

BROKERAGE—WHEN IS IT PERMITTED UNDER THE ROBINSON-PATMAN ACT?

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Until the Supreme Court interpreted Section 2(c) of the Robinson-Patman Act¹ for the first time in 1960's famous *FTC v. Henry Broch & Co.* case,² it was agreed that the statute absolutely prohibited a seller from making, and a buyer from receiving, any payment for brokerage, or any allowance or discount in lieu thereof, upon the sale of goods.³ Buyers and sellers based their defense on section 2(c)'s "except for services rendered" clause. They attempted to demonstrate that services were performed for persons other than their principal, thus justifying the payment of brokerage, but the defense proved futile. For all practical purposes the "services rendered" clause was read out of the act.⁴

Many critics of section 2(c), including the Attorney General's National Committee to Study the Antitrust Laws, advocated legislation

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¹ Section 2(c) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

² 363 U.S. 166 (1960).

³ From the time of the enactment of the so-called brokerage amendment to the Clayton Act until *Broch*, eight circuit courts of appeals had stated in forceful language that the section bars the payment of brokerage, or other compensation in its place, from a seller to a buyer upon the buyer's own purchases. See cases cited note 4 *infra*.

⁴ *FTC v. Washington Fish & Oyster Co.*, 282 F.2d 595 (9th Cir. 1960); *In Re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959); *Independent Grocers Alliance Distrib. Co. v. FTC*, 203 F.2d 941 (7th Cir. 1953); *Southgate Brokerage Co. v. FTC*, 150 F.2d 607 (4th Cir.), cert. denied, 326 U.S. 774 (1945); *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945); *Modern Mktng. Serv., Inc. v. FTC*, 149 F.2d 970 (7th Cir. 1945); *Fitch v. Kentucky-Tenn. Light & Power Co.*, 136 F.2d 12 (6th Cir. 1943); *Quality Bakers of America v. FTC*, 114 F.2d 393 (1st Cir. 1940); *Webb-Crawford Co. v. FTC*, 109 F.2d 268 (5th Cir.), cert. denied, 310 U.S. 638 (1940); *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), cert. denied, 308 U.S. 625 (1940); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir.), cert. denied, 305 U.S. 634 (1938).

to correct what they believed to be the anticompetitive features of the section. The legislative route was deemed best suited for their purposes because "numerous appellate adjudications which affirm[ed] the Commission's previous restrictive interpretations" made judicial reinterpretation seemingly impossible to achieve.⁵

While the *Broch* decision was, on its face, a vindication of the Commission's position in that case, some of the language contained in the decision led commentators to question the viability of the earlier courts of appeals decisions. Recent Federal Trade Commission cases confirm that the Commission has, to some extent, felt obliged to review previously unquestioned dogma in the light of *Broch*. Paradoxically, later federal court decisions in treble damage actions have all but ignored the questionable language in *Broch* and have apparently chosen an approach to section 2(c) which is practically identical to pre-*Broch* rulings.

This article shall review (1) the legislative aims in enacting the statute, (2) the old cases, (3) the *Broch* decision, (4) the new cases, and (5) the future of section 2(c).

I. THE LEGISLATIVE AIMS IN ENACTING THE STATUTE

In 1914 Congress enacted Section 2 of the original Clayton Act in order to halt the large trusts from eliminating smaller competitors by cutting prices in selected local areas.⁶ By the 1930's, however, new and more urgent problems called for corrective action. Both the pressure of a depression economy on the small entrepreneur, and the phenomenal rise of the large chain enterprises, whose purchasing power helped them to extract preferential treatment from a large and small sellers, were brought forcefully to Congress' attention by the FTC's "Final Report on the Chain Store Investigation."⁷

Congress responded with the passage of the sometimes confusing, obscurely worded and overly maligned Robinson-Patman Act. The ostensible purpose of the act was to curb the use of buying power as a means of compelling price favoritism.

⁵ Att'y Gen. Nat'l Comm. Antitrust Report 192, 193 (1955). See also Rowe, Price Discrimination Under the Robinson-Patman Act 546 (1962); Adelman, The Consistency of the Robinson-Patman Act, 6 Stan. L. Rev. 3, 5-6 (1953); Oppenheim, Federal Antitrust Legislation: Guideposts to Revised National Antitrust Policy, 50 Mich. L. Rev. 1139, 1207 (1952). One author, writing about the section in 1959, stated:

Section 2(c) is undoubtedly the most ambiguous and faultily drafted section of the act. Yet, surprisingly enough, it is the only section as to which no important question of interpretation still remains unsettled.

Austin, Price Discrimination 106 (2d rev. ed. 1959).

⁶ 38 Stat. 730 (1940). See also Henderson, The Federal Trade Commission 245-326 (1924), for a discussion of the original Clayton Act.

⁷ S. Doc. No. 4, 74th Cong., 1st Sess. 57-63 (1935).

Section 2(a),⁸ the heart of Robinson-Patman, prohibits price differentials among competing buyers where their effect may be to substantially lessen competition; *i.e.*, when such differentials are not justified by a need to meet good faith competition, or by properly allocated savings in the cost of manufacture, sale or distribution. Sections 2(d) and 2(e)⁹ are companion sections that prohibit allowances for services in connection with the resale of goods unless the allowances are proportionally available to all competing purchasers. Section 2(f) makes it unlawful for a buyer knowingly to induce or receive a prohibited discrimination in price.¹⁰

The avowed purpose of section 2(c)¹¹ was to eliminate all possibility of the use of brokerage as a deceptive means of effectuating price discriminations between competing purchasers for resale.¹² Such discriminations can be effected by paying brokerage to some but not all competing buyers, or by paying different brokerage fees on sales to different customers and passing on the savings to the customers, or by selling to some customers directly at prices which reflect brokerage fees paid on those sales. However, section 2(c) contains no reference to discrimination. It requires no proof that, as a result of the payment of brokerage or a discount in lieu thereof to the other party to the transaction or his agent, others were disadvantaged.

The failure to mention discrimination can be viewed as an unfortunate slip of the congressional pen, especially in view of the plethora of statements in debates and reports that the payment of brokerage to a large purchaser was a cover for discriminatory pricing. Yet, there is language in the same reports and debates which indicates that Congress was also concerned with ensuring that only "true" middlemen, and not buyers or their agents, receive brokerage—regardless of the existence or absence of ultimate discrimination.¹³

⁸ 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1964).

⁹ 49 Stat. 1527 (1936), 15 U.S.C. §§ 13(d), (e) (1964).

¹⁰ 49 Stat. 1526 (1936), 15 U.S.C. § 13 (1964). As the Supreme Court put it: Congress could very well have felt that sellers would be forced to confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings.

FTC v. *Simplicity Pattern Co.*, 360 U.S. 55, 68 (1959). The Court further explained that while § 2(a)'s price discrimination provision is "hedged with qualifications," the brokerage ban of § 2(c) is "absolute." *Id.* at 64-65. See also *FTC v. Washington Fish & Oyster Co.*, *supra* note 4; *Great Atl. & Pac. Tea Co. v. FTC*, *supra* note 4.

¹¹ 49 Stat. 1527 (1936), 15 U.S.C. § 13(c) (1964).

¹² See *FTC v. Henry Broch & Co.*, *supra* note 2, at 168-69. Excellent recent summaries of the background and legislative history of the Robinson-Patman Act include Austin, *supra* note 5, at 4-6; Baum, *The Robinson-Patman Act* 1-5 (1964); Edwards, *The Price Discrimination Law* 1-53 (1959); and Rowe, *supra* note 5, at 3-23.

