In *Bridges v. McClain Stevens Studios, Inc.*, 201 F.3d 6 (1st Cir. 2000), the First Circuit affirmed a grant of summary judgment holding that a non-profit institution's act exempted not only school districts from an alleged Robinson-Patman violation but also a studio which was given a 20% commission passed along to the parents in the form of higher prices in the same amount.

## **C. Brokerage Issues.**

Section 2(c) of the Robinson-Patman Act prohibits unlawful brokerage targeting the so-called dummy brokerage where large buyers would elicit indirect price concessions by setting up dummy brokers who were employed by the buyer and who, in many cases, rendered no services. *See Yeager, Brokerage Problems and Commercial Bribery*, 53 ANTITRUST L.J. 1029 (1985). Nevertheless, Section 2(c) is broadly phrased to cover all means by which a brokerage could be used to effect price discrimination. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 169 (1960). Section 2(c) does not incorporate the meeting competition or cost justification defense. It

applies only to sales of products and not services or other intangibles. Injury to competition is not an element of the offense, and payments for “services rendered” are expressly exempt under Section 2(c).

Section 2(c) has also been construed to prohibit commercial bribery. *See, e.g., Harris v. Duty Free Shoppers L.P.*, 940 F.2d 1272, 1274 (9th Cir. 1991). The so-called bribe must be made in connection with the sale of goods and the seller or agent must have paid the buyer or its agent or vice versa. *See, e.g., Stephen Jay Photography, Ltd. v. Olan Mills, Inc.*, 903 F.2d 988 (4th Cir. 1990).

**D. Promotional Allowances And Services Elements.**

Section 2(d) and (e) involve promotional allowances and services. The elements of a Section 2(d) claim are (1) seller of products (2) engaged in commerce (3) pays or contracts to pay allowances to one customer for services or facilities furnished by that customer (4) in connection with the resale of the seller’s product (5) which are not made available (6) on proportionately equal terms (7) to all competing customers. *See* I. Scher, ANTITRUST ADVISOR, § 4.31 (4th ed. 2001). The elements of a Section 2(e) claim are (1) seller of products (2) engaged in commerce (3) furnishes (or contracts to furnish) services or facilities to one customer (4) in connection with the resale of the seller’s product (5) which are not made available (6) on proportionately equal terms (7) to all competing customers. *Id.*

These sections have been referred to as per se sections because they do not have a requirement that the alleged discrimination caused or threatened injury to competition. *See FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 395 (10th Cir. 1985).

**E. Buyer's Liability.**

Section 2(f) of the Act prohibits buyers from inducing or receiving unlawful discriminations in price, providing “it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this Section.” 15 U.S.C. § 13(f). In *Automatic Canteen Co. v. FTC*, 346 U.S. 61 (1953), the Court found that success on this Section depends on findings that the seller violated Section 2(a) and the buyer both had knowledge of that violation and knew it was not justified by any defense. *See also Am. Booksellers Ass’n. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1063-64 (N.D. Cal. 2001) (plaintiffs have “burden of producing evidence that defendants knew the discounts it received from the publishers were not cost-justified, and that once that burden is met, defendants have the burden of proving that the discounts either were cost-justified or that they did not know or reasonably should not have known that the discounts were not cost-justified.”).

**F. Private Actions Under The Robinson-Patman Act.**

The Act prohibits price discrimination that “may” substantially lessen competition. Nevertheless, a private litigant may only recover treble damages under Section 4 of the Clayton Act where it suffered antitrust injury to its business or property as a result of the price discrimination. It is well settled that the antitrust laws were intended to protect competition and not competitors. A decrease in profits from a reduction in competitor’s prices is not an antitrust injury sufficient to confer standing under the Clayton Act so long as the prices are not predatory. In *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 340 (1990), the Court observed,

“[w]hen prices are not predatory, any losses flowing from them cannot be said to stem from an anti-competitive aspect of the defendant’s conduct.” Thus, unless the plaintiff can show that the prices were predatory, they have failed to show an antitrust injury.

