

2008 PETROLEUM MARKETING ATTORNEYS' MEETING
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**Discriminatory Treatment Under the
PMPA, Federal Antitrust Law, and State Law**

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MICHAEL J. LOCKERBY*

I. DISTINCTIONS, DIFFERENCES, AND “DISCRIMINATION”

A. Common Claims of “Discrimination” in Petroleum Marketing

1. From the reported decisions, it appears that the most common claims of “discrimination” that arise in petroleum marketing are based on:
 - a. Different prices and other terms and conditions of sale;
 - b. Different rents for service station properties;
 - c. Different performance standards for termination and nonrenewal; and
 - d. Different franchise agreement terms and conditions.
2. The “lessons learned” from the case law are summarized herein.

B. “Tell It to the Jury”

1. The case law addressing claims of “discrimination” in petroleum marketing confirms what every seasoned litigator already knows: it is a major tactical error to try to defend the petroleum marketer’s actions on the grounds that “we did it because we can.”
2. Certainly the language of the contracts at issue and the provisions of the statutes on which the claims of “discrimination” are based *should* be dispositive. Contract terms and statutory provisions, however, are sometimes susceptible of more than one interpretation. Or the application of the contracts and statutes to a particular set of facts may be a close call.
3. The finder of fact and the giver of law — jurors and judges at both the trial and appellate level, or arbitrator(s), as the case may be — need to be convinced that the right result from a legal perspective is also the right result from an equitable perspective. This presents an obvious challenge since, oftentimes, “fairness” is in the eyes of the beholder.
4. Regardless of which party has the burden of proof on a particular element of a claim or defense under the governing law, the petroleum marketer defending a claim of “discrimination” needs to be able to tell an attractive

“story” that is true, makes sense, and is credible. It is dangerous to assume that judges, jurors, and/or arbitrators know much about business in general or petroleum marketing in particular. And what they think they know about petroleum marketing — often based upon the entertainment industry, news reports, or raw emotion — may not be helpful to the cause. Someone who is attractive and credible needs to explain how the business operates, why the petroleum marketer did what it did, and why the alleged discrimination — however beneficial to the petroleum marketer and however harmful it allegedly may be to the complaining franchisee — in fact benefits consumers.

5. Obviously, the dictionary definition of “discriminate” is not dispositive. But it is worth reviewing.
 - a. Merriam Webster’s Online Dictionary defines the intransitive verb form of “discriminate” as follows:

“**1 a:** to make a distinction <*discriminate* among historical sources> **b:** to use good judgment

“**2:** to make a difference in treatment or favor on a basis other than individual merit <*discriminate* in favor of your friends> <*discriminate* against a certain nationality>”
 - b. In other words, not every distinction or difference is malevolent, and not all “discrimination” is invidious.
6. There are legitimate reasons for refiners, chain marketers, and distributors to want — or need — to discriminate in pricing and other terms. Those who will be deciding the petroleum marketer’s fate need to hear what they are, in a convincing and understandable way.
7. Similarly, when it comes to performance standards, there are situations where equal treatment is not always desirable or even possible. Those charged with deciding whether there has been “discrimination” in a pejorative sense need to hear why this is one of those situations.

C. Common Statutory Bases for Liability

1. The federal statutes upon which claims of discrimination in petroleum marketing are most commonly based include the Petroleum Marketing Practices Act, 15 U.S.C. § 2801 *et seq.*, and the Robinson-Patman Act, 15 U.S.C. § 13(a) *et seq.*
2. The state statutes upon which claims of discrimination in petroleum marketing are most commonly based include Section 2-305 of the Uniform Commercial Code (Open Price Term) (“U.C.C. § 2-305”) and various state franchise “relationship” laws (industry-specific statutes as

well as statutes of more general applicability). Many of the state franchise law claims that are asserted with respect to alleged “discrimination” are duplicative of PMPA claims. To the extent that state franchise laws purpose to give rise to claims for “discrimination” that is not prohibited by the PMPA, such claims are often held to be preempted by the PMPA. For that reason, state franchise law claims of “discrimination” receive very little attention herein, except insofar as relevant to the issue of PMPA preemption.

3. The bases for liability under these statutes and the interplay among them are discussed in the sections that follow.

II. PETROLEUM MARKETING PRACTICES ACT

A. Statutory Grounds for Termination and Nonrenewal

1. “Failure to comply”: termination and nonrenewal are permitted upon “failure by the franchise to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship.” 15 U.S.C. § 2802(b)(2)(A).¹
2. “Failure to exert good faith efforts”: termination and nonrenewal are permitted upon “failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise.” 15 U.S.C. § 2802(b)(2)(B).²
3. “Occurrence of relevant event”: termination and nonrenewal are permitted upon the “occurrence of an event which is relevant to the

¹ See 15 U.S.C. § 2802(b)(2)(A):

A failure by the franchisee to comply with any provision of the franchise, which provision is both reasonable and of material significance to the franchise relationship, if the franchisor first acquired actual or constructive knowledge of such failure—

- (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804 (a) of this title; or
- (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804 (b)(1) of this title.

² See 15 U.S.C. § 2802(b)(2)(B):

A failure by the franchisee to exert good faith efforts to carry out the provisions of the franchise, if—

- (i) the franchisee was apprised by the franchisor in writing of such failure and was afforded a reasonable opportunity to exert good faith efforts to carry out such provisions; and
- (ii) such failure thereafter continued within the period which began not more than 180 days before the date notification of termination or nonrenewal was given pursuant to section 2804 of this title.

franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable” (15 U.S.C. § 2802(b)(2)(C)),³ with the list of relevant events including enumerated instances of franchisee nonfeasance and malfeasance.⁴

³ See 15 U.S.C. § 2802(b)(2)(C):

The occurrence of an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable, if such event occurs during the period the franchise is in effect and the franchisor first acquired actual or constructive knowledge of such occurrence—

- (i) not more than 120 days prior to the date on which notification of termination or nonrenewal is given, if notification is given pursuant to section 2804 (a) of this title; or
- (ii) not more than 60 days prior to the date on which notification of termination or nonrenewal is given, if less than 90 days notification is given pursuant to section 2804 (b)(1) of this title.

⁴ See 15 U.S.C. § 2802(c):

As used in subsection(b)(2)(C) of this section, the term “an event which is relevant to the franchise relationship and as a result of which termination of the franchise or nonrenewal of the franchise relationship is reasonable” includes events such as—

- (1) fraud or criminal misconduct by the franchisee relevant to the operation of the marketing premises;
- (2) declaration of bankruptcy or judicial determination of insolvency of the franchisee;
- (3) continuing severe physical or mental disability of the franchisee of at least 3 months duration which renders the franchisee unable to provide for the continued proper operation of the marketing premises;
- (4) loss of the franchisor’s right to grant possession of the leased marketing premises through expiration of an underlying lease, if—
 - (A) the franchisee was notified in writing, prior to the commencement of the term of the then existing franchise—
 - (i) of the duration of the underlying lease; and
 - (ii) of the fact that such underlying lease might expire and not be renewed during the term of such franchise (in the case of termination) or at the end of such term (in the case of nonrenewal);
 - (B) during the 90-day period after notification was given pursuant to section 2804 of this title, the franchisor offers to assign to the franchisee any option to extend the underlying lease or option to purchase the marketing premises that is held by the franchisor, except that the franchisor may condition the assignment upon receipt by the franchisor of—
 - (i) an unconditional release executed by both the landowner and the franchisee releasing the franchisor from any and all liability accruing after the date of the assignment for—
 - (I) financial obligations under the option (or the resulting extended lease or purchase agreement);

(continued ...)

4. “Mutual agreement”: termination and nonrenewal are permitted upon “agreement, in writing, between the franchisor and the franchisee to

(footnote continued)

- (II) environmental contamination to (or originating from) the marketing premises; or
 - (III) the operation or condition of the marketing premises; and
- (ii) an instrument executed by both the landowner and the franchisee that ensures the franchisor and the contractors of the franchisor reasonable access to the marketing premises for the purpose of testing for and remediating any environmental contamination that may be present at the premises; and
- (C) in a situation in which the franchisee acquires possession of the leased marketing premises effective immediately after the loss of the right of the franchisor to grant possession (through an assignment pursuant to subparagraph (B) or by obtaining a new lease or purchasing the marketing premises from the landowner), the franchisor (if requested in writing by the franchisee not later than 30 days after notification was given pursuant to section 2804 of this title), during the 90-day period after notification was given pursuant to section 2804 of this title—
- (i) made a bona fide offer to sell, transfer, or assign to the franchisee the interest of the franchisor in any improvements or equipment located on the premises; or
 - (ii) if applicable, offered the franchisee a right of first refusal (for at least 45 days) of an offer, made by another person, to purchase the interest of the franchisor in the improvements and equipment.
- (5) condemnation or other taking, in whole or in part, of the marketing premises pursuant to the power of eminent domain;
- (6) loss of the franchisor’s right to grant the right to use the trademark which is the subject of the franchise, unless such loss was due to trademark abuse, violation of Federal or State law, or other fault or negligence of the franchisor, which such abuse, violation, or other fault or negligence is related to action taken in bad faith by the franchisor;
- (7) destruction (other than by the franchisor) of all or a substantial part of the marketing premises;
- (8) failure by the franchisee to pay to the franchisor in a timely manner when due all sums to which the franchisor is legally entitled;
- (9) failure by the franchisee to operate the marketing premises for—
- (A) 7 consecutive days, or
 - (B) such lesser period which under the facts and circumstances constitutes an unreasonable period of time;
- (10) willful adulteration, mislabeling or misbranding of motor fuels or other trademark violations by the franchisee;
- (11) knowing failure of the franchisee to comply with Federal, State, or local laws or regulations relevant to the operation of the marketing premises; and
- (12) conviction of the franchisee of any felony involving moral turpitude.

terminate the franchise or not to renew the franchise relationship.” 15 U.S.C. § 2802(b)(2)(D).⁵

5. “Market withdrawal”: termination and nonrenewal are permitted upon “a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic area in which the marketing premises are located,” provided that “the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor’s own account.” 15 U.S.C. § 2802(b)(2)(E).⁶

⁵ See 15 U.S.C. § 2802(b)(2)(D):

An agreement, in writing, between the franchisor and the franchisee to terminate the franchise or not to renew the franchise relationship, if—

- (i) such agreement is entered into not more than 180 days prior to the date of such termination or, in the case of nonrenewal, not more than 180 days prior to the conclusion of the term, or the expiration date, stated in the franchise;
- (ii) the franchisee is promptly provided with a copy of such agreement, together with the summary statement described in section 2804 (d) of this title; and
- (iii) within 7 days after the date on which the franchisee is provided a copy of such agreement, the franchisee has not posted by certified mail a written notice to the franchisor repudiating such agreement.

⁶ See 15 U.S.C. § 2802(b)(2)(E):

In the case of any franchise entered into prior to June 19, 1978, and in the case of any franchise entered into or renewed on or after such date (the term of which is 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business to withdraw from the marketing of motor fuel through retail outlets in the relevant geographic market area in which the marketing premises are located, if—

- (i) such determination—
 - (I) was made after the date such franchise was entered into or renewed, and
 - (II) was based upon the occurrence of changes in relevant facts and circumstances after such date;
- (ii) the termination or nonrenewal is not for the purpose of converting the premises, which are the subject of the franchise, to operation by employees or agents of the franchisor for such franchisor’s own account; and
- (iii) in the case of leased marketing premises—
 - (I) the franchisor, during the 180-day period after notification was given pursuant to section 2804 of this title, either made a bona fide offer to sell, transfer or assign to the franchisee such franchisor’s interests in such premises, or, if applicable, offered the franchisee a right of first refusal of at least 45 days duration of an offer, made by another, to purchase such franchisor’s interest in such premises; or

(continued ...)

- a. In the case of leased premises, the franchisor is also required to make “a bona fide offer to sell, transfer, or assign to the franchisee such franchisor’s interests in such premises” or — if applicable — to offer the franchisee a right of first refusal. *Id.*
- b. In the case of a transfer of more than one leased premises, the transferee is required to offer, “in good faith, a franchise to the franchisee on terms and conditions which are not *discriminatory* to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.” *Id.* (emphasis added).

6. Additional grounds for nonrenewal:

- a. “failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise” (15 U.S.C. § 2802(b)(3)(A));⁷
- b. “receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee’s operation of the marketing premises” (15 U.S.C. § 2802(b)(3)(B));⁸

(footnote continued)

(II) in the case of the sale, transfer, or assignment to another person of the franchisor’s interest in such premises in connection with the sale, transfer, or assignment to such other person of the franchisor’s interest in one or more other marketing premises, if such other person offers, in good faith, a franchise to the franchisee on terms and conditions which are not discriminatory to the franchisee as compared to franchises then currently being offered by such other person or franchises then in effect and with respect to which such other person is the franchisor.

⁷ See 15 U.S.C. § 2802(b)(3)(A):

The failure of the franchisor and the franchisee to agree to changes or additions to the provisions of the franchise, if—

(i) such changes or additions are the result of determinations made by the franchisor in good faith and in the normal course of business; and

(ii) such failure is not the result of the franchisor’s insistence upon such changes or additions for the purpose of preventing the renewal of the franchise relationship.

⁸ See 15 U.S.C. § 2802(b)(3)(B):

The receipt of numerous bona fide customer complaints by the franchisor concerning the franchisee’s operation of the marketing premises, if—

(i) the franchisee was promptly apprised of the existence and nature of such complaints following receipt of such complaints by the franchisor; and

(continued ...)

- c. “failure by the franchisee to operate the marketing premises in a clean, safe, and healthful manner, if the franchisee failed to do so on two or more previous occasions and the franchisor notified the franchisee of such failures” (15 U.S.C. § 2802(b)(3)(C)); and
- d. “a determination made by the franchisor in good faith and in the normal course of business”:
 - i. “to convert the leased marketing premises to a use other than the sale or distribution of motor fuel”;
 - ii. “to materially alter, add to, or replace such premises”;
 - iii. “to sell such premises”; or
 - iv. “that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee.”

15 U.S.C. § 2802(b)(3)(D).⁹

(footnote continued)

(ii) if such complaints related to the condition of such premises or to the conduct of any employee of such franchisee, the franchisee did not promptly take action to cure or correct the basis of such complaints.

⁹ See 15 U.S.C. § 2802(b)(3)(D):

In the case of any franchise entered into prior to June 19, 1978 (the unexpired term of which, on such date, is 3 years or longer) and, in the case of any franchise entered into or renewed on or after such date (the term of which was 3 years or longer, or with respect to which the franchisee was offered a term of 3 years or longer), a determination made by the franchisor in good faith and in the normal course of business, if—

- (i) such determination is—
 - (I) to convert the leased marketing premises to a use other than the sale or distribution of motor fuel,
 - (II) to materially alter, add to, or replace such premises,
 - (III) to sell such premises, or
 - (IV) that renewal of the franchise relationship is likely to be uneconomical to the franchisor despite any reasonable changes or reasonable additions to the provisions of the franchise which may be acceptable to the franchisee;
- (ii) with respect to a determination referred to in subclause (II) or (IV), such determination is not made for the purpose of converting the leased marketing premises to operation by employees or agents of the franchisor for such franchisor’s own account; and
- (iii) in the case of leased marketing premises such franchisor, during the 90-day period after notification was given pursuant to section 2804 of this title, either—

(continued ...)