¹³ *E.g.*, the House Judiciary Committee Report, H.R. Rep. No. 2287, 74th Cong., 2d Sess. 14-15 (1936), stressed the fiduciary relationship existing between a principal and his broker-agent:

The difference between what Congress declared to be the purpose of section 2(c) and the actual wording of the statute, coupled with the obscure language of *Broch*, has created the present confusion with regard to its enforcement. Is its sole purpose the prevention of discrimination by subterfuge? Or does its language indicate that Congress also intended to prevent any abuses of the brokerage function?¹⁴ The pre-*Broch* cases took a position somewhere between these extremes. While the cases indicate no overt desire to strengthen the middleman's position, neither do they indicate that the prevention of discrimination was the sole reason for section 2(c)'s enforcement. If the Commission chose to enforce the section where the challenged practice did not result in discrimination, the courts would uphold that decision.¹⁵

II. THE OLD CASES

The legislative aims in enacting the brokerage clause were promptly implemented by a series of decisions that interpreted section 2(c) as a per se statute.¹⁶ *Biddle Purchasing Co. v. FTC*¹⁷ was the first

The true broker serves either as representative of the seller—to find him market outlets, or as representative of the buyer—to find him sources of supply . . . But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer. . . .

Congressman Utterback, in House debate, emphasized his feelings that, in view of the natural antipathy between buyer and seller one cannot serve as agent of the other. 80 Cong. Rec. 9414 (1936). See also Edwards, *supra* note 12, at 47-48. See *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 5 CCH Trade Reg. Rep. ¶ 71,583 (9th Cir. 1965), in which, after an analysis of the legislative history of § 2(c), the court found that Congress intended the section to proscribe practices other than the discriminatory payment of brokerage.

¹⁴ See Note, *Beleagured Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act*, 77 Harv. L. Rev. 1308, 1316 (1964).

¹⁵ See *Southgate Brokerage Co. v. FTC*, *supra* note 4.

¹⁶ See Edwards, *supra* note 12, at 71-72, who states that FTC orders involving brokerage have been almost as numerous as all other orders combined. He states:

The preponderance of brokerage proceedings appears to be due primarily to the simplicity with which such cases can be investigated and tried. After an initial burst of litigation concerned almost wholly with efforts by buyers and their agents to take advantage of the provision in the statute regarding services rendered, the law, as interpreted by the courts, became enforceable by simple proceedings. Violation consisted merely in the payment of brokerage or an equivalent to a party on the other side of a transaction or to his representative. In proving that a payment was made, that it constituted brokerage, and that the payer and recipient came from opposite sides of a transaction of sale, the Commission could establish a conclusive case. There was no need to consider competitive injury, cost justification, good faith in meeting competitors' practices, or even the significance of services rendered. Investigation could be short and inexpensive, evidence could be brief and conclusive, and once the simple facts were established, no valid defense was available. The Commission had an incentive to institute brokerage cases, partly because they could provide an impressive statistical total, and partly because, when an apparent violation came to its attention, the facts were so readily ascertainable and a proceeding based

FTC brokerage decision to be reviewed by an appellate court, and the opinion rendered there set the pattern for subsequent decisions. Biddle sold market information to wholesalers and distributors in the food business for a monthly service fee and also acted as a purchasing agent for these clients. When it made purchases on behalf of its clients, it collected a brokerage fee from the seller which in some cases exceeded the service charge it received from its clients. Biddle did not keep the brokerage fees collected from the sellers but credited the amount as an allowance to the monthly fees due from the buyer-clients. Biddle defended against the FTC complaint chiefly on the ground that it performed a bona fide service for both seller and buyer, and was thus entitled to a commission from both parties. The court, in upholding the first brokerage order of the Commission, stated that, in prohibiting payment of brokerage by a seller to a buyer or his agent or controlled intermediary, "Congress intended to prohibit such payments as an unfair trade practice."¹⁸ The court perceived the intent of Congress by pointing out that the "evil inherent in the payment of brokerage fees by the seller to the buyer directly or through an intermediary, is the fact that this practice makes it *possible* for the seller to discriminate in price without seeming to do so."¹⁹ The court stated that "one of the main objectives of section 2(c) was to force price discrimination out into the open"²⁰

In *Oliver Bros., Inc. v. FTC*,²¹ a companion case also involving the sale of market information, Oliver Bros. was held to have received illegal brokerage from sellers. The court refused to apply the more strict standard of proof required under section 2(a), the price discrimination section, nor would it permit Oliver to invoke the "services rendered" clause as a defense. As in the *Biddle* case, the court held that the payments made to Oliver were not for services rendered because they were eventually transmitted to the buyers, and not retained by Oliver. The court, in commenting on the statutory criteria involved, stated:

[T]hese practices were forbidden because of their tendency to lessen competition and create monopoly, without regard to their effect in a particular case; and there is no reason to read

on them was so simple that there was no need to consider policy questions or litigating strategy. Moreover, the principal organization of brokers in the food field was actively interested in vigorous enforcement of the brokerage provision and probably was zealous in bringing violations of this part of the act to the attention of the Commission.

¹⁷ Supra note 4.

¹⁸ Id. at 691.

¹⁹ Id. at 692. (Emphasis added.)

²⁰ Ibid.

²¹ Supra note 4.

into the sections forbidding them the limitations contained in section 2(a) having relation to price discrimination, which is an extremely difficult matter to deal with and is condemned as unfair only in those cases where it has an effect in suppressing competition or in tending to create monopoly. The forbidding of specific practices because of their tendency toward a general result, also forbidden, is familiar legislative practice; and no reason suggests itself why the limitations and provisions relating to one should be read into those relating to the other.²²

The absolute nature of section 2(c), as contrasted with the more liberal price discrimination provision of section 2(a), was highlighted by the *Great Atl. & Pac. Tea Co. v. FTC* case.²³ Prior to the passage of the Robinson-Patman amendment, A.&P. regularly obtained from its suppliers brokerage commissions on its own purchases on the theory that A.&P. "field buyers" eliminated the need for the use of brokers by its suppliers. Following passage of the amendment, A.&P. issued instructions to its "field buyers" to purchase food products at net prices reflecting the customary brokerage when sales were made through brokers. The effect of this arrangement was to give A.&P. a price concession equivalent to the brokerage commission paid by suppliers to brokers on sales to other customers. A.&P. contended that its field buying agents furnished the sellers with certain services, such as (1) submitting market information to sellers, (2) giving advice as to how the quality of products could be improved, (3) furnishing advice on packaging, (4) suggesting routing of goods and submitting traffic information, and (5) helping to eliminate excessive inventories during periods when there is a glut of commodities.

The court refused to interpret the "services rendered" clause as an exception to the prohibition expressed in section 2(c). According to the court, "If the contention of the petitioner be accepted, all the words employed by Congress in the paragraph after the 'services rendered' clause become meaningless and unnecessary."²⁴ The court showed an appreciation of the fiduciary relationship between a broker and his principal and noted that "it is obvious that dual representation by agents opens a wide field for fraud and oppression." The court added:

The agent cannot serve two masters, simultaneously rendering services in an arm's length transaction to both. While the

²² *Id.* at 767.

²³ *Supra* note 4. Seventeen years after the decision in this case, Congressman Patman remarked: "[O]ne certain big concern had really caused the passage of this act, the A.&P. Tea Co." Hearings before the House Antitrust Subcommittee on the Judiciary on Bills to Amend Sections 2 and 3 of the Clayton Act, 84th Cong., 2d Sess. 57 (1956).

²⁴ *Great Atl. & Pac. Tea Co. v. FTC*, *supra* note 4, at 673.

phrase, "for services rendered," does not prohibit payment by the seller to his broker for bona fide brokerage services, it requires that such service be rendered by the broker to the person who has engaged him. In short, a buying and selling service cannot be combined in one person.²⁵

While the services rendered to the sellers were actually non-brokerage services, or at least not the usual brokerage service, the court felt that they were "incidental" to their duties as the buyer's agent and "for such incidental services, the petitioner may not be compensated."²⁶ The court also stated that section 2(c) was a per se statute independent of section 2(a), and that none of the defenses available in the latter section could be fused into the brokerage provision. As the court put it: "To read the words of paragraph (a) into paragraph (c) destroys the Congressional intent."²⁷

In *A.&P.*, as well as in *Oliver and Biddle*, the brokerage commissions received from the seller inured directly to the buyer. The courts later dealt with the validity of transactions involving brokerage commissions paid to the buyers' agents and retained by the agents.

