1988

The "Good Faith" Meeting Competition Defense to a Section 2(A) Violation of the Robinson-Patman Act: Area-wide Pricing as a Valid Response to Competition

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THE "GOOD-FAITH" MEETING COMPETITION DEFENSE TO A SECTION 2(a) VIOLATION OF THE ROBINSON-PATMAN ACT: AREA-WIDE PRICING AS A VALID RESPONSE TO COMPETITION

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As long as our enterprise system remains free, competitive pressures will continue to shift and with these shifts the hand of official trade regulation must adjust its pressures accordingly. It is important to the continuation of free enterprise that government authorities represented by the Congress, the courts and the Federal Trade Commission and the Department of Justice recognize at all times that the very freedom they are pledged to preserve is itself a fluid and changing pattern, and that the protection of it, through official means, must respond to such changes. If the search for certainty in the law produces a tendency toward rigidity in the regulatory pattern, then the freedom, instead of being preserved, might well be diminished.1

Introduction

Under Section 2 of the Clayton Act, as amended by the Robinson-Patman Act,2 price discrimination3 may be illegal under certain cir-


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cumstances. Although discriminatory pricing is scrutinized under a number of statutes, the Robinson-Patman Act is the most generally applicable statute governing discriminatory commercial conduct because it is the principal statute applicable to the prices charged by a seller to its buyers. Since its enactment in 1936, there has been considerable debate over the real purpose of the Robinson-Patman Act, with most of the debate centered around the issue of interpreting the term "price discrimination." Various definitions have been advanced for the term as applied to the Robinson-Patman Act. "'Economic' price discrimination consists in selling a product to different customers at prices that bear different ratios to the marginal costs of sales to those customers." Under the Robinson-Patman Act "price discrimination is measured by the difference between the high price to one purchaser and the lower price to another." A. Sawyer, supra note 1, at 234. "Price discrimination is the practice of selling some homogeneous product — a good of 'like grade and quality' - to different buyers at different prices." D. Armentano, Antitrust Policy: The Case for Repeal 45 (1986). While a Robinson-Patman price discrimination complaint is triggered by a price difference, not all price differences are prohibited. Only those price differences which are predatory in nature and fail to satisfy the statutory defenses are prohibited.

4. Section 2(a) of the Clayton Act provides in pertinent part:
It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . and where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or 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.


6. The Federal Trade Commission Act and the Sherman Act are also relevant in such matters. In addition to prohibition of price discrimination between purchasers, almost all interstate sale and dealer-oriented promotions are subject to the terms of the Act. Examples include unearned brokerage payments, promotional allowances and services. Buyers are similarly liable for inducing or receiving prohibited price discriminations. American Bar Association, Section of Antitrust Law, Monograph No. 4, The Robinson-Patman Act: Policy and Law, Volume I at 2 (1980) [hereinafter Monograph].

The Robinson-Patman Act's influence on the economy is so pervasive "that tens of thousands, probably hundreds of thousands, of pricing decisions every year are altered through fear of Robinson-Patman." R. Bork, The Antitrust Paradox: A Policy at War with Itself 384 (1978) [hereinafter Antitrust Paradox].

7. See J. Burns, A Study of the Antitrust Laws: Their Administration, Interpretation, and Effect (1958). "A discussion of the particular role of the Robinson-Patman Act in the field of the antitrust laws is in effect an examination of the relationship between the Robinson-Patman Act and the Sherman Act." Id. at 117.
tation, both as to its general language,8 and as to the application of the statutory defenses.9

Part I of this Note will present the historical development of the meeting competition defense and the status of the Robinson-Patman Act.10 Generally, whether conduct meets the good faith standard is a

The Robinson-Patman Act "provides that it is unlawful to discriminate in price, directly or indirectly, between different purchasers of the same or similar commodity where the effect may be to lessen competition or tend to create a monopoly." Economic Freedom, supra note 5, at 149.


[T]he Robinson-Patman Act of 1936, is the most awkwardly drafted of all antitrust legislation. This statute was a roughly hewn, unfinished block of legislative phraseology when it left Congress, and has required much interpretive refinement by the Commission and the courts to reveal the contours of its meaning and application. Indeed, so confusing is certain of this language that experience in applying its provision is the only reliable guide for the wise practitioner.

9. A price discrimination practice which is violative of Section 2(a) of the Act, may nevertheless be permitted if the seller satisfies the statutory requirements of Section 2(b), the so-called "meeting competition" defense. Price discrimination may also be permitted if the seller satisfies the cost justification requirements of Section 2(a).

The Section 2(a) defense of the Robinson-Patman Act states in part:

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 . . . And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the Market . . . .

15 U.S.C. § 13 (1982). In addition, Section 2(b) provides in part that:

Provided, however, That nothing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

Id. § 13(b) (emphasis added).

The difficulty in applying the meeting competition-defense has occurred mainly in the determination of good faith since such an analysis is a subjective inquiry into the state of mind of the seller. "'Good Faith' means that he [seller] may act without fear, provided that there are not additional facts which indicate that he is thereby seeking to implement an indefensible trade practice, an unlawful conspiracy, or a plan of monopoly." VAN GISE, supra note 8, at 146.

10. See infra notes 15-88 and accompanying text.
question of fact, determined on a case-by-case basis. In developing the good faith standard, various dichotomies have evolved which have been considered relevant in the determination of good faith. Where a competitor has invaded a seller's defined market, the seller may choose to respond by confronting the competitor on a customer by customer basis, or instead, take an approach that confronts the competitor in the entire area invaded or threatened. The question of whether the seller takes the piecemeal approach or opts for the so-called "area-wide" approach is one such dichotomy which has evolved as an important issue in the determination of good faith and the availability of the meeting competition defense. Part II examines the judicial development of area-wide pricing, its effect on the meeting competition defense, and its future viability as a meeting competition scheme. Finally, Part III examines the evidentiary requirements for a successful meeting competition defense in an area-wide pricing system.

12. Some of these dichotomies include:
   (A) The lawful versus unlawful character of the competitive price met. In Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69 (1979), the Supreme Court rejected the need for a seller to prove the lawfulness of the price met. Id. at 81.
   (B) Individual competitive situation versus a pricing system (or sporadic, but not systematic meeting competition). In Falls City Indus. v. Vanco Beverage, Inc., 460 U.S. 428 (1983), the Court concluded that "[t]here is no evidence that Congress intended to limit the availability of § 2(b) to customer-specific responses." Id. at 448.
   (C) In the past it was generally accepted that a seller may "meet but not beat" the competitive price. Recent decisions, however, have recognized that where the seller acts in good faith to meet competition, the fact that its price is lower than the competitor's price is not fatal. Accord Great Atlantic & Pacific Tea Co., 440 U.S. at 83; Jones v. Borden Co., 430 F.2d 568, 572-73 (5th Cir. 1970) (inadvertent undercutting of price is not fatal if made in good faith); see also Indian Coffee Corp. v. The Folger Coffee Co., 1982-83 Trade Cas. (CCH) 65,186, at 71,732-33 (W.D. Pa. 1982).
   (D) The defensive versus aggressive nature of the seller's action in meeting competition (meeting competition to retain a customer or meeting competition to gain a new customer). The Supreme Court, in Falls City, held that the Act does not distinguish between prices offered to retain existing customers, and those offered to gain new customers. Falls City, 460 U.S. at 435; accord William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1046 (9th Cir. 1982) (defense is not forfeited simply because new customers are sought).
   (E) An earlier dichotomy was the substantive versus procedural issue. Standard Oil Co. v. FTC, 340 U.S. 231 (1951) (Supreme Court held that the defense once established is absolute).
13. See infra notes 89-198 and accompanying text. A detailed consideration of the various cases would be beyond the scope of this Note. The intent is to give an overview of the general trends and commonalities of the decisions, except for those landmark cases from which the laws governing area-wide pricing emanate, which will be discussed in some detail.
14. See infra notes 199-287 and accompanying text.
I. History and Development of the Meeting Competition Defense Under the Robinson-Patman Act

This is not a statute which can be studied in a vacuum. Rather, it is necessary to consider the Robinson-Patman Act in light of its complicated legislative history, its relationship to the body of antitrust law to which it is, however morganatically, wed, and the way it has been interpreted over the past half-century.\textsuperscript{15}

Initial understanding of the history and development of the Robinson-Patman Act provides the flood light under which any meaningful analysis of its implications can be effectively attempted.\textsuperscript{16} Furthermore, for the practitioner such background knowledge is particularly useful since judicial interpretation of the clients' conduct will invariably be conducted under the same flood light.\textsuperscript{17}

A. Legislative History of the Robinson-Patman Act

It is clear from the legislative history of the Robinson-Patman Act that it was enacted in response to a perceived threat to the traditional structure of distribution brought about by the advent of chain stores and other concentrations of buying power.\textsuperscript{18} The dramatic increase in the early 1900's in the number of chain stores was perceived by

\begin{itemize}
  \item \textsuperscript{15} Henry v. Chloride, Inc., 809 F.2d 1334, 1338-39 (8th Cir. 1987).
  \item \textsuperscript{16} "For it is in its genesis that the purposes animating Congress in passing this ambiguous statute can best be discerned and then borne carefully in mind in contemporary judicial applications." Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1138 (D.C. Cir. 1988).
  \item \textsuperscript{17} The Eighth Circuit's opinion in Henry is indicative of such application of legislative history. Henry, 809 F.2d 1334; accord Boise Cascade: "The imprecision infecting the statutory language has frequently led courts construing the measure to repair to the backdrop against which the Robinson-Patman amendments were crafted in 1937." Boise Cascade, 837 F.2d at 1138.
  \item \textsuperscript{18} See LaRue, The Robinson-Patman Act: The Great Issues and Personalities, 55 Antitrust L.J. 135, 137 (1986). During that period the traditional system of distribution was local family-run stores, the so-called "corner shop." It was feared that the growth of the retail chains during this period threatened the very existence of the independent wholesalers by their ability to buy direct from the manufacturers at substantially low prices, thus reducing margins to independent retailers. It was felt that chain stores were popular with consumers because they were able to sell at relatively lower prices than could the independent stores. Furthermore, it was felt that chain stores were able to offer such attractive prices because of the favorable prices they were able to "coerce" from suppliers. Id.
  
  "Congress found that the 'survival of independent merchants, manufacturers, and other businessmen' continued to be threatened by forms of direct and indirect discrimination — in price and other terms — that were not reached by the original Clayton Act." Van Gise, supra note 8, at 21. This fear was expressed by Mr. Patman in the hearings before the House Committee when he stated:
  
  The day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive under that system. So we reached the crossroads; we must either turn the food in groceries' business of this country . . . over to a few corporate chains, or we have got to pass laws that
\end{itemize}
some to be the cause of the demise of the independent retailer during the same period.\textsuperscript{19} In 1928, the Senate, concerned about the competitive effect of this emerging system of distribution directed the Federal Trade Commission (FTC) to investigate the legality of chain stores. The Committee's report,\textsuperscript{20} issued in 1934, was to a great extent, the basis of the Robinson-Patman Act which was enacted in 1936.

In the Final Report, the Commission reported that the affirmative defenses of the original Clayton Act\textsuperscript{21} rendered its enforcement practically ineffective.\textsuperscript{22} In particular, the Commission attacked the good-faith meeting competition defense.\textsuperscript{23}

In its recommendations the Senate Judiciary Committee removed the meeting competition proviso, finding it to be a major weakness of

\begin{quote}
will give the people, who built this country in time of peace and who saved it in time of war, an opportunity to exist.
\end{quote}

\textit{Hearings Before the House Committee on Judiciary on Bills to Amend the Clayton Act, 74th Cong., 1st Sess., 5-6 (1935).}

\textsuperscript{19}. \textit{Monograph, supra note 6, at 9.} The records indicated that in 1900, there were 700 chain stores. By 1910, the number had grown to 3000, and by 1930 there were about 7000 chain stores in the country. Over the same period their share of the total retail business grew from just 4\% in 1919, to 9\% in 1926, and 25\% by 1933. Some commentators are not persuaded that the success of the chain stores was merely the result of purchasing power. \textit{See, e.g.,} Rowe, \textit{Evolution, supra note 8, at 1062 n.n.8-9.} "Actually, the statistics developed by the FTC indicates that the chains' lower purchase prices were but a minor factor in their ability to undersell the independent retailers. The responsible factors were the chains' bypassing of the wholesaler and buying direct, and their more efficient operations." LaRue, \textit{supra note 18, at 137 n.8.}


\textsuperscript{21}. 15 U.S.C. § 13(a) (1982). The section reads in part:

\begin{quote}
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 . . . . \textit{Provided}, That nothing herein contained shall prevent differentials which make only due allowance.
\end{quote}

\textit{Id.}

\textsuperscript{22}. S. REP. No. 1502, 74th Cong., 2d Sess. 4 (1936) (cited in J. Von Kalinowski, \textit{Antitrust Laws & Trade Regulations} § 32.02 [1], 32.12 (1987)).

\textsuperscript{23}. \textit{Monograph, supra note 6, at 12, n.46 (citing FINAL REPORT, supra note 20, at 51).}

Difficult legal questions arise in this connection, such as whether a price discriminator may merely 'meet' the price of a competitor or may beat it, and whether a concern which occupies a monopolistic position has the right to maintain itself by discriminating in good faith to meet competition. If the monopoly be considered legal it is difficult to deny it the same privilege of protection against competition which the statute assures the independent. Yet that creates the anomaly of a monopoly being allowed to use the same weapons to maintain itself which are denied to others for fear of creating monopoly.

\textit{Id.}
the original Act. At the same time, the House Judiciary Committee reinstated the proviso in its version but in a more restricted form. Both bodies subsequently adopted the House version but rejected the House recommendation that the proviso be an absolute legal rebuttal. Instead, they declared that the meeting-competition proviso "was intended to operate only at [sic] a rule of evidence in a proceeding before the Federal Trade Commission." 

B. Purpose of the Robinson-Patman Act

In light of the history and initial justification of the Robinson-Patman Act, opponents have often attacked the Act on the ground that its foundation in legislative concern for small business implies a lack of concern for competition in general. The argument that the

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[It permits discrimination to meet competition, . . . with destructive consequences to the central object of the bill. Liberty to meet competition which can be met only by price cuts at the expense of customers elsewhere, is in its unmasked effect the liberty to destroy competition by selling locally below cost, a weapon progressively the more deadly to the competitor of limited resources, whatever his merit and efficiency.

Id.