7. Of the foregoing statutory provisions, only one — the market withdrawal provision — expressly prohibits discrimination, and then only in the context of the terms and conditions of the franchise to be offered by the transferee. In practice, however, allegations of discriminatory treatment arise frequently in cases brought under the PMPA. These allegations sometimes find support in the legislative history of the PMPA, which states that its intended purposes include prevention of discriminatory terminations and nonrenewals.

B. Discriminatory Termination and Nonrenewal (15 U.S.C. § 2802(b)(2)(A))

1. Pursuant to 15 U.S.C. § 2802(b)(2)(A), franchisees claim that the grounds for termination or nonrenewal are discriminatory and therefore not “reasonable and of material significance to the franchise relationship.”
2. On its face, 15 U.S.C. § 2802(b)(2)(A) does not expressly prohibit discrimination. However, “[t]he legislative history of the PMPA reveals that the Act was designed to protect franchisees from arbitrary or discriminatory termination or nonrenewal.” S. Rep. No. 731, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 873, 874 (“Senate Report”), *quoted in Doeberiner v. Sohio Oil Co.*, 880 F.2d 329, 331 (11th Cir. 1989).
 - a. In *Doeberiner*, the Eleventh Circuit held that whether a provision is “reasonable” and “material” is measured by an objective standard:

“Neither ‘reasonable’ nor ‘material’ is defined in the PMPA or its legislative history. In interpreting this statute, however, we are not left unguided, for it is a fundamental canon of statutory construction that, unless otherwise defined, words will be interpreted as taking their ordinary, traditional meaning. *See, e.g., Burns v. Alcala*, 420 U.S. 575, 580-581, 95 S. Ct. 1180, 1184-1185, 43 L. Ed. 2d 469 (1975). We look, therefore, to the common definitions of reasonable and material. Reasonable is defined as that which is not absurd, ridiculous, extreme, or excessive. *Webster’s Third New International Dictionary* 1892 (1981). Material means “being of real importance or great consequence.” *Id.* at 1392. Incorporating these definitions into § 2802(b)(2)(A), we conclude that Congress intended to permit termination or

(footnote continued)

- (I) made a bona fide offer to sell, transfer, or assign to the franchisee such franchisor’s interests in such premises; or
- (II) if applicable, offered the franchisee a right of first refusal of at least 45-days duration of an offer, made by another, to purchase such franchisor’s interest in such premises.

nonrenewal only when the franchisee's failure to comply involves a franchise provision that is both conscionable — that is, not absurd, ridiculous, extreme, or excessive — and of real importance or great consequence to the franchise relationship. This analysis necessarily involves an examination of the facts and circumstances surrounding the franchisor's inclusion of the provision in the franchise agreement as well as the franchisee's breach of the provision. To be true to the wording of the statute and commonplace definitions of those words, the court should not judge the franchise provision from the perspective of either the franchisor or the franchisee. Instead, the court should determine reasonableness and materiality from the standpoint of a neutral observer. By reviewing the hours provision in the franchise agreement according to this objective standard, the court insures that the franchisee receives the heightened protection Congress intended while providing the franchisor the latitude necessary to exercise its business judgment. The court does not decide what hours the station is to operate; rather, the court, as a neutral third-party, decides whether the hours provision Gulf has included in the franchise agreement is reasonable and material.”

Id. at 334.

b. If the contractual provision is “objectively reasonable and material to the franchise relationship,” its violation is grounds for termination pursuant to 15 U.S.C. § 2802(b)(2)(A) “absent arbitrariness or discrimination,” the *Doebereiner* court observed. *Id.* at 335.

c. The hours of operation requirement at issue in *Doebereiner* was not the same for all dealers. The Eleventh Circuit found that the requirement was “reasonable” and “material” and not enforced discriminatorily:

“Testimony revealed that all Gulf franchise stations in the Miami district are subject to minimum hours requirements. Each stations’ [sic] hours are determined by reference to several factors, including the location of the station and the hours maintained by Gulf’s competitors. Because *Doebereiner*'s station is located on a busy road adjacent to I-95 and competes with stations that conduct business until midnight and beyond, Gulf determined that it was prudent to require *Doebereiner* to operate until midnight.”

Id.

d. Accordingly, the Eleventh Circuit in *Doebereiner* upheld the district court’s denial of preliminary injunctive relief with respect

to termination for failure to comply with hours of operation requirement.

3. So many claims of discriminatory termination and nonrenewal are based on rent increases that they are addressed separately below.

C. Discriminatory Rent Increases (15 U.S.C. §§ 2802(b)(2)(A) and 2802(b)(3))

1. In *Dean v. Kerr-McGee Refining Corp.*, 714 F. Supp. 1155 (W.D. Okla. 1988), the plaintiff challenged rent increases on the grounds that they resulted in a constructive termination in violation of 15 U.S.C. § 2802(b)(2)(A) because they allegedly were not both “reasonable and of material significance to the franchise relationship.” The plaintiff also alleged that the rent increases violated 15 U.S.C. § 2802(b)(3)(A) because they were not “the result of determinations made by [the] franchisor in good faith and in the normal course of business” but rather were made “for the purpose of preventing renewal of [the] franchise relationship.”
 - a. “Good faith” under the PMPA “is the franchisor’s subjective good faith.” *Id.* at 1159, citing *Tiller v. Amerada Hess Corp.*, 540 F. Supp. 160, 165 (D.S.C. 1981).
 - b. “Reasonableness” under the PMPA “is a subjective standard evaluated principally from the perspective of the franchisor.” *Id.*, citing, *inter alia*, *Gruber v. Mobil Oil Corp.*, 570 F. Supp. 1088, 1093 (E.D. Mich. 1983).
 - c. The court held that, under either test, Kerr-McGee was entitled to summary judgment because the new rental formula was applied uniformly to all franchisees. *Id.*, quoting *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 330 (D.N.J. 1982) (“A showing that terms are applied without discrimination to all dealers rather than selectively to the complaining franchisee is strongly indicative that there is no intent to cause termination or nonrenewal.”).
 - d. Under the new rental formula at issue in *Dean*, some dealers actually paid lower rents. Rent increases for the dealers that — like the plaintiff — paid higher rents were capped at 200 percent. *Id.*
2. In *Munno v. Amoco Oil Co.*, 488 F. Supp. 1114, 1119 (D. Conn. 1980), the court held that the dealer’s claims of “bad faith” rent increases had to be measured by the franchisor’s “subjective good faith” *i.e.*, lack of discriminatory intent. In support of this “subjective good faith” test, the *Munno* court cited both the legislative history of the PMPA and case law.
 - a. Legislative history that supported the “subjective good faith” test included the following passages:

- i. “This good faith test is meant to preclude sham determinations from being used as an artifice for termination or non-renewal. The second test is whether the determination was made “in the normal course of business”. Under this test, the determination must have been the result of the franchisor’s normal decisionmaking process. These tests provide adequate protection of franchisees from arbitrary or discriminatory termination or non-renewal, yet avoid judicial scrutiny of the business judgment itself.”

Id., quoting Senate Report No. 95-731, 95th Cong., 2d Sess. (“Senate Report”), 37, reprinted in (1978) U.S. Code Cong. and Admin. News, pp. 873, 895-96.

- ii. “Elsewhere, the same Senate report indicates that the good faith requirement would ‘preclude the franchisor from basing nonrenewal upon any failure to agree to changes or additions to the provisions of the franchise which are imposed in an (sic) discriminatory manner.’”

Id., quoting Senate Report at 35 U.S. Code Cong. & Admin. News 1978, p. 893.

- b. Case law that the *Munno* court found supported the “subjective good faith” test included the following decisions:

- i. *Pearman v. Texaco, Inc.*, 480 F. Supp. 767 (W.D. Mo. 1979) (“Where rental changes are made in good faith, in the normal course of business and not for the purpose of preventing the renewal of the franchise relationship, the mere fact that the parties or the Court would have made a different business judgment or base that judgment on different factors is immaterial.”).

- ii. *Kesselman v. Gulf Oil Corp.*, 479 F. Supp. 800 (E.D. Pa. 1979) (granting summary judgment in favor of refiner notwithstanding fact that rent formula allowed flexibility in setting rates and notwithstanding plaintiff’s objections that he could not afford to do business at the new rate).

- c. The *Munno* court discounted the apparently contrary holding of *Sexe v. Husky Oil Co.*, 475 F. Supp. 135 (D. Mont. 1979) on the grounds that “its conclusion does not appear to be based on any examination of legislative history or case law and seems at odds with the more fully reasoned opinions.” 488 F. Supp. at 1120.

- d. Applying the “subjective good faith” test, the *Munno* court granted summary judgment in favor of the defendant notwithstanding the fact that the rent increase in question was in the range of 200 to 300 percent.
3. In *John & Kostas Service Station, Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991), the First Circuit affirmed the district court’s grant of summary judgment in favor of the franchisor.
 - a. The plaintiff alleged that the franchisor’s proposed changes or additions in the new franchise agreement — particularly a revised rent schedule — were not “in good faith and in the normal course of business” as required by 15 U.S.C. § 2802(b)(3)(A)(i) and were insisted upon by the franchisor “for the purpose of preventing the renewal of the franchise” in violation of 15 U.S.C. § 2802(b)(3)(A)(ii).
 - b. The First Circuit rejected the plaintiff’s allegations that violations of these PMPA provisions might be established by evidence of “Cumberland’s intent to convert existing stations — including Kostas’ — to use as a convenience store or a combination unit or to sell the property.” *See* 948 F.2d at 824. The PMPA expressly permits nonrenewal “to convert the leased marketing premises to a use other than the sale or distribution of motor fuel” (15 U.S.C. § 2802(b)(3)(D)(i)(I)) or “to sell such premises” (15 U.S.C. § 2802(b)(3)(D)(i)(III)), the First Circuit observed. *See id.*
 4. Under the “subjective good faith” test, “so long as the proposed charge is not being used to disguise an illegal attempt to discriminate against a franchisee and drive him from business, the court has no power to interfere.” *Lippo v. Mobil Oil Corp.*, 802 F.2d 975, 979 (7th Cir. 1986).
 - a. Applying the foregoing test, the Seventh Circuit rejected the plaintiff’s claim that he was treated differently from a similarly situated dealer in the Chicago area.
 - b. The different rent formula was justified, the *Lippo* court found, because the two dealers were *not* similarly situated:

“(1) Fredenhagen was a new dealer; (2) the service station premises were under construction; (3) he held a trial franchise for a one-year period only; and (4) the station was being converted from a partial self-serve operation to a full self-serve operation. Lippo had a partial self-service station which, according to Mobil, has generally higher profit margins than full self-service stations. We reiterate that the margin is Mobil’s projection of a station’s profitability and Mobil’s explanation for the difference is

plausible. Lippo does not persuade us otherwise. Indeed, Lippo's assigned profit margin was within the range for others with partial self-serve operations. The projected profit margin was also below Lippo's actual margin at the time the projection was made. Thus, Fredenhagen's dissimilar treatment does not constitute evidence of discriminatory treatment actionable under the PMPA. We hold therefore that Lippo's projected profit margin was calculated in good faith and in the normal course of Mobil's decisionmaking."

Id. at 980.

5. See also *Palmieri v. Mobil Oil Corp.*, 682 F.2d 295, 296 (2d Cir. 1982) (*per curiam*) ("We also agree with Judge Clarie that the PMPA does not require a franchisor to use objectively reasonable and economically realistic criteria in determining the amount of rent to be charged for a retail gasoline franchise; it merely prohibits a franchisor from applying a rental formula in a discriminatory manner in order to drive a franchisee out of the franchise relationship.").
6. The "subjective good faith" test applies even if the proposed change would arguably work an economic hardship upon the franchisee. See, e.g., *Radecki v. Amoco Oil Co.*, 634 F. Supp. 1393 (D. Minn. 1986).
 - a. In *Radecki*, the "failure to agree" related to Amoco's insistence upon a "pumper rider" whereby the plaintiff's full-service station could be converted into a "pumper," *i.e.*, "a station which sells gasoline and possibly convenience foods and other items and offers a car wash, but provides no auto repair or towing services and no TBA on the premises." *Id.* at 1394-95.
 - b. The terms of the pumper rider to which the plaintiff in *Radecki* objected included a consent to closure of the station for conversion to a pumper, a waiver of all claims against Amoco related to the conversion, and advance agreement to payment of rent upon conversion pursuant to an "established rental policy" that was neither stated in the pumper rider nor provided to Radecki. *Id.* at 1395, n.2.
 - c. Citing *Baldauf v. Amoco Oil Co.*, 553 F. Supp. 408, 415 (W.D. Mich. 1981), the *Radecki* court stated that it was faced with a "difficult choice," *i.e.*, "whether the PMPA mandates maintaining the status quo of the franchise and franchise relationship to the economic detriment of the franchisor or whether it permits alteration of the franchise and franchise relationship in light of changed market and economic conditions to the personal and economic hardship of the franchisee." 634 F. Supp. at 1400.

- d. While expressing sympathy for the plaintiff’s claims of “constructive termination, economic hardship, and other onerous consequences which confront him in the new lease agreement with the pumper rider,” the *Radecki* court found that it “must reluctantly conclude that the PMPA allows the franchisor to alter the franchise and franchise relationship, even if the result is particularly severe or harsh to the franchisee who may have been associated with the franchisor for many years, in response to changed market and economic circumstances, provided that this alteration is the result of a decision which the franchisor made in good faith and in the normal course of business, and not for the purpose of preventing the nonrenewal of the franchise relationship.” *Id.*
 - e. Observing that the PMPA “protects the franchisee from arbitrary or discriminatory termination or nonrenewal, not personal and economic hardship,” the *Radecki* court stated that the PMPA and its legislative history made clear that “the franchisor can act to alter the franchise and franchise relationship to its benefit in response to changed market and economic circumstances, even to the detriment of the franchisee.” *Id.*
7. Claims of discriminatory rent increases also arise frequently in connection with market withdrawals, as discussed in the section that follows.