In 1940 the courts of appeals in *Webb-Crawford Co. v. FTC*²⁸ and *Quality Bakers of America v. FTC*²⁹ invalidated brokerage paid to and retained by the buyers' agents, on the theory that the economic effect of the payment is the same whether it is retained by the agent or passed on to the buyer. Webb-Crawford was a wholesale grocery company which also operated a brokerage house through certain of its officers. The brokerage house arranged sales to the wholesale grocery company, for which it received a commission. Quality Bakers was a cooperative association of bakery companies which collected brokerage from sellers on purchases made by its members through its facilities. In both cases it was argued that the brokerage operations were a legitimate service to the sellers in arranging sales for which compensation should be paid. In holding that representatives of the buyer cannot receive brokerage payments even when they render true brokerage services to the seller, the court severely limited the scope of the statutory language "except for services rendered." Both courts acknowledged that valuable services were received from the agents, but stated that to permit payment from the seller to an agent of the buyer "would largely destroy the statute, and nullify its plain intent."³⁰ The clause was interpreted as simply

²⁵ Id. at 674-75.

²⁶ Id. at 675.

²⁷ Id. at 677.

²⁸ Supra note 4.

²⁹ Supra note 4.

³⁰ *Webb-Crawford Co. v. FTC*, supra note 4, at 270.

permitting a person to pay his own agent for services rendered. As the court stated in *Quality Bakers of America v. FTC*:

It is plain enough that the paragraph, taken as a whole, is framed to prohibit the payment of brokerage in any guise by one party to the other, or the other's agent, at the same time expressly recognizing and saving the right of either party to pay his own agent for services rendered in connection with the sale or purchase.³¹

The early cases made no distinction between the types of services allegedly performed by buyers' agents. It made no difference whether their services were strictly selling services, or those incidental to selling, such as furnishing market information or traffic routing to the sellers. However, the full gambit of services which could be performed without justifying receipt of brokerage was not revealed until *Southgate Brokerage Co. v. FTC*.³²

Southgate was primarily a distributor of food products engaged in sales to wholesalers. Approximately sixty per cent of its business consisted of purchasing for its own account and taking title to the goods; Southgate subsequently resold these goods and received brokerage. Southgate also acted as a legitimate or pure broker on other transactions. The Commission challenged the legality of the brokerage received on those transactions in which Southgate acted as a purchaser and took title. Southgate wished to offer evidence to the effect that, in connection with the goods purchased and sold as distributor, it rendered a service consisting of "promoting, offering for sale, selling, ordering, receiving, adjusting shortage or damage claims, handling, warehousing, distributing, invoicing, collecting, assumption of credit risks."³³ The Commission had excluded this evidence as irrelevant.³⁴ On review, the court stated that the evidence was properly excluded because such services were rendered by Southgate to itself as a purchaser. The court was cognizant of the fact that Southgate competed with brokers on sales to wholesalers and therefore received no discriminatory price concession. However, the court answered: "[P]rice discrimination, which is covered by section 2(a) of the Act, 15 U.S.C.A. § 13(a), is not necessary to a violation of section 2(c), quoted above, which specifically forbids the payment of brokerage by the seller to the

³¹ Supra note 4, at 398. See also *FTC v. Herzog*, supra note 4, where the court invalidated payments to Herzog, a New York City resident buyer representing retailers located in other states. Herzog received a 5% commission from the sellers and no compensation from the buyers. The commission was retained by Herzog. Since Herzog was an agent of the buyers, the payments from the sellers were declared illegal payments of brokerage.

³² Supra note 4.

³³ Id. at 609.

³⁴ *Southgate Brokerage Co.*, 39 F.T.C. 166 (1944).

buyer or the buyer's agent."³⁵ As a purchaser, Southgate could thus not justify the receipt of brokerage by rendering services because, in the court's view, "for sellers to pay purchasers for purchasing, warehousing or reselling the goods purchased is to pay them for doing their own work, and is a mere gratuity."³⁶

The doctrinal formulations resulting from these decisions placed all commissions received by so-called buying brokers on purchases for their own account within the express prohibition of section 2(c).³⁷ Beside the cases discussed, the Commission adhered to and reflected this position in numerous decisions which were not subject to judicial review.³⁸ This became settled administrative policy and was not modified until after the *Broch* case.

III. THE BROCH CASE

The *Broch* case³⁹ is not significant in terms of size, concentration of power, market share or other traditional antitrust yardsticks. Early

³⁵ *Southgate Brokerage Co. v. FTC*, supra note 4, at 609. Likewise, the Ninth Circuit's decision in *FTC v. Washington Fish & Oyster Co.*, 271 F.2d 39, 44 (9th Cir. 1959) stated:

The fact that the granting of a purported brokerage fee to a buyer may in a particular case result in discriminatory prices is immaterial. The gist of the violation under section 2(c) is not that discriminatory prices have been charged, but that the parties have engaged in a practice designed to deceive others as to the price charged and paid, whether or not discriminatory.

³⁶ *Southgate Brokerage Co. v. FTC*, supra note 4, at 611. Accord, *In Re Whitney & Co.*, supra note 4, at 214 n.6, holding that the commission or brokerage "would not be bona fide" since "the person who receives such 'commission or brokerage' is buying for his own account and renders no brokerage service." Similarly, in *FTC v. Washington Fish & Oyster Co.*, supra note 4, at 597 n.4, the court, in speaking of services of a promotional nature as an exception to the act, pointed out that "this exception, however, does not include services of a kind which a buyer normally performs for himself, such as warehousing and reselling [citing *Southgate*] or which are of a merely incidental nature [citing *A.&P.*]."

³⁷ See Att'y Gen. Nat'l Comm. Antitrust Rep. 189 (1955), which concludes:

As a result, the payment of middleman's commissions to any but pure "brokers" becomes per se illegal, even though valuable distributive services are performed, even when no adverse competitive effect results, and even where the challenged concession reflects actual savings in the seller's distribution costs.

See also Austin, supra note 5, at 115-16; Edwards, supra note 12, at 103-05; Rowe, supra note 5, at 359.

It should be noted that reference to a "true," "pure" or "legitimate" broker refers to an agent who performs the services of negotiating the sale or purchase of goods for and on the account of the seller or buyer as principal, and who is not employed or compensated by the other party to the transaction. The broker does not own or have any interests in the products in which he deals. Thus, a broker who purchases goods for his own account is often referred to as a "buying broker." Actually, a "buying broker" is simply a purchaser who sometimes acts as a broker.

³⁸ See, e.g., *American Nat'l Growers Corp.*, 55 F.T.C. 3121 (1959); *Chinoak Packing Co.*, 55 F.T.C. 611 (1958); *Ivar Wendt*, 55 F.T.C. 44 (1958); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941); *Haines City Citrus Growers Ass'n*, No. 7144, FTC, May 19, 1941; *American Brokerage Co.*, 31 F.T.C. 1581 (1940); *H. M. Ruff & Son*, 31 F.T.C. 1573 (1940); *Albert W. Sisk & Sons*, 31 F.T.C. 1543 (1940).

³⁹ *FTC v. Henry Broch & Co.*, supra note 2.

in the proceedings, one of the principal defenses was that the case was in the nature of a private controversy, and thereby lacked the requisite element of public interest required of an FTC proceeding. From the standpoint of the FTC, it was a case of paramount importance because it was necessary to establish that section 2(c)'s ban on commissions by a seller "to the other party" or the intermediary of the other "party" also imposes a liability on an independent seller's broker. Thus, the Supreme Court's decision was a complete ratification of the Commission's assertion of jurisdiction over such a broker, because the majority and minority opinions agreed that the phrase "any person" in the section included a truly independent seller's buyer.⁴⁰

The Court dealt with these facts: Henry Broch and Oscar Adler were co-partners in a brokerage business trading as Henry Broch & Co. They represented approximately twenty-five seller principals, negotiating the sale of frozen foods, fruit juices and other food products. For such services, they were compensated by being paid a commission or brokerage fee by their seller principals. Among these principals was Canada Foods, Ltd., a Canadian processor of apple concentrate and similar products, which was also represented in the United States by other brokerage firms. Broch's commission on sales for Canada Foods was established at five per cent during the period in question. The manufacturer established a price of \$1.30 per gallon on its apple concentrate and authorized its brokers to negotiate sales at that price.