25. In the House bill, "seller [was] permitted to meet local competition, it [did] not permit him to cut local prices until his competitor [had] first lower[ed] prices, and then he [could] go no further than to meet those." Id. at n.15 (citing H. Rep. No. 2287, 74th Cong., 2d Sess. 4 (1936)).

26. Id. at n.21 (citing H. Rep. No. 2951, 74th Cong., 2d Sess. 7 (1936)).

[A] seller may show that his lower price was made in good faith to meet an equally low price of a competitor . . . . It is to be noted, however, that this does not set up the meeting of competition as an absolute bar to a charge of discrimination under the bill. It merely permits it to be shown in evidence. This provision is entirely procedural. . . . This procedural provision cannot be construed as a carte blanche exemption to violate the bill.

Id. (emphasis in original).

27. Id. at 32.12 (citations omitted).

28. Monograph, supra note 6, at 15.

[T]he bill was characterized as (a) an effort to salvage that part of the NRA [National Retail Association] which benefitted independent merchants and wholesalers, (b) a means of saving independent businessmen from the chain store "menace," and (c) a way of preventing the use of concentrated buying power to extract concessions that were unwarranted by any actual saving to the manufacturer. It was, however, as an antichain measure that the Patman bill received its widest publicity.

Id.; see also Note, Effective Competition and the Antitrust Laws, 61 Harv. L. Rev. 1289, 1336 (1948). "The Robinson-Patman Act was designed to aid small buyers and to hamper the chain stores." Accord Boudis v. United States Suzuki Motor Corp., 711 F.2d 1319, 1926 (6th Cir. 1983) (aim of the Robinson-Patman Act, amending section 13 and adding section 13(a), (b) and 21(a) of Clayton Act, is to prevent large buyer from gaining discriminatory preferences over small buyer solely because of large buyer's greater purchasing power).

As a result of this express concern for small business, the Robinson-Patman Act has been extensively labeled as an anti-competition statute. For example, it has been
Robinson-Patman Act is invalid merely because it was born out of concern for the small retailer is, however, unpersuasive. Even though Congress may have focused its attention on the predatory purchasing practices of chain stores, the Robinson-Patman Act is not to be rigidly confined to that set of circumstances alone. While protection of the independent retailer may have been the "short range goal" of the Act, its main objective was the "long range protection of competition." The Act was designed to protect small businesses, not for the sake of the individual firms, but for the sake of competition in general.

Considerable disagreement still remains over the real purpose of the Robinson-Patman Act and its place in the overall antitrust scheme which is to protect competition. It has been suggested, for

suggested that the Act contributes to price rigidity, aids price-fixing efforts and oligopolistic behavior, discourages entry into new markets, fosters inefficient distribution schemes, encourages inefficient product differentiation, and imposes an undue regulatory burden on businesses. MONOGRAPH, supra note 6, at 27; see generally P. SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 42-44 (1947); see also Shniderman, The Impact of the Robinson-Patman Act on Pricing Flexibility, 57 NW. U.L. REV. 173 (1962) (Act may be means of obtaining price uniformity and discouraging competition).

29. Predatory price cutting is "the attempt to destroy competition and attain a monopoly in some market which can henceforth be isolated from the intrusion of others." M. ADELMAN, GEOGRAPHICAL PRICE DIFFERENTIALS: AN ECONOMIC COMMENTARY, HOFFMANN'S ANTITRUST LAW AND TECHNIQUES, Vol. 2, 577, 579 (M. Hoffmann & A. Winard 1963).

Congress, in drafting the Robinson-Patman Act, distinguished between size achievement by normal trade practices and size gained by means aimed at eliminating competition. The latter means is considered predatory, and it is this form of discriminatory pricing that is expressly prohibited by the Act.

30. Some commentators have found these two goals to be in basic conflict stating that they cannot be simultaneously achieved by any one rule. They argue that "[i]t is hard to protect competitors and competition at the same time. For it is competition from which competitors seek to be protected." Liebeler, Let's Repeal It, 45 ANTITRUST L.J. 18, 19 (1976). Others have found the Robinson-Patman Act to be "a law that attacks a nonexistent threat and hinders the free movement of prices in markets needlessly. The policy of Robinson-Patman is directly contrary to the Sherman Act rule against price fixing. They cannot both be considered sound antitrust policy." ANTITRUST PARADOX, supra note 6, at 394 (footnote omitted).

Proponents of the Act argue that to the extent that enforcement of the Act benefits small business competitors, it is only incidental to its overall antitrust goal of protecting competition. They argue that the Robinson-Patman Act, though designed to protect competitors, also protects competition.

31. ANTITRUST PARADOX, supra note 6, at 64.

At worst, then, the policy goal of the Robinson-Patman Act is left unclear by the various statements made during the legislative history of the measure. More accurately, however, the legislative history shows predominant concern for consumers, with protection of small competitors intended only when that was a means of protecting consumers from monopoly not based on efficiency.

Id. Contra Note, supra note 28, at 1334. This author defends the Robinson-Patman Act, stating that "[i]t would be an unjust exaggeration to say that the sponsors of the
example, that there is a basic conflict in policies between the Robinson-Patman Act and the Sherman Act. It is argued that because the Robinson-Patman Act was designed to protect the competitors, it is antithetical to the overall antitrust goal of protecting competition. Critics of the Act argue that this apparent difference in motivation is prima facie evidence that the two acts are divergent. However, this argument ignores the direct relationship between individual competitors and competition in general.

If competition is comprised of individual competitors, then any systematic attack or elimination of the individual competitors invariably disturbs competition. The only question, once this occurs, is whether the instability thus created benefits or harms the consumer. The answer will depend on the circumstances of the given case, the dynamics of the given market, the level of competition, and the barriers to entry. Thus, where it can be established that the injury to a competitor is part of a systematic plan aimed at reducing competition, the requisite injury to competition should be deemed established.

Opponents of the Robinson-Patman Act argue that by protecting competitors the Act ignores the consumer. This argument ignores the actual effect of the present Act. In fact, the Robinson-Patman Act in some cases permits injury to competition such as when the attendant price discrimination is the result of "general competitive pricing." Concededly, the concerns for "small business and fairness" is sometimes in conflict with the free operation of competition. In fact, it has been recognized that "protecting competitors from this type of price discrimination does not always maximize 'consumer welfare.' " From its inherent shortcomings, however, it cannot be concluded that the Robinson-Patman Act is either anti-competitive or anti-consumer. Occasional divergence from the pub-

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Robinson-Patman Act intended simply to injure competition in order to protect certain competitors." *Id.*

32. There have been numerous articles and debates on the relationship between these two laws. For a list of authorities on the subject, see *MONOGRAPH,* supra note 6, at 21.

33. "Competition does not exist in a vacuum; it consists of rivalry among competitors." Hasbrouck v. Texaco, Inc., 830 F.2d 1513, 1518 (9th Cir. 1987). *Accord* Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1157 (D.C.Cir. 1988) ("Often, injury to competitors does involve... some impact on competition.") (Mikva, J., dissenting).

34. *See ANTITRUST PARADOX,* supra note 6, at 63.

35. *See VON KALINOWSKI,* supra note 24, at § 32.02 [1]. *Cf.* Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir.), *cmt. denied,* 382 U.S. 959 (1965) ("[W]here the record indicates a price differential *substantial* enough to cut into the purchaser's profit margin... an inference of injury may properly be indulged.") (emphasis added).


37. *Id.*
lic policy concerns for *competition* and *consumer welfare* is not an uncommon phenomenon of antitrust law enforcements in general. Both the Robinson-Patman Act, which begins with the individual competitor, and the Sherman Act, which is concerned with competition in general, are consistent with the overall antitrust policy and ultimately benefit the consumer.\(^{38}\) Viewed in this light, both the Sherman Act and the Robinson-Patman Act are, in fact, consistent with the overall objectives of the antitrust laws.\(^{39}\)

The underlying assumption of the Robinson-Patman Act is that predatory pricing\(^{40}\) has been and remains an important tool of aspiring monopolists.\(^{41}\) Another underlying assumption is "that price fa-

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38. If the overall antitrust goal is to foster competition for the ultimate benefit of the consumer, then, since competition comprises a group of individual competitors, it is reasonable to expect that any law that protects either consumers or individual competitors protects competition and therefore, benefits the consumer.

39. See generally Burns, supra note 7, at 127. Both Acts prohibit certain types of competition — those types that destroy competition and create a monopoly. Similarly, both acts condemn price discrimination as one of the prohibited methods of competition. Id.

40. While there is no universally accepted definition of the term "predatory pricing", the term is "generally used to describe the adoption of a pricing policy that somehow restricts competition by driving out existing rivals or by excluding potential rivals from the market." Jaskow & Klevorick, A Framework for Analyzing Predatory Pricing Policy, 89 YALE L.J. 213, 219 (1979); see also Baumol, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing, 89 YALE L.J. 1 (1979).

41. For example, in William Inglis there was evidence that the consulting firm of McKinsey & Co., which had been retained by the defendant, Continental, had prepared a report in which it analyzed pricing in the relevant market. Among the issues McKinsey suggested to Continental for further consideration was "the possibility of maintaining low prices to hasten wholesaler exit pace." William Inglis, 668 F.2d at 1055. Such practices are clearly predatory in nature.
voritism was responsible for the growth of the large retail chains at the expense of the independent retailer."

On the other hand, "[t]he presumption behind the Sherman Act is that the function of public policy is to remove such restraints on competitive behavior and to stop such business conduct as may lead to the destruction or substantial weakening of competition." The drafters of the Sherman Act believed that once this objective was met the business community would then be free to set pricing as the market would bear.

Various arguments have been advanced by opponents of the Robinson-Patman Act to support the proposition that the Act is in conflict with basic antitrust objectives. These arguments are based on the false premise that "[p]rice discrimination should not be expected to injure competitors in any improper way." While fair price discrimination should not be expected to injure competitors, the Robinson-Patman Act recognizes that unfair price discrimination should be expected to, and does injure competitors.

The Eighth Circuit is in agreement with this reasoning. While merely showing an injury to a specific competitor is not sufficient to show competitive injury, showing such injury provides a relevant starting point for inquiry into the possible existence of injury to competition of the type prohibited by the Act. Two standards have

42. MONOGRAPH, supra note 6, at 2-3; see also KINTNER & BAUER, FEDERAL ANTITRUST LAW, THE ROBINSON-PATMAN ACT § 18.4, at 9 (1983) [hereinafter FEDERAL ANTITRUST LAW]. The Act was founded on the premise that the protection of small business is a proper and achievable objective, and that discrimination is harmful to competition.

43. BURNS, supra note 7, at 118.

44. See id.

45. For example, it has been suggested that the Robinson-Patman Act encourages price uniformities which is adverse to consumer interest. It is suggested that the Act "discourag[es] certain structural changes in the methods of business conduct which are a natural result of the competitive contest" and that it constitutes an attempt to impede efficient marketers in distributing goods more cheaply to the consumers. MONOGRAPH, supra note 6, at 27; see also BURNS, supra note 7, at 121. For other criticisms of the Act, see SAMUELSON, FOUNDATIONS OF ECONOMIC ANALYSIS 42-44 (1947); see also Shniderman, supra note 28.

46. ANTITRUST PARADOX, supra note 6, at 385.

47. See Cohen, Let's Retain It, 45 ANTITRUST L.J. 44, 48 (1976). "A large company [could] go into a local area, cut its prices, knock out the local [competitors], and then move on somewhere else and do the same thing until there [are] no more significant competitors left." Id. This is possible because even a highly competitive market is comprised of pockets, or market segments with the characteristics of a monopoly. The degree of competition in any given industry is defined by the relative sizes of these pockets of monopolies.

48. Henry v. Chloride, Inc., 809 F.2d 1334, 1341 (8th Cir. 1987). "[W]hile injury to a competitor may result from honest competition (encouraged under the antitrust laws), this same honest competition is compromised when a market participant acts with the intention of destroying its competitors." Id.

49. See id. at 1340.
evolved for the determination of competitive injury. The plaintiff may show competitive injury "either directly by market analysis . . . or by inference from injury to the plaintiff-competitor accompanied by the defendant's predatory intent . . . ."50

In order to protect and encourage fair competition, a higher burden is placed on a plaintiff who challenges a competitor's prices on the grounds of individual injury. In order to show injury sufficient for a Robinson-Patman price discrimination violation under these circumstances, the plaintiff must also show that the defendant had the specific intent to injure the plaintiff.51 The foregoing demonstrates that the Robinson-Patman Act is concerned only with unfair price discrimination.52

Furthermore, the suggestion that the Robinson-Patman Act equates price differentials with price discrimination53 is equally erroneous. In reality, the Act clearly attempts to accommodate justifiable economic price differentials by making "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which" the commodities are sold or delivered.54 In addition, the Act permits price differences "made in good faith to meet an equally low price by a competitor."55

Opponents further argue that the Robinson-Patman Act is on a futile mission because there exists no easy means of identifying price discrimination.56 However, mere difficulty of administration is not a persuasive argument for doing away with a law whose objectives are otherwise valid.

The original Clayton Act and the Federal Trade Commission Act were intended to reinforce the Sherman Act and to protect consumers from the predatory practices of monopolists.57 Even though the

The naked demonstration of injury to a specific competitor without more is not sufficient to show that a price discrimination may substantially lessen competition . . . . The Federal Trade Commission also has long said that it is not enough simply to establish that individual sellers have been injured, or that some competitors have left the market.

Id. (citations omitted).

50. Id. at 1344.

51. See id. at 1941. "[A]t the heart of these cases is the sense 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 overall antitrust policies.'" Id. (citations omitted).

52. The affirmative defenses of the Robinson-Patman Act attempt to do this by permitting price discriminations that are supported by sound business practices. Thus, not all Robinson-Patman price discrimination actions in which the plaintiff has been injured are resolved in favor of the complainant.

53. See Antitrust Paradox, supra note 6, at 399.


55. Id. § 13(b).

56. See Antitrust Paradox, supra note 6, at 399.

57. See id. at 63.
Robinson-Patman Act of 1936 was an amendment to the original Clayton Act, it is still said to be in basic conflict with the interests of consumers.\footnote{See \textit{Department of Justice Report on the Robinson-Patman Act} (1977) [hereinafter \textit{JUSTICE REPORT}]. It has also been argued that limiting the availability of the defenses restricts competition to unnecessary levels. This criticism reflects a general frustration with the lack of guidelines from past judicial decisions on the subject. Nevertheless, the courts have repeatedly held that "where . . . a price differential threatens injury . . . [to competition] the Sherman Act and the Clayton Act [as amended by the Robinson-Patman Act] . . . are directed at the same economic evil and have the same substantive content." Janich Bros., Inc. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977) (citations omitted), \textit{cert. denied}, 439 U.S. 829 (1978); \textit{see also} International Air Indus. v. American Excelsior Co., 517 F.2d 714, 720 n.10 (5th Cir. 1975), \textit{cert. denied}, 424 U.S. 943 (1976).