D. Discriminatory Market Withdrawal (15 U.S.C. § 2802(b)(2)(E))

1. Following a market withdrawal, the most common claim of “discrimination” is that the purchasing franchisor offered a discriminatory new franchise in violation of 15 U.S.C. § 2802(b)(2)(E)(iii)(II).
2. In *Southern Nevada Shell Dealers Ass’n v. Shell Oil Co.*, 725 F. Supp. 1104, 1108 (D. Nev. 1989), the plaintiff dealers alleged that — following Shell’s withdrawal from the Las Vegas gasoline retail service market — the purchasing franchisor did not offer nondiscriminatory franchises to the Shell dealers in good faith “because (1) ARCO initially offered a one-year trial franchise before offering its usual three-year franchise; [and] (2) internal memoranda and ARCO pricing policies indicate an intent to terminate the franchises of the Shell dealers....”¹⁰
 - a. With respect to ARCO’s offer of trial franchises, ARCO had later offered each dealer a three-year franchise before Shell terminated the franchises. On that basis, the court found no discrimination in violation of the PMPA. *Id.*, citing *Ewing v. Amoco Oil Co.*, 823

¹⁰ The third allegation of bad faith, “which deals with Shell’s alleged violations of the PMPA, has no bearing on ARCO’s alleged violations of the PMPA,” the court found. *Id.* at 1109.

F.2d 1432, 1438 (10th Cir. 1987); *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d 12, 15 (1st Cir. 1986).

b. With respect to ARCO's alleged lack of good faith, the dealers cited an internal memorandum discussing the use of "economic rent" — which would result in substantial rent increases ("by as much as 425 percent") — to encourage dealers to become low cost, high volume stations. The *Southern Nevada Shell Dealers Ass'n* court, however, rejected the contention that the rent increases reflected lack of good faith because:

i. "The PMPA ... only requires that the franchise terms be similar, *i.e.*, not discriminatory, to other franchises currently in effect or currently being offered by the purchasing franchisor[.]" *Id.* at 1109, citing 15 U.S.C. § 2802(b)(2)(E)(iii)(II); *Jimenez v. B.P. Oil Co.*, 853 F.2d 268, 270 (4th Cir. 1988); *Avramidis v. Arco Petroleum Products Co.*, 798 F.2d at 13-14.

ii. "The 'good faith' requirement is concerned with whether a sham determination is being used to conceal selective discrimination against individual franchises." *Id.*, citing S. Rep. No. 731, 95th Cong. 2d Sess., *reprinted in* 1978 U.S. Code Cong. & Admin. News, 873.

iii. While providing "protection from an arbitrary or a discriminatory franchise termination or nonrenewal," the "good faith" test "'avoid[s] judicial scrutiny of the business judgment itself.'" *Id.*, quoting *Siecko v. Amerada Hess Corp.*, 569 F. Supp. 768, 772 (E.D. Pa. 1983).

c. Under this "business judgment" rule:

i. "Rather than being indicative of any lack of good faith, ARCO's higher franchise rents represent its business decision to operate high volume, low priced retail outlets instead of the traditional full service station." *Id.*

ii. "ARCO can properly adopt its position and this court cannot properly second guess the prudence of that decision." *Id.*, citing *Lippo v. Mobil Oil Co.*, 802 F.2d 975, 980 (7th Cir. 1986); *Meyer v. Amerada Hess Corp.*, 541 F. Supp. 321, 331-32 (D.N.J. 1982).

3. In *John & Kostas Service Station, Inc. v. Cumberland Farms, Inc.*, 948 F.2d 821 (1st Cir. 1991), the First Circuit affirmed the district court's grant of summary judgment in favor of the purchasing franchisor following a market withdrawal. The First Circuit found no violation of

15 U.S.C. § 2802(b)(2)(E)(iii)(II) because “the renewal franchises were the same for all franchises” and “Cumberland used the same rental formula for all the franchises and its rental review policy was applied across the board.” *Id.* at 824.

4. In *Unocal Corp. v. Cassel*, 177 F.3d 755, 767 (9th Cir.), *cert. denied sub. nom. Simmons v. Unocal Corp.*, 528 U.S. 1061 (1999), the Ninth Circuit held that the PMPA’s requirement of nondiscriminatory offers of new franchises did not require that the terms of a franchisee’s new franchise agreement be identical to those of every other franchise agreement.
 - a. In support of this holding, the Ninth Circuit in *Unocal* quoted the following decisions:
 - i. *Ewing v. Amoco Oil Co.*, 823 F.2d 1432, 1438 (10th Cir. 1987) (“[a] franchisor must be free to offer different terms at different franchise locations.”). *Id.* at 767.
 - ii. *Southern Nevada Shell Dealers Ass’n v. Shell Oil Co.*, 725 F. Supp. 1104, 1109 (D. Nev. 1989) (“The PMPA ... only requires that the franchise terms be similar, *i.e.*, not discriminatory to other franchises currently in effect or currently being offered by the purchasing franchisor.”). *Id.*
 - iii. *Valentine v. Mobil Oil Corp.*, 789 F.2d 1388, 1392 (9th Cir. 1986) (“So long as the franchisor does not have a discriminatory motive or use the altered terms as a pretext to avoid renewal, the franchisor has met the burden required by the PMPA for determining good faith.”). *Id.*
 - b. In *Unocal*, the franchises offered by the purchasing franchisor to the California franchisees acquired following another refiner’s market withdrawal differed from the purchasing franchisor’s agreements with franchisees outside California in that they provided for annual rent increases rather than having a fixed rent throughout the lease term.
 - c. The franchise agreements of the selling franchisor, however, did contain a provision for annual rent increases.
 - d. Finding no evidence of bad faith, the Ninth Circuit upheld the district court’s dismissal of the franchisees’ PMPA claims.
5. However, the very existence of a market withdrawal within the meaning of 15 U.S.C. § 2802(b)(2) may be called into question if not all franchises in the geographic area were terminated at the same time.

6. In *Southern Nevada Shell Dealers Ass'n*, the court held that to establish a market withdrawal the selling franchisor had to withdraw completely and totally from the “sale of motor fuel through retail outlets” at a specified time. 725 F. Supp. at 1111. The court so held because:
 - a. ““The overriding purpose of the PMPA ... is to prevent unfair and discriminatory termination of franchisees by franchisors.” *Id.* at 1110, *citing Russo v. Texaco, Inc.*, 630 F. Supp. 682 (E.D.N.Y.), *aff'd*, 808 F.2d 221 (2d Cir. 1986).
 - b. “Consistent with this purpose is the acknowledgement that the PMPA must be given a liberal construction.” *Id.*, *citing Brach v. Amoco Oil Co.*, 677 F.2d 1213 (7th Cir. 1982).

E. Discriminatory (Not “Bona Fide”) Offers to Sell Premises (15 U.S.C. § 2802(b)(3)(D)(iii))

1. In *Tobias v. Shell Oil Co.*, 782 F.2d 1172, 1174 (4th Cir. 1986), the Fourth Circuit observed that the PMPA’s “standards incorporate both procedural and substantive considerations in defining a ‘bona fide offer’ under § 2802(b)(3)(D)(iii).”
 - a. With respect to establishing a “bona fide offer,” the Fourth Circuit described the PMPA’s procedural requirements as follows:

“On a procedural level, the PMPA seeks to protect the individual franchisee from arbitrary or discriminatory treatment by a franchisor. S. Rep. No. 95-731 at 15, 1978 U.S. Code Cong. & Ad. News at 874. To show that a contested offer is bona fide, therefore, the defendant must demonstrate ‘that the offer was made in conformity with the offeror’s general practice for selling property.’ *Brownstein v. Arco Petroleum Products*, 604 F. Supp. 312, 315 (E.D. Pa. 1985).”

Id.
 - b. With respect to establishing a “bona fide offer,” the Fourth Circuit described the PMPA’s substantive requirements as follows:

“This particular focus of the PMPA is complemented by a more general substantive concern with ‘remedying the disparity in bargaining power between franchisors and franchisees.’ S. Rep. No. 95-731 at 18, 1978 U.S. Code Cong. & Ad. News at 877. The rule of conformity with the offeror’s general practices is accordingly accompanied by the requirement that a bona fide offer ‘must meet or very nearly approach’ the fair market value of the fully operative leased station. *Brownstein v. Arco*, 604 F. Supp. at 315.”

Id.

- c. Applying the foregoing standards, the Fourth Circuit held that Shell's offer was *bona fide* and that Shell's refusal to sell the underground steel storage tanks was part of Shell's program of replacing all unprotected steel tanks with fiberglass models.
2. "Approaching market value": the substantive test of a "bona fide" offer.
 - a. The Fourth Circuit's reference in *Tobias* to the requirement that a "bona fide" offer "must meet or very nearly approach" the fair market value is consistent with other authority holding that, to establish that an offer was "bona fide," the refiner need not necessarily establish that it was at fair market value. *See, e.g., Roshan Associates, Inc. v. Motiva Enterprises, L.L.C.*, 241 F. Supp. 2d 639, 642 (E.D. La. 2002), ("Congress' use of the term 'bona fide' rather than 'fair market value' indicates a 'degree of deference' and 'a recognition that "the word 'value' almost always involves a conjecture, a guess, a prediction, a prophecy."") (quoting *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (3d Cir. 1987)) (quoting *Amerada Hess Corp. v. Commissioner*, 517 F.2d 75, 83 (3d Cir. 1975)), *aff'd*, 2003 U.S. App. LEXIS 8965 (5th Cir. April 16, 2003).
 - b. Under the test of "objective reasonableness," "there may be a range of prices with reasonable claims to being fair market value." *Roshan Associates*, 241 F. Supp. at 642 (quoting *Harris v. Equilon Enterprises, LLC*, 107 F. Supp. 2d 921, 931 (S.D. Ohio 2000)) (quoting *Slatky v. Amoco Oil Co.*, 830 F.2d 476, 485 (3d Cir. 1987)).
 - c. In granting summary judgment on the plaintiff's PMPA claim, the *Roshan Associates* court found that the refiner's offer was "bona fide" for two reasons.
 - i. First, "Motiva's method for arriving at a purchase price (*i.e.*, valuing land based on other land sales and valuing equipment separately) has been approved by other courts evaluating whether an asking price constitutes a bona fide offer under the PMPA." *Id.* (citation omitted).
 - ii. Second, "it is the same method used by Motiva in appraising 4,200 other service station locations." *Id.*
 3. Exceeding market value: still a "bona fide" offer?
 - a. In *Lauro v. Mobil Oil Corp.*, 825 F. Supp. 994 (M.D. Fla. 1992), the court observed that "an asking price that 'substantially

exceeds' the appraised value of the property may raise a question as to whether the offer is bona fide." *Id.* at 995, citing *Brownstein v. ARCO Petroleum Products Co.*, 604 F. Supp. 312 (E.D. Pa. 1985). Such an offer is not "bona fide," however, unless "the franchisor's offer was a 'sham' or was intended to terminate the franchise arbitrarily." *Id.*, citing *Ballis v. Mobil Oil Corp.*, 622 F. Supp. 473, 476 (N.D. Ill. 1985).

- b. In *Ellis v. Mobil Oil*, 969 F.2d 784 (9th Cir. 1992), the Ninth Circuit reversed the district court's grant of summary judgment where the refiner's allegedly "bona fide" offer arguably exceeded the fair market value because it included items — such as good will — that the franchisee would not be purchasing:

"The facts of each case will set the terms of what constitutes a bona fide offer. The record demonstrates that Ellis is entitled to a bona fide offer to buy land, improvements and equipment. The value of that offer should reflect what a willing purchaser would pay for the fee title of the land, the improvements and the equipment of a terminated franchise. A bona fide offer in this case would not include the value of the franchisee's own goodwill or Mobil's franchise value of the station. Such values as Mobil's accumulated advertising and trademark recognition are not being offered for sale and, therefore, need not be included in the franchisee's purchase price under the PMPA when the franchise is being terminated."

Id. at 788.

III. ROBINSON-PATMAN ACT

A. Section 2(a): Price Discrimination Prohibited

1. Elements of the Offense

a. Difference in price

- i. Discrimination is "merely a price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

- ii. Discrimination is determined based on actual net prices — taking into account all discounts, rebates, surcharges, and other factors that affect prices.¹¹
 - (a) A price difference can include different credit terms — if not based on a sound business rationale or if different criteria are applied to some customers.¹²
 - (b) Delivered pricing systems must apply to all customers on a non-discriminatory basis and may violate the Robinson-Patman Act if they confer an advantage upon favored customers.¹³
- iii. Differences in price must be “**reasonably contemporaneous**,”¹⁴ taking into account:
 - (a) **the seasonal quality of industry sales;**¹⁵

¹¹ See, e.g., *Conoco Inc. v. Inman Oil Co.*, 774 F.2d 895, 901-02 (8th Cir. 1985); *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 902 (3d Cir.), cert. denied, 474 U.S. 863 (1985); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 118-20 (3d Cir. 1980), cert. denied, 451 U.S. 911 (1981); *O’Connell v. Citrus Bowl, Inc.*, 99 F.R.D. 117, 121-22 (E.D.N.Y. 1983); *Diehl & Sons v. International Harvester Co.*, 445 F. Supp. 282 (E.D.N.Y. 1978); *Carsalve Corp. v. Texaco Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,370, 1978 U.S. Dist. LEXIS 19924 (D.N.J. 1978); *Guyott Co. v. Texaco, Inc.*, 261 F. Supp. 942, 948-49 (D. Conn. 1966).

¹² *Thomas J. Kline, Inc. v. Lorillard, Inc.*, 878 F.2d 791 (4th Cir. 1989), cert. denied, 493 U.S. 1073 (1990), *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325 (6th Cir. 1983); *Craig v. Sun Oil Co.*, 515 F.2d 221, 224 (10th Cir. 1975), cert. denied, 429 U.S. 829 (1976); *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338, 350 (W.D. Pa. 1998); *Metro Video Distribs. v. Vestron Video, Inc.*, 1990-1 Trade Cas. (CCH) ¶ 68,986, at 63,348-50, 1990 U.S. Dist. LEXIS 18739 (D.P.R. 1990); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637 (D.N.J. 1980), *aff’d mem.*, No. 82-5217 (3d Cir. June 15, 1983); *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4, 9 (E.D. Pa. 1977).

¹³ See, e.g., *Edward J. Sweeney*, 637 F.2d at 120; *Anderson Foreign Motors, Inc. v. New England Toyota Distrib, Inc.*, 492 F. Supp. 1383, 1387 (D. Mass. 1980); *World-Wide Volkswagen Corp. v. Autobahn Motors Co.*, 1980-81 Trade Cas. (CCH) P 63,601, at 77,197, 1980 U.S. Dist. LEXIS 14523 (S.D.N.Y. 1980); *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 442 (1983); *Advisory Op. No. 483*, 83 F.T.C. 1843, 1844 (1974), *modified*, 85 F.T.C. 1174, 1176 (1975); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 387 (8th Cir. 1987); *Bell v. Fur Breeders Agric. Coop.*, 3 F. Supp. 2d 1241, 1242-43 (D. Utah 1998); *Guyott Co. v. Texaco*, 261 F. Supp. 942 (D. Conn. 1964).

