

COMMENT

NEW DIMENSIONS IN THE ROBINSON-PATMAN ACT AFTER *VANCO BEVERAGE**

R. MARK MCCAREINS**

The Article addresses the concerns of the courts, commentators, practitioners, and business persons over the years in defining the parameters of the "meeting competition" defense under the Robinson-Patman Act. The Supreme Court in Falls City Industries v. Vanco Beverage, Inc. held that a seller can meet a competitor's prices on an area-wide basis without analyzing the intricacies of each competitive situation. The Court further held that a seller can find a safe harbor in the "meeting competition" defense even if the matching prices are offered to attract new customers. The Court's decision, if not unthoughtfully extended, should provide welcome guidance to those facing the difficult task of interpreting the "meeting competition" defense of the Robinson-Patman Act.

The Supreme Court's pronouncement in *Falls City Industries v. Vanco Beverage, Inc.*¹ reaffirms dictum in *J. Truett Payne Co. v. Chrysler Motors Corp.*² requiring a Robinson-Patman plaintiff to establish only a "reasonable possibility" of competitive injury. More importantly, the decision reflects a daring, yet welcome, clarification of the permissible parameters of area-wide pricing under the "meeting competition" defense of the Robinson-Patman Act.

A seller in the marketplace must respond quickly³ to a competi-

* © 1983, R. Mark McCareins.

** Associate, Winston & Strawn, Chicago, Illinois; member of Bar in State of Illinois, United States Court of Appeals for the Seventh Circuit, United States District Court for the Northern District of Illinois. The comments of the author are his own and are in no way attributable to the views of Winston & Strawn or its clients.

1. 103 S. Ct. 1282 (1983).

2. 451 U.S. 557 (1981).

3. The Ninth Circuit in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1047 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57-58 (1982), indicated how "price cut news travels fast" in a closed market:

Although the record does not always identify which of Continental's competitors initiated a price reduction, it does reveal how a price reduction to one customer quickly became the prevailing market price. Each bakery ignored his [competitor's] new price at its peril. Because the number of private label accounts was not large, buyers for those

tor's price reductions, often without an opportunity to contact individual customers to determine whether the seller can meet the competitor's offer in an identical fashion. Thus, competitive market conditions may compel a seller to implement pricing reductions within a narrowly defined geographic area that directly correlates with the known area in which a competitor has made similar price concessions. In *Vanco Beverage*, Justice Blackmun, writing for a unanimous Court, held the practice of area-wide price reductions permissible under the meeting competition defense of the Robinson-Patman Act if the seller reasonably believes in good faith that a competitor's lower price is generally available throughout the same market within the same time period, even if the area-wide price attracts new customers.

This comment traces the history of area-wide pricing under the section 2(b) meeting competition defense⁴ of the Robinson-Patman Act.⁵ It then analyzes the Supreme Court's recent decision in *Vanco Beverage*.⁶ Finally, the comment concludes with predictions concerning both the implications of *Vanco Beverage* and future judicial limitations on the practice of area-wide pricing.⁷

I. THE ROBINSON-PATMAN ACT

Congress enacted the Robinson-Patman Act in 1936 as an amendment to the Clayton Act.⁸ The Robinson-Patman Act encourages price

accounts communicated with each other and with all of the wholesale bakeries. Price reductions to one account did not long remain secret. We conclude, therefore, that there was a reasonable basis for Continental's assumption that a new price offered to one of its accounts by a competitor, which Continental did verify, would become available with or without its assistance to all of its existing and prospective customers.

Id. at 1047. The problems incurred by a seller are especially acute when the products involved are homogeneous in quality. See Cooper, *Price Discrimination Law and Economic Efficiency*, 75 MICH. L. REV. 962, 967 (1977).

4. 15 U.S.C. § 13(b) (1982) (amending section 2(b) of the Clayton Act, 38 Stat. 730 (1914)). A seller may attempt in good faith to meet, but not beat, a competitor's price. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 83 (1979); *Indian Coffee Corp. v. Folger Coffee Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,186, at 71,733 (W.D. Pa. 1982); see also *Jones v. Borden Co.*, 430 F.2d 568, 572-73 (5th Cir. 1970) (inadvertent undercutting of price does not eliminate defense if seller acts in good faith); *In re Beatrice Foods Co.*, 76 F.T.C. 719, 812 (1969) (good faith, inadvertent undercutting does not eliminate defense), *aff'd sub nom. Kroger v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

5. See *infra* notes 46-71 and accompanying text.

6. See *infra* notes 86-107 and accompanying text.

7. See *infra* notes 108-18 and accompanying text.

8. See generally, 1 AMERICAN BAR ASSOCIATION SECTION ON ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW, MONOGRAPH NO. 4, at 1 (1980) [hereinafter cited as MONOGRAPH 1]; C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 6-11 (2d rev. ed. 1959); C. EDWARDS, THE PRICE DISCRIMINATION LAW 21-53 (1959); E. KINTNER, A ROBINSON-PATMAN PRIMER 6-16 (2d rev. ed. 1979); W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 7-10 (rev. ed. 1963); F. ROWE, PRICE DIS-

uniformity among sellers⁹ and protects small buyers from large buyers who are able to extract price cuts because of volume purchasing practices.¹⁰

A. *Demonstrating Competitive Injury.*

A buyer, under section 2(a) of the Robinson-Patman Act,¹¹ must prove that a seller's price discrimination:¹² (1) occurred in contempora-

CRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-23 (1962); Gifford, *Promotional Price-Cutting and Section 2(a) of the Robinson-Patman Act*, 1976 WIS. L. REV. 1045, 1046, 1053; Hanson, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1120 (1983).