Both Acts, in fact, contribute in different but important ways to the protection of competition.\footnote{See Rowe, \textit{Price Differentials}, supra note 8, at 2-4; \textit{see generally} 80 \textit{Cong. Rec.} 3447 (1936); 79 \textit{Cong. Rec.} 11575 (1935). \textit{Cf. Antitrust Paradox}, supra note 6, at 69.} While the Sherman Act primarily enforces competition, the Robinson-Patman Act controls it.\footnote{62. One commentator, reflecting on a system without these regulations describes a free system where the seller could merge at will, boycott his enemies and reward his friends, tie the sale of commodities to purchase of other products, achieve monopoly power, misrepresent the quality of his goods, launder money, evade taxes, and generally hang loose and get rid of all inhibitions. \textit{[In the final analysis] few rational people would say there should be no regulatory restraints.} Shniderman, \textit{The Robinson-Patman Act: A Critical Appraisal}, 55 \textit{Antitrust L.J.} 149, 152-53 (1986).} Unchecked,
freedom to price can be used by the powerful (not necessarily the most efficient) corporations to undermine the smaller and financially “weaker” firms (not necessarily the least efficient).64 This is precisely the type of anti-competitive outcome that the Robinson-Patman Act was designed to prevent.65

C. Status of the Robinson-Patman Act

In the midst of the foregoing debate, courts have attempted to reconcile the perceived inconsistencies between the Robinson-Patman Act and the overall antitrust goals.66 In the period following enactment of the Robinson-Patman Act, it was soon recognized that the language of the Act was vague and confusing67 and that the courts would have difficulty in interpreting it.68 These difficulties have led to calls for reform69 and, in some cases, calls for outright repeal of the Act.70

The disadvantages of an anti-price discrimination law suggested by opponents of the Robinson-Patman Act may be more illusory than real.71 On the other hand, to accept the Act as a totally effective and
harmless law would be misleading since like all laws, it must be flexible in order to respond effectively to changing market conditions and the growing concern for consumer welfare.

The Robinson-Patman Act begins with the premise that predatory pricing can effectively eliminate those competitors who lack financial support to withstand prolonged price competition. The function of the Robinson-Patman Act and the Sherman Act is to prevent the type of discriminatory pricing that has crippling effects on the competition. If this is accepted as a legitimate goal of antitrust policy, then mere difficulty in interpretation or enforcement of the Robinson-Patman Act will not justify its repeal. The Robinson-Patman Act does not address a "nonexistent threat to competition" as has been

ciency. See generally ANTI TRUST PARADOX, supra note 6, at 116-33. While those adopting the Chicago school viewpoint argue that price discrimination necessarily increases output, others are not persuaded. For example, in P. SAMUELSON, FOUNDATION OF ECONOMIC ANALYSIS 42-44 (1947), the author suggests that "it cannot be shown on a priori grounds that price discrimination necessarily increases output in the direction of the competitive supply over that provided under a single price." Id.

72. As suggested by Shniderman, "the Act has its 'grass roots' in a feeling that fairness in opportunity requires equality in pricing, unless there is justification for departure." Shniderman, supra note 62, at 158.

73. Where a seller possesses monopoly power, the use of predatory pricing is a potent tool for keeping out competition. Even in a highly competitive market, firms with sufficient financial support can afford to use predatory pricing to maintain and gain new markets. In the business world, this is known as "buying the market." By its terms, it is a practice only available to financially powerful organizations, but not necessarily the most efficient organizations in a given market. Smaller firms generally cannot afford such a practice, not because they are inefficient, but because they lack the financial resources to withstand sustained predatory pricing competition. Thus, the Robinson-Patman Act seeks "to protect the efficient competitor, not from inefficiency but from power." COHEN, supra note 46, at 48.

To the extent that the Robinson-Patman Act seeks to protect small firms from these practices, it should be vigorously enforced. In recent years it has been suggested that certain products imported into the United States have been subsidized by the governments of the exporting nations. The general objection to such subsidies stems from the belief that, as a result of such subsidies these foreign firms are able to sell in their target markets at levels considerably below cost. This, in turn, allows these firms to acquire greater market shares (i.e., "buy the market"). As the volume increases, the marginal cost of production decreases so that eventually they become profitable. In addition, if such predatory practices are successful in lessening competition, the predator eventually will increase prices in order to recoup its previous losses. The result is that other competitors who may be equally efficient, if not more efficient, are kept out of the market. Proponents of regulation argue that such subsidies constitute unfair methods of competition in violation of the Unfair Practices in Import Trade Statute, 19 U.S.C. § 1337(a) (1982). It is this element of unfairness that the Robinson-Patman Act prohibits. The threat of eliminating or substantially injuring firms which lack financial subsidies is quite real. Where there are substantial barriers to entry into the particular market, the predator will enjoy increased sales and profits by virtue of reduced competition. Even in a highly competitive market with low entry barriers, there will be significant benefits to the predator.
suggested by some commentators. Rather, it is a law with the laudable purpose of preventing pricing practices which injure competition. While the Act may have appeared to be anti-competitive in the past when it was narrowly interpreted, recent decisions by the Commission and the courts have quite effectively dispelled that notion.

Recent decisions reflect a trend towards greater flexibility of the Act through less restrictive application of the available defenses, particularly the meeting competition defense. In response to persistent efforts of opponents to repeal or reform the Robinson-Patman Act, a House Committee on Small Business was formed in 1975 to investigate the validity of these efforts and to recommend future directions for the Act. The outcome of this investigation was the Small Business Report, presented in 1976, which generated strong support for the Act and its objectives, and called for greater enforcement.

74. See Antitrust Paradox, supra note 6, at 394.

75. "[T]he Sherman Act speaks of attempts to monopolize, while the Robinson-Patman Act [speaks of conduct] aimed at lessening competition." Henry v. Chloride, Inc., 809 F.2d 1334, 1345 (8th Cir. 1987).

76. These recent allegations are ill-timed. They come "at a time when the lower federal courts, in an almost consistent line of decisions . . . have been adjudging pricing practices challenged under either or both the Sherman and the Robinson-Patman Acts under a standard which gives sellers greater leeway to practice competitively without violating the Acts." Monograph, supra note 6, at 1-2.


81. The findings and conclusions of the Report read in part:

1. The Robinson-Patman Act, which is an important part of the antitrust laws of the United States, should not be repealed nor emasculated nor weakened in any manner whatsoever; neither should it be amended.

2. The Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise.

3. Regulation means supervisory control by an administrative body that substitutes for the impersonal control of the free market. In that sense, neither the Robinson-Patman Act nor other provisos of law making it illegal to use price discriminatory acts or practices are regulation of business. The Act is not a regulation. It "merely requires that business avoid such acts and practices which restrain, injure, damage, or destroy small business through price discriminatory practices, or tend to create a monopoly."

4. Certain special interests have mounted a strong and vigorous campaign, and made erroneous charges to the effect that the [Act] impedes competition. Therefore, vigilance is needed and prompt action required to oppose
Following the Small Business Report, the Antitrust Division of the Department of Justice, in 1977, released a comprehensive analysis of the Robinson-Patman Act. The Justice Report called for reform, charging that the Act imposed great costs on society by encouraging inefficiency.

It is unlikely that the persistent calls for reform or repeal will succeed at this time, in light of the strong support for the Act from both Congress and small businesses. In recent decisions, the Supreme Court has called for the need to construe the Act "consistently with these special interest groups and other individuals who would like to emasculate or even do away with such needed laws.

5. The allegations have had the ill effects of confusing citizens and governmental officials and misleading them into the disbelief that those laws against price discrimination practices are anticompetitive and undesirable and should be repealed.

6. That the lobbying activities have had the unfortunate effect of persuading some officials to refrain from its full and complete enforcement with the result that the Congressional intent is thwarted and a bureaucratic repeal effected.

Id.

82. Justice Report, supra note 58.

83. The report criticized various aspects of the Act, alleging that it instills extreme pricing caution in sellers and buyers, reduces pricing flexibility, discourages the development of efficient distribution systems, and frequently operates to the detriment of consumers. Specifically, the report suggested that the Act reinforces price rigidity and stability to the detriment of consumers or by:

a) discouraging pricing flexibility
b) encouraging exchanges of data and price fixing
c) allowing buyers to negotiate without restraint
d) restricting competition for new markets and customers

The report also suggested the Act fosters inefficient and costly distribution patterns to the detriment of consumers and small business since it:

a) preserves inefficient distribution networks;
b) handicaps small retailers;
c) unduly burdens small business;
d) handicaps smaller retailers by restricting supplier ability to respond to pricing challenges from the smaller businessman's competitors, the so-called secondary line injury.

Justice Report, supra note 58.

84. See Federal Antitrust Law, supra note 42, at 705; see also Klein, Meeting Competition by Pricing Systems Revisited: The Vanco Decision, 28 Antitrust Bull. 795 (1983).

Recently, the Act's supporters have become more vocal:

Although compromise [pressures] may be exacted from time to time . . ., the political and economic interests supporting price regulation are not only sufficiently numerous and influential to forestall this event, but also can rally behind what has become in financial and international trade circles an increasingly respectable battle cry of a "level playing field" whose equitable tenor further ensures the act's survival.

Id. at 821-22. As a result of several liberal court opinions in the past decade, there is clearly a definite trend toward greater flexibility in both interpretation and application and, consequently, further makes reform of the Act unlikely. Also, "The Act has shown its capacity to survive attack or indeed amendment, no matter whether proponents or opponents oppose change." Shniderman, supra note 62, at 158.
the broader policies of the antitrust laws."\textsuperscript{85} At the same time, lower federal courts have begun to apply more flexible standards.\textsuperscript{86} This increased flexibility gives sellers greater leeway in pricing decisions.\textsuperscript{87} The shift in the courts' position is mainly a response to the trend toward greater consumer protection. No longer is it proper to legislate laws that protect business at the expense of the individual consumer. This change reflects not only a positive response to a changing market system, but also a reaction to the continuing pressures for reform. Thus, to the extent that the Robinson-Patman Act sets limits on permissible pricing and challenges the seller's conduct only where the potential for competitive injury exists, it should be vigorously preserved.\textsuperscript{88}

II. Meeting Competition Through Area-Wide Pricing

Opinions differ as to whether or not the Robinson-Patman Act is enforced too aggressively at the cost of greater business flexibility.\textsuperscript{89} Acceptance of area-wide pricing as a legitimate business response to competition strikes a reasonable balance between these two goals.\textsuperscript{90}

\textsuperscript{85.} Great Atlantic & Pacific Tea Co. v. FTC, 440 U.S. 69, 80 n.13 (1979); see also United States v. United States Gypsum Co., 438 U.S. 422, 455 (1978).

\textsuperscript{86.} MONOGRAPH, supra note 6, at 1-2.

\textsuperscript{87.} Id.

\textsuperscript{88.} The House Subcommittee on Small Business in 1976 expressed concern over the declining level of enforcements by the Commission in the 1970's compared to prior years. H.R. Rep. No. 1738, 94th Cong., 2d Sess. 127 (1976). This decline in enforcement has been gradual but steady. MONOGRAPH, supra note 6, at 41 n.158. "[D]espite the FTC's periodic assertion that it will continue vigorously to enforce the Act, FTC investigations have dropped off precipitously." Id. The Monograph provides a table of formal enforcement and complaints from 1965 to 1978. The table shows that the number of complaints dropped sharply from 159 in 1967, to just 73 in 1968, to only four in 1977, and none in 1978. Over the same period, the number of formal complaints dropped from 14 in 1968 to five in 1978. Id.

\textsuperscript{89.} Halverson & Flexner, ABA Section of Antitrust Law Business Meeting, Introductory Remarks, 55 Antitrust L. J. 3 (1986). The authors discussed the justification for governmental interference in pricing decisions:

[T]here are two basic ideas that are at issue. One holds that the consumer is sovereign and that his interest and society's interest in allocating scarce resources is best served by the interaction of supply and demand as regulated only by the market price. The other idea does not necessarily quarrel with the goals to be served by the market, but sees government as a more efficient and a fairer system for ensuring the delivery of goods and services at the right price.

Id. at 173.

\textsuperscript{90.} "As a result, there is no need to alter the meeting competition defense as it has emerged over the years under the Robinson-Patman Act [since] decisions construing the . . . defense have recognized business realities by giving preeminence to the good faith aspects of competitive response." Henneberger & Fleischaker, Reform of the Robinson-Patman Act: A Second Look, 21 Antitrust Bull. 203, 225 (1976); see also Kuenzel & Schiffris, Making Sense of Robinson-Patman: The Need to Revitalize its Affirmative Defenses, 62 Va. L. Rev. 1211 (1976). "As enacted [the meeting competition de-
If the Act’s purpose is preservation of the freedom to compete, then both the courts and the Commission must be mindful that “[i]f the search for certainty in the law produces a tendency toward rigidity in the regulatory pattern, then the freedom, instead of being preserved, might well be diminished.” Recognizing that flexibility is a necessary condition for the preservation of the Act, the courts and the Commission have now accepted that, under certain circumstances, area-wide pricing can be the most reasonable method of meeting competition.

A. The Good Faith Requirement

The only question in any meeting competition defense is whether the seller has acted in good faith in response to a competitive encroachment. Where a seller has good reasons to believe that a competitor is charging lower prices throughout a particular region, it must be allowed to respond accordingly. While “good faith” is not defined by the Act, the Federal Trade Commission (FTC) has developed a workable compromise between the economic and antitrust rule of competition, and the Robinson-Patman Act’s concern for small independent businesses.”

91. Sawyer, supra note 1, at 319.


93. See E. Corwin, D. Edwards, The Price Discrimination Law 565 (1959). The good faith of the seller cannot be established where his purpose is to eliminate competition by conspiracy or monopolization, to make an aggressive attack on the business of competitors who can maintain their position only through a price differential, or to modify the resale practices of the favored customer. . . . The good or bad faith of a seller can be established only after examination of a variety of circumstances as to the nature and history of [the] practice, the setting in which it occurs, and [the] purposes.