¹⁴ See, e.g., *Bruce’s Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1202 (11th Cir.), *amended per curiam*, 997 F.2d 1340, cert. denied, 510 U.S. 1012 (1993); *Motive Parts Warehouse v. Facet Enters.*, 774 F.2d 380, 389-90 (10th Cir. 1985); *Zwicker v. J.I. Case Co.*, 596 F.2d 305, 309 (8th Cir. 1979); *Fred Meyer, Inc. v. FTC*, 359 F.2d 351, 357 (9th Cir. 1966), *rev’d in part on other grounds*, 390 U.S. 341 (1968); *Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371-72 (2d Cir. 1958); *Allied Sales & Serv. Co. v. Global Indus. Techs., Inc.*, 2000-2 Trade Cas. (CCH) ¶ 72,953, 2000 U.S. Dist. LEXIS 7774 (S.D. Ala. 2000); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916 (5th Cir. 1962).

- (b) **overall market conditions;**¹⁶ and
 - (c) **the particular terms of sale.**¹⁷
 - iv. N.B.: Section 2(a) permits “price changes from time to time” to reflect changing market conditions. 15 U.S.C. § 13(a).
- b. Sales to two or more purchasers
 - i. Two completed sales are generally necessary to establish goods “sold” to two or more “purchasers” at different prices by a single seller.¹⁸
 - ii. This requirement is generally *not* satisfied by:
 - (a) **a sale and an offer to sell;**¹⁹
 - (b) **a sale and a refusal to sell,**²⁰ and

(footnote continued)

¹⁵ See, e.g., *Xeta, Inc. v. Atex, Inc.*, 852 F.2d 1280 (Fed. Cir. 1988); *Dealers Wholesale Supply, Inc. v. Pacific Steel and Supply Co.*, 1984-2 Trade Cas. (CCH) ¶ 66,109, at 66,203-04, 1984 U.S. Dist. LEXIS 15145 (N.D. Cal. 1984); *Valley Plymouth v. Studebaker-Packard Corp.*, 219 F. Supp. 608, 610-11 (S.D. Cal. 1963).

¹⁶ See, e.g., *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25, 27 (1st Cir. 1993); *A.A. Poultry Farms v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990); *Texas Gulf Sulphur Co. v. J.R. Simplot Co.*, 418 F.2d 793, 807 (9th Cir. 1969).

¹⁷ See, e.g., *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1572-73 (N.D. Ga. 1992); *SDI Reading Concrete, Inc. v. Hilltop Basic Resources, Inc.*, 576 F. Supp. 525, 532 (S.D. Ohio 1983); *Chroma Lighting v. GTE Prods. Corp.*, 1997-1 Trade Cas. (CCH) ¶ 71,836, 1997 U.S. App. LEXIS 6725 (9th Cir.), *cert. denied*, 1997 U.S. LEXIS 6442 (1997); *American Booksellers Ass’n, Inc. v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1038-39 (N.D. Cal. 2001); *First Comics, Inc. v. World Color Press, Inc.*, 672 F. Supp. 1064, 1067 (N.D. Ill. 1987), *aff’d in part and rev’d in part on other grounds*, 884 F.2d 1033 (7th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990).

¹⁸ See, e.g., *Bruce’s Juices*, 330 U.S. at 755; *Parrish v. Cox*, 586 F.2d 9, 11 (6th Cir. 1978); *Shaw’s, Inc. v. Wilson-Jones Co.*, 105 F.2d 331, 333 (3d Cir. 1939); *Amsterdam Tobacco, Inc. v. Philip Morris, Inc.*, 107 F. Supp. 2d 210, 220-21 (S.D.N.Y. 2000); *Gabriel & Assocs. v. Invisible Fence Co.*, 1993-2 Trade Cas. (CCH) ¶ 70,440, 1993 U.S. Dist. LEXIS 19907 (D. Md. 1993); *Burns v. Cover Studios, Inc.*, 818 F. Supp. 888, 891 n.7 (W.D. Pa. 1993); *Capital Ford Truck Sales*, 819 F. Supp. at 1574.

¹⁹ See, e.g., *Crossroads Cogeneration Corp. v. Orange & Rockland Util., Inc.*, 159 F.3d 129, 142 (3d Cir. 1998); *Terry’s Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604, 615 (4th Cir. 1985); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334-35, 337 (8th Cir. 1982); *Maier-Schule GMC, Inc. v. General Motors Corp.*, 780 F. Supp. 984, 989-90 (W.D.N.Y. 1991); *Gillette Tire Jobbers of La., Inc. v. Appliance Indus., Inc.*, 596 F. Supp. 1277, 1278 (E.D. La. 1984); *Capitol Ice Cream Wholesalers, Inc. v. Mid-Atlantic Coca-Cola Bottling Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,068, 1982 U.S. Dist. LEXIS 16321 (D.D.C. 1982); *Highspire, Inc. v. UKF Am., Inc.*, 469 F. Supp. 1009, 1012 (S.D.N.Y. 1979).

- (c) **other combinations not involving two completed sales;**²¹
 - (d) ***except that*** one of the two sales can be established by an enforceable contract.²²
- iii. Intra-enterprise transactions — such as transfers from a parent to a subsidiary — are generally ***not*** “sales” subject to Section 2(a).²³
 - iv. “Sales” do ***not*** include:
 - (a) **leases** (as determined by the “dominant nature” of the transaction);²⁴

(footnote continued)

²⁰ See, e.g., *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113, 1120 (5th Cir. 1982); *Mullis v. Arco Petroleum Corp.*, 502 F.2d 290, 294 (7th Cir. 1974); *Najfeh v. Ronson Art Metal Works*, 218 F.2d 202, 206 (10th Cir. 1954); *Cancel PCS, LLC v. Omnipoint Corp.*, 2000-1 Trade Cas. (CCH) ¶ 72,855, 2000 U.S. Dist. LEXIS 2830 (S.D.N.Y. 2000); *General United Co. v. American Honda Motor Co.*, 618 F. Supp. 1452, 1454 (W.D.N.C. 1985).

²¹ See, e.g., *Robertson’s Battery Terminal, Inc. v. Pacific Chloride, Inc.*, 1992-1 Trade Cas. (CCH) ¶ 69,809, at 67,760, 1992 U.S. App. LEXIS 10271 (6th Cir. 1992) (different quotes that do not result in sales do not violate Section 2(a)); *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 517 F.2d 1059, 1065 n.11, 1067 n.17 (5th Cir. 1975) (“purchaser” does not include “one who merely seeks to purchase”), *cert. denied*, 424 U.S. 968 (1976); *Stevens v. Zenith Distrib. Corp. of Kansas*, 568 F. Supp. 1200, 1201 (W.D. Mo. 1983) (same); *Uniroyal, Inc. v. Hoff & Thames, Inc.*, 511 F. Supp. 1060, 1068 (S.D. Miss. 1981) (not sufficient merely to show a failure to offer plaintiff a special promotional price); *LaMar Printing, Inc. v. Minuteman Press Int’l, Inc.*, 1981-1 Trade Cas. (CCH) ¶ 64,034, at 76,348, 1981 U.S. Dist. LEXIS 12490 (N.D. Ga. 1981) (case dismissed because plaintiff alleged only that it was charged more than it would have paid to an alternative supplier).

²² See, e.g., *En Vogue v. UK Optical Ltd.*, 843 F. Supp. 838, 846 (E.D.N.Y. 1994); *Koblar v. G.H. Dacy Assocs., Inc.*, 1987-2 Trade Cas. (CCH) ¶ 67,665, at 58,381 (N.D. Fla. 1987); *J.W. Burress, Inc. v. JLG Indus., Inc.*, 491 F. Supp. 15, 18 (W.D. Va. 1980); *Republic Packaging Corp. v. Haveg Indus., Inc.*, 406 F. Supp. 379 (N.D. Ill. 1976); *Aluminum Co. of Am. v. Tandet*, 235 F. Supp. 111, 114 (D. Conn. 1964).

²³ See, e.g., *Caribe BMW, Inc. v. Bayerische Motoren Werke A.G.*, 19 F.3d 745, 750-51 (1st Cir. 1994); *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268, 278-79 (8th Cir. 1988); *Russ’ Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 217-20 (6th Cir. 1985); *O’Byrne v. Cheker Oil Co.*, 727 F.2d 159, 164 (7th Cir. 1984); *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 966 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979); *Yellow Page Solutions, Inc. v. Bell Atl. Yellow Pages Co.*, Civ. 5663 (MBM), 2001 U.S. Dist. LEXIS 18831 (S.D.N.Y. Nov. 19, 2001); *General Supply Deck & Floor Underlayment Co. v. Maxxon Southwest, Inc.*, Civ. No. 3:00-CV-2745-G, 2001 U.S. Dist. LEXIS 18938 (N.D. Tex. Nov. 20, 2001); *Keller’s Radiator Warehouse, Inc. v. Go/Dan Indus.*, 1996-1 Trade Cas. (CCH) ¶ 71,318, 1996 U.S. Dist. LEXIS 1086 (D. Kan. 1996); *Houry v. Getty Petroleum Corp.*, Civ. A. No. 93-0216T, 1993 U.S. Dist. LEXIS 19641 (D.R.I. Dec. 3, 1993); *Adcom, Inc. v. Nokia Corp.*, Civ. A. No. 90-4088, 1991 U.S. Dist. LEXIS 8097 (E.D. La. June 7, 1991); *Krause v. General Motors Corp.*, 1988-2 Trade Cas. (CCH) ¶ 68,163, 1988 U.S. Dist. LEXIS 12048 (E.D. Mich. 1988); *Novatel Communs., Inc., v. Cellular Tel. Supply, Inc.*, 1986-2 Trade Cas. (CCH) ¶ 67,412, 1986 U.S. Dist. LEXIS 16017 (N.D. Ga. 1986); *Island Tobacco Co., Ltd. v. R.J. Reynolds Indus., Inc.*, 513 F. Supp. 726, 735 (D. Haw. 1981).

²⁴ See, e.g., *Export Liquor Sales, Inc. v. Ammex Warehouse Co.*, 426 F.2d 251, 252 (6th Cir. 1970), *cert. denied*, 400 U.S. 1000 (1971); *Rea v. Ford Motor Co.*, 355 F. Supp. 842, 851 (W.D. Pa. 1972), *rev’d in part on* (continued ...)

- (b) **bona fide**²⁵ **agency or consignment agreements;**²⁶
 - (c) **licenses;**²⁷
 - (d) **exchange agreements;**²⁸ and
 - (e) **loans.**²⁹
- v. In determining whether there is a “single seller,” courts will permit a Section 2(a) claim to be brought under certain circumstances by an “indirect purchaser.”

(footnote continued)

other grounds and remanded, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Plum Tree, Inc. v. N.K. Winston Corp.*, 351 F. Supp. 80, 87 (S.D.N.Y. 1972); *Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Ctr., Inc.*, 219 F. Supp. 400, 403 (W.D. Pa. 1963).

²⁵ See *Fusco v. Xerox Corp.*, 676 F.2d 332 (8th Cir. 1982) (consignment could be sale by original vendor if vendor was actively involved and had recourse only against consignee); *Parrish v. Cox*, 586 F.2d 9, 12 (6th Cir. 1978) (dictum) (purported consignment may not disguise an actual sale); *Ludwig v. American Greetings Corp.*, 264 F.2d 286, 288 (6th Cir. 1959) (placing competitor’s former customers on consignment program is indirect price discrimination).

²⁶ See, e.g., *Seaboard Supply Co. v. Congoleum Corp.*, 770 F.2d 367, 373 (3d Cir. 1985); *Eximco, Inc. v. Trane Co.*, 737 F.2d 505, 516-17 (5th Cir. 1984); *Loren Specialty Mfg. Co. v. Clark Mfg. Co.*, 360 F.2d 913 (7th Cir.), *cert. denied*, 385 U.S. 957 (1966); *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); *Metro Communs. Co. v. Ameritech Mobile Communs., Inc.*, 788 F. Supp. 1424, 1437 (E.D. Mich. 1992), *aff’d*, 984 F.2d 739 (6th Cir. 1993); *Southern Bus. Communs., Inc. v. Matsushita Elec. Corp. of Am.*, 806 F. Supp. 950, 960 (N.D. Ga. 1992); *Kem-Tech, Inc. v. Mobil Corp.*, 1986-1 Trade Cas. (CCH) ¶ 66,947, at 61,867-68, 1985 U.S. Dist. LEXIS 15079 (E.D. Pa. 1985); *Martin Ice Cream Co. v. Chipwich, Inc.*, 554 F. Supp. 933, 944 (S.D.N.Y. 1983); *National Auto Brokers Corp. v. General Motors Corp.*, 376 F. Supp. 620, 626-27 (S.D.N.Y. 1974), *aff’d*, 572 F.2d 953 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979); *Kennedy Theater Ticket Serv. v. Ticketron, Inc.*, 342 F. Supp. 922 (E.D. Pa. 1972).

²⁷ See, e.g., *Microsoft Corp. v. BEC Computer Co.*, 818 F. Supp. 1313, 1315 (C.D. Cal. 1992); *Record Club of Am., Inc. v. CBS, Inc.*, 310 F. Supp. 1241 (E.D. Pa. 1970); *LaSalle St. Press, Inc. v. McCormick & Henderson, Inc.*, 293 F. Supp. 1004 (N.D. Ill. 1968), *aff’d in part and rev’d in part*, 445 F.2d 84 (7th Cir. 1971); *County Theatre Co. v. Paramount Film Distrib. Corp.*, 146 F. Supp. 933 (E.D. Pa. 1956); *Kearuth Theatres Corp. v. Paramount Pictures*, 1956 Trade Cas. (CCH) ¶ 68,574, 1956 U.S. Dist. LEXIS 4039 (S.D.N.Y. 1956).

²⁸ See, e.g., *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184, 1192 (9th Cir. 1984), *cert. denied*, 469 U.S. 1213 (1985); *American Oil Co. v. McMullin*, 508 F.2d 1345, 1353 (10th Cir. 1975); see also *Rebel Oil Co. v. Atlantic Richfield Co.*, 146 F.3d 1088, 1094 (9th Cir.), *cert. denied*, 525 U.S. 1017 (1998).

²⁹ See, e.g., *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1325 (6th Cir. 1983); *Cemar, Inc. v. Nissan Motor Corp. in U.S.A.*, 678 F. Supp. 1091, 1101 (D. Del. 1988); *Blount Fin. Serv., Inc. v. Walter E. Heller & Co.*, 632 F. Supp. 240, 242 (E.D. Tenn. 1986), *aff’d*, 819 F.2d 151 (6th Cir. 1987); *L.S. Amster & Co. v. McNeil Labs., Inc.*, 504 F. Supp. 617, 620-22 (S.D.N.Y. 1980); *American Bankers Club, Inc. v. American Express Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,247, 1977 U.S. Dist. LEXIS 17841 (D.D.C. 1977); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 421 F. Supp. 237, 246 (D.N.J. 1976) (motion for preliminary injunction), 502 F. Supp. 637, 646-48 (D.N.J. 1980); *Rea v. Ford Motor Co.*, 355 F. Supp. 842, 869 (W.D. Pa. 1972), *rev’d in part on other grounds and remanded*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Bichel Optical Labs, Inc. v. Marquette Nat’l Bank*, 336 F. Supp. 1368, 1371 (D. Minn. 1971), *aff’d*, 487 F.2d 906 (8th Cir. 1973).