9. One express purpose of the Act is to ensure that supply costs do not differ among sellers, so that all sellers, regardless of size, will compete on an even basis. *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963). The Act is designed to protect competitors rather than safeguard the process of competition. See L. SULLIVAN, *ANTITRUST* 678 (1977); Rowe, *Pricing and the Robinson-Patman Act*, 41 *ANTITRUST L.J.* 98, 101 (1971); Rowe, *Price Differentials and Product Differentials: The Issues Under the Robinson-Patman Act*, 66 *YALE L.J.* 1, 2 (1956). But see Adelman, *Effective Competition and the Antitrust Laws*, 61 *HARV. L. REV.* 1289, 1327-28, 1334-37 (1948) (the Act imposes unnatural restraints on seller's market).

10. *FTC v. Henry Broch & Co.*, 363 U.S. 166, 168-69 (1960); *FTC v. Morton Salt Co.*, 334 U.S. 37, 42 (1948); see *Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983). Some decisions in the older primary line cases have been criticized as forbidding procompetitive pricing practices and, thus, bringing the Act in conflict with Sherman Act policy. R. BORK, *THE ANTITRUST PARADOX* 382-94 (1978); Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 *YALE L.J.* 70, 70 (1967); Liebler, *Let's Repeal It*, 45 *ANTITRUST L.J.* 18, 27-31 (1976); *Report of Nixon Task Force on Productivity and Competition*, 413 *ANTITRUST & TRADE REG. REP. (BNA)* X-1 (June 10, 1969). The most frequently cited example of this position is the Supreme Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

A number of commentators have questioned the efficacy of the Act. See generally Cooper, *Price Discrimination Law and Economic Efficiency*, 75 *MICH. L. REV.* 962, 975 (1977); Elman, *The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal*, 42 *WASH. L. REV.* 1, 8-9 (1966). But see Rosner, *A Year Under the Robinson-Patman Act*, 52 *ANTITRUST L.J.* 435, 442 (1983) (recent Supreme Court Robinson-Patman decisions indicate that the Act is very much alive).

11. 15 U.S.C. § 13(a) (1982). When a discriminating seller inflicts competitive injury at the buyer level, it is identified as secondary line injury. If a seller complains of another seller's unlawful price discriminations to its customers, the resultant anticompetitive effect is termed primary line injury. For a general discussion of the two types of injury, see *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 702 (1967); *Holleb & Co. v. Produce Terminal Cold Storage Co.*, 532 F.2d 29, 35 (7th Cir. 1976); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 720 n.11 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

Customers of a seller that has suffered a primary line injury suffer tertiary line injury. In *Perkins v. Standard Oil Co.*, 395 U.S. 642, 647 (1969), the Supreme Court read the Act as protecting buyer competition to the fourth level of distribution (i.e., customers of customers of the seller).

12. The Supreme Court in *Vanco Beverage* set forth the following explanation of the difference between "economic price discrimination" and price discrimination for Robinson-Patman Act purposes:

"Economic" price discrimination consists in selling a product to different customers at prices that bear different ratios to the marginal costs of sales to those customers, for example, charging the same price to two customers despite the fact that the seller incurs higher costs to serve one than the other, or charging different prices to two customers despite the fact that the seller's costs of service are the same. Price discrimination under

neous interstate sales;¹³ (2) was between competing purchasers of goods¹⁴ that were of like grade and quality;¹⁵ and (3) resulted in an adverse effect on competition.¹⁶ A seller's practice, however, of discriminating in price because of cost differences in processing or marketing the product is not actionable under the Robinson-Patman Act.¹⁷ In addition, a seller does not violate the Act if it offers a lower price in favor of one customer over another in order to meet a competitor's price to the favored customer.¹⁸

Price discriminations are *prima facie* illegal under section 2(a) when their effect "may be substantially to lessen competition or tend to

the Robinson-Patman Act, however, "is merely a price difference." *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960).

103 S. Ct. 1282, 1293 n.10 (1983).

13. A section 2(a) violation cannot occur unless two sales took place. *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 547 (9th Cir. 1983), *cert. denied*, 52 U.S.L.W. 3612 (U.S. Feb. 21, 1984) (No. 82-1876).

14. The courts have defined goods to include a seller's offer of credit terms, *see, e.g.*, *Carlo C. Gerdaldi Corp. v. Miller Brewing Co.*, 502 F. Supp. 637, 647 (D.N.J. 1980), delivery service arrangements, *see, e.g.*, *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 356 (E.D.N.Y. 1960), freight allowances, *see, e.g.*, *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 54 (8th Cir. 1951), and even electric power, *see Borough of Ellwood City v. Pennsylvania Power Co.*, 1983-2 Trade Cas. (CCH) ¶ 65,673, at 69,299-149 (W.D. Pa. 1983); *see also Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319, 1325 (6th Cir. 1983) ("section 2(a) is not violated when the credit decisions are based upon legitimate business reasons").