94. In such circumstances, customer-by-customer negotiations would be unlikely to result in prices different from those set according to information relating to the competitor’s territorial prices. Furthermore, pricing on a customer-by-customer basis may be inefficient. In addition, individual response may be unrealistically expensive and impractical under some circumstances. Callaway Mills Co. v. FTC, 362 F.2d 435, 442 (5th Cir. 1966).
oped guidelines which now govern the good faith inquiry. Despite these definitions, the good faith element of the meeting competition defense has proved difficult to apply. Thus far, no pattern has emerged for determining whether a given conduct will satisfy the section 2(b) good faith requirement. At best, some broad guidelines may be constructed from past decisions. The question of whether a given pricing response is valid remains a factual determination based on the reasonableness of the conduct. The same is true for area-wide pricing. Where there is reasonable proof from past conduct that a competitor is systematically going after a seller’s market, the seller should be free to defend its market by meeting the anticipated competition. Because good faith is a flexible and pragmatic

95. The standard was established in FTC v. Continental Baking Co., 62 F.T.C. 2071, 2163 (1963):

[A]t the heart of the section 2(b) defense is the concept of “good faith.” This is a flexible and pragmatic, not a technical or doctrinaire concept. The standard of good faith is simply the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.

Id.

96. Professor Edwards suggests that good faith of the seller in meeting competition is not a satisfactory basis for determining the relative importance of the values that are to be reconciled. Rather than good faith, he suggests that the question should center on the scope and character of injuries to competition resulting from the discriminatory pricing. It is further suggested that while good faith may be an appropriate basis for the determination of the impact on the seller’s competition, it is inappropriate in the measure of effect on buyers. See C. Edwards, The Price Discrimination Law 581 (1959). Proponents of the Act argue that the bail-out provisions of the meeting competition defense unduly limits a plaintiff’s cause of action. See generally C. Austin, Price Discrimination and Related Problems Under the Robinson-Patman Act (2d rev. ed. 1959). While proof of good faith effectively rebuts an inference of injury in such cases, it does not overcome an inference of injury to competition between that customer and other customers. Id. at 95.

97. See infra notes 101-86 and accompanying text.

98. “The Supreme Court has consistently interpreted the language of section 2(b) to require that defendant show only the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.” FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1949); see also United States v. United States Gypsum, 438 U.S. 422, 453 (1978) (a good faith belief rather than absolute certainty is sufficient to satisfy the section 2(b) defense); Indian Coffee Corp. v. Folger Coffee Co., 1982-83 Trade Cas. (CCH) ch. 65,186 (W.D. Pa. 1982), aff’d 817 F.2d 1081 (3d Cir. 1985) (courts focus is on good faith of the corporation).

99. Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381 (8th Cir. 1987). “The [meeting competition] defense is designed to enable sellers to make flexible responses to individual competitive situations; it is a rule of economic self-defense which allows a seller to cut his price to one of his customers who is being tempted by a competitor’s low bid, without exposing him to Robinson-Patman liability . . . .” Id. at 392.

“The defense expressly recognizes the need for a seller to adjust practices to
concept, a case-by-case approach is almost inevitable.100

B. The Cases

In the years following the enactment of the Robinson-Patman Act, the FTC was expressly against the meeting competition defense.101 The areawide/individual pricing dichotomy was first addressed by the Supreme Court in the 1945 landmark case of FTC v. A.E. Staley Manufacturing Co.102 Staley was engaged in the manufacture of corn syrup and in competition with Corn Products Refining Company.103 To increase its sales, Staley adopted Corn Product’s base point price system.104 Under this system, Staley sold its products at delivered price based on Chicago plus freight.105 All customers were charged freight from Chicago regardless of whether actual freight originated from shipping points much closer to the buyer. Staley conceded that its discriminatory freight charges were intended to meet the equally discriminatory price of its principal competitor, Corn Products.106

The Commission believed the meeting competition defense was not available to a seller who meets a competitor’s pricing system, without taking prior steps to verify competitors’ prices, or who failed to take precautions to prevent unwarranted discriminations in price.107 The Supreme Court sustained the Commission’s decision

particular competitive situations, and permits him flexibility to compete.” Kitner, Henneberger & Fleischaker, supra note 90, at 210.

100. See Continental Baking Co. v. FTC, 63 F.T.C. 2071, 2163 (1963) (the facts and circumstances of the given case should govern application of the good faith requirement of § 2 (b)).

101. Testimony of Assistant Attorney General Richard McLaren before the House Subcommittee of the Regulatory Agencies relating to Small Business (reprinted in BNA ANTITRUST AND TRADE REGULATION, REP. No. 453, Mar. 17, 1970, at X-4). “Regrettably the Commission in the past has attempted to impose limitations on the availability of the defense that are inconsistent with the broader antitrust goal of the promotion of competition.” Id.

102. 324 U.S. 746 (1945).

103. Id. at 747-48.

104. Id. Under a single basing point system, the seller selects one place other than its plant, usually the location of a large competitor’s plant as its basing point. The delivered price to any buyer is this base price, plus actual freight from the basing point. See FEDERAL ANTITRUST LAWS, supra note 42, at 169. “This system . . . has potential anti-competitive effects. The equalization by a number of sellers of the price facing any potential buyer has many of the characteristics of a price fixing cartel.” Id. at 170.

Section 1 of the Sherman Act makes price fixing agreements unlawful per se. Furthermore, “since such freight differentials bear no relation to the actual cost of delivery, they are systematic discriminations prohibited by section 2(a) of the Robinson-Patman Act.” Id. at 750-51; see also Corn Products v. FTC, 324 U.S. 726 (1945) (decided the same day as Staley).

105. Staley, 324 U.S. at 749.

106. Id. at 750.

107. Id. at 759.
and rejected Staley’s meeting competition defense on the ground that Staley established an artificially high price by adopting Corn Product’s prices.\textsuperscript{108} The Court stated: “We cannot say that a seller acts in good faith when it chooses to adopt such a clearly discriminatory pricing system, at least \textit{where it has never attempted to set up a non-discriminatory system . . . .}”\textsuperscript{109} The Court reasoned that in order to establish the good faith meeting competition defense, the seller must show the “existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.”\textsuperscript{110} The Court found that Staley adopted the pricing system without supporting evidence and had made no effort to investigate or verify the existence of the adopted price scheme.\textsuperscript{111}

The Court stated that the Act “places emphasis on individual competitive situations, rather than upon a general system of competition.”\textsuperscript{112} In the years following the \textit{Staley} decision, this statement was to become the source of much confusion, particularly in cases involving area-wide pricing practices. It was interpreted by some courts to imply that the meeting competition defense is available only for customer-by-customer pricing schemes.\textsuperscript{113} Other courts interpreted the Court’s language to allow area-wide pricing if good faith can be established by the seller.\textsuperscript{114} The latter courts present

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 756-57.
\item \textsuperscript{109} \textit{Id.} at 757 (emphasis added).
\item \textsuperscript{110} \textit{Id.} at 759-60. This standard was later adopted by the FTC in \textit{In re Continental Baking Co.}, 63 F.T.C. 2071 (1963) as “the standard of the prudent businessman responding fairly to what he reasonably believes is a situation of competitive necessity.”
\item \textsuperscript{111} \textit{Staley}, 324 U.S. at 758-59. While the Commission recognized that section 2(b) did not place an impossible burden upon the seller, it does require a seller to show the existence of good faith. \textit{Id.} at 759. The \textit{Staley} decision was based on a finding that Staley adopted the discriminatory prices without good faith since it made no attempt to verify the existence of any lower prices by its competitors. \textit{Id.}
\item \textsuperscript{112} \textit{Id.} at 753.
\item \textsuperscript{113} See, e.g., D.L. Ingram v. Phillips Petroleum Co., 259 F. Supp. 176, 184 (D.N.M. 1966) (refusing to grant the defense on the grounds that the defendant’s price reduction was more a part of a customary industry pricing system than an individual meeting of competition); see also \textit{Exquisite Form Brassiere, Inc. v. FTC}, 360 F.2d 492, 493 (D.C. Cir. 1965) (relying on \textit{Staley}, held that the meeting competition defense was applicable only in individual competitive situations rather than a general system), cert. denied, 384 U.S. 959 (1966), reh’g denied, 385 U.S. 890 (1966); \textit{Standard Motor Products, Inc. v. FTC}, 265 F.2d 674, 677 (2d Cir. 1959) (“It is well settled that a lowered price is within section 2 (b) only if it is made in response to an individual competitive demand, and not as part of the seller’s pricing system.”), cert. denied, 361 U.S. 826 (1959).
\item \textsuperscript{114} See, e.g., \textit{William Inglis & Sons Baking Co. v. ITT Continental Baking Co.}, 668 F.2d 1014, 1046 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982); \textit{Bargain Car Wash, Inc. v. Standard Oil Co.}, 465 F.2d 1163, 1176 (7th Cir. 1972); \textit{Callaway Mills v. FTC}, 362 F.2d 435, 442 (5th Cir. 1966); \textit{Balian Ice Cream Co. v. Arden Farms Co.},
\end{itemize}
the better reading of Staley.\footnote{115}{See generally Federal Antitrust Law, supra note 42, at 417-18 (courts must consider the rationale of the Staley rule and the practical alternatives available to seller before simply condemning out of hand the adoption of a competitor's pricing system).}

The Fifth Circuit discussed the issue of area-wide pricing in some detail in Callaway Mills Co. v. FTC.\footnote{116}{362 F.2d 435 (5th Cir. 1966) (defense allowed where defendant granted a volume discount, adopting a "formal pricing system" rather than meeting individual competition).} Callaway, a small textile manufacturing firm, had successfully adopted a method of carpet weaving which was less expensive than traditional weaving methods.\footnote{117}{See id. at 437.} The established selling mode in this industry was to offer volume discounts. This meant that larger retailers obtained lower prices than their smaller competitors.\footnote{118}{See id. at 437-38. There were other facts peculiar to the carpet industry which the Court considered relevant. For example, the carpet industry wished to discontinue the established practice of granting volume discounts. The industry, through its national association, had attempted to discontinue this pricing practice on an industry-wide basis. That attempt resulted in a suit by the Justice Department which sought to enjoin termination of the industry's discount system. The Justice Department alleged that termination of volume discounts on an industry-wide basis would constitute collusion, conspiracy and an attempt to monopolize. As a result of the suit, a consent decree was issued which prohibited the carpet industry from entering into any agreements or conspiring to terminate volume allowances or rebates to purchasers of rugs and carpet. \textit{Id.}} Originally, Callaway had refused volume discounts to its purchasers. Under pressure from its customers, Callaway adopted a volume discount pricing schedule similar to that offered by other manufacturers in the industry.\footnote{119}{See id. at 437-38. Until 1955, Callaway's policy was to grant no volume discounts. After the consent decree, the pressure from Callaway's customers increased and led to Callaway's decision to adopt the industry's volume discount pricing system. \textit{Id.}} Since Callaway sold in smaller volumes than its larger competitors, Callaway's discounts were offered at lower dollar volumes.\footnote{120}{See id. at 448.} In 1959, the Commission filed a complaint against Callaway alleging a violation of section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act.\footnote{121}{See id. at 439. The meeting competition defense is an absolute defense which...} The hearing examiner found that Callaway had successfully defended itself under section 2(b) of the Robinson-Patman Act and dismissed the complaint.\footnote{122}{See id. at 439. The meeting competition defense is an absolute defense which...}
grounds that Callaway had adopted a formal pricing system instead of meeting each individual competitive situation. Callaway appealed the decision of the Commission.

The Fifth Circuit Court of Appeals defined the issue on appeal as whether Callaway's pricing was genuinely responsive to a competitive price. The court concluded that in some circumstances, the requirement of customer-by-customer pricing "would be burdensome, unreasonable, and practically unfeasible." The court rejected the Commission's ruling that Callaway should have adopted a policy of lowering prices on a piecemeal fashion. In doing so, the court dismissed the Commissioner's conclusion that Callaway had failed to show good faith by adopting a formal pricing system rather than meeting each individual situation. The Court reasoned that since the meeting competition defense is a factual determination, it was error for the Commission to completely disregard the peculiarities of the industry and the particular circumstances of the case. The Callaway Court distinguished Staley on the grounds that Staley involved a "basing-point" system which had the effect of creating greater price discrimination than was necessary. In Callaway, the court found that "under the totality of the circumstances, the discount system, thoughtfully tailored... to meet... problems in the market,

exonorates the seller of discriminatory pricing violations, even though the plaintiff has shown competitive injury.

123. See Callaway, 362 F.2d at 429. The Commission also reversed the hearing examiner's opinion because Callaway (1) failed to show that its products were "like grade and quality" as those of the competition and (2) that Callaway had actually under cut the competition by granting discounts at lower volume levels. Id.

124. See id. at 442. The question is whether the volume discount pricing system is thoughtfully tailored to meet individual competitive problems in the market. Id. "It is only when no reasonable and prudent person would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned." Id. at 442.

125. Id. This is especially true in a highly competitive market with many product lines. The Court took the position that since Callaway was a very small firm and in competition with larger firms, it would be unreasonable to require Callaway to respond on a piecemeal basis as that would be too financially burdensome for Callaway. Id. This opinion seems to imply that the financial ability of the seller is a consideration in the determination of good faith. It can be further implied that a seller's good faith may depend on its financial capabilities and its other resources.

126. See id. "There is nothing wrong per se with adopting a pricing system." Id. at 441.

127. Id. at 441-42; see also FTC v. Sun Oil Co., 371 U.S. 505, 518 (1963) (court should consider individual circumstances of small gas stations who were hurt by gas distributor's price break to a competitor).

128. Callaway, 362 F.2d at 442 ("Clearly this is not a basing-point case."); see also Federal Antitrust Law, supra note 42, at 415-16 (because no basing-point was found, the Callaway court "upheld the adoption by one company of its competitor's entire pricing system.").