The J. M. Smucker Co. of Orville, Ohio, manufacturers of apple butter and preserves, was first contacted by another broker representing Canada Foods in the United States—A. J. Phipps of Tenser & Phipps, which had been dealing with Smucker for many years on behalf of other sellers. Smucker did not wish to pay the \$1.30 per gallon price but after some negotiations did notify Phipps that it would purchase 500 drums at \$1.25 per gallon. Phipps wired the offer to his principal, Canada Foods. The following day Phipps received a telephone call from Koldinsky, manager of Canada Foods, who stated that the only way the price could be less than \$1.30 was by reducing the brokerage fee. Phipps then telephoned Smucker advising them of his inability to confirm their offer at the lower price. In a confirming letter, he stated that the order could be confirmed if he, Phipps, was willing to cut his commission, but he was afraid that this would be a violation of the Robinson-Patman Act.⁴¹

⁴⁰ Ibid. Mr. Justice Douglas delivered the opinion of the Court. Mr. Justice Whittaker, joined by Justices Frankfurter, Harlan and Stewart, dissented. *Id.* at 177.

⁴¹ Henry Broch & Co., 54 F.T.C. 673 (1957). Phipps wrote:

We could confirm the order at the price of \$1.25, but we are very much afraid that we would be right in the way of the Robinson-Patman Act and we might find our names in print.

It would be a feather in somebody's cap to decorate us with the violation

At about this time, Broch also contacted Smucker in an effort to sell the apple concentrate on behalf of Canada Foods. Smucker was still holding to the \$1.25 price, and when Broch notified his principal of the offer, he was also informed that the sale could be made at the offered price only if brokerage was cut from five per cent to three per cent. Broch consented and the sale was consummated at the lower price and the reduced brokerage.⁴² Broch continued to collect a five per cent fee on other sales of Canada Food's goods, but subsequent sales to Smucker through Broch were at the reduced brokerage and selling price.

The FTC issued a complaint against Broch, charging it with violating the brokerage clause. Before the examiner and the Commission, counsel for Broch argued that section 2(c) was intended to prevent so-called "dummy" brokerage and that Congress never intended the section to apply to "pure" brokers, that is, brokers who represent only the seller in a transaction and are not connected in any way with the buyer. Moreover, it was argued that even if section 2(c) did apply, the reduction of the seller's broker's commissions cannot be considered a payment or allowance "in lieu of brokerage" to the "other party" in the transaction by the broker. Finally, the respondent contended that it was not in the public interest to construe the brokerage clause so as to inhibit price bargaining, using, as a sole basis, an isolated transaction involving "a purely private grievance between a respondent and a disgruntled rival."⁴³

The examiner and the Commission concluded that the section outlaws the diversion of brokerage to buyers "in any manner, directly or indirectly, from any source."⁴⁴ Further, the Commission stated that Congress, in enacting section 2(c), established a policy which "prohibits a broker, acting solely for the seller and not controlled by the buyer, from passing on, directly or indirectly, to the buyer any part of his brokerage."⁴⁵ The Commission felt that the two per cent reduction in brokerage on the Smucker transaction was contemporaneous

and further, we do not believe that you are the kind of folks that would want to go along with a deal of this kind knowingly.

Frankly, we do not know how to handle the situation. We do hate to lose the business, but there is nothing that we can put together that will come up with the right answer and leave us with clean slates, all of which we regret exceedingly.

Id. at 679.

⁴² Following the agreement to Smucker through Broch, Phipps wrote Canada Foods: "We do not know how to talk to you regarding this Smucker deal on the 500 barrels. We do hope the buyer's position is legal. The Robinson-Patman Act prohibits remittance of brokerage to the buyer and they are always looking for some publicity with larger concerns." Id. at 680.

⁴³ Appeal Brief for Respondent, pp. 7-8, Henry Broch & Co., *supra* note 41.

⁴⁴ 54 F.T.C. at 673.

⁴⁵ Id. at 698.

with the price reduction by Canada Foods to Smucker and amounted to a sharing of the price reduction by Broch and Canada Foods. Thus, the only reasonable inference to be drawn was "that respondent's acceptance of a reduced brokerage in such circumstances constitutes a payment of part of their commission to the buyer exactly as though respondents had paid 2 percent of their commission to the buyer direct."⁴⁶ Finally, the Commission dismissed the public interest argument by pointing out that Sections 2(c), (d) and (e) of the Robinson-Patman Act do not require any showing of injury to the public in order to make the act illegal.⁴⁷

On appeal, the Seventh Circuit reversed the Commission, adopting the arguments advanced by counsel for Broch before the Commission.⁴⁸ The court first stated that "neither the language of § 2(c) nor its legislative history indicates that a seller's broker is covered by § 2(c)."⁴⁹ The court distinguished the previous FTC cases charging brokers with section 2(c) violations by pointing out that these cases involved brokers purchasing as agents for buyers, who were receiving brokerage commissions from sellers which they passed on to their buyer principals.⁵⁰ Then the court stated that the Commission had "interested itself in a private grievance between rival brokers" and concluded that there was no public interest in the Commission's injunction against the seller's broker.⁵¹ The court added that if the Commission's interpretation of section 2(c) was adopted, it would "promote price rigidity and uniformity contrary to the national antitrust policy."⁵²

If Canada Foods had simply sold direct to Smucker without the services of Broch, granting Smucker a price concession equivalent to the usual brokerage fee paid Broch, there would have been no difficulty in finding a violation under this section. However, Broch's chief defense, adopted by the Seventh Circuit, was that the act did not apply to reductions in the commissions paid seller's brokers. At this stage there was no evidence concerning the functional positions of the parties, discrimination, services rendered by Smucker, or any suggestion of "dummy" brokerage.

⁴⁶ *Id.* at 698-99. The Commission distinguished its holding in *Main Fish Co.*, 53 F.T.C. 88 (1956), where it found that the simultaneous presence of a reduced price and an eliminated "brokerage" fee could not, in the factual situation there present, generate a presumption that the lower price reflected an "allowance in lieu of brokerage." There the Commission had pointed out that the price was not arithmetically commensurate with brokerage and the factual situation did not warrant a conclusion that brokerage had passed. The Broch situation, however, presented price reductions commensurate with brokerage in the context of a clear factual situation. 54 F.T.C. at 699.

⁴⁷ *Id.* at 700.

⁴⁸ 261 F.2d 725 (7th Cir. 1958).

⁴⁹ *Id.* at 728.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Id.* at 729.

Thus, in seeking certiorari before the Supreme Court, the Commission was primarily interested in establishing its jurisdiction over an independent seller's broker. The petition was granted and, in reversing the court of appeals, both the majority and minority agreed that a seller's broker was covered by the language of section 2(c) "as clearly such as a buyer's broker."⁵³ The Court approved the Commission's traditional position that, although a reduction in price, coupled with a reduction in brokerage or other compensation, does not automatically compel the conclusion in every case that a discount in lieu thereof has been granted, the question of whether it has been granted depends on the circumstances of each case.⁵⁴ The very fact that the Court found it pertinent to note that such a coupling does not always compel the conclusion is itself a revealing though tacit comment upon the strong inferential power of such coupling, and a recognition that it might itself be sufficient in the circumstances of some cases.

The Court noted that "the 'savings' in brokerage was passed on to a single buyer who was not shown in any way to have deserved favored treatment."⁵⁵ And, "there is no evidence that the buyer rendered any services to the seller or to the respondent nor that anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge."⁵⁶ The opinion then suggested that, since these elements were not present, it was not necessary to "explore the applicability of § 2(c) to such circumstances."⁵⁷ Nevertheless, Mr. Justice Douglas explicitly rejected Broch's argument that the cost justification defense in section 2(a) could be used to justify a brokerage discount and would not "fuse" the more flexible price prohibitions with the absolute nature of section 2(c).⁵⁸

The dissent, while objecting to the majority's conclusion which prohibits an independent seller's broker from renegotiating his commission rate with his principal "to effect a sale that would otherwise be lost to him,"⁵⁹ felt that the majority had left the door open for cases where a reduction in price based on savings in a seller's brokerage costs may be legally justified.⁶⁰ Mr. Justice Whittaker pointed out that "Section 2(c) does *not* expressly require discrimination between pur-

⁵³ *FTC v. Henry Broch & Co.*, 363 U.S. 163, 170 (1960). Justice Whittaker stated for the minority that "the phrase 'any person' in § 2(c) includes, of course, even a truly independent seller's broker." *Id.* at 179.