15. *See Checker Motors Corp. v. Chrysler Corp.*, 283 F. Supp. 876, 888 (S.D.N.Y. 1968) (whether taxicabs and passenger cars are of "like grade and quality"), *aff'd*, 405 F.2d 319 (2d Cir.), *cert. denied*, 394 U.S. 999 (1969). *See generally* *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 538 (1960); *In re United Fruit Co.*, 82 F.T.C. 53, 56 (1973), *rev'd sub nom.* *Harbor Banana Distrib. v. FTC*, 499 F.2d 395 (5th Cir. 1974).

16. 15 U.S.C. § 13(a) (1982); *see* *Foremost Pro Color, Inc. v. Eastman Kodak Co.*, 703 F.2d 534, 548 (9th Cir.) ("there can be no violation of section 2(a) if the alleged price differential has no potential for adversely affecting competition" (citing *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 862 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978))), *cert. denied*, 104 S. Ct. 62 (1983).

17. *See Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 693-94 (1967); *United States v. Borden Co.*, 370 U.S. 460, 461, 467 (1962). *See generally* 2 AMERICAN BAR ASSOCIATION SECTION ON ANTITRUST LAW, THE ROBINSON-PATMAN ACT: POLICY AND LAW, MONOGRAPH NO. 4, at 99 (1983). The defense does not offer solace to the discriminating seller, however, because the cost justification defense is founded on an evaluation of historical, rather than marginal, costs. *See Kuenzel & Schiffrs, Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses*, 62 VA. L. REV. 1211, 1220 (1976); *Rowe, Cost Justification of Price Differentials Under the Robinson-Patman Act*, 59 COLUM. L. REV. 584, 594 (1959).

18. 15 U.S.C. § 13(b) (1982). The Supreme Court, by a five to four decision, held in *Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 103 S. Ct. 1011, 1014 (1983), that the legislative history of the Robinson-Patman Act did not support extension of the government sales exemption, which removes government sales from the purview of Robinson-Patman, to the sale of pharmaceutical products to state and local government hospitals for resale in competition with private pharmacies.

The judiciary has created an availability defense to a § 2(a) violation when a seller makes the lowest of two or more varying prices equally available to all its buyers. *See Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983); *Piraino, The Legality of Distributor Incentive Discount Plans Under the Robinson-Patman Act*, 58 WASH. U.L.Q. 807, 810 (1980).

create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them."¹⁹ Although a "mere possibility" of injury will not suffice,²⁰ a plaintiff need not demonstrate actual injury to procure relief. Congress designed the Act to reach price discriminations before competition was harmed.²¹

In *J. Truett Payne Co. v. Chrysler Motors Corp.*,²² the Supreme Court severely limited the effect of this statutory language when it held that "even if there has been a violation of the Robinson-Patman Act, petitioner is not excused from its burden of proving antitrust injury and damages."²³ The *Payne* Court dismissed an automobile dealer's claim for treble damages under section 4 of the Clayton Act against an automobile manufacturer who paid a bonus to dealers who exceeded their quotas for car sales. The Court indicated that proof of a violation of section 2(a) of Robinson-Patman does not automatically suggest that the disfavored customer was injured within the meaning of section 4 of the Clayton Act.²⁴ The Court therefore held that even if there had been a violation of the Robinson-Patman Act the plaintiff must prove antitrust injury and damages.²⁵

B. *The Meeting Competition Defense.*

Under section 2 of the Robinson-Patman Act a seller may rebut a prima facie case of price discrimination by demonstrating that the "lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor."²⁶ If the elements of section 2(b) are satisfied, the defense is absolute even

19. 15 U.S.C. § 13(a) (1982).

20. See C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 627-28 (1959); *White House Task Force Report on Antitrust Policy*, ANTITRUST & TRADE REG. REP. (BNA) pt. 11, at 19 (No. 411, May 27, 1969); Rowe, *Section 2(a) of the Robinson-Patman Act: New Dimensions in the Competitive Injury Concept*, 37 ANTITRUST L.J. 14, 16 (1968).

21. See *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945); *Whitaker Cable Corp. v. FTC*, 239 F.2d 253, 256 (7th Cir. 1956), cert. denied, 353 U.S. 938 (1957).

22. 451 U.S. 557 (1981).

23. *Id.* at 568.

24. *Id.* at 561-63.

25. *Id.* at 568.

26. 15 U.S.C. § 13(b) (1982); see also *FTC v. Sun Oil Co.*, 371 U.S. 505, 514-15 (1963). One commentator has suggested, however, that the section 2(b) defense injects an artificial pricing mechanism that "reinforce[s] existing barriers to entry" and halts naturally occurring "downward movement[s] of prices." Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1486 (1977).

though the price discrimination injures competition or is not a mathematically precise response to a competitor's lower price.²⁷

Courts are divided over whether a seller must have actual knowledge that a buyer has received an offer as opposed to mere knowledge of a competitor's pricing practices before the seller can lower prices to meet the competition.²⁸ In the vast majority of cases involving the meeting competition defense, the buyer has received an offer from a competitor, and has communicated that lower offer to the seller before the discriminating seller has instituted a price reduction.²⁹ Courts, however, have evaluated the merits of a section 2(b) defense on an ad hoc basis when the seller has no knowledge of the exact identity of the competing offeror or the price it is charging.³⁰

In *FTC v. A.E. Staley Mfg. Co.*³¹ the Supreme Court disallowed the defendant's section 2(b) argument. The seller in *Staley* did not extend the lower price in response to a specific offer of a competitor, but rather in reaction to a competitor's basing point delivered price system, which included an illegal phantom freight charge.³² The Supreme

27. *United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 459 n.32 (1978); *Standard Oil Co. v. FTC*, 340 U.S. 231, 246-47, 251 (1951); *In re Continental Baking Co.*, 63 F.T.C. 2071, 2166 (1963); *cf. Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 741 (1945) (§ 2(a) violation found because seller unable to establish good faith belief that it was meeting an equally competitive offer).