Actual injury is required. *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (mere proof of discrimination is insufficient for recovery absent proof that the plaintiff suffered an actual injury and that the amount of such injury is attributable to the price discrimination; actual injury will be found upon evidence of lost or diverted sales or a favored reduction in profit margin due to defendant’s violative conduct). Actual injury may be established by a showing of diverted or lost sales or a reduced profit margin. *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983). In *Huntsman Chem. Corp. v. Holland Plastics Co.*, 2000-1 Trade Cas. (CCH) ¶ 72,807 (10th Cir. 2000), the court held that testimony which showed that favored customer forced the plaintiffs to sustain losses in order to keep customer was an antitrust injury inquiry. *See also Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1273-76 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996) (\$1.3 million award reversed because a plaintiff failed to show lost sales or profits to a favored customer); *DeLong Equip. Co. v. Wash. Mills Electro Minerals Corp.*, 990 F.2d 1186 (11th Cir. 1993), *amended by* 997 F.2d 1340 (11th Cir.), *cert. denied*, 510 U.S. 1012 (1993) (evidence of price discrimination alone insufficient to presume plaintiff suffered harm); *Tel-Instrument Elecs. Corp. v. Teledyne Indus., Inc.*, 934 F.2d 320 (4th Cir. 1991) (plaintiff failed to meet essential elements of buyer’s bid requirements and would not have been awarded contract if favored customer had not

submitted bid); *White Indus. v. Cessna Aircraft Co.*, 845 F.2d 1497 (8th Cir.), *cert. denied*, 488 U.S. 856 (1988) (economist's testimony about adverse effect on "average dealer" failed to prove particular injury to the plaintiff); *Bell v. Fur Breeders Agric. Coop.*, 3 F. Supp. 3d 1241 (D. Utah 1998) (antitrust injury properly pleaded by allegations that discrimination lowered plaintiff's profit margins and affected their ability to compete).

Summary judgment may be granted, and often is, where there is insufficient evidence of injury or causation. *See, e.g., H.L. Hayden Co. v. Siemens Med. Sys., Inc.*, 879 F.2d 1005 (2d Cir. 1989) (dismissal of plaintiff's claim affirmed where allegations of three instances of discriminatory sales unaccompanied by any evidence of lost sales or profits; sales that plaintiff allegedly lost due to discriminatory practices were actually lost due to unrelated circumstances); *Allen Pen Co. v. Springfield Photo Mount Co.*, 653 F.2d 17 (1st Cir. 1981) (plaintiff adduced no evidence to show that claimed price differences enabled any competitor to draw sales or profits away from plaintiff; price differences were small; only two competitors of plaintiff were shown to have actually received lower prices and plaintiff's purchases from defendant amounted to only 1½% to 2% of plaintiff's sales). However, *see J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1539 (3d Cir. 1990) (Section 4 injury to disfavored competitor can be found upon direct evidence of diverted sales, evidence of lost profits due to a forced cut in margins and an expert report measuring the magnitude of the impact); *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427 (11th Cir. 1990) (summary judgment improper even though there was no direct evidence of either diverted sales or lost profits; evidence proffered that favored

competitor's use of defendant's discrimination to gain a promotional advantage may have caused a substantial decrease in plaintiff's market share created questions of fact).

#### **IV. PREDATORY PRICING**

##### **A. Introduction.**

Many lawsuits are filed complaining of a competitor's pricing practices, i.e., the prices are too low, thereby allegedly injuring its rival's business by reducing profits or taking market share. It is important to recognize, however, that charging low prices does not qualify as a bad act under the antitrust laws. Indeed, as noted above, low prices are the primary goal of the antitrust laws.

Prior to the Supreme Court's decision in *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), many courts imposed liability even where the prices were not "predatory." However, ever since the decision in *Brooke Group*, courts have routinely held that in a case alleging injury from a reduction in competitor's prices, there can be no claim if the prices are not predatory. Absent proof of predation, it is immaterial whether the price reduction is a result of illegal price setting, below-cost sales, illegal mergers, collusion, price discrimination or any other antitrust violation. "Low prices benefit consumers regardless of how those prices are set, and so long as they are above predatory levels, they do not threaten competition. We have adhered to this principle regardless of the type of antitrust claim involved." *Id.* at 223.

Predatory pricing claims are brought under various statutes. Commonly, it is alleged that a large competitor with either market power or monopoly power

charged predatory prices and either monopolized or attempted to monopolize the relevant market in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. Often, predatory pricing claims are brought as primary line Robinson-Patman Act discrimination claims. *See* discussion *supra*. Many Section 2 and Robinson-Patman Act predatory pricing claims are joined with a Sherman Section 1 allegation that the pricing practices of the defendant restrained trade. Finally, because predatory pricing is so difficult to prove in a federal court setting, plaintiffs have now resorted to bringing such claims under various states' unfair sales acts.