⁵⁴ "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted." *Id.* at 175.

⁵⁵ *Id.* at 177 n.19.

⁵⁶ *Id.* at 173.

⁵⁷ *Ibid.*

⁵⁸ *Id.* at 170-72, 176.

⁵⁹ *Id.* at 184.

⁶⁰ *Id.* at 189.

chasers as an element of its proscriptions, nor does it provide any defenses based on legitimate savings in brokerage costs; only § 2(a) contains such provisions.⁶¹ Thus, the dissent viewed section 2(c) as absolute in its terms, viewed the "services rendered" clause as only permitting "payments by a seller or a buyer to his own broker" and agreed that "neither a party to the transaction nor his intermediary could perform legitimate services for the *other* party."⁶²

In sum, both the majority and minority agreed that section 2(c) was a *per se* statute, absolute in its terms, and that defenses familiar in a section 2(a) proceeding, such as cost justification, injury to competition, services rendered and functional discounts, will not exonerate the payment of brokerage or an allowance reflecting brokerage.

IV. THE NEW CASES

The wave of appellate decisions, culminating with the Supreme Court decision in *Broch* conferring judicial approval upon the FTC's absolute interpretation of the brokerage clause, was shattered by reversals of FTC orders in *Thomasville Chair Co. v. FTC*⁶³ and *Central Retailer-Owned Grocers, Inc. v. FTC*.⁶⁴ These reversals seemed especially significant only because past FTC decisions in brokerage cases had been approved with monotonous regularity.

Thomasville Chair Company manufactured chairs that were sold to retailers through commission salesmen. The FTC was concerned with the pricing utilized which permitted large volume customers a five per cent reduction from the list price. The Commission found that this discount reflected, at least in part, a reduction in the salesmen's commission, although the reduction was not arithmetically commensurate with the discount from the list price: salesmen regularly received a six per cent commission, but they received only three per cent on sales to the large volume, favored customers. The list price reductions were held to constitute discounts in lieu of brokerage in violation of section 2(c).⁶⁵ While the court of appeals agreed with the FTC that the section applies to differentials in salesmen's commissions, it injected a new element into the offense by insisting that discrimination be shown before a section 2(c) violation could be established. Under the rationale of *Broch*, the court felt "that a reduction in price giving effect to reduced commissions paid by the seller, are violations of Section 2(c) only if such reduction in price is 'discriminatory.' We read that to mean 'without justification based on actual bona fide differences in the costs of sales resulting from the differing methods or quantities in

⁶¹ *Id.* at 188.

⁶² *Id.* at 181.

⁶³ 306 F.2d 541 (5th Cir. 1962).

⁶⁴ 319 F.2d 410 (7th Cir. 1963).

⁶⁵ *Thomasville Chair Co.*, 58 F.T.C. 441 (1961).

which such commodities are sold or delivered.' ”⁶⁶ The court remanded the case to the Commission for “a full inquiry” as to whether the respondent’s custom of paying “a smaller commission” on sales to large volume accounts “could be legally justified.”⁶⁷

Thus, the Fifth Circuit, contrary to the explicit refusal of the Supreme Court to do so, “fused” the provisions of sections 2(a) and 2(c) by making discrimination a prerequisite to a 2(c) violation and by importing into the latter the cost justification defense. Under the court’s reasoning, it appears that a seller could pass on the savings to certain buyers where the services of the broker have been eliminated. This robs the section of all vitality.⁶⁸ Subsequently, the Commission dismissed the complaint, but did “not necessarily agree” with the “dicta” in the court’s opinion. The Commission construed the case as meaning that in future cases involving the passing on of a “reduction in brokerage to favored buyers in the form of a discriminatory price reduction,” the Commission would “not rely solely on the fact that the seller has paid less brokerage on sales at the lower price.” It would also require proof of a causal relationship between the reduced brokerage fee and the reduced sales price.⁶⁹

In *Central Retailer-Owned Grocers, Inc. v. FTC*,⁷⁰ the Seventh Circuit apparently believed that the Commission had relied solely on the fact that brokers’ commissions were eliminated in sales to this co-operative buying group at price discounts, without establishing the causal connection between the discounts and the commissions saved. Central purchased food supplies under private labels for its thirty-five members. The supplier shipped direct to the member and invoiced Central, which reinvoyed its members, adding a markup to cover operating costs. At the end of the year, Central paid out of its profits a patronage dividend to its members. Central officials insisted at FTC hearings that they had never discussed brokerage during negotiations with suppliers and the term “brokerage” never appeared on invoices or other documents. The Commission nevertheless found that the discounts Central received were “in lieu” of brokerage. This conclusion was based on the “correlation” between the price differentials secured by Central and the usual rate of brokerage paid by some suppliers.⁷¹

⁶⁶ *Thomasville Chair Co. v. FTC*, supra note 63, at 545.

⁶⁷ *Ibid.*

⁶⁸ Compare *Robinson v. Stanley Home Prods., Inc.*, 272 F.2d 601 (1st Cir. 1959), where the court held that § 2(c) was not violated by a seller who eliminated the services of a broker entirely, converted to direct selling, and thereafter reduced his prices. See also *In Re Whitney & Co.*, 273 F.2d 211 (9th Cir. 1959); *Venus Foods, Inc.*, 57 F.T.C. 1025 (1960).

⁶⁹ Memorandum Accompanying Final Order, *Thomasville Chair Co.*, No. 7273, FTC, Oct. 22, 1963.

⁷⁰ Supra note 64.

⁷¹ *National Retailer-Owned Grocers, Inc.*, 60 F.T.C. 1208, 1238 (1962). In com-

In addition, the Commission relied on testimony by officials of Central's suppliers to the effect that the discounts granted Central reflected savings attributable to elimination of the need for dealing with each member-owner individually, and eliminated the work of soliciting and taking orders.⁷² In short, the Commission construed Central's functions as typical duties of brokers for which they were compensated by discounts equivalent to brokerage fees.⁷³

On appeal, the Seventh Circuit reversed, holding that the inference to the effect that Central received allowances or discounts in lieu of brokerage "was improperly drawn from comparison of brokerage paid by such suppliers on sales which they made through brokers, with the price reductions granted to Central."⁷⁴ The court stated that Central was able to buy at favorable prices because of its volume of purchases, its advance commitments and the savings realized in central billing.⁷⁵ The court was obviously impressed by the fact that Central was a co-operative undertaking of individual retailers who were attempting to compete with large chains. As the court put it: "Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large chain stores."⁷⁶

Central can be harmonized with previous FTC decisions because the court based its opinion on the fact that there was no substantial evidence in the record to support the inference upon which the Commission's finding and order was based. *Thomasville*, however, cannot be harmonized with previous decisions disallowing price differentials based on brokerage savings. But while *Thomasville* has departed from precedent by opening the door for cost justification in section 2(c) cases, and also by requiring that discrimination be proved, it did not involve the "services rendered" clause. There were no claims by buyers that any "brokerage" or "allowance" received was compensation for services rendered.

menting on the coupling of the brokerage with the price discount, the Commission stated that the payment of brokerage could be inferred even though the price differential is not "arithmetically commensurate with the amount of the brokerage." *Ibid.*

⁷² *Id.* at 1237.

⁷³ Commissioner Elman criticized the Commission's opinion for not recognizing the importance of cooperative buying groups: "For what it in effect holds is that any price concessions to a cooperative buying organization—which of necessity performs functions which a buyers' broker would perform—will be deemed in lieu of brokerage in per se violation of Section 2(c)." He added: "[T]he Commission's opinion would most certainly have the effect of driving these groups out of existence." *Id.* at 1247.

⁷⁴ *Central Retailer-Owned Grocers, Inc. v. FTC*, *supra* note 64, at 414.