- (a) An indirect purchaser is a customer of a customer of the defendant seller.
- (b) To bring a Section 2(a) claim, the indirect purchaser must establish that the defendant exercised sufficient control over its resellers to impute the resellers' pricing to the defendant (such as a "dummy wholesaler").³⁰
- (c) If a parent exercises control over the customer and pricing decisions of a subsidiary, the subsidiary's sales may be attributed to the parent.³¹
- (d) The First Circuit, however, has adopted a "bright line" rule that a wholly owned subsidiary's sales should *always* be attributed to its parent without any inquiry into whether the parent controls the subsidiary. The First Circuit's "Reverse *Copperweld*"³² theory was enunciated in an opinion written by Stephen Breyer, who was at the time Chief Judge of the First Circuit before his appointment to the Supreme Court. *See Caribe BMW, Inc. v. Bayerische Motoren Werke A.G.*, 19 F.3d 745 (1st Cir. 1994).

c. Commodities

- i. The Robinson-Patman Act does not define what "commodities" are subject to Section 2(a), but only tangible products are covered.
- ii. As with the determination of whether a particular transaction is a "sale," whether a particular sale involves

³⁰ *See, e.g., FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1028 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Purolator Prods., Inc. v. FTC*, 352 F.2d 874, 883 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).

³¹ *See, e.g., Acme Refrigeration of Baton Rouge, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243 (5th Cir.), *cert. denied*, 479 U.S. 848 (1986); *Schwimmer v. Sony Corp. of Am.*, 637 F.2d 41, 49 (2d Cir. 1980); *Ashkanazy v. I. Rokeach & Sons, Inc.*, 757 F. Supp. 1527, 1547 (N.D. Ill. 1991); *Island Tobacco Co., Ltd. v. R..J. Reynolds Indus.*, 513 F. Supp. 726, 734-35 (D. Haw. 1981); *Baim & Blank v. Philco Corp.*, 148 F. Supp. 541, 543 (E.D.N.Y. 1957).

³² *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984) (parent and subsidiary cannot conspire for purposes of Section 1 of the Sherman Act).

“commodities” depends upon the “dominant nature of the transaction.”³³

d. “Like Grade and Quality”

- i. Section 2(a) prohibits only discriminatory pricing of goods of “like grade and quality.” 15 U.S.C. § 13(a).
- ii. Brand names and labels are *not* determinants of “grade and quality.” *FTC v. Borden Co.*, 383 U.S. 637 (1966). Rather, grade and quality are to be determined by the characteristics of the product itself. *Id.* at 641. If two products are “physically and chemically identical,” they are of “like grade and quality” within the meaning of Section 2(a). *Id.* at 638.
- iii. Differences in packaging and warranties insufficient to establish that products are *not* of like grade and quality.³⁴
- iv. Differences that affect consumer use and marketability will suffice to establish that goods are *not* of like grade and quality.³⁵

e. Injury to Competition

³³ *First Comics, Inc. v. World Color Press, Inc.*, 884 F.2d 1033 (7th Cir. 1989), *cert. denied*, 493 U.S. 1075 (1990); *Aviation Specialties, Inc. v. United Techs. Corp.*, 568 F.2d 1186 (5th Cir. 1978); *Freeman v. Chicago Title & Trust Co.*, 505 F.2d 527, 531 (7th Cir. 1974); *Baum v. Investors Diversified Servs., Inc.*, 409 F.2d 872, 875 (7th Cir. 1969); *KMG Kanal-Muller-Gruppe Int'l GmbH & Co. v. Inliner U.S.A., Inc.*, 1999-2 Trade Cas. (CCH) ¶ 72,628, 1999 U.S. Dist. LEXIS 13895 (S.D. Tex. 1999); *General Glass Co. v. Globe Glass & Trim Co.*, 1978-2 Trade Cas. (CCH) ¶ 62,231, at 75,490, 1978 U.S. Dist. LEXIS 15559 (N.D. Ill. 1978); *Advanced Office Sys. Co. v. Accounting Sys.*, 442 F. Supp. 418 (D.S.C. 1977); *Ideal Plumbing Co. v. Benco, Inc.*, 382 F. Supp. 1161 (W.D. Ark. 1974), *aff'd*, 529 F.2d 972 (8th Cir. 1976); *May Dep't Store v. Graphic Process Co.*, 637 F.2d 1211 (9th Cir. 1980); *Morning Pioneer, Inc. v. Bismarck Tribune Co.*, 493 F.2d 383, 389 n.11 (8th Cir.), *cert. denied*, 419 U.S. 836 (1974).

³⁴ *See, e.g., DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 703 (7th Cir. 1967), *rev'd on other grounds*, 392 U.S. 134 (1968); *Hartley & Parker, Inc. v. Florida Beverage Corp.*, 307 F.2d 916, 923 (5th Cir. 1962); *William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co.*, 461 F. Supp. 410, 421 (N.D. Cal. 1978), *aff'd in part and rev'd in part on other grounds*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982); *Bruce's Juices, Inc. v. American Can Co.*, 87 F. Supp. 985, 987 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919, 924 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951); *Flair Zipper Corp. v. Textron, Inc.*, 1980-2 Trade Cas. (CCH) ¶ 63,555, 1980 U.S. Dist. LEXIS 13578 (S.D.N.Y. 1980).

³⁵ *See, e.g., Utah Foam Prods. Co. v. Upjohn Co.*, 154 F.3d 1212, 1217-18 (10th Cir. 1998), *cert. denied*, 526 U.S. 1051 (1999); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1575 (N.D. Ga. 1992); *Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 888-89 (S.D.N.Y. 1968), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 184 F. Supp. 312, 314, 319 (N.D. Ill. 1960), *aff'd*, 287 F.2d 265 (7th Cir.), *cert. denied*, 368 U.S. 829 (1961); *Atalanta Trading Corp. v. FTC*, 258 F.2d 365 (2d Cir. 1958).

- i. Statutory test: “The effect of such discrimination may be substantially [a] to lessen competition or tend to create a monopoly in any line of commerce, or [b] to injure, destroy, or prevent competition with any person who either [i] grants or [ii] knowingly receives the benefit of such discrimination, or [iii] with customers of either of them.” 15 U.S.C. § 13(a).
- ii. “Primary line” injury: Injury to competition with the seller.
 - (a) Recovery for predatory pricing requires (1) evidence that the challenged prices of a competitor were “below an appropriate measure of [its] ... costs,” and (2) “a demonstration that the competitor had a reasonable prospect, or, under Section 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices.” *Brooke Group Ltd. v. Brown & Williamson Corp.*, 509 U.S. 209, 224 (1993).
 - (b) *Brooke Group* thus established an objective test for primary line injury rather than allowing it to be inferred from the seller’s predatory intent.
- iii. “Secondary line” injury: Injury to competition at the buyer’s level.
 - (a) Requires proof of competition between the favored and disfavored purchasers.³⁶
 - (b) Proof of injury by direct evidence of lost sales or profit caused by the discrimination. *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 434-35 (1983).³⁷

³⁶ See, e.g., *Stelwagon Mfg. Co. v. Tarmac Roofing Sys., Inc.*, 63 F.3d 1267, 1271-72 (3d Cir. 1995), *cert. denied*, 516 U.S. 1172 (1996); *Anaren Microwave, Inc. v. Loral Corp.*, 49 F.3d 62, 63 (2d Cir. 1995); *National Distillers and Chem. Corp. v. Brad’s Mach. Prods.*, 666 F.2d 492, 496 (11th Cir. 1982); *Lupia v. Stella D’Oro Biscuit Co.*, 586 F.2d 1163, 1170-71 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979); *Parrish v. Cox*, 586 F.2d 9, 11 (6th Cir. 1978); *M.C. Mfg. Co. v. Texas Foundries*, 517 F.2d 1059 (5th Cir. 1975), *cert. denied*, 424 U.S. 968 (1976); *Universal-Rundle Corp. v. FTC*, 382 F.2d 285, 287 (7th Cir. 1967); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1575 (N.D. Ga. 1992); *Olympia Co. v. Celotex Corp.*, 597 F. Supp. 285, 297 (E.D. La. 1984), *aff’d on other grounds*, 771 F.2d 888 (5th Cir. 1985), *cert. denied*, 493 U.S. 818 (1989).

³⁷ See also *DeLong Equip. Co.*, 990 F.2d at 1202; *Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1418 (11th Cir. 1990); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1539 (3d Cir. 1990), *cert. denied*, (continued ...)

- (c) Proof of injury by inference: The existence of a substantial price difference over a substantial period of time involving a product for resale, where competition among resellers is “keen,” creates an inference of injury to competition. *FTC v. Morton Salt*, 334 U.S. 37, 50-51 (1948).
- (d) Rebutting the inference of injury. *See, e.g., Falls City Indus.*, 460 U.S. at 435 (“this inference may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits”); *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1144, 1135 (D.C. Cir. 1988) (“the inference can also be overcome by evidence showing an absence of competitive injury within the meaning of Robinson-Patman,” holding that proof that disfavored customers have prospered may rebut the inference).

iv. “Tertiary line” injury: Injury to competition at the level of customers of the favored and disfavored customers. *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543 (1990).

2. Proof of Injury to Competition in Petroleum Marketing Cases

a. **Evidence sufficient to establish injury to competition:** In *Schwartz v. Sun Oil Co.*, 1999 U.S. Dist. LEXIS 22257 (E.D. Mich. Dec. 9, 1999), the plaintiffs’ evidence of injury to competition was limited to a comparison of the DTW prices paid by the plaintiffs with the “rack” prices paid by the allegedly favored jobbers and a showing of declining sales at the plaintiffs’ service stations during a time when sales increased modestly at competing jobber-stations.

i. “Given that pennies in prices make a significant difference,” the *Schwartz* court found, “there was sufficient evidence for the jury to find the competitive injury element of a Robinson-Patman claim was made out.” *See* 1999 U.S. Dist. LEXIS 22257, at *33, *citing Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1041 (9th Cir. 1988).

(footnote continued)

499 U.S. 921 (1991); *Eagle Windows of N. Ill., Inc. v. Eagle Window & Door, Inc.*, 1992 U.S. Dist. LEXIS 1254 (N.D. Ill. Feb. 7, 1992).

- ii. On appeal, the Sixth Circuit affirmed the district court’s finding of sufficient proof of “injury to competition,” while reversing the district court’s holding that the *Schwartz* plaintiffs’ proof was *insufficient* to establish the antitrust injury element of a Robinson-Patman Act violation. *See Schwartz v. Sun Co., Inc. (R&M)*, 276 F.3d 900, 904-06 (6th Cir. 2002).
- b. **Evidence insufficient to establish injury to competition:** The Robinson-Patman Act Section 2(a) claim in *Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415 (8th Cir. 1986) was based on a rebate program to direct purchasing retailers that was not uniformly available to wholesale distributors such as the plaintiff.
- i. Affirming the district court’s grant of a directed verdict in favor of the refiner, the Eighth Circuit found insufficient evidence of injury to competition generally as required by *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977): “The record in this case indicates that there was little, if any, injury to competition in the Little Rock area by virtue of the discrimination in prices.” *See* 799 F.2d at 420.
 - ii. “On the contrary, the evidence at trial indicated that Texaco was only one of many sellers in the market and that the market was highly competitive and remained so after the changes in its rebate program.” *Id.*
 - iii. To meet its burden of showing “injury to competition” based on harm to its own competitive position, the plaintiff was required to come forward with evidence “of a substantial price discrimination between competing purchasers over time.” *Id.*, quoting *Falls City Indus.*, 460 U.S. at 435.
 - iv. The plaintiff’s summaries of discriminatory pricing, however, “were constructed so that the volume of the discriminatory sales and the duration of any price differences could not be ascertained” and — because they “rely solely on end of the month sales rather than examining sales throughout the entire month” — “would have forced the jury to speculate as to whether there had been substantial injury over time.” *Id.*
 - v. Last but not least, the plaintiff in *Richard Short Oil Co.* failed to meet its burden of proof with respect to causation: “No evidence was presented at trial that Short actually lost

sales to any competing Texaco station as the result of the difference in prices; nor was there any evidence that Short ever lowered its prices and decreased its profits in order to compete with any lower price by a Texaco dealer.” *Id.* at 421. “In addition, there was ample evidence presented at trial [of] Short’s mismanagement and questionable business practices as being the cause of its alleged injury.” *Id.*

3. Statutory Defenses

a. “Cost Justification”

- i. Section 2(a) permits price differentials that “make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities” in which the goods are “sold or delivered.” 15 U.S.C. § 13(a).
- ii. The burden is on the party asserting the defense to establish actual cost savings equal to or greater than the price difference. *FTC v. Morton Salt Co.*, 334 U.S. 37, 48 (1948); *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040 (9th Cir. 1987), *aff’d*, 496 U.S. 543 (1990); *Typhoon Car Wash, Inc. v. Mobil Oil Corp.*, 770 F.2d 1085, 1091 (Temp. Emer. Ct. App.), *cert. denied*, 474 U.S. 981 (1985); *In re: United States Rubber Co.*, 46 F.T.C. 998, 1012 (1950).
- iii. For example, in *Schwartz v. Sun Oil Co.*, 1999 U.S. Dist. LEXIS 22257 (E.D. Mich. Dec. 9, 1999), *rev’d in part on other grounds sub. nom. Schwartz v. Sun Co., Inc. (R&M)*, 276 F.3d 900 (6th Cir. 2002), the defendant asserted that the price differential was justified because the favored jobbers bore costs and risks not assumed by the plaintiff dealers. These included the cost of transporting gasoline from the defendant’s terminals to the jobbers’ own storage facilities or to service stations that they supplied, the regulatory risks and insurance expenses of operating certain stations, and various marketing functions. The evidence, however, showed that the “rack” prices paid by jobbers and the DTW prices paid by the plaintiff dealers were set independently. As a result, the *Schwartz* court held, “there is no way on the evidence offered by Sunoco to account with any degree of certainty for the differences between rack and DTW prices following principles governing proof of the legitimacy of a functional discount.” *See* 1999 U.S. Dist. LEXIS 22257, at *49.

- b. **“Changing Conditions”**: Section 2(a) includes a defense for price differences resulting from a “response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.” 15 U.S.C. § 13(a).

4. **Functional Availability Defense**

- a. This nonstatutory defense applies if the challenged lower price was in fact made available to the allegedly disfavored purchasers.³⁸
- b. This defense is analogous to the availability provisos of Section 2(d) (which prohibits promotional allowances “unless ... available on proportionally equal terms”) and Section 2(e) (which prohibits provision of promotional services “not accorded ... on proportionally equal terms”).
- c. Prerequisites for application of the functional availability defense:
 - i. The availability of the lower price must be known to the competing purchasers.³⁹
 - ii. The lower price must be attainable by most competing customers, such that the lower price is functionally — and not merely theoretically — available to them. *See, e.g., FTC v. Morton Salt Co.*, 334 U.S. 37, 42 (1948).⁴⁰

³⁸ *See, e.g., Comcoa, Inc. v. NEC Telephones, Inc.*, 931 F.2d 655, 664-65 (10th Cir. 1991); *Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983); *Shreve Equip., Inc. v. Clay Equip. Corp.*, 650 F.2d 101, 105 (6th Cir.), *cert. denied*, 454 U.S. 897 (1981); *Capital Ford Truck Sales, Inc. v. Ford Motor Co.*, 819 F. Supp. 1555, 1568 (N.D. Ga. 1992); *Mays v. Massey-Ferguson, Inc.*, 1990-1 Trade Cas. Cas. (CCH) ¶ 69,028, at 63,640, 1990 U.S. Dist. LEXIS 10245 (S.D. Ga. 1990).