**B. Modern Status Of The Law.**

Predatory prices have become very difficult for the plaintiff to win or even to maintain past summary judgment. As the Supreme Court said in *Brooke Group*, 509 U.S. at 226, “these prerequisites to recovery are not easy to establish” in a predatory pricing case.

Thus, in *Brooke Group, Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (“*Cargill*”) and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (“*Matsushita*”), the Court cited policy reasons which have led it to erect high obstacles to recovery in a predatory pricing case. In *Brooke Group*, the Court explained:

As we have said in the Sherman Act context, “predatory pricing schemes are rarely tried, and even more rarely successful,” *Matsushita, supra*, at 589, and the costs of an erroneous finding of liability are high. “[T]he mechanism by which a firm engages in predatory pricing — lowering prices — is the same mechanism by which a firm stimulates competition; because “cutting prices in order to increase business often is the very essence of competition ...[;] mistaken inferences ... are especially costly, because they chill

the very conduct the antitrust laws are designed to protect.”

*Brooke Group*, 509 U.S. at 226 (quoting *Matsushita*, *supra*, at 594). It would be ironic indeed if the standards for predatory pricing were so low that the antitrust suits themselves became a tool for keeping prices high. *Id.*

**C. Prerequisites To Prove A Predatory Pricing Claim.**

The Supreme Court in *Brooke Group* established the same basic two-part test which will apply to a predatory pricing claim in a Section 2(a) “primary line” Robinson-Patman case as in an attempted monopolization case as in a restraint of trade case. First, the plaintiff must demonstrate that “the prices complained of are below an appropriate measure of its rival’s costs.” *Brooke Group*, 509 U.S. at 222 (citing *Cargill*, 479 U.S. at 117 and *Matsushita*, 475 U.S. at 585 n.8). Next, the plaintiff must demonstrate that the defendant had a “reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.” *Brooke Group*, 509 U.S. at 224 (quoting *Matsushita*, 475 U.S. at 588-89).

Predatory pricing is where a single firm having a dominant share of the relevant market cuts its prices in order to force competitors out of the market and perhaps deter others from coming in. The purpose is to gain and exercise control over prices in the relevant market.

**D. Price - What Is “Below Cost”?**

While making clear that it is only below-cost sales which are actionable, the *Brooke Group* Court once again avoided resolving the conflict between the various circuits as to the proper measure of “costs” noting that the parties in the case had agreed that the relevant measure of costs was average variable costs. *Brooke Group*,

509 U.S. at 222 n.1. Nevertheless, while failing to resolve what was the proper measure of costs, the *Brooke Group* Court explicitly resolved in the negative the question of whether the price above an “appropriate measure of cost” could ever be predatory. 509 U.S. at 223 n.1. Only below-cost prices will suffice, and the Court has “rejected elsewhere the notion that above-cost prices that are below general market levels or the costs of a firm’s competitors inflict injury to competition cognizable under the antitrust laws.” *Id.* at 223. The Court thus explicitly overruled any lower court decision that had interpreted *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967) to permit liability in primary line Robinson-Patman cases “on a mere showing that the defendant intended to harm competition or produced a declining price structure.” 509 U.S. at 221-22.

There is a split in the Circuits as to what measure of cost should be utilized. For example, the First Circuit utilizes pricing below “incremental” or “variable” costs as its “normal” and “ordinary” test for predation. *See Tri-State Rubbish v. Waste Mgmt.*, 998 F.2d 1073, 1080 (1st Cir. 1993). The Second Circuit applies an average variable cost standard coupled with presumptions. *See Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 88 (2d Cir. 1981). In the Fifth Circuit, predatory pricing is defined as pricing below average variable or marginal costs, and in *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 532 (5th Cir. 1999), the court held flatly after *Brooke Group* that pricing above average variable costs can never be predatory. The Sixth Circuit and Ninth Circuit apply a “hybrid” approach to predatory pricing, observing that prices above average variable costs are presumed non-predatory and prices below average variable costs are presumed predatory. *See*

also *D.E. Rogers Assocs., Inc. v. Gardner-Denver Co.*, 718 F.2d 1431, 1436-37 (6th Cir. 1983); *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088 (9th Cir. 1998) (signaling some movement away from use of a subjective test and rejecting the rule that evidence of below-cost pricing is not required). The Ninth Circuit has also declined to adopt a rigid characterization of particular costs as “fixed” or “variable,” but rather held that the proper characterization depends on the facts of each case. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1038 (9th Cir. 1981).