129. See Callaway, 362 F.2d at 442.
was a mature and reasonable approach to a very real and difficult competitive problem...."130

In 1981, the Ninth Circuit was presented with a similar problem in William Inglis & Sons Baking Co. v. ITT Continental Baking Co.,131 involving the scope of permissible area-wide pricing. William Inglis was a family owned wholesale bakery which manufactured and sold bread and rolls in northern California.132 Inglis was in competition with Continental, at the time one of the nation's largest wholesale bakeries.133 Both firms sold their bread under an "advertised" label and a "private" label.134

In its suit, Inglis alleged that Continental sought to eliminate competition in the northern California market by charging below cost prices for its "private" label.135 It further alleged that Continental's predatory pricing was in response to a declining "advertised" label market resulting from the growing "private" label market in the region.136 Inglis alleged that Continental embarked on this discriminatory pricing practice for the purpose of "eliminating independent wholesalers like Inglis who were financially less capable of withstanding a price war."137 William Inglis' final allegation was that Continental's ultimate goal was to use its enhanced market power to improve its market position by later raising its private label prices to ultimately improve the competitive position of its "advertised" label.138 Inglis attempted to show that its demise was not the result of honest competition but rather the result of "unfair predatory tactics

130. Id. (emphasis in original). The Court also introduced another element by holding that under the circumstances of the case, Callaway could in good faith attempt to meet competition by granting similar volume discounts especially since no workable alternative was evident. Id.

In subsequent years the Fifth Circuit reached two conflicting results in seemingly similar situations. Compare Surprise Brassiere Co., Inc. v. FTC, 406 F.2d 711 (5th Cir. 1969) (rejecting the defense) with Hanson v. Pittsburgh Plate Glass Industries, Inc., 482 F.2d 220 (5th Cir. 1973) (upholding the defense), cert. denied, 414 U.S. 1136 (1974). It has been suggested however, that these two decisions are in fact, consistent with Callaway if the true test of "whether a reasonable businessman would conclude that such a response was a reasonable method of meeting the competitive price," is applied. MONOGRAPH, supra note 6, at 127.

131. 668 F.2d 1014 (9th Cir. 1981), cert. denied, 459 U.S. 825 (1982).

132. See id. at 1024.

133. See id.

134. See id. "Private" label bread was manufactured on behalf of retailers and marketed under the retailer's label. The principal difference between "private" and "advertised" labels is that "private" labels are lower priced and thus have lower profit margins. Id.

135. See id.

136. See id.

137. See id.

138. See id. at 1024-25.
adopted by a [competitor's] intent to monopolize the market.”139

Similar to the Fifth Circuit in Callaway, the Ninth Circuit held that the meeting competition defense applies to territorial pricing in the same way that the defense applies to individual pricing, as long as the area-wide price is “coextensive with the price competition to be met.”140

The Inglis court adopted the view that area-wide pricing was permissible as long as it was not used to aggressively reduce prices to other customers in the area.141 Consequently, the Inglis court held that area-wide pricing must be narrowly tailored so that the reduced prices are available only in the area where the competitor’s prices are reasonably believed to exist.142

The permissible scope of the Callaway “reasonable and prudent” test, although narrowed by Inglis, was once again expanded by the Supreme Court in Falls City Industries, Inc. v. Vanco Beverage, Inc.143

The seller, Falls City Industries, operated a brewery in Louisville, Kentucky, from which it sold beer to wholesalers in Indiana, Kentucky, and eleven other states. Vanco Beverages, one of Falls City’s wholesalers, brought an action alleging that Falls City charged higher prices to its wholesalers in Indiana that it did to those in Kentucky. Falls City defended its higher Indiana prices by pointing out that its Indiana prices were offered in an attempt to meet its competitors’ lower prices in Indiana.144

The Supreme Court held that the meeting competition defense is

139. See id. at 1026.

140. Id. at 1045.

141. Id. “Market-wide price reductions are not necessarily fatal to the defense of meeting competition in price discrimination actions.” Id. Rather, the 2(b) defense (the meeting competition defense) “permits justification of seller’s lower prices which are granted not only to particular customers, . . . but which respond in a given area by blanket price reductions co-extensive with the price competition to be met.” Id. A seller may not, however, embark in area-wide pricing unless it has a reasonable basis to believe that the competitor is making the lower prices available throughout the entire market. Id. at 1046.

142. Id. (“the price competition zone cannot be perceived to be smaller than the zone of price reduction”). The permissible price competition zone is that defined by the competitor’s low prices. This standard on its face would seem to put a high burden of proof on the seller wishing to meet competition in an area-wide basis by requiring that it have actual knowledge of the number of customers being enticed with the lower prices. However, the court went on to state that absolute certainty is not required. Rather, the seller needs only a “reasonable basis to believe that equally low offers are available . . . throughout the market.” Id.; accord United States v. United States Gypsum Co., 438 U.S. 422, 453 (1978), appeal after remand 600 F.2d 414 (3d Cir. 1979), cert. denied, 444 U.S. 884 (1979) (seller must have a reasonable basis for its determination of both the existence of the lower price and the geographic size of the competitive zone).


144. See id. at 434.
not defeated merely because the seller responds with area-wide pricing rather than on a customer-by-customer basis.\(^{145}\) As a result, the Court rejected the Seventh Circuit’s conclusion that the defense of section 2(b) is available only in individual pricing situations. The Court refused to construe the 2(b) defense as narrowly as the Seventh Circuit, instead applying a “prudent businessman” standard.\(^{146}\) Furthermore, the Court reasoned that such a requirement would be too expensive for smaller firms such as Falls City.\(^{147}\) The Court distinguished *Staley* on the grounds that in *Staley*, the seller was involved in illegal, interseller conspiracy and collusion.\(^{148}\) Applying the good faith standard developed in *Staley*, the Court held that the facts and circumstances of this case were different from *Staley* because unlike *Staley*, Falls City did not adopt an illegal system of prices.\(^{149}\)

In the more recent decision of *Rose Confections, Inc. v. Ambrosia Chocolate Co.*,\(^{150}\) the Eighth Circuit Court of Appeals reiterated that the

\(^{145}\) *Id.* at 448. The Court stated “there is no evidence that Congress intended to limit the availability of Section 2(b) to customer-specific responses.” *Id.* Rather, Congress intended to allow reasonable pricing responses in area-specific cases where competitive circumstances warrant them. The Court went on to conclude that “Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.” *Id.*

\(^{146}\) *Falls City*, 654 F.2d 1224, 1230 (7th Cir. 1981), rev’d, 460 U.S. 428, 438 (1983). “This Court consistently has held that the meeting-competition defense ‘at least requires the seller who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.’” *Id.* (quoting FTC v. A. E. Staley Mfg. Co., 324 U.S. 746, 759-60 (1945)).

The Court rejected the rule requiring customer-specific responses which had been applied in *Exquisite Form Brassiere*, 360 F.2d at 493 and *Standard Motor Products*, 265 F.2d at 677, holding instead that the seller must be allowed to show that its territorial pricing system was a genuine, reasonable response to prevailing competitive circumstances. *Falls City*, 460 U.S. at 450 (“We choose not to read into Section 2(b) a restriction that would deny the meeting-competition defense to one whose area wide price is a well-tailored response to competitors’ low prices.”).

\(^{147}\) *Id.* at 449; accord *Callaway*, 362 F.2d at 442. *But see F.T.C. v. Sun Oil Co.*, 371 U.S. 505, 513 n.8 (1963) (holding size of buyer irrelevant).

\(^{148}\) *Falls City*, 460 U.S. at 441. First, at the time, Staley had been found to be a party to an interseller conspiracy aimed at maintaining “oppressive and uniform net delivered prices” throughout the country. Second, Staley could not claim that its low Chicago prices were set for the purpose of meeting competition there, thus “the Chicago prices could be seen only as a collusive pricing system designed to exact artificially high prices throughout the country.” *Id.* As a result, the Court, in *Staley*, sustained the FTC’s finding that respondent’s price discriminations were not made in good faith. Thus, *Staley* was based on a finding of lack of good faith. *Falls City*, 460 U.S. at 442 (the court distinguished Falls City’s pricing practices from the collusive pricing scheme found in *Staley*).

\(^{149}\) *Id.* The Court stated that “[i]f Falls City set its lower price in good faith to meet an equally low price of a competitor, it did not violate the Robinson-Patman Act.” *Id.*

\(^{150}\) 816 F.2d 381 (8th Cir. 1987).
meeting competition defense is a "fact-specific inquiry" which may be satisfied by "any proof demonstrating that a reasonable person would have believed that a low-price offer was available to the favored purchaser." 

Rose Confections (Rose) was a Minnesota-based firm engaged in the business of rebagging chocolate chips. Ambrosia, a Milwaukee-based firm and the nation's largest manufacturer of cocoa-based products, was Rose's principal supplier. Facing a difficult competitive situation on the West Coast, Ambrosia instituted its so-called "West Coast project." Under this plan, Ambrosia would sell chocolate chips to its West Coast customers at the same price it charged other buyers, but it would deliver the products free of charge to the customers' West Coast facilities. This offer of free delivery was only extended to its West Coast customers.

In 1981, Ambrosia made a proposal to Barge & Foster (Barge), a Milwaukee-based company, and Rose's primary competitor. Under the terms of the proposal, Barge would build a plant on the West Coast and Ambrosia would sell chips to Barge freight-free. Barge accepted the offer and pursuant to the "West Coast project" agreement, built a rebagging facility in Sparks, Nevada. Between 1981 and 1983, under this agreement Barge took delivery of more than five million pounds of freight-free chips for a total savings of almost $310,000. Ambrosia did not make a similar offer to Rose. Rose brought this action against Ambrosia under the Robinson-Patman Act on the grounds that the free-freight arrangement was an illegal price discrimination that injured Rose in the West Coast market. The jury returned a verdict in favor of Rose and Ambrosia appealed.

The Eighth Circuit agreed with the Callaway decision, stating that "[i]t is possible that a general pricing policy spanning several different markets in a certain region could be a good-faith response to

151. Id. at 390 (citing United States v. United States Gypsum Co., 438 U.S. 422, 455 (1978)).
152. Id.
153. Id. at 384.
154. Id.
155. Id.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id. at 384-85.
161. Id. at 385.
162. Id.
163. Id.
164. Id.

competition in each of the markets in that region." Defendants must still show, however, that such pricing, if found to be discriminatory, was made in good faith to meet an equally low price of a competitor.

In *Rose*, it was found that the pricing policy was not made in response to a good faith belief of lower prices from competition, but rather was an independent decision specifically to have such a pricing policy without regard to any particular competition. The facts showed that *Rose* was having difficulty competing on the West Coast. Its major competitors in the west had their manufacturing facilities on the West Coast and therefore could offer lower prices to rebaggers because of low freight charges. Thus, the "West Coast project" was not designed with any particular competitor in mind. Rather, it was a business plan designed to improve market standing on the West Coast in general. While such a plan is not *per se* illegal, *Ambrosia*'s failure to make the "West Coast project" available to other purchasers similarly situated and in competition with Barge placed this pricing decision beyond the reach of the meeting competition defense.

In another recent decision, *Boise Cascade Corp. v. FTC*, the Federal Trade Commission was faced with the issue of whether an area-wide pricing response in violation of the Robinson-Patman Act was a bar to the meeting competition defense. *Boise* was a firm engaged principally in the manufacture, distribution and sale of office products which consist mainly of paper, packaging, office supplies, wood products, and building materials. *Boise* entered the business of distributing office products through their acquisition of Associated Stationers Company in 1964. Subsequently, *Boise* operated as a dual distributor, selling both to office products dealers and end-

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165. *Id.* at 392.
166. *Id.*
167. The Eighth Circuit held that *Ambrosia*'s pricing strategy in the West Coast was not defensive but rather offensive. The court found that *Ambrosia* could not have had a good faith belief that it was meeting competitors' low prices. *Id.* It concluded that the "project was a strategy to increase sales . . . on the West Coast . . . . While this may be a laudable corporate policy, . . . it does not square with the defense of meeting competition as envisioned by Congress and interpreted by the Supreme Court." *Id.* at 391-92.
168. *Id.* at 389.
169. 107 F.T.C. 76 (1986) (because the required injury to competition was missing, the meeting competition defense was not addressed), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988).
170. *Boise*, 837 F.2d at 1130. The major issue presented in *Boise* involved the buyer's liability for inducing the seller to offer discriminatory prices in violation of section 13(f) of the Robinson-Patman Act.
171. *Id.* at 1137-38.
users. Because of this dual distributor status, Boise was able to receive lower prices than did other retailers with whom it competed. The Commission brought this action alleging that Boise illegally induced favorable prices from manufacturers in violation of the Robinson-Patman Act. The Court of Appeals for the District of Columbia reversed on the grounds that the Commission’s allegations of competitive injury was not supported by the evidence. The requisite element of competitive injury was found to be missing by the court, and thus it did not reach the issue of availability of the meeting-competition defense.

The Commission in Boise did not expressly rule area-wide pricing illegal per se. It found, however, that the facts taken together did not appear to support a good faith response to particular competitive circumstances. The Commission reasoned that even if the area-wide prices were offered in order to meet competition, proof was still needed that Boise had verified the existence of lower competitive offers. In Boise, the requisite good faith was found missing. The Boise decision reinforced the idea that the predominant consideration in determining the validity of a pricing response is the good faith standard. The test is the same regardless of the method of pricing employed.

In summary, these recent cases make it clear that area-wide pricing is now generally allowed under appropriate circumstances.

172. Id. at 1133-34.
173. Id. at 1134.
174. Id. at 1130.
175. Id. at 1148.
176. Id. at 1137.
177. Id.
178. The decisive facts in Boise were as follows:
1. Boise knew of the systematic nature of the discounts, id. at 1134.
2. Its employees knew it received the discounts because it had been classified as a wholesaler, id. at 1135-35;
3. Boise offered no evidence that its discounts were responsive to lower competitive offers, id.;
4. Boise knew that wholesaler discounts were not available to dealers with which it competed in the retail market, id. at 1135;
5. Boise was positioned to know if the price was to meet a competing seller’s price or not and, Boise, a sophisticated buyer might be presumed to be capable and held to know. Id. at 1135-36.

Given these facts, the Commission found that the inference of lack of good faith was not unreasonable, so that it was not necessary to obtain a direct confession from Boise. Id. at 1136.

179. Indian Coffee Corp. v. Folger Coffee Co., 1982-83 Trade Cas. (CCH) 65186 (W.D. Pa. 1982) (general pricing is not precluded by section 13(b)); William Inglis, 668 F.2d at 1014 (prevailing industry practice made area-wide response reasonable and prudent; area-wide pricing is permissible where there is reasonable basis for the belief); Callaway, 362 F.2d at 435 (there is nothing wrong per se with adopting a pricing system; court must look at the realities of the competitive conditions prevalent in the
area-wide pricing, as in every discriminatory pricing situation in which competitive injury is shown, there is a rebuttable presumption of lack of good faith. The burden of proof is on the challenging party to show competitive injury or facts from which such injury may be inferred. Once shown, the burden shifts to the challenged party to show absence of competitive injury.