³⁹ For example, in *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338 (W.D. Pa. 1998), the court granted summary judgment for defendant because the plaintiff failed to take advantage of the defendant’s special pricing programs. Although the plaintiff did not know the exact price its competitors were paying, the court observed, the plaintiff knew of the special pricing programs through which competitors obtained lower prices. *See also Caribe BMW, Inc. v. Bayerische Motoren Werke A.G.*, 19 F.3d 745, 751-52 (1st Cir. 1994); *Mays*, 1990-1 Trade Cas. (CCH) ¶ 69,028, 1990 U.S. Dist. LEXIS 10245; *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 355-56 (E.D. Wis. 1979).

⁴⁰ *See also Caribe BMW*, 19 F.3d at 751-52; *Comcoa.*, 931 F.2d at 664; *DeLong Equip. Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516-17 (11th Cir. 1989), *cert. denied*, 494 U.S. 1081 (1990); *Bouldis*, 711 F.2d at 1326; *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 120-21 (3rd Cir. 1980); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1025-26 (2d Cir. 1976), *cert. denied*, 429 U.S. 1097 (1977); *Century Hardware Corp. v. Acme United Corp.*, 467 F. Supp. 350, 355-56 (E.D. Wis. 1979); *Chapman v. Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 (9th Cir. 1969); *National Dairy Prods. Corp. v. FTC*, 395 F.2d 517, 523 (7th Cir.),

(continued ...)

B. Section 2(b): “Meeting Competition” Defense

1. Applies when the seller acts “in good faith to meet an equally low price of a competitor.”
2. Provides an absolute defense to otherwise prohibited discrimination. *See, e.g., Standard Oil Co. v. FTC*, 340 U.S. 231, 251 (1951).
 - a. The meeting competition defense “may be the primary means of reconciling the Robinson-Patman Act with the more general purposes of the antitrust laws of encouraging competition between sellers.” *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 83 n.16 (1979).
 - b. The “purpose of the defense is to permit a seller to treat different competitive situations differently.” *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 445 (1983).
3. Proof of “Meeting Competition” in Petroleum Marketing Cases
 - a. In *Schwartz v. Sun Oil Co.*, 1999 U.S. Dist. LEXIS 22257 (E.D. Mich. Dec. 9, 1999), *rev’d in part on other grounds sub. nom. Schwartz v. Sun Co., Inc. (R&M)*, 276 F.3d 900 (6th Cir. 2002), the defendant argued that it had established the “meeting competition” defense because both prices — the DTW price paid by the plaintiffs and the “rack” prices paid by jobbers — were set daily in response to the average prices charged by the defendant’s competitors. The defendant’s “rack” pricing was the same for all jobbers, however, and the defendant offered no evidence of jobber pricing to other major refiner branded service stations in the plaintiffs’ trade area. As a result, the *Schwartz* court held, the defendant had not met its burden of proof to establish “meeting competition.” *See* 1999 U.S. Dist. LEXIS 22257, at **50-51.
 - b. Additional case law addressing proof of “meeting competition” in the context of “zone pricing” *infra*.

C. Section 2(c): Commissions and Brokerage Fees

1. Section 2(c) prohibits a party to a sales transaction from granting to or receiving from the other party a “commission, brokerage, or other

(footnote continued)

cert. denied, 393 U.S. 977 (1968); *American Booksellers Ass’n v. Houghton Mifflin Co.*, 1995-2 Trade Cas. (CCH) ¶ 71,217, at 75,890-91, 1995 U.S. Dist. LEXIS 21035 (S.D.N.Y. 1995); *Boise Cascade Corp.*, 107 F.T.C. 76, 215, *rev’d on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988), *on remand*, 113 F.T.C. 956 (1990) (same).

compensation, or any allowance or discount in lieu thereof, except for services rendered.” 15 U.S.C. § 13(c).

2. Section 2(c) applies only in connection with the sale or purchase of “goods, wares, or merchandise,” and not to contracts for services.⁴¹
3. The meeting competition, cost justification, changing conditions, and functional availability defenses are *not* applicable to claims for violation of Section 2(c).⁴²

D. Sections 2(d) and 2(e): Advertising and Promotional Allowances and Services

1. Sections (d) (which applies to payments in connection with transactions involving “commodities”) and 2(e) (which applies to services in connection with a “commodity”) prohibit the discriminatory provision of advertising or other promotional allowances and services in connection with the favored customer’s resale of the seller’s goods.
2. Sections 2(d) and 2(e) *do* apply to allowances that indirectly support resale, such as payments made for advertising of the customer’s store where the merchandise was offered for resale. *See R.H. Macy & Co. v. FTC*, 326 F.2d 445 (2^d Cir. 1964).
3. Sections 2(d) and 2(e) *do not* apply to:
 - a. **Additional allocation of products in short supply;**⁴³
 - b. **Preferential credit arrangements;**⁴⁴

⁴¹ *See Patterson v. Ford Motor Credit Co.*, 2000-1 Trade Cas. (CCH) P 72,781, at 86,742, 2000 U.S. App. LEXIS 1303 (4th Cir. 2000); *Fiore v. Kelly Run Sanitation, Inc.*, 609 F. Supp. 909, 916 (W.D. Pa. 1985); *May Dep’t Store v. Graphic Process Co.*, 637 F.2d 1211, 1214-16 (9th Cir. 1980); *Miyano Mach. USA, Inc. v. Zonar*, 1993-1 Trade Cas. (CCH) ¶ 70,145, at 69,604, 1993 U.S. Dist. LEXIS 963 (N.D. Ill. 1993).

⁴² *See, e.g., FTC v. Henry Broch & Co.*, 363 U.S. 166, 171 (1960); *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959); *Ideal Plumbing Co. v. Benco, Inc.*, 529 F. 2d 972, 977 (8th Cir. 1976); *FTC v. Washington Fish & Oyster Co.*, 271 F. 2d 39, 44 (9th Cir. 1959); *Quality Bakers of Am. v. FTC*, 114 F.2d 393, 400 (1st Cir. 1940).

⁴³ *See, e.g., David R. McGeorge Car Co. v. Leyland Motor Sales, Inc.*, 504 F.2d 52 (4th Cir. 1974), *cert. denied*, 420 U.S. 992 (1975); *D.S. Am (East), Inc. v. Chromagrafx Imaging Sys. Inc.*, 873 F. Supp. 786, 797 (E.D.N.Y. 1995); *Morris Elecs. of Syracuse, Inc. v. Mattel, Inc.*, 595 F. Supp. 56 (N.D.N.Y. 1984); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974).

⁴⁴ *See, e.g., Alan’s of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414 (11th Cir. 1990); *Bouldis*, 711 F.2d 1319, 1328; *Craig v. Sun Oil Co. of Penn.*, 515 F.2d 221 (10th Cir. 1975), *cert. denied*, 429 U.S. 829 (1976); *Skinner v. U.S. Steel Corp.*, 233 F.2d 762, 765 (5th Cir. 1956); *John Peterson Motors, Inc. v. General Motors Corp.*, 613 F. Supp. 887, 898 (D. Minn. 1985); *Carlo C. Gelardi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637 (D.N.J. 1980), *aff’d mem.*, No. 82-5217 (3d Cir. June 15, 1983); *ACS Enters., Inc. v. Sylvania Commercial Elecs. Corp.*, 1979-2 Trade Cas. (CCH) ¶ 62,765, 1979 U.S. Dist. LEXIS 11382 (E.D. Pa. 1979); *Robbins Flooring, Inc. v. Federal Floors, Inc.*, 445 F. Supp. 4, 8 (E.D. Pa. 1977); *Diehl & Sons, Inc. v. International Harvester Co.*, 426 F.

(continued ...)

- c. **Delivery services;**⁴⁵
 - d. **Discriminatory freight allowances;**⁴⁶
 - e. **Returns of unsold products;**⁴⁷
 - f. **Technical support owed under a contract;**⁴⁸ and
 - g. **Discriminatory lease terms.**⁴⁹
4. Note that Sections 2(d) and 2(e) apply to resale whereas Section 2(a) applies to the initial sale.

(footnote continued)

Supp. 110 (E.D.N.Y. 1976); *O'Malley v. American Petrofina, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 75,097, 1974 U.S. Dist. LEXIS 8317 (D. Minn. 1974).

See also *Rea v. Ford Motor Co.*, 355 F. Supp. 842 (W.D. Pa. 1972), *rev'd in part on other grounds and remanded*, 497 F.2d 577 (3d Cir.), *cert. denied*, 419 U.S. 868 (1974); *Cook v. Ralston Purina Co.*, 366 F. Supp. 999 (M.D. Ga. 1973) (seller's extension of credit to one buyer's customers but not those of competing buyer is not a Section 2(e) violation because credit is not a "service or facility"). *But cf. Hygrade Milk & Cream Co. v. Tropicana Prods., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,438, 1996 U.S. Dist. LEXIS 6598 (S.D.N.Y. 1996) (an extension of credit by off-invoice payments relating to payment of promotional allowances, and not to the original sale of goods, was within the scope of Section 2(d)); *Morris Elecs.*, 595 F. Supp. at 65 (discrimination "with respect to written and oral cancellations" might violate Section 2(e)); *In the Matter of American Candle Co.*, 78 F.T.C. 1158 (1971) (consent order) (applying Section 2(e) in connection with alleged preferential credit terms).

⁴⁵ See, e.g., *L & L Oil Co. v. Murphy Oil Corp.*, 674 F.2d 1113 (5th Cir. 1982); *Allied Sales & Servs. Co. v. Global Indus. Techs., Inc.*, 2000-2 Trade Cas. (CCH) ¶ 72,953, 2000 U.S. Dist. LEXIS 7774 (S.D. Ala. 2000); *D.S. Am., (East), Inc.*, 873 F. Supp. at 797; *Gassett v. Nissan N.A., Inc.*, 877 F. Supp. 974, 983 (D.V.I. 1994), *aff'd without op.*, 66 F.3d 311 (3d Cir. 1995); *John Peterson Motors*, 613 F. Supp. at 898; *Morris Elecs.*, 595 F. Supp. at 64-65; *Howell Indus., Inc. v. Sharon Steel Corp.*, 532 F. Supp. 400 (E.D. Mich. 1981); *ACS Enters.*, 1979-2 Trade Cas. (CCH) ¶ 62,765, 1979 U.S. Dist. LEXIS 11382. *But see Centex-Winston Corp. v. Edward Hines Lumber Co.*, 447 F.2d 585 (7th Cir. 1971), *cert. denied*, 405 U.S. 921 (1972).

⁴⁶ See, e.g., *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534 (9th Cir. 1983), *cert. denied*, 465 U.S. 1038 (1984); *Bouldis*, 711 F.2d at 1328; *Chicago Spring Prods. Co. v. U.S. Steel Corp.*, 371 F.2d 428 (7th Cir. 1966); *Glowacki v. Borden, Inc.*, 420 F. Supp. 348 (N.D. Ill. 1976); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960); *In the Matter of General Foods Corp.*, 52 F.T.C. 798 (1956).

⁴⁷ Compare *In the Matter of Joseph A. Kaplan & Sons*, 63 F.T.C. 1308 (1963) (return privileges for slow moving merchandise is connected to the resale of a line of products), *modified on other grounds*, 347 F.2d 785 (D.C. Cir. 1965), with *Bouldis*, 711 F.2d at 1328 (declining to apply *Kaplan* where a dealership had been terminated before dealer sought to return goods). The FTC dropped returns of unsold goods as an example of a service covered by Section 2(d) or Section 2(e) in its *Fred Meyer Guides*. 16 C.F.R. Section 240 (2001).

⁴⁸ See, e.g., *Tel-Phonic Serv., Inc. v. TBS Int'l, Inc.*, 975 F.2d 1134 (5th Cir. 1992); *Cancell PCS, LLC v. Omnipoint Corp.*, 2000-1 Trade Cas. (CCH) ¶ 72,855, 2000 U.S. Dist. LEXIS 2830 (S.D.N.Y. 2000).

⁴⁹ See, e.g., *Portland 76 Auto/Truck Plaza, Inc. v. Union Oil Co. of Calif.*, 153 F.3d 938 (9th Cir. 1998), *cert. denied*, 526 U.S. 1064 (1999); *Hinkleman v. Shell Oil Co.*, 962 F.2d 372, 380 (4th Cir.), *cert. denied*, 506 U.S. 1041 (1992).

- a. For example, Section 2(a) applies to “slotting allowances” paid by a seller to obtain shelf space for, or encourage purchases of, a new product.
 - b. In contrast, Section 2(d) applies to a seller’s payments to maintain preferential shelf space.⁵⁰
5. Section 2(e) applies to discrimination in the furnishing of services to purchasers “of a commodity bought for resale, with or without processing.” 15 U.S.C. § 13(e).
6. Section 2(d) prohibits discrimination between or among “customers” whereas Section 2(e) prohibits discrimination between or among “purchasers.” 15 U.S.C. §§ 13(d), 13(e).
- a. The Section 2(d) prohibition against discriminatory payments made “to or for the benefit of a customer” does *not* apply where payments benefit a customer only indirectly by increasing the profits of a different business of its owner.
 - i. For example, in *Nuarc Co. v. FTC*, 316 F.2d 576 (7th Cir. 1963), the Seventh Circuit found that no benefit was conferred by a manufacturer’s payment for advertising in a trade magazine published by an owner of a retail store buying from the manufacturer. The court so held because the magazine was not identified with the retailer and the manufacturer paid standard rates.
 - ii. In contrast, in *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*, 258 F.2d 831 (7th Cir. 1958), *cert. denied*, 358 U.S. 947 (1959), a violation of Section 2(d) was found when grocery suppliers purchased advertising in a grocery store chain’s magazine distributed in and identified with the chain.⁵¹
 - b. The Section 2(d) prohibition against discriminatory payments made “to or for the benefit of a customer” *does* apply when sellers make direct payments to third parties who in turn provide

⁵⁰ See *Fred Meyer Guides*, 16 C.F.R. Section 240.9, Example 5 & n.1 (2001); Mary L. Azcuenaga, Commissioner, Federal Trade Comm’n, *The Robinson-Patman Act: A Perspective from the FTC at 18-19* (May 13, 1993); *cf. Hygrade Milk & Cream Co. v. Tropicana Prod., Inc.*, 1996-1 Trade Cas. (CCH) ¶ 71,438, 1996 U.S. Dist. LEXIS 6598 (S.D.N.Y. 1996) (slotting allowances are within scope of Section 2(d) and Section 2(e) because “they are used primarily to promote the resale of the seller’s product by securing shelf space”).