28. See generally Eaton, *The Robinson-Patman Act: Reconciling the Meeting Competition Defense with the Sherman Act*, 18 ANTITRUST BULL. 411, 420 (1973); McLareu & LaRue, *The Defense of Meeting Competition as a Problem of the National Seller*, in THE ROBINSON-PATMAN ACT: FRED MEYER, UTAH PIE, AND OTHER COMPLIANCE PROBLEMS 60-65 (Van Cise & McCord eds. 1969); Steele, *Section 2(b) of the Robinson-Patman Act—Rules for Meeting Competition in the Past and Present*, 13 ANTITRUST BULL. 1223, 1254-69 (1968); Vogel, *Meeting Competition*, 25 BUS. LAW. 199, 200 (1969).

29. See *William Inghs & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1047 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *Hamptou v. Graff Vending Co.*, 478 F.2d 527, 535 (5th Cir.), *cert. denied*, 414 U.S. 859 (1973); *Jones v. Borden Co.*, 430 F.2d 568, 570-73 (5th Cir. 1970); *In re Beatrice Foods Co.*, 76 F.T.C. 719, 810 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

30. See *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 759-60 (1945); see also *FTC v. Standard Oil Co.*, 355 U.S. 396, 402-03 n.8 (1958); *Surprise Brassiere Co. v. FTC*, 406 F.2d 711, 715 (5th Cir. 1969).

31. 324 U.S. 746, 753, 756 (1945); see also *Exquisite Form Brassiere, Inc. v. FTC*, 360 F.2d 492 (D.C. Cir. 1965) (defendant who wishes to utilize § 2(b) defense must show that price-cut was aimed at competitor's lower price in individual, competitive situations rather than a generally competitive market), *cert. denied*, 384 U.S. 959 (1966); *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674 (2d Cir.), (defendant did not show that price cuts were individually negotiated to meet individual, competitive situations), *cert. denied*, 361 U.S. 826 (1959).

32. A seller who knowingly meets an illegal price offered by a competitor cannot utilize the § 2(b) defense because this price cut cannot satisfy the *A.E. Staley* good faith standard. If a seller, however, unknowingly meets a competitor's illegal price, some circuits have permitted application of the § 2(b) defense. See, e.g., *National Dairy Prods., Inc. v. FTC*, 395 F.2d 517, 524 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956). *But*

Court held that the section 2(b) defense is available only when the price discriminating seller can "show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor."³³ The effect of the Court's holding in *A.E. Staley* requires a defendant to investigate the reliability of an informant's character and verify for itself the accuracy of the defendant's own internal reports of competitor price-cutting before meeting competition.³⁴

In 1977, the Supreme Court confronted the Robinson-Patman verification requirement in a Sherman Act section 1 price-fixing context. In *United States v. United States Gypsum Co.*,³⁵ the Court addressed the seller's duty to verify a customer's report that it had received a lower offer from a competitor. The seller in *Gypsum* reasonably believed that its buyer was untruthful, and sought to verify the buyer's comments by consulting directly with competitors.³⁶ The *Gypsum* Court rejected the

see *FTC v. Standard Oil Co.*, 340 U.S. 231, 246-47 (1951)(section 2(b) defense applies only to meeting another seller's lawful price); *In re Tri-Valley Packing Ass'n*, 60 F.T.C. 1134, 1173 (1962), *rev'd*, 329 F.2d 694 (9th Cir. 1964); 80 CONG. REC. 9418 (statement of Rep. Utterbach). See generally MONOGRAPH I, *supra* note 8, at 128 (1980).

33. *Staley*, 324 U.S. 746, 759-60 (1945); see *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 82 (1979) (reaffirming *A.E. Staley* "reasonable and prudent" person standard); *United States v. United States Gypsum Co.*, 438 U.S. 422, 453 (1978) ("A good faith belief, rather than absolute certainty that a price concession is being offered to meet an equally low price offered by a competitor, is sufficient to satisfy the § 2(b) defense."); see also *Indian Coffee Corp. v. Folger Coffee Corp.*, 1982-83 Trade Cas. (CCH) ¶ 65,186, at 71,733-34 (W.D. Pa. 1982) (court's focus is on good faith of corporation, "not its home office managers").