If the plaintiff is able to establish competitive injury, the defendant must show justifications for its conduct. Thus, there is an additional burden of proof on the challenged party to show evidence of good faith. Once shown, it is a complete defense regardless of its effect on competition. The quantum of proof necessary to satisfy this burden depends on the particular circumstances of each case. Historically, area-wide pricing has required a higher level of proof than individual pricing responses. This bifurcation in standards was due in part to the various judicial interpretations of the Supreme Court's decision in Staley which appeared to limit the meeting competition defense to individual pricing responses.

The issue seems to have been settled. Now, the generally accepted particular industry or market.); accord Surprise Brassiere Co. v. FTC, 406 F.2d 711 (5th Cir. 1969).

180. 15 U.S.C. § 13(b) provides that once price discrimination is shown there is a prima facie case which places a rebuttable presumption on the defendant to demonstrate good faith. See SHNIDERMAN & LEVERICH, supra note 114, at 141; Accord Morton Salt, 334 U.S. at 50-51 (competitive injury is presumed whenever there is substantial price discrepancy over a sustained period of time).


182. Id.

183. The Robinson-Patman Act, 15 U.S.C. § 13(b) (1982), reads in part or as follows:

Upon proof being made . . . that there has been discrimination in price . . . the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section . . .

Id.


185. See Klein, Meeting Competition by Price Systems Under Section 2(b) of the Robinson-Patman Act: Problems and Prospects, 16 ANTITRUST BULL. 213 (1971).

Although the proviso makes no distinction, in practice the Courts and the Federal Trade Commission have treated sellers responding in ad hoc fashion differently from those who attempt to project a response to a comprehensive market situation in a pre-planned manner.

Id. at 213; see also McCareins, New Dimensions in the Robinson-Patman Act after Vanco Beverage, 1983 DUKE L. J. 1308.

Until the Supreme Court's decision in [Falls City], the section 2(b) defense and the [A.E. Staley] reasonable and prudent standard were applied more strictly when seller responded to a competitor's area-wide price reduction than when a seller met competition on a one-on-one basis.

Id. at 1320-21; see also SHNIDERMAN & LEVERICH, supra note 114, at 147.

186. See supra notes 109-12 and accompanying text.
reading of *Staley* is that its holding must be limited to situations where the seller adopts its competitor's illegal pricing system without first attempting to establish a non-discriminatory system. The current view is that area-wide pricing is a viable method of meeting competition under appropriate circumstances, as long as the decision is reasonable and prudent.

C. The Future of Area-Wide Pricing

The Supreme Court has noted on several occasions that the Section 2(b) defense was not intended as an obstacle to competition. Where area-wide pricing is truly made in response to the competitive prices of rivals, the Court has generally allowed the defense.\(^{187}\) The seller must, however, limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors.\(^{188}\) This interpretation merely imposes the burden of proof on the seller asserting the defense in an area-wide pricing situation to show that the chosen method was "a genuine, reasonable response to prevailing competitive circumstances."\(^{189}\)

Historically, application of the meeting competition defense was presumed limited to individual competition.\(^{190}\) As a result, area-wide pricing has been viewed as presumptively suspect.\(^{191}\) Even in recent decisions which have tended to apply more flexible standards

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187. *Falls City*, 460 U.S. at 450.
Territorial pricing, however, can be a perfectly reasonable method — sometimes the most reasonable method of responding to a rival's low prices. We choose not to read into section 2(b) a restriction that would deny the meeting competition defense to one whose area-wide price is a well-tailored response to competitor's low prices.

188. *William Inglis*, 668 F.2d 1014, 1045 (1981). Otherwise, the seller would not meet the required standard of good faith. *Cf. Falls City*, 460 U.S. at 448-49 (seller does not have to match the group of customers exactly as long as it acts under a reasonable belief that the lower price was available to the entire group of customers).

189. *Id.* at 450-51 (citing *International Air*), 517 F.2d at 725-26; accord *Callaway*, 362 F.2d at 441-42.

[T]his burden will be discharged by showing that a reasonable and prudent businessman would believe that the price charged was generally available from his competitors throughout the territory and throughout the period in which [it] made the lower price available.

190. *Staley*, 324 U.S. at 753.

[Section] 2(b) does not concern itself with pricing systems or even with all the seller's discriminatory prices to buyers. It speaks only of the seller's "lower" price and of that only to the extent that it is made "in good faith to meet an equally low price of a competitor." *The Act thus places emphasis on individual competitive situations rather than upon a general system of competition.*

191. See *Shniderman & Leverich*, *supra* note 114, at 147 (pricing systems viewed as violative of good faith).
to the meeting competition defense, such pricing practices are still generally subjected to a higher level of scrutiny than is applied to individual pricing situations.\textsuperscript{192}

In more recent decisions, federal courts have relaxed the standards. It is now generally accepted that to meet the requirements of the meeting competition defense, the seller need only show that the decision to choose territorial pricing rather than customer-specific pricing was a genuine and reasonable response to prevailing competitive circumstances.\textsuperscript{193} The defense merely requires the seller to show that the lower price would meet the equally low price of a competitor.\textsuperscript{194} The standard governing good faith remains the standard of a prudent businessperson responding fairly to what is reasonably believed to be a situation of competitive necessity.\textsuperscript{195}

These recent interpretations of the meeting competition defense indicate a recognition by both the Commission and the courts that flexibility will temper the anti-competitive stigma that has surrounded the Robinson-Patman Act. Flexible application of the meeting competition defense further reflects the recognition that the Robinson-Patman Act was not designed to discourage market intelligence,\textsuperscript{196} but rather to protect competition. Valid area-wide pricing

\textsuperscript{192} In \textit{Falls City}, Justice Blackmun asserted that industry-wide price discrimination within a geographic market should signal to a court that a substantial possibility of collusion exists. \textit{Falls City}, 460 U.S. at 443; see generally Note, \textit{Antitrust Laws — Robinson-Patman Act — Harm to Competition — Meeting Competition Defense}, 22 Duq. L. Rev. 207 (1983).

\textsuperscript{193} “Although pricing systems have been viewed as collusive in nature and thus violative of the good faith requirement, a buyer [sic] can demonstrate a valid meeting competition defense when prices are not customer-specific if he proves that the system was actually responsive to a competitive situation.” \textit{Shniderman \& Leverich}, supra note 114, at 147.

\textsuperscript{194} \textit{Falls City}, 460 U.S. at 439-41.

\textsuperscript{195} This was the standard established in FTC v. A.E. Staley Mfg. Co., 324 U.S. 746 (1945).

\textsuperscript{196} That this was not the intent is best shown by the language of the Supreme Court in \textit{Standard Oil Co. v. FTC}, 340 U.S. 231 (1950):

Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor. For example, if a large customer requests his seller to meet a temptingly lower price offered to him by one of his seller’s competitors, the seller may well find it essential, as a matter of business survival, to meet that price rather than to lose the customer . . . . There is nothing to show a congressional purpose, in such a
is a self-defense mechanism used to keep competitors away from a seller's customer base. For a small firm, time and financial constraints may make the piecemeal approach impractical, such that any legal constraints under such circumstances could force the seller out of the given market. On the other hand, the Act was not intended to strip large sellers of their right to defend their markets. Absent the flexibility to respond to changing market conditions, competition will be hampered to the detriment of the consumer. It is precisely this environment of healthy competition that the Sherman Act was designed to enforce, and the Robinson-Patman Act, to control. Therefore, flexible application of the meeting competition defense is essential to minimize any anti-competitive effects, and will lead to greater acceptance of the Robinson-Patman Act.

III. AREA-WIDE PRICING: EVIDENTIARY REQUIREMENTS

The nature of the congressional draftsmanship, coupled with the myriad of situations to which the language of the Robinson-Patman Act must be applied, make unrealistic any expectations of a mechanistic formula to resolve issues of meeting competition through area-wide pricing. This difficulty, however, does not pretermit an attempt at setting forth guidelines for the analysis and interpretation of section 2 cases.

From the decided cases, it is clear that the seller who seeks to invoke the meeting competition defense for a violation of Section 2(a) has the burden of establishing that the price discrimination was a good faith response to competition. An examination of Staley and its progeny reveals several elements necessary for an area-wide pricing scheme to be deemed valid.

The quantum of proof required to meet this burden may vary, depending on several factors. This section examines the various evidentiary concerns raised in any given Robinson-Patman price discrimination action. These requirements occur at two levels. At

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situation, to compel the seller to choose only between ruinously cutting its prices to all its customers to match the price offered to one, or refusing to meet the competition and then ruinously raising its prices to its remaining customers to cover increased unit costs.

Id. at 249-50.
197. Id.
198. See Sawyer, supra note 1, at 319.
199. Section 2(b) provides in part:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination.

the first level are those elements which are required at the initial stage to either establish competitive injury or the lack thereof. At the second level are those factors which address the existence or lack of justifications for the defendant’s conduct once competitive injury is established. Where the defendant has engaged in area-wide pricing which is later shown to have injured competition, the defendant has the burden of producing evidence of factors relevant in the determination of whether or not the meeting competition defense is available. Thus, any acceptable area-wide pricing system must be designed with these considerations in mind. Taken individually, none is dispositive. The weight of the various factors is determined by the special circumstances of each case.200

The impact of any alleged conduct on competition is determined by comparing the competitive stance of the market subsequent to the alleged conduct with the market condition in the period prior to the defendant’s conduct. As a result, the plaintiff’s preliminary hurdle in any Robinson-Patman price discrimination action must begin with the definition of the relevant market. Only after the market is defined may the plaintiff proceed to establish the extent to which competition has been injured.201 Generally, the market is defined by such factors as the product characteristics,202 customer characteristics,203 the number of competitors,204 and the competitive structure.205 Other factors relevant to market definition include the degree of customer loyalty and the level of customer reliance on the expertise of the sales force.206 Another factor relevant to the question of comparative injury is the level of entry barriers,207 which in turn are defined by the market characteristics.

200. The good faith requirement of section 2(b) cannot be determined by application of rigid and inflexible rules, but rather, “the facts and circumstances of the particular case, not abstract theories or remote conjectures, should govern its interpretation and application. Thus, the same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.” Continental Baking Co. v. FTC, 63 F.T.C. 2071, 2163 (1963). Cf. Bargain Car Wash, Inc. v. Standard Oil Co., 466 F.2d 1163 (7th Cir. 1972) (a non-collusive system may qualify as a defense upon full examination of all relevant background factors).

201. Henry, 809 F.2d at 1341-42.

202. Id. at 1342 (product characteristics include interchangeability and cross-elasticity of demand).

203. Id.

204. Lomar Wholesale Grocery v. Dieter’s Gourmet Foods, Inc., 824 F.2d 587, 596-97 (8th Cir. 1987); William Inglis, 668 F.2d at 1046-47.

205. Lomar, 824 F.2d at 599; Richard Short Oil Co., Inc. v. Texaco, Inc., 799 F.2d 415, 420 (8th Cir. 1986).

206. Lomar, 824 F.2d at 597.

207. Entry barriers are those factors which protect the given market from outside competition. They include such factors as capital requirements, customer loyalty, cross-elasticity of demand and customer reliance on salespersons. Id.
A. Level I

Once the relevant market is defined, the burden of proof is on the plaintiff to present evidence of injury to competition of the type prohibited by the Robinson-Patman Act.208 To do this, the plaintiff must "either show substantial possibility of injury to competition by market analysis, or show injury to a competitor, accompanied by predatory intent."209

I. Market Analysis

The structure of the market becomes relevant in the determination of whether the defendant's conduct has caused competitive injury. In a market characterized by intense competition, for example, the plaintiff's burden of proof in showing market injury is quite weighty.210 On the other hand, where there are few competitors, injury to one may be sufficient to establish the requisite competitive injury.211 In a highly competitive market characterized by many competitors, the plaintiff may be required to show injury to a substantial number of the competitors in order to successfully carry its burden. This is particularly the case where there are few or no significant barriers to entry.212 Generally, the fewer the number of players affected, the higher the requirement of predatory intent.213 Other factors that may indicate competitive injury include evidence of a drastically declining price structure,214 and increasing market concentration.215 In Lomar, the circuit court held that evidence of an

208. Note, however, that competitive injury under Robinson-Patman embraces a broader concept. Boise, 837 F.2d at 1139 n.12. It "does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they 'may' have such an effect." Id. (citing Corn Products Refining Co. v. FTC, 324 U.S. 726, 742 (1945)); see also Falls City, 460 U.S. at 434-35 (to establish competitive injury under the Robinson-Patman Act, a plaintiff need only show a reasonable possibility of harm to competition).

209. Henry, 809 F.2d at 1341 (emphasis added); accord Lomar, 824 F.2d at 596.

210. Thus, in Boise, where the office products industry was found to be highly competitive, plaintiff had the burden of showing a general market failure affecting a large number of competitors. Boise, 837 F.2d at 1155.

211. However, many courts place an additional burden on the plaintiff, even under such circumstances, to show evidence of predatory intent. Henry, 809 F.2d at 1341.

212. "If entry barriers to new firms are not significant, the elimination of the competitor may not significantly affect competition as a whole, because a new firm or firms easily can enter the market to take the place of the old one." Lomar, 824 F.2d at 597.


215. Utah Pie, 386 U.S. at 703.
increase in the plaintiff’s sales volume over the same period was not consistent with the lower court’s finding of competitive injury.²¹⁶

Generally, evidence of the existence of factors other than the alleged price discrimination, which may reasonably be expected to cause similar injury, will rebut the plaintiff’s attempt to show injury. Similarly, evidence that the plaintiff was losing sales in markets other than the present market may be sufficient to rebut an inference of competitive injury. Thus, in Boise, the defendant presented evidence showing that the plaintiff’s loss of accounts was the result of a shift of sales representatives and not the result of price discrimination.²¹⁷ The defendant may also rebut an inference of competitive injury by presenting evidence of competitive health in the market during the period of discriminatory pricing. In Boise, evidence of a flourishing industry and a steady rise in the number of dealers indicated an absence of anti-competitive forces.²¹⁸

Thus, a defendant engaged in area-wide price discrimination may quell an action under Section 2(a) by convincing the court there has been no injury to competition of the type prohibited by the Act. It may do this by having adequate knowledge of its industry from which it may present rebuttal evidence of the kind discussed above. Since prudent business decisions are normally supported by such market information, this requirement places no additional burden on the diligent seller. Knowledge of the importance of such information in the event of a Section 2(b) defense may increase the diligence with which such records are collected and maintained. Comprehensive market research and analysis is not only good business practice, it is legally necessary in the event of a Robinson-Patman price discrimination action. As stated above, this necessity is heightened where the defendant engages in area-wide pricing practices.