⁵¹ See also *In the Matter of Billy & Ruth Promotion, Inc.*, 65 F.T.C. 143 (1964); *In the Matter of ATD Catalogs, Inc.*, 65 F.T.C. 71 (1964); *In the Matter of Individualized Catalogues, Inc.*, 65 F.T.C. 48 (1964), *rescinded*, 76 F.T.C. 80 (1969).

advertising or promotional services to the sellers' customers. *See P. Lorillard Co. v. FTC*, 267 F.2d 439 (3d Cir.), *cert. denied*, 361 U.S. 923 (1959).

7. Contemporaneous Sales Requirement

- a. The two sales were *not* sufficiently contemporaneous where the first customer received a promotional allowance in July but the second customer did not receive a promotional allowance in December. *See Atalanta Trading Corp. v. FTC*, 258 F.2d 365, 371 (2d Cir. 1958); *see also England v. Chrysler Corp.*, 493 F.2d 269, 272 (9th Cir.) (not “reasonably contemporaneous” because gap of 16 months), *cert. denied*, 419 U.S. 869 (1974).
- b. The two sales *were* sufficiently contemporaneous when the supplier was selling a standardized product on a regularly recurring basis and market conditions had not changed in the period between the challenged transactions. *See Fred Meyer, Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968).

E. Section 2(f): Buyer Liability

1. Section 2(f) prohibits the knowing inducement or receipt of a price discrimination that is unlawful under Section 2(a). *See Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 76 (1979) (“a buyer cannot be liable if a *prima facie* case could not be established against a seller or if the seller has an affirmative defense.”).
2. Section 2(f) has also been applied to buyer-induced allowances and services prohibited by Sections 2(d) and 2(e). *American Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1068 (N.D. Cal. 2001) (denying summary judgment); *Intimate Bookshop, Inc. v. Barnes & Noble, Inc.*, 88 F. Supp. 2d 133, 137-38 (S.D.N.Y. 2000).

IV. U.C.C. § 2-305 (OPEN PRICE TERM)

A. Pertinent Provisions of U.C.C. § 2-305

1. The “open price term” provisions of U.C.C. § 2-305 allow the enforcement of sales contracts where the sales price is not fixed.
2. If the price is not specified in the contract, the contract price is “a reasonable price at the time for delivery.” U.C.C. § 2-305(1).
3. If one party has reserved the contractual right to set the price, the party with such right must do so “in good faith.” U.C.C. § 2-305(2).

B. Buyer's Burden of Proving Lack of "Good Faith"

1. Objective "Good Faith" a/k/a "Commercial Reasonableness"

- a. In *Tom-Lin Enterprises, Inc. v. Sunoco, Inc. (R&M)*, 349 F.3d 277 (6th Cir. 2003), the court found that Sunoco had acted in good faith when it set prices based on a "market basket" of competitors' prices. In *Tom-Lin Enterprises*, governing Ohio law required an **objective** analysis of whether the pricing was reasonable. *See id.* at 281 ("under Ohio law, to show that a merchant-seller lacks good faith in fixing a price pursuant to a contract with an open price term, it must be shown that the price was not fixed in a commercially reasonable manner and, moreover, that the pricing was commercially unjustifiable.").
- b. Under U.C.C. § 2-305, the burden is on the buyer to show that the seller's pricing was not commercially reasonable. *See, e.g., Schwartz v. Sun Co., Inc. (R & M)*, 276 F.3d 900, 905 (6th Cir. 2002) (affirming j.n.o.v. because plaintiff failed to introduce any background evidence against which the commercial reasonableness of the defendant's prices could be assessed).

2. Subjective "Good Faith" a/k/a "Honesty in Fact"

- a. The *Tom-Lin Enterprises* court recognized, however, that some jurisdictions, including Texas, have both an **objective** and a **subjective** test. *See* 349 F.3d at 281, *citing, inter alia, Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002). Applying Texas law, the *Mathis* court held that there is both a subjective test ("honesty in fact") and an objective test ("reasonable commercial standards") for determining the propriety of a seller's price-setting when price is an open term. *Mathis* at 454-57.
- b. In jurisdictions such as Texas, even if the seller's pricing was **objectively** "commercially reasonable," the buyer can establish liability upon a **subjective** showing that the seller did not act in good faith. For example, in *Mathis v. Exxon Corp.*, 302 F.3d 448 (5th Cir. 2002), even though the defendant's pricing was within the range of competitive prices and therefore objectively "commercially reasonable," the plaintiff established subjective bad faith by showing that the defendant intended to drive franchisees (such as the plaintiff) out of business.
- c. A common formulation of subjective bad faith is that the party "exercises its discretionary authority arbitrarily, unreasonably, or capriciously, with the objective of preventing the other party from receiving its reasonably expected fruits under the contract."

Yonaty v. Amerada Hess Corp., 2005 U.S. Dist. LEXIS 22429, *14 (N.D.N.Y. June 20, 2005) (internal citations omitted).

- d. Extrinsic evidence may be admissible to show that the seller did not act in good faith. *Allapattah Services, Inc. v. Exxon Corp.*, 333 F.3d 1248, 1262 (11th Cir. 2003), *aff'd*, 545 U.S. 546 (2005).

3. Proof of Discrimination Required?

- a. There is some authority to the effect that U.C.C. § 2-305 was intended to prevent discriminatory pricing, *i.e.*, “to prevent suppliers from charging two buyers with identical pricing provisions in their respective contracts different prices for arbitrary or discriminatory reasons.” *ISP Mineral Products, Inc. v. GS Roofing Products Co.*, 1999 U.S. Dist LEXIS 2024, *10 (N.D. Tex. Feb. 22, 1999), *quoting Wayman v. Amoco Oil Co.*, 923 F. Supp. 1322, 1347 (D. Kan. 1996), *aff'd*, 145 F.3d 1347 (10th Cir. 1998).
 - i. The service station franchise agreements at issue in *Wayman* provided that the plaintiffs would purchase their gasoline from Amoco at its “dealer buying price.” *See* 923 F. Supp. at 1332. Because this “dealer buying price” was higher than the price at which Amoco sold to independent marketers, the plaintiffs alleged, they had been placed at a competitive disadvantage. *See id.* at 1334.
 - ii. The *Wayman* court observed that Comment 3 to U.C.C. § 2-305 states that its purpose was “to prevent **discriminatory** pricing — *i.e.*, to prevent suppliers from charging two buyers with identical pricing provisions in their respective contracts different prices for arbitrary or discriminatory reasons.” *Id.* at 1347. Because all Amoco franchisees paid the same “dealer buying price,” the *Wayman* court held, Amoco’s pricing was not discriminatory and therefore did not violate U.C.C. § 2-305. *See id.*
- b. Following *Wayman*, the Texas Supreme Court held that “[e]vidence that different prices are available to different classes of trade is not evidence of bad faith under section 2-305.” *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429, 438 (Tex. 2004).⁵² Rejecting

⁵² In construing Texas law before the Texas Supreme Court decided *Shell Oil Co. v. HRN, Inc.*, the Fifth Circuit expressly rejected the notion that price discrimination was the only type of “bad faith” prohibited by U.C.C. § 2-305:

(continued ...)

the plaintiffs' contention that their status as "captive buyers" was evidence of bad faith, the Texas Supreme Court reasoned that Shell dealers "are only 'captive' as a result of their own choice to become Shell-branded lessee dealers, which involved their agreement to buy gasoline from Shell at the DTW price, rather than at rack or some other price." *Id.* Because U.C.C. § 2-305 prohibits only discriminatory pricing, "[a] good faith price under section 2-305 is not synonymous with a fair market price or the lowest price available." *Id.* at 437.

- c. *See also Richard Short Oil Co. v. Texaco, Inc.*, 799 F.2d 415, 422 (8th Cir. 1986) (posted price offered by an oil company to all its wholesale purchasers satisfied the U.C.C.'s open price term good faith requirement).
- d. Under the foregoing interpretation of U.C.C. § 2-305, the buyer has no cause of action unless it can show that the seller's pricing was discriminatory.

4. Duty to Mitigate

- a. The party complaining of breach of the implied duty of good faith and fair dealing has a duty to mitigate.
- b. *See, e.g., TCP Industries, Inc. v. Uniroyal, Inc.*, 661 F.2d 542, 550 (6th Cir. 1981) (seller's duty to mitigate); *Upsher-Smith Laboratories, Inc. v. Mylan Laboratories, Inc.*, 944 F. Supp. 1411, 1432-33 (D. Minn. 1996) (buyer's duty to mitigate).

5. Notice Requirement

- a. There is authority to the effect that a U.C.C. § 2-305 claim is barred if the buyer has failed to give notice of breach. For example, in *Dixie Gas & Food, Inc. v. Shell Oil Co.*, 2005 U.S. Dist. LEXIS 12010, at **18-20 (N.D. Ill. May 25, 2005), the court dismissed the plaintiffs' claims for failure to provide notice of breach:

(footnote continued)

Although price discrimination was the type of aberrant case on the minds of the drafters, price discrimination is merely a subset of what constitutes such an aberrant case. Any lack of subjective, honesty-in-fact good faith is abnormal; price discrimination is only the most obvious way a price-setter acts in bad faith --by treating similarly-situated buyers differently.

Mathis v. Exxon Corp., 302 F.3d 448, 457 (5th Cir. 2002).

Plaintiffs apparently accepted all dealer tank wagon deliveries and do not allege that they have ever provided notice to Shell of its alleged dealer tank wagon pricing breaches. Filing this lawsuit did not serve as proper notice.

- b. *See also Autry Petroleum Co. v. BP Products North America, Inc.*, 2006 U.S. Dist. LEXIS 25583 (M.D. Ga. May 1, 2006); *Bly & Sons, Inc. v. Ethan Allen Interiors, Inc.*, 2006 U.S. Dist. LEXIS 62629, at *21 (S.D. Ill. Sept. 1, 2006).
- c. Pleading the requisite notice is, however, sufficient to withstand a Rule 12(b)(6) motion to dismiss. *Autry Petroleum Co. v. BP Products North America, Inc.*, 2006 U.S. Dist. LEXIS 25583, at *9 (M.D. Ga. 2003)

V. “ZONE PRICING”: ESTABLISHING — AND AVOIDING — LIABILITY

A. Case Law Addressing Liability for “Zone Pricing”

1. Robinson-Patman Act

- a. The Supreme Court’s decision in *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983), established that a seller can avail itself of the “meeting competition” defense if it sets lower prices on an area-wide basis rather than on a customer-by-customer basis. In support of its holding, the Supreme Court stated:
 - i. “Congress did not intend to bar territorial price differences that are in fact responses to competitive conditions.” *Id.* at 448.
 - ii. “A seller may have good reason to believe that a competitor or competitors are charging lower prices throughout a particular region.” *Id.* at 449.
 - iii. “In such circumstances, customer-by-customer negotiations would be unlikely to result in prices different from those set according to information relating to competitors’ territorial prices. A customer-by-customer requirement might also make meaningful price competition unrealistically expensive for smaller firms....” *Id.*
 - iv. “One choosing to price on a territorial basis, rather than on a customer-by-customer basis, must show that this decision was a genuine, reasonable response to prevailing competitive circumstances.” *Id.* at 450-51 (citations omitted).

- b. In *USA Petroleum Co. v. Atlantic Richfield Co.*, 577 F. Supp. 1296 (C.D. Cal. 1983), the court denied the defendant’s motion to dismiss a Robinson-Patman Act claim based on zone pricing.
- i. The “injury to competition” alleged by the plaintiff in *USA Petroleum* included both “primary-line” injury (“injury occurring at the defendant-seller’s level of competition”) and “secondary-line” injury (“injury to the competition existing among the *customers* of the defendant-seller”). *Id.* at 1303 (emphasis in original).
 - ii. The plaintiff’s allegations of primary-line injury were inextricably intertwined with allegations of a Sherman Act Section 1 conspiracy intended to eliminate independent retailers such as the plaintiff:
 - (a) “USA’s primary-line price discrimination claim focuses on Arco’s alleged ‘geographic price discrimination,’ whereby Arco sells gasoline and other refined petroleum products to its branded dealers and distributors at different prices, depending upon the locations of the retail service stations through which the product is sold.” *Id.*
 - (b) “In oral argument, USA’s counsel asserted that this ‘zone pricing’ system was instituted in order to lower only the prices charged by those conspiring dealers located near a USA station.” *Id.*, n.5.
 - iii. The plaintiff’s allegations of secondary-line injury included allegations that “Arco has extended prices to its branded distributors which are more favorable than those extended to independent or unbranded wholesale customers, such as plaintiff.” *Id.*, n.8.
- c. Unlike many Robinson-Patman Act challenges to zone pricing, the alleged discrimination at issue in *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*, 446 F.2d 1163 (7th Cir. 1972), arose in the context of different pricing to dealers at the same level of distribution (rather than challenging, for example, a difference between dealer pricing and jobber pricing).
- i. The *Bargain Car Wash* case was decided before the Supreme Court’s pronouncement in *Falls City* that territorial price differences can represent legitimate responses to competition. In view of the facts at issue in

Bargain Car Wash, however, it is not clear that the case would be decided any differently today.

- ii. In reversing the district court’s grant of summary judgment in favor of the refiner, the Seventh Circuit addressed the reasonableness of the zones used by the refiner (American), injury to competition, antitrust injury, the refiner’s meeting competition defense, and rebates.
- iii. The facts upon which the Seventh Circuit reversed the district court’s holdings with respect to the reasonableness of the refiner’s Trading Area Competitive Allowance (“TACA”) price zones include the following:
 - (a) “There is no finding as to the creation and development of TACA; nor with regard to the factors, standards or guidelines that were used in determining the original boundaries of the zones; nor was any exhibit or other writing or literature produced thereon.” *Id.* at 1167.
 - (b) “It is readily apparent ... that the zones did not represent actual areas of competition in the sale of gasoline.” *Id.* at 1168.
 - (c) “The apparent secrecy of TACA operation, ... the identity of the officials in charge and the criteria used as well as the personalities involved in the making of the final decision kept the details of operation in the dark.” *Id.*
 - (d) “[T]he arbitrary lines of the zones plus the denial of participation by the dealers in their determination cast[] doubt on their integrity.” *Id.*
 - (e) “[T]he operation itself is suspect when American’s own brief tells us that ‘in some instances it did not use a TACA even though it had evidence that competitive brand stations and their suppliers had reduced prices in a zone.’ That seems to smack of ‘unsystem.’” *Id.* (citation omitted).
- iv. Finding sufficient evidence of injury to competition, the *Bargain Car Wash* court observed:

“To sum up, we have here a price differential that meets all of the tests of the cases, *i.e.*, a price differential that influences prices (*Morton Salt Company, supra*); or a

substantial differential that exists in the context of keen competition and tight profit margins (*E. Edelmann Company, supra*); or a substantial and sustained price differential between competing resellers. (*National Dairy Products Corp., supra*.)”