⁷⁵ *Id.* at 414-15.

⁷⁶ *Id.* at 415.

What buyer functions or services will justify discounts labelled as "brokerage"? A consideration of several recent FTC decisions involving wholesalers and distributors of fresh fruit and produce will supply the answer. The FTC issued cease and desist orders enjoining three wholesalers⁷⁷ from receiving brokerage, or other compensation, or any allowance or discount in lieu thereof, on purchases for their own account. At the same time, in *Hruby Distrib. Co.*,⁷⁸ a two-to-one decision, the Commission exonerated discounts, clearly labeled as "brokerage," received by another wholesaler on the ground that these discounts actually represented functional discounts.

The Commission distinguished the *Hruby* case on the basis that Edward Hruby purchased fresh fruit and vegetables from suppliers for his own account and resold to wholesalers. Unlike the other wholesalers, Hruby did not sell to retailers but competed with brokers in making sales to wholesalers.⁷⁹ Hruby took title to the foodstuffs, set his own resale prices, and assumed the risks of collection and loss in transit. Half of his purchases were "drop-shipped" directly to his customers; the remainder was sold from his own warehouse. Many of the discounts received were referred to by the suppliers and Hruby as "brokerage";⁸⁰ the remaining purchases were made at net prices which reflected the savings of brokerage payments made on sales by the same producers through brokers.

Commissioner Elman concluded that the discounts could not be

⁷⁷ Garrett-Holmes & Co., No. 7273, FTC, Feb. 26, 1965; Exchange Distrib. Co., 61 F.T.C. 1 (1962). The FTC also obtained consent orders from the following wholesalers: Guercio & Son, Inc., No. C-508, FTC, June 20, 1963; Wayne L. Bowman Co., No. C-272, FTC, Nov. 29, 1962; M. Degaro Co., 59 F.T.C. 1274 (1961); Yankee Brokerage Co., 59 F.T.C. 729 (1961).

⁷⁸ 61 F.T.C. 1437 (1962). Commissioner Elman wrote the majority decision in which he was joined by Chairman Dixon. Commissioner MacIntyre dissented. Commissioners Anderson and Higginbotham did not participate.

⁷⁹ Hruby testified that he occasionally sells to product departments of grocery chains on a "fill-in" basis; however, the majority held there was no record evidence as to the extent of such sales or the prices charged or paid for the goods. *Id.* at 1446 n.2. The dissent protested that

it is beyond dispute that respondent has as one of his customers a large chain retail food distributor. The extent to which the favors shown to have been extended to him as a buyer have been passed on to this large chain food retailer is undetermined, but it is not necessary to make that determination in this case in order to hold that the respondent violated Section 2(c) as a buyer.

Id. at 1454.

⁸⁰ The record contains a letter from one supplier advising Hruby that they would pay the brokerage by check at the end of the transaction instead of deducting it from each invoice. On many of the invoices brokerage deductions appeared on the face of the invoice—in some instances Hruby deducted the brokerage. *Id.* at 1441. Commissioner Elman stated that "the characterization" of these allowances as "brokerage . . . or discounts in lieu of brokerage, reveals nothing more than the not surprising fact that businessmen, in describing their actions, do not talk like lawyers expert in the niceties of the Robinson-Patman Act." *Id.* at 1449.

considered as brokerage, even though the parties may have intended the discounts to reflect brokerage, because the economics of the situation required Hruby to purchase at a price which would permit him to compete with brokers in sales to wholesalers. According to the majority, "such lower prices no matter how labelled, reflects not a saving of brokerage by the seller (for there is none) but, rather, the difference in the functional-competitive level at which Hruby and his wholesaler customers operate."⁸¹ The majority pointed out that Hruby, unlike brokers, warehouses, makes deliveries and extends credit. Thus, he "must be able to offer and sell to wholesalers at a price competitive with that offered to wholesalers by producers selling through food brokers."⁸² The dissent felt that "it is absurd" to contend that Hruby renders such services for the benefit of his suppliers who compete with him. By treating such discounts as functional discounts, Commissioner MacIntyre concluded that the majority had fused "Section 2(a) which permits a price difference to buyers in different noncompetitive functional classes with Section 2(c) which, up to now, did not do so where the difference in price amounted to a discount in lieu of brokerage given to a buyer on purchases for his own account."⁸³ Finally, the dissent protested that the "'except for services rendered' proviso in Section 2(c) was never considered as applying to a buyer purchasing for his own account" in direct conflict with *Southgate Brokerage Co. v. FTC*.⁸⁴

The *Hruby* decision can be regarded as evidence of the Commission's disposition to be reasonable in determining as a factual matter when, and under what circumstances, a payment is "brokerage."⁸⁵

⁸¹ Ibid.

⁸² Id. at 1446.

⁸³ Id. at 1455.

⁸⁴ Ibid. The dissent noted that counsel for Hruby stated: "We are frank to concede that in seeking such a ruling, we face the heavy burden of dislodging the long encrusted authority of *Southgate Brokerage Co. v. FTC*, supra, upon which the hearing examiner relied." Id. at 1452. During oral argument, counsel for respondent stated: "The hearing examiner and Commission counsel say the decision here is absolutely bound by *Southgate*, that it is on all fours with *Southgate*. If *Southgate* is the law, we don't have a case." Transcript of Oral Argument, p. 30, *Hruby Distrib. Co., No. 8068, FTC*, July 10, 1962. Similar statements were also made throughout the argument. Id. at 14, 64-65. Most commentators also agree that the *Hruby* decision overrules *Southgate*. See, e.g., Note, *Be-leagured Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act*, 77 Harv. L. Rev. 1308, 1323-24; Comment, 38 N.Y.U.L. Rev. 768, 775 (1963).

⁸⁵ Sometime after the decision, Chairman Dixon, in an explanatory letter to the President of the National Food Brokers Association, stated "that in deciding matters that present questions of whether payments are discounts in lieu of brokerage, the Commission will analyze carefully all of the relevant facts in seeking to determine their true character. This, it seems to me, is essential, for only by making such analyses in these cases can the Commission avoid the risk of becoming a victim of the tyranny of 'ambiguous labels.'" See BNA Antitrust & Trade Reg. Rep. No. 87, pp. A-19 to A-20 (March 12, 1963).

Similarly, the FTC assumed a rational role in *Flotill Prods., Inc.*⁸⁶ in ascertaining the actual relationship existing between the seller and the intermediary, and in validating payments to so-called "field brokers" who purchased and resold for their own account. The "field broker," unlike Hruby, operates from a small office, does no warehousing and never takes possession of the goods; he is invoiced by his supplier and is responsible for the payment of the goods; as a rule, he bills his customer in the same amounts and earns his only profit through the brokerage commissions. In short, the "field broker" operates in the same manner as a pure broker, except that he takes what the opinion referred to as "technical title."⁸⁷ In these circumstances, the opinion concluded that the "field brokers" did not purchase for their own account but functioned as intermediaries on behalf of the seller-canner. Thus, the opinion was based in part on the fact that ownership of the goods did not vest absolutely in the "field brokers" as in previous "buying broker" cases which involved illegal receipt of brokerage. The opinion indicated that a different conclusion would probably have been reached "if it were established that a field broker customarily bills purchasers at a price higher than he pays Flotill" because then he would be "acting for and on behalf of himself in his dealings with canners." Commissioner Elman agreed with the result but filed a separate opinion stating that it is "immaterial whether, in what sense, or to what extent the field broker acquires title to the goods."⁸⁸ He felt that the "field brokers" perform a useful service to small canners in finding a market for their goods, and pointed out that the practice results in no injury. Thus, according to Commissioner Elman,

Section 2(c) applies only to transactions in which no brokerage services are actually rendered. Spurious, false, unearned brokerage is forbidden; but if a businessman performs a valuable and substantial service or function in the distribution of goods, he is entitled to be compensated for it, and Section 2(c) does not apply.⁸⁹

In both *Hruby* and *Flotill*, Commissioner Elman relied heavily on *Broch*, which states the legislative purpose behind section 2(c) was to eliminate "dummy" brokerage and "other means by which brokerage

⁸⁶ No. 7226, FTC, June 26, 1964 (slip opinion).