The Tenth Circuit has observed that marginal or average variable cost is a valuable indicator respecting predatory pricing, but stated in a pre-*Brooke Group* case that prices above average variable costs “do not preclude a finding of predatory pricing if other factors are present indicating unreasonably anticompetitive behavior.” (Query: can this be so even if there is no proof of recoupment?). *Instructional Sys. Dev. Corp. v. Aetna Cas. & Surety Co.*, 817 F.2d 639, 648 (10th Cir. 1987). This is probably not good law after *Brooke Group* which requires that pricing below cost to be predatory. In a recent case, *United States v. AMR Corp.*, 140 F. Supp. 2d 1141 (D. Kan. 2001), the court applied the Tenth Circuit and *Brooke Group* standard and held that where a claim focuses on the pricing practices of the defendant, the standards of proof set forth in *Brooke Group* must be met. The Eleventh Circuit focuses on average total costs. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1503 (11th Cir. 1988).

One issue is whether pricing below cost of a small subset of products or services will be sufficient to establish the pricing below cost component of a

predatory pricing claim. Several courts have held that a claim of predatory pricing may not rest on the prices of a minimal number of products that would be offered in a relevant market place. See *Taylor Publ'g Co. v. Jostens, Inc.*, 216 F.3d 465, 478-79 (5th Cir. 2000); *Int'l Travel Arrangers v. NWA, Inc.*, 991 F.2d 1389, 1396 (8th Cir. 1993); *Directory Sales Mgmt. Corp. v. Ohio Bell Tel. Co.*, 833 F.2d 606, 614 (6th Cir. 1987); *Bayou Bottling, Inc. v. Dr Pepper Co.*, 725 F.2d 300, 305 (5th Cir. 1984). In *United States v. AMR*, the court observed that proof that a defendant underpriced only a fraction of the products or services was insufficient. Liability under the Sherman Act requires proof “that the full product line was sold at below the relevant cost measure, not simply one or a small subset of products.” 140 F. Supp. 2d at 1203. Citing *Areeda and Hovenkamp*, the court observed that by requiring the focus to be on the entire product line or relevant market, the authorities necessarily reject the approach that predatory conduct can be determined solely by focusing on a fraction of the product. *Id.*

**E. Recoupment.**

In order to sustain liability for predatory pricing, whether under the Sherman Act or the Robinson-Patman Act, the plaintiff must be able to demonstrate that the predator had a “reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered.” *Brooke Group*, 509 U.S. at 224; *Matsushita*, 475 U.S. at 588-89. As the *Brooke* Court explained:

Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some

inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers.

509 U.S. at 224.

Thus, in order to show recoupment, the plaintiff must first show that below-cost pricing “[is] capable, as a threshold matter, of producing the intended effects on the firm’s rivals,” that is, of driving them from the market or, as was alleged in *Brooke Group*, “causing them to raise their prices to supracompetitive levels within a disciplined oligopoly.” 509 U.S. at 225. Relevant factors include “the extent and duration of the alleged predation, the relative financial strength of the predator and its intended victim, and their respective incentives and will.” The inquiry is “whether, given the aggregate losses caused by the below-cost pricing, the intended target would likely succumb.” *Id.*

If the plaintiff is able to show that below-cost pricing “could likely produce its intended effect on the target,” the plaintiff must still prove that there is a “likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it.” *Id.* This, in turn, requires “an estimate of the cost of the alleged predation” and “a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market.” *Id.* at 226. Where the market is competitive, i.e., highly diffuse and competitive, there are low barriers to entry and there is insufficient excess capacity, i.e., the defendant cannot absorb the market shares of its rivals and cannot

quickly purchase or create new capacity, summary disposition is often granted. *See Brooke Group*, 509 U.S. at 226; *Cargill*, 479 U.S. at 119-20 n.15.

While under Section 2 of the Sherman Act a plaintiff must demonstrate the predatory pricing “poses a dangerous probability of actual monopolization,” *Brooke Group*, 509 U.S. at 222, quoting *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 455 (1993), a Robinson-Patman or Sherman Act claim must only demonstrate that there is a “reasonable possibility” of substantial injury to competition. *Brooke Group*, 509 U.S. at 222, quoting *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434 (1983).