Because "facts," "good faith," and "reasonableness" play roles in evaluating the sufficiency of a § 2(b) defense, see, e.g., *In re Beatrice Foods Co.*, 76 F.T.C. 719, 757-60 (1969), *aff'd sub nom. Kroger v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971), the courts have tested the efficacy of the defense on a case by case basis. See Kintner, Henneberger & Fleischaker, *Reform of the Robinson-Patman Act: A Second Look*, 21 ANTITRUST BULL. 203, 210 (1976) ("defense expressly recognizes the need for a seller to adjust his pricing practices to particular competitive situations, and permits him flexibly to compete"); see also *United States v. United States Gypsum Co.*, 438 U.S. 422, 456 n.31 (1978).

34. 324 U.S. at 758; see *Hillside Dairy Co. v. Fairmont Foods Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,313 (N.D. Ohio 1980) (defendant made "substantial efforts to verify" actual prices of competitor by questioning own officials and evaluating their responses in light of defendant's knowledge of the market), *aff'd*, 1981-2 Trade Cas (CCH) ¶ 64,375 (6th Cir. 1981).

35. 438 U.S. 422 (1978). This case was a price-fixing action brought under section 1 of the Sherman Act in which a defendant attempted to rebut allegations of conspiracy by stating that it sought to avoid a § 2(a) violation by verifying the prevailing market prices. Section 1 overtones in Robinson-Patman cases are common. See Klein, *Meeting Competition by Price Systems Under § 2(b) of the Robinson-Patman Act: Problems and Prospects*, 16 ANTITRUST BULL. 213, 218-23 (1971). See generally Leddy, *The Effects of the Gypsum Decision on Government Criminal Prosecutions*, 48 ANTITRUST L.J. 1551 (1979).

36. The uncommunicative buyer presents a troubling problem for the seller who desires to meet competition. See *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975) (buyers often misinform sellers of competitors' prices in order to induce a larger discount), *cert. denied*, 424 U.S. 943 (1976).

defendant's "resort to other seller verification as a means of checking the buyer's reliability"³⁷ because of Sherman Act section 1 prohibitions. The Court indicated, however, that if a seller received either reports of similar discounts from other customers or a threat of termination if the seller did not meet the buyer's offer, it need not further verify the competitor's prices for purposes of section 2(b).³⁸

The Supreme Court in 1979 again addressed the issue of inter-seller verification and the meeting competition defense. In *Great Atlantic & Pacific Tea Co. v. FTC*,³⁹ the Court ruled that for sellers to exchange information would invariably "frustrate competitive bidding and . . . lead to price matching and anticompetitive cooperation among sellers."⁴⁰ Thus, the Court advised future litigants to analyze section 2(b) of the Robinson-Patman Act with a healthy respect for the prohibitions and procompetitive pricing goals expressed in section 1 of the Sherman Act.

A seller, however, cannot lower prices to meet competition solely on the basis of general rumors in the marketplace or on the basis of one salesman's unsubstantiated report. In *Viviano Macaroni Co. v. FTC*,⁴¹ the United States Court of Appeals for the Third Circuit held that the defendant's failure to corroborate information gleaned from a salesman was not a good faith response to competition under *A. E. Staley*.⁴² The seller must not only receive information on the competing offer from reliable sources, but must also be confident that the pricing information relates to a geographic market region that is substantially similar to its buyer's area of business.

37. 438 U.S. at 454-55 (citing *Jones v. Borden Co.*, 430 F.2d 568 (5th Cir. 1970), and *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976)).

38. See also *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 84 (1979) (threat of loss of an important customer may be sufficient to establish section 2(b) defense). But see *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 741 (1945) (need personal knowledge of competitors' price cuts).

39. 440 U.S. 69 (1979).

40. *Id.* at 80 (if seller establishes good faith § 2(b) defense, buyer is also vindicated even if buyer enticed seller into beating competition).

41. 411 F.2d 255 (3d Cir. 1969).

42. *Id.* at 259-60 (Third Circuit held that eighteen-year veteran salesman's report that buyer had informed him of competitor's price reductions was not reasonable, good faith effort under *A. E. Staley*).

The court in *Double H. Plastics, Inc. v. Sonoco Prods. Co.*, 575 F. Supp. 389 (E.D. Pa.), *aff'd in part and rev'd in part*, 1983-2 Trade Cas. (CCH) ¶ 65,730 (3d Cir. 1983), expanded the *Viviano Macaroni* requirements:

What is required is a showing of reliability of the informant who has personal knowledge of the bidding, coupled with an attempt to investigate by asking for more information about the competitive bid and the making of a credible threat of termination of purchases in the absence of a second offer.

575 F. Supp. at 399 (citing *A&P*, 440 U.S. at 84 n.17) (emphasis added).

A buyer who refuses to discuss the existence or nature of a competitor's bid places a seller in a precarious position.⁴³ The seller, although generally obligated to meet only individual competitive offers, is forbidden under *Gypsum* to verify a price with competing sellers,⁴⁴ and may be unable to ascertain from the buyer the specific terms of the competing offer. Courts have permitted sellers in this situation to rely on their own good faith and reasonable knowledge of competitive market conditions in order to establish a section 2(b) defense. Prior to the Supreme Court's decision in *Vanco Beverage*, some courts even al-