⁸⁷ *Id.* at 7.

⁸⁸ *Id.* at 10.

⁸⁹ *Id.* at 5. Commissioner MacIntyre did not agree with the handling of the "field broker" issue. As he saw it, a canner could sell to a field broker and grant him a functional discount "as the character of the canner may pay brokerage to the field broker, issuing his invoices and looking for payment to the wholesalers and retailers who buy and resell the goods. But the two systems cannot be blended without doing violence to the law. Also, to permit a buyer to receive brokerage on purchases made for his own account opens the door to abuse and discrimination."

could be used to effect price discrimination."⁹⁰ He emphasized that "field brokers" like Hruby and Central perform services for which they are legally entitled to receive compensation. Commissioner Elman felt that, in *Broch*, the Court indicated that section 2(c) has *no* application in any case where "the buyer rendered any services to the seller or . . . anything in its method of dealing justified its getting a discriminatory price by means of a reduced brokerage charge."⁹¹

It should be noted, however, that in *Broch* there was no issue concerning any services performed by the buyer, Smucker. The decision does inform us that Smucker is a manufacturer of apple butter and preserves, but the record does not indicate the functional positions of Broch's other customers.⁹² Thus, the record is not clear as to the nature or extent of any discrimination involved. There is no information as to the identity of the unfavored purchasers, their method of doing business or the nature of any injury they may have incurred.

Consider the record in *Garrett-Holmes, Inc.*,⁹³ one of the produce wholesalers charged with receiving brokerage or discounts in lieu thereof shortly after the *Hruby* decision. Complainant's counsel presented clear evidence that Garrett-Holmes received brokerage allowances on purchases for its own account and that competitors doing business in the same area, purchasing from the same suppliers, did not receive such price concessions. The examiner made findings that the brokerage allowances received by Garrett-Holmes resulted in their buying at preferential prices which made it difficult for others to compete in the resale of the same items.

Garrett-Holmes argued that it performed valuable services for its suppliers which justified the brokerage or discount obtained and pointed to the fact that it warehoused the goods, acted as a central point of redistribution, and bought in large quantities. However, the Commission, in affirming the initial decision, highlighted the strong factual situation by quoting from *Broch*: "There is no evidence that the buyer rendered any services to the seller[s] . . . nor that anything in its method of dealing justified its getting a discriminatory price as 'brokerage' or discounts in lieu thereof."⁹⁴

⁹⁰ *FTC v. Henry Broch & Co.*, supra note 53, at 169.

⁹¹ See *Flotill Prods., Inc.*, supra note 86, at 7, citing *FTC v. Henry Broch & Co.*, supra note 53, at 173.

⁹² The Commission opinion in *Henry Broch & Co.* does show some invoice prices by Canada Foods, Ltd. on sales through its broker, and the names of two of these customers are mentioned; but there is no information as to the kind of business they are engaged in, where located, or any other information from which injury could be inferred. Supra note 41, at 698.

⁹³ No. 8564, FTC, Sept. 29, 1964.

⁹⁴ No. 8564, FTC, Feb. 26, 1965. Commissioner MacIntyre concurred in the result but disagreed with the Commission's use of the controversial passage from *Broch*, stating that "the Majority, in holding that the brokerage payments were discriminatory prices unjustified by services rendered to the seller, applies a Section 2(c) test where it does

Similarly, the Commission in *Western Fruit Growers Sales Co.*⁹⁵ invalidated allowances granted to certain buyers of fruit who sometimes acted as brokers, but who, when they purchased for their own account, resold the goods at a profit. Thus, they took title absolutely as purchasers and not in a "technical" manner, as the Commission had characterized the taking of title by field brokers in *Flotill*. Western Fruit argued that the brokers were billed "as a matter of convenience" because they resold to various small purchasers.⁹⁶ However, the Ninth Circuit responded that "motive and intent are immaterial to a violation of Section 2(c), if a sale upon which brokerage is paid has in fact been made."⁹⁷ According to the court, the only issue was whether a seller-buyer relationship existed. If one existed, then "a seller may not pay a buyer brokerage on the latter's purchases for his own account or for the account of another."⁹⁸

Shortly after its opinion in *Western Fruit*, the Ninth Circuit affirmed a treble damage award in *Rangen, Inc. v. Sterling Nelson & Sons*,⁹⁹ a case brought under section 2(c) against a competitor who had bribed a state official in order to make sales to the state. The bribing seller argued that the payments made to the state official were "for services rendered in connection with the sale or purchase of goods, wares or merchandise," and that the brokerage provision relates only to cases involving price discrimination, not commercial bribery. The court answered that one of Congress' purposes in enacting the section "was to guard against practices undermining the fiduciary relationship between buyers and sellers on the one hand, and the agents, representatives, or other intermediaries on the other, in a Section 2(c) transaction."¹⁰⁰ The court did not believe that the services rendered clause could be used "as a statutory shield to protect illicit conduct which the subsection as a whole was designed to suppress."¹⁰¹ The court, noting that after *Broch* there was some speculation that the Supreme Court decision may have imposed a requirement of price discrimination upon section 2(c), stated that "although discrimination would appear now to be relevant in reduced-commission cases, it does not follow that it is now an essential element in cases involving the outright payment of unearned brokerage."¹⁰²

not belong and misinterprets through misapplication the Supreme Court's *Broch* decision. . . ."

⁹⁵ No. 8194, FTC, Sept. 18, 1962, aff'd, 322 F.2d 67 (9th Cir. 1963), cert. denied, 376 U.S. 907 (1964).

⁹⁶ 322 F.2d at 69 n.5.

⁹⁷ *Ibid.*

⁹⁸ *Id.* at 68.

⁹⁹ 5 CCH Trade Reg. Rep. ¶ 71,583 (9th Cir. 1965).

¹⁰⁰ *Id.* at 81,627.

¹⁰¹ *Ibid.*

¹⁰² *Id.* at 81,626.

The absolute interpretation of the section was further bolstered by the Second Circuit opinion in *Empire Rayon Yarn Co. v. American Viscose Corp.*,¹⁰³ reversing a district court finding that discounts given to two appointed jobbers were functional discounts. The manufacturer, American Viscose, sells most of its yarn directly to wholesalers, converters, and retailers, but it selected two jobbers to sell and service customers. These jobbers took title to the yarn, maintained inventory, assumed all risk, and agreed to resell at the manufacturer's list price. In return, they were allowed a discount of five per cent from that price. The court held that the services rendered by the jobbers were actually a service they rendered to themselves in reselling the yarn and that the functional discount the jobbers received masked the fact that they were actually receiving a favored price. The court stated that where the discrimination

is effected by a discount which is related to a sale by the person receiving the discount (i.e. a commission or brokerage or other similar compensation), Section 2(c) is applicable.

A "functional discount" which is paid, like commissions and brokerage, in connection with such a sale, may be used to mask price discrimination in violation of the legislative purpose of Section 2(c).¹⁰⁴

Thus, in *Hruby*, the Commission found that a discount labelled "brokerage" was actually a functional discount and not subject to attack under section 2(c);¹⁰⁵ in *Empire*, the court found that a nominal "functional discount" was subject to attack under the same statute.

V. THE FUTURE OF SECTION 2(c)

The best prophet of the future is the past. Since injury to competition and cost justification are expressly associated with section 2(a), it is doubtful that these defenses will be effectively invoked by persons charged under the brokerage section. It can be anticipated, however, that persons charged with section 2(c) violations will contend that the "services rendered" clause affords a basis for exonerating them from liability by urging (1) that payments to the buyer are not necessarily payments of brokerage or in lieu thereof if the services rendered are not "brokerage" services; or (2) that the tender which is found to be brokerage or a payment in lieu thereof is nevertheless justified if the other party to the transaction or his representative renders brokerage

¹⁰³ 5 CCH Trade Reg. Rep. ¶ 71,632 (2d Cir. 1965).

¹⁰⁴ Id. at 81,842.