Id. at 1174.

- v. Finding that that plaintiff’s competitors received TACA discounts and rebates that the plaintiff did not, the Seventh Circuit concluded that the causal connection between the price discrimination and the plaintiff’s injury was proven based on evidence that included the following:

“The most significant evidence in this regard came from American’s own executives who testified that lower priced dealers would gain volume at the expense of their higher priced competitors and that TACA was essential to competition. Bargain received only 50 days of TACA while its other American competitors got 135.9 days at the least and some of its American competitors also had a 2 cent gallonage rental or advertising allowance. American has been unable to explain these inconsistencies in its position. It also overlooks the testimony of Bargain’s experts that place the blame right at American’s doorstep. The fact is that one of Bargain’s competitors was an American gasoline station-car wash that built up a million gallon annual sales record while Bargain’s was down 40 percent below the previous year. This competitor enjoyed not only TACA but a rebate besides, neither of which Bargain received.”

Id. at 1175.

- vi. With respect to the refiner’s meeting competition defense, the Seventh Circuit remanded for a more detailed factual examination of the zone pricing system:

“American may not sustain its burden of proving that it was merely meeting the equally low price of a competitor simply by proving that its price cuts conformed to its own TACA system unless the record demonstrates a valid economic justification for that system. Was the system developed and has it been used to meet limited competitive situations, or were the zone boundaries arbitrarily drawn to enable American to initiate discrimination rather than merely to defend its business in good faith? On remand, the

District Court should develop the history and background of the TACA system; the competitive pattern of the zones and the resulting economic effects that the granting of TACA has on competition between American dealers; the rules under which the system is implemented and their effect in the actual experience of the system including the impact on individual dealers, their reaction thereto from a competitive standpoint, and any resulting changes therein. In short, we must know the competitive nature of the system in operation and its impact on individual competing American dealers. Only then can the courts intelligently pass upon the availability of the Section 2(b) defense in a zone operation.”

Id. at 1176.

- d. With respect to the refiner’s “lease-backs” (rent credits of 1.5 cents per gallon) to other dealers, the *Bargain Car Wash* court found that “the lease-back is a mere subterfuge and a classic example of discrimination” and that “American made no showing that justified such rebates and without a showing they are discriminatory.” *Id.* at 1169-70.

2. U.C.C. § 2-305 (Open Price Term)

- a. Courts have generally been reluctant to find that zone pricing is *per se* commercially unreasonable. *See, e.g., Callahan v. Sunoco, Inc.*, 2005 U.S. Dist. LEXIS 7395, at *15 (E.D. Pa. April 28, 2005), *citing Cain v. Chevron U.S.A., Inc.*, 757 F. Supp. 1120, 1124 (D. Or. 1991) (Chevron’s “system of zone pricing is a commercially reasonable trade practice, used by gasoline marketers for many years.” *Id.*).

i. In *Callahan*, the evidence showed that:

- (a) “Every business day, Sunoco’s Pricing Department sets the DTW price for each of the 414 price zones in which its 1,180 dealers operate.” 2005 U.S. Dist. LEXIS 7395, at *4.
- (b) The factors used to set DTW zone prices were “competitors’ prices, historical sales volume within the price zone, trends in the gasoline spot market, Sunoco’s costs, Sunoco’s ‘netback requirements [*i.e.*, intended profit],’ and terminal inventories.” *Id.* (citations omitted).

- (c) “Although Sunoco uses a mathematical formula to generate a ‘recommended’ price, setting final DTW prices requires Pricing Department employees to weigh all of the relevant factors.” *Id.* at **4-5 (citations omitted).
- (d) “Dealers in different price zones pay different prices, but every dealer within a particular price zone is charged the same DTW price.” *Id.* at *5 (citations omitted).
- (e) “The DTW price is generally higher than the rack price to compensate Sunoco for the functions that it performs for the dealers (*e.g.*, delivering the gasoline).” *Id.*, n.7.
- (f) When faced with market conditions that “make it impossible for a dealer to earn a profit when reselling the gasoline to consumers at a competitive price,” dealers can request “TVAs” — temporary volume allowances — “discounts on DTW prices that ‘enable Sunoco dealers *to meet* (not beat) ... unusual or special competition.’” *Id.* at **6-7 (emphasis in original).

ii. The *Callahan* court rejected the plaintiffs’ contention that — because some stations that Sunoco did not deem to be competitors for purposes of establishing price zones were closer to one another than stations that Sunoco did deem to be competitors — “Sunoco generally draws price zones arbitrarily, unreasonably, and capriciously,” reasoning:

“Under plaintiffs’ theory, Sunoco could escape liability only by assigning all stations to a single price zone or by not assigning more than one station to any price zone. Either alternative would effectively eviscerate price zones. The former would render price zoning meaningless because every station in the entire nation would be charged the same DTW price, and the latter would require Sunoco to set prices for each station individually, even if several nearby stations faced similar competitive conditions.”

Id. at **13, 14.

b. In *United Food Mart, Inc. v. Motiva Enterprises, LLC*, 457 F. Supp. 2d 1329 (S.D. Fla. 2005), the court stated that “whether Motiva adopted or used a faulty or inaccurate zone pricing system

is not a material issue — the relevant question is whether Motiva adopted or used a *discriminatory* pricing system.” *Id.* at. 1336-37 (emphasis in original).

- i. Citing the Texas Supreme Court’s decision in *Shell Oil Co. v. HRN, Inc.*, 144 S.W.3d 429 (Tex. 2004), the court granted summary judgment on the plaintiffs’ U.C.C. § 2-305 claims:

“Plaintiffs have put forth *no evidence* to suggest that Motiva developed its zone area pricing system for discriminatory reasons or that Motiva used its system in an arbitrary or capricious manner. The fact that the system may be imperfect and fail to identify all of Lakes Shell’s possible competitors does not mean that Motiva exhibited bad faith in establishing the system or using it to set Plaintiffs’ DTW prices.”

United Food Mart, 457 F. Supp. 2d at 1337 (emphasis in original).

- ii. Pursuant to U.C.C. § 2-305(2), “Motiva is entitled to a presumption that its DTW prices were set in good faith,” the court held, “[b]ecause Motiv[a]’s DTW prices fell within the range of prices that other suppliers in the relevant geographic market charged and were applied uniformly among Motiva’s dealers through its zone area pricing system.” *Id.*

- c. In *Schwartz v. Sun Oil Co.*, 1999 U.S. Dist. LEXIS 22257 (E.D. Mich. Dec. 9, 1999), *aff’d sub. nom. Schwartz v. Sun Co., Inc. (R&M)*, 276 F.3d 900 (6th Cir. 2002), the defendant’s DTW pricing was the same to all dealers located in any particular price zone and was based upon a “market basket” of prices charged by key competitors in the area.

- i. Granting judgment as a matter of law in favor of the defendant, the district court in *Schwartz* observed:

“[P]laintiffs offered no evidence that Sun’s DTW price formula was not followed or was a formula uniquely applied to plaintiffs or did not follow an industry norm. Sun’s DTW pricing, as far as the record was concerned, was a ‘posted price,’ ‘price in effect’ and a ‘market price.’ Additionally, the record is silent as to the good faith price plaintiffs say Sun was required to charge.”

1999 U.S. Dist. LEXIS 22257, at **58-59.

- ii. On appeal, the Sixth Circuit affirmed, “agree[ing] with the district court that Schwartz failed to introduce any background evidence against which the commercial reasonableness of the prices Sun had charged him could be assessed.” 276 F.3d at 905.

B. Practice Pointers: Structuring Price Zones to Minimize Liability

1. Document the methodology used to develop zones and the pricing within zones and review to ensure it is plausible.
2. Share the methodology with dealers so that they can provide input with respect to both the zone boundaries and the pricing within zones.
3. Recognizing that competitive circumstances change, periodically review the zones to ensure that the criteria by which they were established remain valid.
4. Disseminate to dealers the results of competitive price surveys used to draw zone boundaries and set zone prices.
5. Have someone objective verify that the zone pricing system passes the “smell test.”

VI. ANTI-DISCRIMINATION PROVISIONS: AN “UNEVEN PATCHWORK”?

A. Preemption Under the PMPA

1. The legislative history of the PMPA stated that various state franchise laws “have, unfortunately, resulted in an uneven patchwork of rules governing franchise relationships, which differ from State to State.” S. Rep. No. 731, 95th Cong., 2d Sess. 18-19, *reprinted in* 1978 U.S.C.C.A.N. at 877 (emphasis supplied), *cited in Mobil Oil Corp. v. Virginia Gasoline Marketers and Automotive Repair Ass’n, Inc.*, 34 F.3d 220, 230 n.2 (dissent) (4th Cir. 1994).⁵³

“Needed is a single, uniform set of rules governing the grounds for termination and non-renewal of motor fuel marketing franchises and the notice which franchisors must provide franchisees prior to termination of a franchise or non-renewal of a franchise relationship. Such a set of rules would clearly define the rights and obligations of the parties to the franchise relationship in the crucial area of termination of a franchise or non-renewal of the franchise relationship.”

⁵³ Mr. Lockerby represented Mobil Oil Corporation in this litigation.

Id.

2. Consistent with the foregoing statement of statutory purpose, the PMPA contains the following express preemption provision:

“To the extent that any provision of this subchapter applies to the termination (or furnishing of notice with respect thereto) of any franchise, or to the nonrenewal (or the furnishing of notice with respect thereto) of any franchise relationship, no State or any political subdivision thereof may adopt, enforce or continue in effect any provision of law or regulation (including any remedy or penalty applicable to any violation thereof) with respect to termination (or the furnishing of notice thereto) of any such franchise relationship unless such provision of such law or regulation is the same as the applicable regulation of this subchapter.”

15 U.S.C. § 2806(a).

3. The express preemption provision of 15 U.S.C. § 2806(a) is “clearly intended to provide uniform minimum standards for the termination and nonrenewal of [petroleum] franchises and to bar state regulation of this area.” *Continental Enterprises, Inc. v. American Oil Co.*, 808 F.2d 24, 27 (8th Cir. 1986).

B. Resolving Inconsistencies Between Federal Law and State Law

1. Questions presented:
 - a. Can “discrimination” that is permitted by the PMPA give rise to potential liability under U.C.C. § 2-305 and/or state franchise “relationship” laws?
 - b. Does the answer depend upon whether the alleged “discrimination” occurs in the context of a termination or nonrenewal?
2. Representative cases:
 - a. *Alford’s Service, Inc. v. Sinclair Oil Corp.*, 2003 U.S. Dist. LEXIS 22894 (D. Minn. Dec. 17, 2003).
 - i. The plaintiff service station dealers in *Alford’s Service* alleged that Sinclair’s gasoline pricing was not competitive and did not allow them to compete effectively, in part because Sinclair’s pricing was higher than the price available from Sinclair jobbers and because company-operated service stations charged retail prices that were near or below the wholesale prices paid by Sinclair dealers.

- ii. The plaintiffs' claims included breach of the open price term provisions of U.C.C. § 2-305 and violation of the Minnesota Franchise Act. The plaintiffs also complained of Sinclair's rent increases at the time of renewal and had ultimately renewed their franchise agreements "under protest." *Id.* at *7. Sinclair sought dismissal of the plaintiffs' claims on the grounds that they were preempted by the PMPA.
- iii. The *Alford's Service* court found no PMPA preemption because "neither party asserts that Sinclair explicitly terminated or nonrenewed the written agreements. Instead, Plaintiffs allege an attempt by Sinclair to force Plaintiffs out of business, eliminate franchise dealers, and undermine Plaintiffs' ability to compete. Plaintiffs do not allege that their franchise agreements have been terminated or non-renewed, constructively or otherwise. In fact, Plaintiffs continue to do business as Sinclair dealers, selling Sinclair-branded gasoline, pursuant to their written agreements with Sinclair." *See* 2003 U.S. Dist. LEXIS 22894, at *14.
- iv. "[I]n the cases cited by Sinclair," the *Alford's Service* court observed, "the plaintiff-dealers actually plead termination or constructive termination, thereby triggering PMPA preemption of state law claims." *Id.* at *15, *citing Continental Enter., Inc. v. American Oil Co.*, 808 F.2d 24, 26 (8th Cir. 1986); *Dean v. Kerr-McGee Ref. Corp.*, 714 F. Supp. 1155 (W.D. Okla. 1988); *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998); *Simmons v. Mobil Oil Corp.*, 29 F.3d 505 (9th Cir. 1994); *Shukla v. BP Exploration & Oil, Inc.*, 115 F.3d 849 (11th Cir. 1997).
- v. In support of its preemption argument, Sinclair cited no case in which a court implied constructive termination when it had not been alleged. The *Alford's Service* court nevertheless analyzed whether the plaintiffs' allegations were sufficient to establish constructive termination, *i.e.*, "breach of at least one of the three statutory components of a franchise agreement," (1) "a contract to use the refiner's trademark," (2) "a contract for motor fuel supply," and (3) "a lease of the dealer premises." *Id.* at *16, *citing Shukla*, 115 F.3d at 853; *Dersch Energies, Inc. v. Shell Oil Co.*, 314 F.3d 846, 860 (7th Cir. 2002). Because the plaintiffs could not maintain a claim under the PMPA, the *Alford's Service* court found no PMPA preemption. *See* 2003 U.S. Dist. LEXIS 22894, at *16.

- b. In *Clark v. BP Oil Co.*, 137 F.3d 386 (6th Cir. 1998), one of the cases cited by the *Alford's Service* court, the Sixth Circuit found PMPA preemption of the dealer's state law claims for wrongful termination and nonrenewal while also finding no constructive termination or nonrenewal in violation of the PMPA. This result is consistent with the preemption provision of the PMPA, which preempts any provision of state law with respect to termination, nonrenewal, or notice of termination or nonrenewal that is not "the same as" the applicable provision of the PMPA. 15 U.S.C. § 2806(a).
- c. *Yonaty v. Amerada Hess Corp.*, 2005 U.S. Dist. LEXIS 22429, at **9-11 (N.D.N.Y. June 20, 2005) (PMPA preempted claim that defendant's "onerous pricing policy, culminating in its refusal to extend credit to plaintiff and plaintiff's consequent inability to continue its business, constituted a constructive termination and cancellation without just cause of plaintiff's franchise with defendant, in violation of New York General Business Law § 199-c(1)").

C. Resolving Inconsistencies Between Federal Statutes

1. As the foregoing review of the statutes and case law suggests, "discrimination" that is permitted by the PMPA may violate the prohibitions of the Robinson-Patman Act against price discrimination.
2. Alternatively, differences in price that do not violate the prohibitions of the Robinson-Patman Act against price discrimination may nevertheless violate the PMPA.
3. In addition, the PMPA prohibits other forms of "discrimination" — such as discriminatory terminations and nonrenewals — that have nothing to do with price.
4. To the extent that these statutes are inconsistent, the inconsistency is hardly surprising in view of the different purposes of these two statutes.