43. A buyer may frequently not disclose either the terms of a competitive offer or the identity of the competing offeror. See *Forster Mfg. v. FTC*, 335 F.2d 47, 55 (1st Cir. 1964) ("categorical testimony of . . . buyer who said it was . . . common practice of buyers never to disclose to sellers the specific offers made by their competitors."), *cert. denied*, 380 U.S. 906 (1965); see also *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 84 (1979); McLaren & LaRue, *The Defense of Meeting Competition as a Problem of the National Seller*, in *THE ROBINSON-PATMAN ACT: FRED MEYER, UTAH PIE, AND OTHER COMPLIANCE PROBLEMS* 64 (Van Cise & McCord eds. 1969) ("The evidence necessary to establish a 2(b) defense includes a showing of market conditions, a good faith effort to check out customers' claims of competitors' low price offers, facts establishing reason to believe the claims are true, and a belief that the meeting of such offers is necessary to maintain your business. The particular evidence which will establish this showing will no doubt differ in different industries and in different competitive patterns, but these are the objectives."). McLaren and LaRue proceed to suggest a § 2(b) compliance program for national sellers:

- (1) Establish firm list prices, if that is the way the industry operates, with discounts on a cost justified basis, and a policy, communicated to all sales people, to stay "on scale."
- (2) Establish procedures for departures from scale to meet competition. If possible, have a sales supervisor as well as a salesman confer with the customer. It may be well to have a pricing executive who acts as a director and who must approve deviations from scale.
- (3) Establish a documentation program under which sales personnel are instructed to obtain, if possible:
 - (a) Copies of competitors' offers, invoices, or discount checks—obtained from customers.
 - (b) Signed affidavits or statements of customers as to offers claimed to have been made by competitors.
 - (c) Memoranda of their conversations with customers during which the latter have reported competitive offers. These memoranda should be personalized as much as possible so that both the salesman and the buyer actually will remember the occasion if they are refreshed from the memoranda. Also include "lost customer" reports when a reported competitive offer has not been met, and the business has been lost. Precautions should be taken to ensure that these are truthful. The company's showing of "good faith" will be seriously jeopardized if salesmen's reports are produced but customers deny that they are true.
- (4) Review the need to continue meeting competition prices once a year or so.

Id. at 65-66. The Federal Trade Commission explicitly recognized the dilemma faced by sellers attempting to adhere to the spirit of § 2(b): "[T]he burden of not exceeding Robinson-Patman bounds should at some point fall on the buyer who plays the cards so close to his vest as to persuade the seller to come down just a little more, and not on the seller who has tried by every proper means to feel out the opposition." *In re Beatrice Foods Co.*, 76 F.T.C. 719, 810 (1969), *aff'd sub nom. Kroger Co. v. FTC*, 438 F.2d 1372 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971).

44. *United States v. United States Gypsum Co.*, 438 U.S. 422, 458 (1978) ("To recognize even a limited 'controlling circumstance' exception for interseller verification in such circumstances would be to remove from scrutiny under the Sherman Act conduct falling near its core with no assurance, and indeed with serious doubts, that competing antitrust policies would be served thereby.'").

lowed sellers to match a competitor's lawful pricing or discount system, and to offer an area-wide discount or price without requiring them to analyze each meeting competition situation on an individual basis.⁴⁵

C. *Initial Judicial Reaction to Area-Wide Quantity Discounts or Pricing Under the Robinson-Patman Act.*

The United States Court of Appeals for the Ninth Circuit was the first court of appeals to sanction a seller's blanket price reductions that had been prompted by the "necessities of competition."⁴⁶ In *Balian Ice Cream Co. v. Arden Farms Co.*,⁴⁷ the defendant lowered the price of its ice cream sold to retailers in the Los Angeles area. Competition among ice cream suppliers in Los Angeles was especially fierce and manufacturers deviated greatly from their list prices in their attempts to lure customers. The defendant ice cream manufacturer admitted that it had not responded to individual, competitive situations, but instead had instituted a "blanket price cut" . . . to eliminate a great many of the chiseling cuts, special advantages and rebates given by its competitors."⁴⁸

The *Balian* decision did not indicate whether all buyers in the market were cognizant of all available offers. The court did suggest that a seller could implement a blanket price reduction without reference to a specific buyer-seller relationship if three factors were present. First, the price cuts must be available only in a restricted geographic area. Second, the seller's actions must be in response to improper rebates and illegal price concessions. Finally, the competition in the market must be "so intense that the price structure for said products [is] very badly broken down."⁴⁹

In a 1966 case, *Forster Manufacturing Co. v. FTC*,⁵⁰ the United States Court of Appeals for the First Circuit allowed a defendant to raise a section 2(b) defense even though the defendant had not confirmed with each customer that the buyer had actually received a com-

45. See *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. at 82; see also *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966); *Forster Mfg. v. FTC*, 335 F.2d 47, 53 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965); *Ludwig v. American Greetings Corp.*, 282 F.2d 917, 919 (6th Cir. 1960), *appeal dismissed*, 336 U.S. 269 (1961); *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

46. *Balian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

47. 231 F.2d 356 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

48. *Id.* at 366.

49. *Id.* at 358 n.1.