¹⁰⁵ The dissenting judge insisted that a price discount should not be treated as "an allowance 'in lieu of brokerage' if it is causally conceived in considerations *other* than a saved commission or fee." To support this statement he cited the decisions in *Central* and *Hruby*. Id. at 81,844.

service.¹⁰⁶ However, the traditional position is that the services performed by buyers, whether they be clear-cut brokerage services or incidental to a broker's functions, are not performed primarily for the sellers' benefit—but rather to promote their own business. For example, a buyer who redistributes goods, warehouses, extends credit, or inspects goods, is doing so because it is in his interest to do so. How can it seriously be suggested that a buyer or his agent inspects goods purchased as a service for the seller? Obviously, a buyer or his agent inspects the goods to make certain the buyer is getting what he ordered. Any benefits accruing to the seller are incidental and cannot justify the payment of brokerage.

In the *A.&P.* case the court found that the services rendered by A.&P. agents were not the usual brokerage services, but were incidental to the brokerage function and therefore not compensable.¹⁰⁷ Even assuming that A.&P. actually provided brokerage service to its sellers, to permit it to receive brokerage payment would make section 2(c) even more flexible than section 2(a). Under the latter, a favored price or discount can be justified under the cost justification proviso which recognizes only actual cost savings to the manufacturer. It cannot be assumed that the services provided by A.&P. would necessarily save the seller an amount equal to the brokerage.¹⁰⁸ Such brokerage payments can be compared to functional discounts which depend on many factors having no relationship to cost.¹⁰⁹

If A.&P. were to be permitted to receive "brokerage" payments for "services rendered" it would undoubtedly receive more value than it gives. The same is, of course, true with regard to brokers. However, one distinction is apparent. As a buyer, A.&P. could use the brokerage fee to competitively injure other purchasers buying through brokers who retain all of their fee, including any "unearned" portion.

¹⁰⁶ See Commissioner Elman's separate opinion in *Flotill Prods., Inc.*, supra note 86, at 5, wherein he states that "Section 2(c) applies only to transactions in which no brokerage services are actually rendered [by the other party to the transaction or his agent]."

¹⁰⁷ See text accompanying notes 23-27 supra.

¹⁰⁸ Of course, the seller could argue that he is "saving" the brokerage fee since he would otherwise have to give it to a "true" broker. This is essentially a bootstrap argument, since the seller chooses to give a brokerage fee to "true" brokers which is, itself, not based on actual cost savings. Cf. *Purolator Prods., Inc.*, p. 23, No. 7850, FTC, April 3, 1964 (slip opinion).

¹⁰⁹ *Alhambra Motor Parts*, pp. 19-20, No. 6889, FTC, Dec. 17, 1965 (slip opinion). The Commission and the courts have approved of price differentials quoted by sellers who classify their customers for pricing purposes according to the distributional function performed. Thus, a seller may have one price to customers who purchase products for further processing, another to wholesalers and another to retailers. Although functional discounts are not mentioned in the Robinson-Patman Act, they therefore are not expressly permitted. They usually are permitted because they do not result in injury to competition since the higher price customer does not compete with the lower price customer.

The easy answer to this would seem to be that the brokerage fee's legality should be measured under section 2(a) since it is in reality a price discrimination. But is it a price discrimination? The argument is that A.&P. is rendering "brokerage services" in return for "brokerage payments." As such, the payments come squarely within section 2(c) and not section 2(a). The irony is that the "services rendered" which, the argument goes, *completely justifies* the payment of brokerage might well not be cognizable under the cost justification proviso to section 2(a).

While there may have been some reason to believe that *Thomasville*¹¹⁰ destroyed the precedential value of early cases outlawing price differentials reflecting eliminated or reduced commissions, recent appellate decisions disclose a rather surprising reaffirmation of the traditional approach to the brokerage clause. Both the FTC and the courts are using section 2(c) to achieve a desirable result. In *Flotill*¹¹¹ and *Hruby*,¹¹² the majority could perceive no public benefit or good flowing from the issuance of an order where the payments labelled as "brokerage" could not possibly involve any competitive injury.¹¹³ In *Rangen*¹¹⁴ and *Empire*,¹¹⁵ the payment of commissions caused evident injury which could be rectified by a rigorous interpretation. In his dissent in *Flotill*, Commissioner MacIntyre was sympathetic toward the position of the "field broker," but felt that the seller could either "sell to a field broker granting him such functional discounts as the character of such buyer's resale warrants, or the canner may pay brokerage to the field broker, issuing his invoices and looking for payment to the wholesalers and retailers who buy and resell goods." He warned that "the two systems cannot be blended without doing violence to the law."¹¹⁶

It is not clear whether in future cases the FTC will fasten upon the absolute language of *Rangen* and *Empire*. While the FTC may be more selective in issuing complaints under section 2(c), it is certain that its swift and absolute provisions will be utilized when deemed necessary.¹¹⁷ Even in such cases, it may well be that complainant's counsel

¹¹⁰ *Thomasville Chair Co. v. FTC*, supra note 63.

¹¹¹ *Flotill Prods., Inc.*, supra note 86, at 2.

¹¹² *Hruby Distrib. Co.*, supra note 78.

¹¹³ The absolute nature of § 2(c) was emphasized in a most detailed interpretation of the section by the FTC in its Trade Practice Rules for the Fresh Fruit and Vegetable Industry, 30 Fed. Reg. 5331 (1965). This development indicates that the Commission intends to limit *Hruby* and *Flotill* to their facts, and that a broader interpretation of these decisions may be unwarranted. See also *Bison*, The "Services Rendered" in the Brokerage Section on the Robinson-Patman Act, 41 *Notre Dame Law* 326-35 (1966).

¹¹⁴ *Rangen, Inc. v. Sterling Nelson & Sons*, supra note 99.

¹¹⁵ *Empire Rayon Yarn Co. v. American Viscose Corp.*, supra note 103.

¹¹⁶ *Flotill Prods., Inc.*, supra note 86.

¹¹⁷ See, e.g., *ibid.*, where the Commission invalidated "special promotional allowances" granted to a large buyer because they actually reflected savings in brokerage expenses and thus were payments "in lieu of brokerage," in violation of § 2(c). Com-

will not rely on mechanical invocations of the statute. He will also present some evidence showing that the practice results in detriment to the public interest.¹¹⁸ The Commission has shown a disposition to be reasonable in the application of a per se statute, but this attitude should not be construed as an unwillingness to act when action is required.¹¹⁹

paring this phase of the case with the "field broker" issue it becomes evident that the FTC will act decisively in condemning preferential payments based on savings in brokerage. Moreover, in the same case, the FTC attacked the promotional program employed by Flotill because it clearly favored certain customers and was not available to competing customers. Thus, while Flotill is often cited on the "field broker" issue it should not be overlooked that the company was adjudged in violation of §§ 2(c) and (d) of the Robinson-Patman Act. The case is now before the United States Court of Appeals for the Ninth Circuit on a petition by Flotill to review the cease and desist order issued by the Commission covering brokerage payments as well as advertising allowances.

¹¹⁸ Ibid. See also Garrett-Holmes, Inc., *supra* notes 93-94. One commentator has suggested that complaint counsel should have the burden of proving "that the beneficiary of brokerage concessions in fact purchased at lower price than other companies in the same market" even though he rejects "a marriage of the provisions of § 2(a) with those of § 2(c)." Rill, *Brokerage Under the Robinson-Patman Act: Toward a New Certainty*, 41 *Notre Dame Law*. 337, 348, 353 (1966).

¹¹⁹ In other areas involving enforcement of the Robinson-Patman Act, the FTC has also demonstrated a willingness to be flexible in dealing with commercial practices. See, e.g., Mezines, *Cooperative Conditional Advertising Agreements: The Requirement of Proportionally Equal Terms Under the Robinson-Patman Act*, 41 *Notre Dame Law*. 371, 381 (1966); Rockefeller, *The Federal Trade Commission's Potential For Making Purposeful Antitrust Policy*, 24 *Fed. B.J.* 541 (1964); Statement of Mayer, Chief, Division of Discriminatory Practices, *What's New Robinson-Patman Wise?* 27-29 (Aug. 10, 1965).