2. Injury to Competitors Plus Predatory Intent

The threshold question in any Robinson-Patman price discrimination action is whether the plaintiff is “a casualty of vigorous, but honest, competition, or the victim of unfair and predatory tactics adopted by a company intent on monopolizing the market.”²¹⁹ The courts have consistently stated that absent a clear showing of com-

²¹⁶. This is particularly so where plaintiff claimed to be defendant’s only competitor. Lomar, 824 F.2d at 598 (citing Borden Co. v. FTC, 381 F.2d 175, 179 and n.12 (5th Cir. 1967)). However, evidence of increased sales volume will not always preclude a finding of injury. Lomar, 824 F.2d at 597; accord Rose Confections, Inc. v. Ambrosia Chocolate Co., 816 F.2d 381, 387 (8th Cir. 1987) (citing Utah Pie, 386 U.S. at 702).

²¹⁷. Boise Cascade Corp., 837 F.2d at 1136.

²¹⁸. Id. at 1135 (testimony of Boise’s expert witness, Dr. Kenneth Elzinga, Professor of Economics at the University of Virginia).

²¹⁹. William Inglis, 668 F.2d at 1026.
petitive injury by market analysis, the plaintiff, in addition to showing individual injury, must show causation.220 Causation may be inferred from the fact that one competitor is paying more for the product than another.221 This inference may be rebutted, however, by evidence of other factors which could reasonably have caused the alleged injury. To accomplish this, the defendant must show that its conduct was merely coincidental and did not contribute to the plaintiff's demise.222 For example, in Short, the defendant presented evidence of other factors such as "mismanagement" and various "questionable business practices" which it alleged led to the injury.223

The Supreme Court, in Falls City, held that evidence of competitive injury may be either direct or by inference and circumstantial evidence.224 Under Morton Salt, a presumption of competitive injury exists whenever there is a substantial price discrepancy between the favored purchaser and the other purchasers existing over a sustained period of time.225 While the Morton Salt inference is still the law, recent court decisions seem to have reduced the weight of this inference. For example, United States Court of Appeals for the District of Columbia in Boise held that while the presence of such discriminations is indicative of competitive injury, it is rebuttable by evidence that no detrimental impact resulted from the alleged price discrimination.226

Assuming the plaintiff is able to show individual competitive injury either by direct evidence or by inference, it must, in addition, show that the defendant acted with the actual intent to lessen competition. Again, to show intent the plaintiff may present either direct evidence

220. See, e.g., Short, 799 F.2d at 421.
221. FTC v. Morton Salt Co., 334 U.S. 37, 46-47 (1948); accord Boise, 837 F.2d at 1139 (weight of inference downplayed, however, since it was not a typical Robinson-Patman Act case and court was reluctant to invoke the full strength of Morton Salt inference).
222. Specifically, such inferences "may be overcome by evidence breaking the causal connection between a price differential and lost sales of profits." Falls City, 460 U.S. at 435; accord Short, 799 F.2d at 421.
223. Short, 799 F.2d at 421. Cf. American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951). "We think there were too many factors bearing upon the decline in the plaintiff's earning power to justify blaming it upon the trade practices of defendant." Id. at 60. But see Rose, 816 F.2d at 387 (once competitive injury is shown where the effect may be to substantially lessen competition, the mere fact that other factors exist which may have had the same effect on competition is irrelevant).
224. Falls City, 460 U.S. at 435, citing Morton Salt, 334 U.S. at 46, 50-51. Competitive injury may be inferred from evidence of substantial price discrimination existing over time.
226. Boise, 837 F.2d at 1137. The Commission recognized the rebuttable nature of the Morton Salt inference, but nonetheless failed to give much weight to Boise's evidence of a healthy industry and absence of lost sales.
or circumstantial evidence or inferences drawn from the defendant’s conduct.227

Determining what motivates the parties to any transaction is a difficult undertaking. Rules making motive relevant tend to encourage deceit and are frequently misleading.228 A better alternative would be an inquiry into the rationality of the transaction.229 The question would then become whether or not a rational businessperson under similar circumstances would have entered into the given transaction.230 Applying this rule, one could safely conclude that a rational businessperson is unlikely to price goods below the average variable cost over a long period of time when there are more profitable pricing schemes available. Discriminatory intent could then be inferred from such conduct.231

The Federal Trade Commission and several courts have accepted this "rational-economic-conduct rule," and have adopted the average variable cost as one basis for evaluating a defendant's pricing

227. Henry, 809 F.2d at 1344.
228. See R. Posner, Antitrust Law - An Economic Perspective 190 (1976). "Any doctrine that relies upon proof of intent is going to be applied erratically at best." William Inglis, 668 F.2d at 1028. The Eighth Circuit "is among those [courts] that have recognized the hazards of using evidence of desire to prevail competitively to forecast economic harm." Id. Similarly, the Ninth Circuit has recognized that the reliance on intent as a forecast of economic harm in the law of monopolization "must tread a narrow pathway between rules that would inhibit honest competition and those that would allow pernicious but subtle conduct to escape antitrust scrutiny." Id.

To prevent unnecessary judicial interference with healthy competition, the Eighth Circuit has in some cases required a separate showing of "predatory or anticompetitive conduct" even where direct evidence of intent has been established. See Conoco, Inc. v. Inman Oil Co., 774 F.2d 895, 904 n.6 (8th Cir. 1985); Trace X Chem., Inc. v. Canadian Indus., Ltd., 738 F.2d 261, 268 (8th Cir. 1984), cert. denied, 469 U.S. 1160 (1985); accord William Inglis, 668 F.2d at 1028 n.6 ("direct evidence of intent alone, without corroborating evidence of conduct, cannot sustain a claim of attempted monopolization"). One commentator has noted:

[T]he availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality. A firm of executives sensitized to antitrust problems will not leave any documentary trail of improper intent; [on the other hand], one whose executives lack this sensitivity will often create rich evidence of such intent simply by clumsy choice of words to describe innocent behavior . . . [Thus], any doctrine that relies upon proof of intent is going to be applied erratically at best.

R. Posner, supra, at 189-90 (cited in William Inglis, 668 F.2d at 1028 n.6).

229. Lomar, 824 F.2d at 599-600 (conduct must be shown to be "rational economic behavior").

230. If not, the conduct is said to be one "without legitimate business purpose." Such conduct is not competitive but rather a means of eliminating competition. Cf. William Inglis, 668 F.2d at 1030-31 n.16, (citing Janich Bros. Inc. v. American Distilling Co., 570 F.2d 848, 853 (9th Cir. 1977), cert. denied, 439 U.S. 829 (1978)).

231. Henry, 809 F.2d at 1344.
practices. These courts would hold pricing at below average variable cost presumptively predatory and prices above average variable cost presumptively valid. While some courts have found prices above the average total cost to be predatory, the Eighth Circuit has adopted the view that pricing above the average total cost is presumptively valid. Thus, evidence that the price is above the average variable cost of the product will rebut the presumption of predatory intent.

In addition to price/cost comparisons, direct evidence of predatory intent may also be shown by documents or the seller’s conduct. Thus, in William Inglis, there was documentary evidence that an independent consultant retained by Continental had recommended “price maintenance” as a means of “hasten[ing] wholesaler exit.” In addition, there was direct evidence of predatory conduct by the seller. Continental’s salesforce particularly focused on Inglis’ accounts and actively made competitive offers for those accounts. Inglis alleged that evidence of various conduct by Continental’s management indicated an intent to injure Inglis. Where such direct evidence is available, the plaintiff’s burden of proof is considerably lighter than when the plaintiff relies on circumstantial evidence. When the plaintiff relies on circumstantial inferences, the plaintiff must prove not only predatory intent, but also actual conduct corroborating such intent.

In the absence of direct evidence, the plaintiff may rely on inferences drawn from circumstantial evidence to show predatory intent. For example, defendant’s pricing at unprofitable levels even though more profitable means are available may signal predatory intent. The weight given to circumstantial evidence will depend upon the nature of the market. For example, where there are significant entry practices.

232. See id.
233. Id. at 1345-46; accord Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233-36 (1st Cir. 1983).
234. William Inglis, 668 F.2d at 1034-36.
235. Henry, 809 F.2d at 1346 (“at some point, competitors should know for certain they are pricing legally, and . . . this point should be average total cost.”) (citing Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 229, 233-36 (1st Cir. 1980)).
236. Lomar, 824 F.2d at 598.
237. William Inglis, 668 F.2d at 1055. “Predation exists when the justification of these prices is based, not on their effectiveness in minimizing losses but on their tendency to eliminate rivals . . . .” Id. at 1035. The existence of other loss minimizing alternatives may also lead to the same conclusion. Id. at 1037.
238. See id. at 1025.
239. Id. at 1039.
240. Id. at 1030.
241. In Callaway, the court found that no other workable alternatives were available to the defendant in that case. Callaway, 362 F.2d at 442.
barriers, greater weight will be placed on evidence of predatory intent, even if it is circumstantial.

To further ensure that competitiveness is not unduly restricted, the Eighth Circuit, in addition to requiring evidence of both discriminatory conduct and intent, requires that the defendant have the ability to dominate the market. The theory being that absent such capacity to dominate, there exists no possibility of lessening competition in the market.242 In *Falls City*, however, the Supreme Court rejected the large versus small competitor distinction made by the lower court, and found no economically justified reason why evidence of discriminatory pricing should not be used to infer competitive injury in cases where the favored competitor is not necessarily large.243

Whether or not the elimination of specific competitors will be significant in determining injury depends on the proportion of the market that is injured.244 Thus, even though evidence of sales lost by the plaintiff is relevant, it is not dispositive.245 Again, the inferences are rebuttable with evidence of factors other than the proferred evidence which may be reasonably expected to cause the injury.246 The Court in *Falls City* sought a compromise by establishing that where there are other factors contributing to the plaintiff’s demise, in addition to a Robinson-Patman violation, it is proper to apportion the harm.247

B. Level II: Justification for Price Discrimination

If the plaintiff succeeds in showing prohibited competitive injury, either through market analysis or by evidence of individual injury plus predatory intent, the burden of proof shifts to the defendant to advance evidence justifying its conduct. This section addresses the

242. *Henry*, 809 F.2d at 1345 ("if the price-cutter cannot dominate . . . competition is not seriously or permanently damaged"); accord *William Inglis*, 668 F.2d at 1027-28 (the weight of the evidence will depend on the market structure and the characteristics of the defendant such as its market power).


244. *Lomar*, 824 F.2d at 597.

245. *Short*, 799 F.2d at 421; *William Inglis*, 668 F.2d at 1025.

246. In *Falls City*, the defendant attempted to show that the plaintiff’s sales loss was not unique to the given market since plaintiff was also losing sales in other markets where the defendant was not using discriminatory pricing practices. *Falls City*, 460 U.S. at 437.

247. *Id.*
evidentiary requirements when the defendant seeks to justify its area-wide pricing practices under the meeting competition defense.

Once the plaintiff has established competitive injury, there is a prima facie violation of Section 2 and to be exonerated the defendant must show justification.\textsuperscript{248} The evidentiary requirements at this level go mainly toward establishing good faith. Whether the defendant’s conduct shows good faith depends on such factors as the size of the competitors,\textsuperscript{249} the level of price competition,\textsuperscript{250} the geographic area covered,\textsuperscript{251} the industry or market characteristics,\textsuperscript{252} the history and trend of pricing in the specific geographic region,\textsuperscript{253} and the duration of the competitive price offer.\textsuperscript{254}

What is required in order to satisfy the standard of good faith in each case depends on the specific industry and general practices of the trade.\textsuperscript{255} In addition, some courts have taken the relative sizes of

\textsuperscript{248} \textit{Id.}

\textsuperscript{249} \textit{Id.} at 449; accord \textit{Callaway}, 362 F.2d at 442 (requirement of customer-by-customer pricing would be “burdensome, unreasonable, and practically unfeasible”). The \textit{Callaway} court believed that one reason for allowing territorial pricing is to free smaller sellers from expending financial and administrative resources to confirm the availability of competitor’s prices in the region with individual buyers. \textit{Id.}

\textsuperscript{250} \textit{Surprise Brassiere Co.}, 71 F.T.C. at 963 (\textit{Surprise} failed to show the competitive necessity for its discrimination). But see \textit{Balian Ice Cream Co. v. Arden Farms Co.}, 231 F.2d 356 (9th Cir. 1955), \textit{cert. denied}, 350 U.S. 991 (1956), in which the court held that area-wide pricing was permissible given that the competition in the market was “so intense that the price structure for the said product was very badly broken down.” \textit{Id.} at 358 n.1.

\textsuperscript{251} \textit{See} \textit{McCareins}, supra note 185, at 1321. Area-wide pricing is permissible provided that the lower price is made available only in a restricted geographic area. “The courts that have allowed a seller to institute area-wide price reductions to meet competition have done so after extensive analysis of the areas in which the territorial price reductions were offered.” \textit{Id.} at 1328. Perfect overlap is not required.

\textsuperscript{252} \textit{See} \textit{Federal Antitrust Law}, supra note 42, at 415-16. “[T]he Fifth Circuit has upheld the adoption by one company of its competitor’s entire pricing system in light of particular industry characteristics.” \textit{Id.} (emphasis added); \textit{see also} \textit{Callaway}, 362 F.2d at 441-42 (the Commission completely disregarded the realities of the competitive conditions prevalent in the carpeting industry).

\textsuperscript{253} \textit{Callaway}, 362 F.2d at 442.

\textsuperscript{254} A seller may continue to offer the lower price only as long as the competitive offer remains. \textit{Accord v. Falls City}, 460 U.S. at 451 (area-wide pricing “may continue only as long as the competitive circumstances justifying it . . . persist.”); \textit{see also} \textit{Federal Antitrust Law}, supra note 42, at 435 (“If a seller continues its discrimination beyond the period reasonably necessary to meet the competition, it will lose its Section 2(b) defense.”); \textit{see, e.g.}, \textit{Viviano Macaroni Co. v. FTC}, 411 F.2d 255 (3d Cir. 1969). \textit{Cf. National Dairy Prods. Corp. v. FTC.}, 395 F.2d 517 (7th Cir. 1968) (good faith not established because seller continued to offer lower price, even though competitor withdrew from the market about six months after the initial offer), \textit{cert. denied}, 393 U.S. 977 (1968).