50. 335 F.2d 47 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

petitor's "1 case free with purchase of 10" offer.⁵¹ The *A.E. Staley* "reasonable, prudent and good faith" standard guided the seller in *Forster* in evaluating the competitive necessities of the market.⁵² The limited geographic area (Pittsburgh) of the seller's "11 for the price of 10 offer," and the seller's extension of the discount offer to all its customers in the area buttressed the meeting competition defense. The *Forster* court asserted that because "buyers never . . . disclose to sellers the specific offers made by their competitors," a seller should not be required to show an actual meeting of a competitive offer.⁵³

In *Callaway Mills Co. v. FTC*,⁵⁴ the United States Court of Appeals for the Fifth Circuit allowed a carpet manufacturer to grant volume discounts without regard to individual, competitive situations. Defendant's buyers had unsuccessfully demanded such discounts from the seller, Callaway Mills, for a number of years. In order to meet an industry-wide practice of volume discounting, Callaway Mills adopted a discount program rather than negotiate prices on individual competitive offers.

The *Callaway Mills* court, citing *A.E. Staley*, held that Callaway Mills's volume discount system was a "thoughtfully tailored"⁵⁵ response to "competitive conditions prevalent in the carpeting industry."⁵⁶ In addition, the seller made the discounts available to all customers. Thus the *Callaway Mills* court found "nothing wrong *per se* with adopting a 'pricing system' used by competitors" in order to avoid "piecemeal" price reductions.⁵⁷ The court formulated the following test to determine whether such a pricing system violates the Robinson-Patman Act: "It is only when no 'reasonable and prudent' person

51. The factual setting on which the seller based its decision to offer an area-wide quantity discount is representative of the situation that confronts many sellers daily:

The respondents [Forster] heard of Penley's [competitor's] free goods offer from their local broker and sent one of their sales staff from Maine to Pittsburg [sic] to investigate. Several buyers for Forster's customers in the area told Forster's representative of Penley's free goods offer, but only one of them identified Penley as the offeror. None of the buyers interviewed had bought from Penley or had received an offer from its sales representative. The respondents concluded from their investigation that Penley's free goods offer was generally available in the area and early in July met Penley's price with an area-wide cut of one free case of clothespins with each 10 cases bought.

335 F.2d at 54.

52. See also *National Dairy Prods. Corp. v. FTC*, 395 F.2d 517, 523 (7th Cir.), cert. denied, 393 U.S. 977 (1968) (seller need not know exact price or identity of competitor if seller has strong factual basis for good faith belief that approximate price is available to the buyer).

53. *Forster*, 335 F.2d at 55-56 (citing *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759 (1945)).

54. 362 F.2d 435 (5th Cir. 1966).

55. *Id.* at 442.

56. *Id.*

57. *Id.* at 441 (emphasis in original).

would conclude that the adopted system is a reasonable method of meeting the lower price of a competitor that it is condemned."⁵⁸

Prior to the Ninth Circuit's 1982 opinion in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,⁵⁹ and the Seventh Circuit's 1981 decision in *Vanco Beverages, Inc. v. Falls City Industries*,⁶⁰ a seller, responding to a competitor's area-wide price concessions, had to offer price reductions cautiously to customers within an intensely price competitive area that overlapped perfectly in location with the competitor's pricing structure. A court also would apply the *A.E. Staley* "reasonable and prudent" test in a much more stringent fashion when a seller had not verified the competitor's matching offer with his buyers in the specific region than when the "discriminating seller" actually knew that his buyer had received an equally low offer from a competitor.⁶¹

D. *The Ninth Circuit Attempts to Settle the Area-Wide Price Reduction Debate.*

The Ninth Circuit interrupted the federal appellate courts' fifteen year hiatus regarding the issue of whether a seller could meet competition within section 2(b) of the Robinson-Patman Act by reducing prices to a geographically confined group of buyers.⁶² In *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,⁶³ an independent baker claimed that defendant Continental discriminated in price between northern California buyers who bought private label bread and those who bought advertised bread. Continental reduced its price on private label bread to all its customers in northern California although Continental had not attempted to verify that each of its buyers had actually received an equally low competitor's offer in that region. Continental's private label bread prices in neighboring Nevada were consistently higher than its northern California prices.

58. *Id.* at 442.

59. 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

60. 654 F.2d 1224 (7th Cir. 1981), *vacated and remanded*, 103 S. Ct. 1282 (1983).

61. *See* *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 725-26 (5th Cir. 1975) (seller need only demonstrate that its pricing system was a reasonable method of meeting competitor's lower price), *cert. denied*, 424 U.S. 943 (1976); *Ludwig v. American Greetings Corp.*, 1960 Trade Cas. (CCH) ¶ 69,830 (N.D. Ohio 1959), *aff'd*, 282 F.2d 917, 918-19 (6th Cir. 1960) (section 2(b) allowed territory-wide sales policy), *appeal dismissed*, 336 U.S. 269 (1961).

62. The Fifth Circuit's decision in *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 715-16 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), provides some support for area-wide pricing.

63. 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982). For some unexplained reason, the Ninth Circuit refrained from referring to the Seventh Circuit's opinion in *Vanco Beverage*.