Several courts have emphasized recoupment analysis in affirming summary judgment of predatory pricing claims. *See Dial-A-Car v. Transportation, Inc.*, 82 F.3d 484, 488 (D.C. Cir. 1996); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 528-31 (5th Cir. 1999) (observing that the plaintiff failed to demonstrate that it would be driven from the market and failed to negate the possibility that foreign competitors would enter the market in the event of supra-competitive pricing by the defendant); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401-03 (7th Cir. 1989) (observing that recoupment is highly unlikely unless the defendant already has monopoly power); *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) (observing that a 44% market share was sufficient for avoiding summary judgment on attempted monopolization claim as was evidence of high barrier entry, but evidence that existing competitors not only could but had increased their outputs warranted granting summary judgment for the defendant). Although plaintiff had offered expert affidavits on these issues, it could not overcome the

undisputed facts respecting increased outputs. *Id.* at 1440-43. In *Western Parcel Express v. United Parcel Serv. of Am.*, 190 F.3d 974 (9th Cir. 1999), the court affirmed summary judgment for UPS on the grounds that the plaintiff had failed to establish that UPS had market power in a relevant market, specifically failing to show that there were barriers to expansion or entry in the relevant market. With respect to a Section 1 case, there must be evidence of conspiracy under the Federal Antitrust Act while the Oklahoma Antitrust Reform Act would allow unilateral conduct which restrains trade to be actionable.

## V. OKLAHOMA STATE STATUTES

### A. Oklahoma Antitrust Reform Act.

The Oklahoma Antitrust Reform Act can be found at 79 O.S. Supp. 2002, §§ 201 *et seq.* It went into effect in July 1998. Section 203 of the Act is similar in sum and substance to Section 1 of the Sherman Act. One major difference is that while the Sherman Act requires a conspiracy, combination or agreement, a single actor may violate the Oklahoma Antitrust Act. *Harolds Stores v. Dillard Dep't Stores*, 82 F.3d 1533 (10th Cir. 1996). The Oklahoma Supreme Court in *Beville v. Curry*, 39 P.3d 754 (Okla. 2001) held that federal cases construing Section 1 of the Sherman Act are persuasive and relevant in construing Oklahoma's mini-Sherman Act. *See Beville*, 39 P.3d at 759. Section 203(B) is a miniature version of Section 2 of the Sherman Act and now conforms Oklahoma law to the federal provision. Section 204 of the Act is in sum and substance identical to Section 2 of the Robinson-Patman Act and includes the defenses of meeting competition, cost justification and changing conditions. It too is limited to commodities. Section 205

of the Act provides the basis for injured parties and attorneys general to bring an action, and Section 212 of the Act codifies Oklahoma case law that provisions of the Act shall be interpreted in a manner consistent with the federal antitrust law.

**B. Oklahoma's Unfair Sales Act.**

Because predatory pricing is difficult to establish under the federal antitrust laws many cases are now being brought under a state's unfair sales act. Oklahoma has codified its Unfair Sales Act at 15 O.S. §§ 598.1 *et seq.* That Act, at Section 598.3, declares that any advertising, offer to sell or sale of merchandise, by retailers or wholesalers, at less than cost with the intent and purpose of inducing the purchase of other merchandise or of unfairly diverting trade from a competitor or otherwise injuring a competitor, impairing and preventing fair competition, or injuring public welfare, are unfair competition and contrary to the public policy where the effect is to tend to deceive the purchaser or to substantially lessen competition, or to unreasonably restrain trade, or to tend to create a monopoly in any line of commerce.

Okla. Stat. tit. 15 § 598.5(C) provides that evidence of an advertisement, offer to sell, or sale of merchandise by a retailer or wholesaler at less than cost shall be *prima facie* evidence of intent to injure competitors and to destroy or substantially lessen competition. Section 598 defines costs and allows the alternative use of replacement cost or actual cost, whichever is lower. Costs should include such components as invoice cost or replacement cost (a 30-day average), trade discounts except customary discounts for cash, freight charges, cartage, if applicable, state and federal taxes, and mark-up is presumed to be 6% unless there is proof to the contrary. Cost to the wholesaler omits the mark-up cost of doing business. *Id.*