\textsuperscript{255} \textit{Continental Baking}, 63 F.T.C. at 2163. “[T]he same method of meeting competition may be consistent with an inference of good faith in some circumstances, inconsistent with such an inference in others.” \textit{Id.}
the competitors, and duration of competitive offer and pricing trends in the region into account. In earlier decisions, area-wide pricing was allowed only if the market was intensely competitive and seller had no other practical non-discriminatory alternatives to meeting competition. In Callaway, the Fifth Circuit sanctioned the adoption of competitor's pricing system in light of the particular industry characteristics. Furthermore, the volume discount system in Callaway was found to be a thoughtfully tailored response to competitive conditions prevalent in the carpeting industry. Thus, the verification requirements of Inglis were established with respect to the specifics of the market.

In area-wide pricing situations, good faith may be inferred from proof that the lower price was limited only to the group of customers reasonably believed to have been tempted by the low prices. Every area-wide pricing analysis must begin with a definition of the relevant market. Until Falls City, a seller was required to ensure that price reductions were only offered in the area where the competitor's prices were equally low. The standard was deliberately strict because of the perceived "evil" consequence of area-wide pricing.

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256. See Klein, supra note 185, at 238. "Results of the cases would indicate that the larger concern . . . cannot adopt as aggressive a posture . . . as a smaller enterprise." Id.; see also Note, Effective Competition and The Antitrust Laws, 61 Harv. L. Rev. 1289, 1336 (1948) (one must look at the number of competitors, the size of the market and the relative size of the players). Contra FTC v. Sun Oil Co., 371 U.S. 505, 513 n.8 (1963) (size of competitor is irrelevant).

257. See Klein, supra note 185, at 233-34.

258. See McCareins, supra note 185, at 1320; See also Callaway, 362 F.2d at 442 (seller may grant competitive volume discount, especially where "no workable alternative is evident").

259. Callaway, 362 F.2d at 442. For further discussion on the subject see Federal Antitrust Law, supra note 42, at 415-16. See also Note, The "Meeting Competition" Defense of the Robinson-Patman Act and Quantity Discount Systems, 52 Cornell L. Rev. 802 (1967); Recent Decisions, 35 Geo. Wash. L. Rev. 618 (1966); Recent Cases, 20 Vand. L. Rev. 635 (1966).

260. Callaway, 362 F.2d at 442; see generally Note, supra note 256. The effect of any pricing decision is best seen by evaluating the particular industry or market structure. "It is interesting to see how industry absorbs the impact of public laws in ways not quite foreseen." Note, supra note 256, at 1336.

261. See McCareins, supra note 185, at 1320. If the market is one where competitor's price can easily be verified, then seller must show such facts. Id.

262. Falls City, 460 U.S. at 450.

263. William Inglis, 668 F.2d at 1046. "[T]he price competition zone cannot be perceived to be smaller than the zone of [seller's] price reduction." Id.

264. Other courts similarly have found an inherent "evil" in the practice of area-wide pricing. See General Gas Corp. v. National Util. of Gainsville, Inc., 271 F.2d 820 (5th Cir. 1959).

It appears from the evidence here that competitors of the defendant corporation were cutting their prices from time to time on a customer basis and, while defendant contends that its broad price cuts in the . . . area were good faith reductions to meet the equally low price of a competitor, it seems clear
The courts that have allowed sellers to institute area-wide price reductions to meet competition have done so only after extensive analysis of the area in which the territorial price reductions were offered. This has led to recommendations that the seller perform extensive evaluation of the competitor’s pricing zone, and then offer its price only within the region in which the competitor’s new prices have been offered.265 In *Falls City*, however, the Court did not require this extensive analysis of the zone of competitor’s price offers. Thus, *Falls City* seems to have broadened the area of application beyond the restricted geographic zone.266

Prior to *Falls City*, sellers had to approach area-wide pricing cautiously. They were required to limit area-wide pricing to the specific region in which their competitor’s lower prices were generally available, and the particular market had to be intensely price competitive. In addition, the *Staley* standard was applied more strictly when the seller had not verified the competitive price in the region.267 *Falls City* only requires that the seller choosing territorial pricing, rather than individual pricing show, that the decision is a genuine, reasonable response to prevailing competitive circumstances.268 *Falls City* notwithstanding, sellers must approach any area-wide pricing defense with caution since area-wide pricing is still strictly scrutinized.269 A seller who cannot meet these requirements is best

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265. Accord *William Inglis*, 668 F.2d at 1046 (well-defined geographic region); Foster Mfg. Co. v. FTC, 335 F.2d 47 (1st Cir. 1964) (price extended to all customers within the restricted geographic area brought it within *Staley*’s “reasonable, prudent and good faith” standard), *cert. denied*, 380 U.S. 906 (1965); Balian Ice Cream v. Arden Farms Co., 231 F.2d 356 (9th Cir. 1956) (first Court of Appeals to sanction area-wide “blanket price cut”); *see also* *McCareins*, supra note 185, at 1331 (area-wide pricing permissible only within restricted geographic area).

266. *See* *McCareins*, supra note 185, at 1330 n.118. (“*Falls City* area definition . . . may have created the opportunity for sellers, under the guises of area-wide pricing, to negotiate individualized, selective price cuts with preferred buyers to the detriment of other buyers in the same region.”).

267. When the seller actually knew or verified the prices, however, the defense was allowed. *See* *International Air Indus.* v. *American Excelsior Co.*, 517 F.2d 714, 725-26 (seller need only demonstrate that its pricing systems were a reasonable method of meeting competitor’s lower price), *cert. denied*, 424 U.S. 943 (1976).


269. *See* *McCareins*, supra note 185, at 1331.
advised to limit its pricing response to individual customers.\textsuperscript{270}

Reasonable belief cannot be based upon assumptions. When a belief is based on "assumptions or speculations," the defendant is required to undertake some investigation in order to verify the belief.\textsuperscript{271} Furthermore, the belief cannot be based on defendant's experiences in other markets, or even in the same market with different competitors. Because the meeting-competition defense invokes a fact-specific inquiry, when investigation is undertaken, the good faith requirement demands specificity. Such investigation must be undertaken with respect to the particular products in the given market, and must focus on the actual competitors whose lower prices are suspected. General investigations of pricing practices will not suffice at this level.\textsuperscript{272}

In addition, the lower price offered to meet competition may continue for only as long as the competitive offer exists.\textsuperscript{273} Some courts have held that a defendant does not forfeit the meeting competition defense in area-wide pricing by failing to document knowledge of available competitive prices.\textsuperscript{274} In \textit{Callaway}, the Fifth Circuit found that such a vigorous evidentiary requirement would be too burdensome on the defendant.\textsuperscript{275} This conclusion was based on the fact that there were many competitors and several product lines. Nevertheless, a seller should attempt to document as many of the facts as possible since the meeting competition defense is fact-specific. The degree of verification that will be required depends on the given market characteristics and the nature of the competition.

The seller \ldots must respond to a competitor's area-wide prices in a "well-tailored," reasonable, good faith, and prudent manner. At a minimum, the seller must \textit{adequately verify} the existence of the competitor's territorial offer, \textit{carefully assess} the parameters of the competitor's "pricing zone," and \textit{offer} the price only to buyers within the region in which the competitor's new prices have been offered. In addition, seller must \textit{adequately verify} the duration of the competitor's area-wide prices, and limit its response to the \textit{same time period}.

\textit{Id.} (emphasis added).

\textsuperscript{270} \textit{See} \textit{Klein}, supra note 185. "An enterprise seeking to employ area-wide pricing must analyze in detail the market factors in specific locations so as to be able to determine a course of conduct which is responsive but not over-responsive." \textit{Id.} at 238. "Market factors include the competing sellers, their size, market positions in the territory, the history and trend of prices in the area." \textit{Id.}

\textsuperscript{271} \textit{Rose Confections, Inc.}, 816 F.2d at 392 ("When defendant's belief is founded on assumptions or speculation, the good-faith element \ldots requires that it make some attempt to investigate or verify its belief.")

\textsuperscript{272} \textit{Id.}

\textsuperscript{273} \textit{Falls City}, 460 U.S. at 450; \textit{Klein}, supra note 185, at 233-34.

\textsuperscript{274} \textit{William Inglis}, 668 F.2d at 1046 ("The defendant knew of competitive prices actually available \ldots even though it did not document" rigorously).

\textsuperscript{275} \textit{Callaway}, 362 F.2d at 442.
Underlying the requirements enumerated above is the verification requirement which is at the heart of any meeting competition defense.\textsuperscript{276} In \textit{Inglis}, the defendant was engaged in the sale of two different brands of bread, “private label” and “advertised label.” The market for private label was intensely competitive, but there were fewer accounts in that market than there were in the advertised label market.\textsuperscript{277} In the less competitive advertised label market, the defendant engaged in a rather elaborate verification procedure whenever a customer claimed lower price offers from Continental’s competitors.\textsuperscript{278} In the private label market, however, Continental engaged in area-wide pricing without verification or investigation. Continental sought to justify its conduct on the ground that because of the relatively few accounts in this market, there was a substantial degree of communication among the accounts. As a result of the communication, any price offers to one account quickly became known in other accounts.\textsuperscript{279} The Court rejected Continental’s argument, finding that “[g]iven the smaller number of private label ac-

\textsuperscript{276} See \textit{FEDERAL ANTITRUST LAW}, supra note 42, at 390. “It is clear that good faith requires seller who intends to rely on the meeting competition defense to attempt to verify the offers at [sic] lower prices allegedly made by the seller’s competitors which are the basis of its defense.” \textit{Id}; see also \textit{McCareins}, supra note 185, at 1320 (seller must show such facts as to validate the parameters of competitor’s prices); accord \textit{Boise Cascade Corp.}, 107 F.T.C. 76 (1986), rev’d on other grounds, 837 F.2d 1127 (D.C. Cir. 1988) (in order to show good faith, seller is required to verify the actual existence of the competitive offer). “However, verification requirements stop short of direct communication with the competitor.” \textit{Gypsum}, 438 U.S. at 454-55; accord \textit{William Inglis}, 668 F.2d at 1044-47.

The Fifth Circuit, in \textit{Callaway}, downplayed the importance of the evidentiary requirements of the meeting competition defense by holding that Callaway did not need to show its list price as evidence that its prices were equal to those being met. \textit{Callaway}, 362 F.2d at 443-44. Callaway was required only to show facts which would lead a “reasonable and prudent person to believe,” that the lower price would in fact meet competition. \textit{Id.} While this language would seem to impose a lower evidentiary burden on the defendant, it should be noted that Callaway produced substantial evidence to support its good faith argument. Furthermore, the court reversed the Commission’s decision on the grounds that the hearing examiner failed to take Callaway’s evidence into consideration. \textit{Id.} at 444. Thus, the evidentiary issue in \textit{Callaway} was not one of sufficiency, but rather the Commission’s failure to adequately consider the available evidence.

\textsuperscript{277} \textit{William Inglis}, 668 F.2d at 1046.

\textsuperscript{278} \textit{Id.} n.55. The procedure included extensive corroboration from several levels of management to and including the comptroller and division vice presidents of the customer. Continental only extended discounts to its customers after this extensive verification. Furthermore, even when the lower prices were verified, the discounts were limited to those accounts where competitive offers had been proven. It did not make the reduced prices available to the entire market as it did in the private label market.

\textsuperscript{279} \textit{Id.} at 1047.
counts, documentation of competitive offers for those accounts would have been easier than verification for advertised label reductions." 280 Area-wide pricing is permissible, but only when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market. 281 While Falls City requires only that the seller reasonably know in good faith that the price is available in the region, 282 Inglis, and now Boise, require more. 283 Falls City remains the Supreme Court's broadest application of the Morton Salt inference. 284 A seller relying on the Court's language must be cognizant of later decisions which have limited its application. 285 A seller must show facts to support its belief that the lower price is available from a competitor. 286

**Conclusion**

After fifty years, the judicial path of area-wide pricing appears less cloudy. There is now an indication of a relaxed standard for the meeting competition defense. Whether this trend will continue remains to be seen. 287 What is clear, however, is that the future of the

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280. *Id.* at 1047-48. Continental's failure to verify in this case was found to be the type of conduct condemned by the Robinson-Patman Act.
281. *William Inglis*, 668 F.2d at 1046 (Continental could not escape its verification duty given the small number of customers and the relative ease of certainty within the well-defined geographic region). In Callaway, the court found that this requirement would be unreasonable given the large number of competitors in the market. *Callaway*, 362 F.2d at 441. Continental did not have a similar justification.
282. Falls City, 460 U.S. at 451. A seller should not be required to expend significant efforts to confirm the lower price from each buyer when the seller reasonably knows in good faith from verified sources that its competitor's lower prices have been extended throughout the region.
283. Boise Cascade Corp., 107 F.T.C. 76 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988). "Mere recitation of a meeting competition formula does not prove the requisite good faith, which is more than a sworn-to state of mind." *Id.* at —.
284. *Id.* at 1139.
285. Falls City notwithstanding, a seller must attempt to investigate or verify any assumptions or market speculations. *Rose Confections Co.*, 816 F.2d at 392.
286. Viviano Macaroni, 411 F.2d at 259. "While we can sympathize with the difficulty petitioner has in finding precise information as to the identity of competitors and the amount of offers, . . . we think that it is clear from the Supreme Court . . . that petitioner was under a duty to investigate or verify . . . ." *Id.* The court held that the defendant's failure to provide references as to the terms of the competitive offer and its lack of diligence in verifying lower price, indicated lack of good faith. *Cf.* National Dairy Prods. Corp. v. FTC, 395 F.2d 517 (7th Cir. 1968) (seller's knowledge of industry costs should have placed it on notice that the reported price was unlikely; therefore seller did not satisfy the good faith requirement); *see also* Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 97, 108 (9th Cir. 1973) (where an unnamed competitor was alleged to be negotiating with customer, the court found such evidence insufficient to establish good faith).
287. *See Monograph*, supra note 6, at 1-2 n.5 for a list of cases in which federal courts have applied more flexible standards in analyzing pricing practices.
Act will depend to a large extent on whether the Commission and courts continue to apply flexible standards. Flexible application of the statutory defenses will go a long way toward ensuring a stable future for the Robinson-Patman Act. These recent decisions, giving businesses greater pricing flexibility, signal a movement in the right direction and the coming of age of the Robinson-Patman Act.

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