The main purposes of the Act are spelled out in 15 O.S. § 598.3 as (1) to prevent “loss leader,” selling or featuring items at below cost to entice customers into a store where other merchandise prices are inflated, and (2) to prevent unfairly diverting trade or to protect small merchants from large competitors. *So-Lo Oil Co. v. Total Petroleum, Inc.*, 832 P.2d 14, 17 (Okla. 1992). The Act is antiquated and clearly anti-competitive, not pro-competitive. As the Oklahoma Supreme Court observed in *So-Lo*, the Act is penal and anti-competitive and should be strictly construed to prohibit only those below-cost sales which meet the statutory requirements. 832 P.2d at 18-19. In 1997, the Oklahoma Attorney General wrote in Opinion 97-18, available at 1997 WL 718664, that whether a specific sale is in violation of the Act depends on whether the Act exempts the sale from the Sales Act (*see* 15 O.S. § 598.6), the seller acts with bad intent, the seller harms competition and the seller meets a competitor’s price. While an advertisement or sale below cost is *prima facie* evidence of the necessary intent and purpose, a defendant can obviously rebut the presumption, *see Glenn Smith Oil Co. v. Sheets*, 704 P.2d 474, 478 (Okla. 1985), and the presumption does not apply to the requirement that a plaintiff prove that the result or effect of the below-cost sales is to harm competition.

The Act provides that the result must be “to substantially lessen competition” or “to unreasonably restrain trade.” 15 O.S. § 598.3. The Attorney General Opinion observes that the Act requires proof that the below cost sales “resulted in harm to competitors.” What does this mean?

Well, in *Beville v. Curry*, 39 P.3d 754 (Okla. 2001), the Oklahoma Supreme Court said that Section 1 of the Antitrust Act requires proof that the alleged anti-

competitive act “unduly restricts competition” or “injuriously restrains trade.” *Beville* again uses the term “injury to competition,” i.e., anti-competitive effect on a relevant market. The *Beville* court required a plaintiff to show injury to competition, i.e., potential for genuine adverse effect on competition through sufficient market power in the relevant market or evidence of actual detrimental effects on competition. The *Beville* court observed that market power is the preliminary inquiry and “often dispositive of antitrust cases.” *Id.* at 760. A plaintiff must “define the relevant market and establish that the defendant possessed market power ... [A]bsent evidence that the defendant had sufficient market power to affect competition, [a claim] must fail.” *Id.* Market share alone is insufficient. A plaintiff must show the number and strength of competitors, market trends, barriers to entry. At a minimum, a plaintiff must show how much of a relevant market a defendant controls and injury to competition as a whole and not just injury to yourself. If there is no showing that a defendant’s acts had the effect of restricting competition, then the claim fails.

Thus, under the Oklahoma Unfair Sales Act which requires that the effect of below-cost sales substantially lessen competition or unreasonably restrain trade, the same test should be applied. The court in *Beville* said the fundamental test in evaluating a restraint of trade is the effect on the public. The United States Supreme Court has observed that below-cost sales are only adverse if they are predatory. In other words, if a predatory pricing scheme fails, it is generally a boon to consumers in that they are the recipients of the charitable acts of lower prices. Thus, a key issue under the Oklahoma Unfair Sales Act is whether the federal predatory intent/recoupment analysis will be applied to the Oklahoma Unfair Sales Act. If the Act truly only pro-

hibits below-cost sales which adversely affect competition, then it is respectfully submitted that the only logical construction of the Act is to require a predatory pricing analysis.

Under the Oklahoma Unfair Sales Act, one can only meet competition if its rival's prices are above cost. 15 O.S. § 598.7. In other words, if its rival has priced below cost, then the Oklahoma Unfair Sales Act would not permit a defendant to assert a meeting competition defense. *See Glenn Smith Oil Co. v. Sheets*, 704 P.2d 474 (Okla. 1985); *Safeway Stores, Inc. v. Okla. Retail Grocers Ass'n*, 322 P.2d 179 (Okla. 1957), *aff'd*, 360 U.S. 334 (1959). However, if a plaintiff is seeking injunctive relief and its prices are also below cost, injunctive relief will be denied on the grounds that the plaintiff had "unclean hands" and, therefore, could not seek equitable relief. *See Okla. Retail Grocers Ass'n v. Wal-Mart Stores, Inc.*, 605 F.2d 1155 (10th Cir. 1979) (applying Oklahoma law).

In *Safeway Stores*, the court observed that giving trading stamps redeemable in cash or merchandise with purchases of groceries sold at minimum prices did not violate the Act because such stamps were a "cash discount" constituting a selling cost rather than a price reduction. 322 P.2d at 186.

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