The United States Court of Appeals for the Ninth Circuit ruled that "marketwide price reductions are fatal to a section 2(b) defense in all instances."⁶⁴ Instead, section 2(b) permits a seller to reduce prices in an area coextensive with a territory in which a competitor has offered its lower prices. The *Inglis* rule that "[m]arketwide price reductions are permissible when there is a reasonable basis to believe that equally low offers are available from competitors throughout the market"⁶⁵ was premised on the Supreme Court's standard enunciated in *A. E. Staley*.⁶⁶ Hence, the Ninth Circuit held that Continental could not escape its verification duty in the private label bread market, "given the smaller number of private label accounts"⁶⁷ and the relative ease of contacting a few customers in a well-defined geographic region to determine if those buyers had actually received an equally low offer from a competitor.⁶⁸

The *Inglis* decision demonstrates the importance of adequate verification of a competitor's prices in a meeting competition situation. If a seller is responding to a competitor's area-wide price reductions in a market where a competitor's prices can be easily verified, the seller must rigorously validate the parameters of the competitor's sale terms. In addition, a seller can implement area-wide reductions under *Inglis* only if the market structure is intensely price competitive and the seller does not possess any other practical alternative to meeting a competitor's price reductions.

Until the Supreme Court's decision in *Vanco Beverage*, the section 2(b) defense and the *A.E. Staley* reasonable and prudent standard were applied more strictly when the seller responded to a competitor's area-

64. *Inglis*, 668 F.2d at 1045 (quoting F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 239 (1962)).

65. *Inglis*, 668 F.2d at 1046.

66. The *Inglis* court, however, issued two caveats. The seller who reduces prices without evidence that its buyers received similar offers must be cautious that the price reductions are only offered in an area in which its competitors' prices are equally low. "[T]he price competition zone cannot be perceived to be smaller than the zone of price reduction." *Id.* In addition, "a defendant may not use the existence of a competitive offer to one of its customers as an excuse to reduce aggressively prices to others when it has no reasonable basis to believe that competitors are extending similar offers throughout the market" during a similar time period. *Id.*

67. *Id.* at 1045-48.

68. The *Inglis* decision, and its forerunners, apparently indicated that sellers could reduce prices on a regional basis to meet competition without incurring liability under § 2(a). *Inglis*, however, did not grant sellers a *carte blanche* to meet competitive offers without actually verifying the existence of an outstanding offer. *Id.* at 1047. The Ninth Circuit reversed the district court's grant of a judgment notwithstanding the verdict in favor of defendant Continental on § 2(b) grounds, holding that the trial court's ruling in favor of Continental was not defensible on meeting competition grounds because Continental should have provided detailed verification of the existence of a competitor's price reductions in the private label market.

wide price reduction than when a seller met competition on a one-on-one basis.⁶⁹ If a seller verified fully the terms of a competitor's zone price cuts and limited its response to the same geographic area, an area-wide price reduction might have been permissible. The propriety of the price reduction would depend on whether the market was intensely price competitive and whether the seller offered the terms only to its customers within the competitive region.⁷⁰ If the seller failed to observe these requirements, the courts would apply the traditional rule that a seller could meet competition only on an individual basis.⁷¹

69. The *Inglis* court also indicated that sellers could employ market-wide price reductions to attract new customers. *Id.* at 1047. Prior to *Vanco Beverage* three courts of appeals permitted a seller to reduce prices to existing and prospective customers under section 2(b):

If, in situations where the Section 2(b) proviso is applicable, sellers could grant good faith competitive price reductions only to old customers in order to retain them, competition for new customers would be stifled and monopoly *would* be fostered. In such situations an established seller would have a monopoly of *his* customers and a seller entering the market would not be permitted to reduce his price to compete with his established rivals unless he could do so on a basis such as cost justification. Moreover, the distinction would create a forced price discrimination between a seller's existing customers to whom he had lawfully lowered his price under Section 2(b) and a prospective new customer. These results, we believe, are incompatible with the purpose for which the Robinson-Patman Act was enacted.

Sunshine Biscuits, Inc. v. FTC, 306 F.2d 48, 52 (7th Cir. 1962) (emphasis in original); *see Cadigan v. Texaco, Inc.*, 492 F.2d 383, 387 (9th Cir. 1974) (a seller's meeting of competition for one purchaser and not for another buyer violates § 2(a) only if seller motivated by bad faith); *see also International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 725 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Hanson v. Pittsburgh Plate Glass Indus.*, 482 F.2d 220, 226-27 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *National Dairy Prods. Corp. v. FTC*, 395 F.2d 517, 523 (7th Cir.), *cert. denied*, 393 U.S. 977 (1968); *McCaskill v. Texaco, Inc.*, 351 F. Supp. 1332, 1340 (S.D. Ala. 1972), *aff'd without pub. op. sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973).

The Second Circuit, however, refrained from allowing the § 2(b) defense when the seller sought to gain new customers. *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *see also In re Anheuser-Busch, Inc.*, 54 F.T.C. 277, 301 (1957).

70. *See also Indian Coffee Corp. v. Folger Coffee Co.*, 1982-83 Trade Cas. (CCH) ¶ 65,186, at 71,733 (W.D. Pa. 1982).

71. The Fifth Circuit in *General Gas Corp. v. Nat'l Utilities Co.*, 271 F.2d 820 (5th Cir. 1959) (quoting unpublished trial court opinion), addressed one alleged "evil" consequence of area-wide pricing:

It appears from the evidence here that competitors of the defendant corporation were cutting their prices from time to time on a customer basis and, while defendant contends that its broad price cuts in the Athens and Gainesville areas were good faith reductions to meet the equally low price of a competitor, it seems clear that there is this situation: The competitors of General were struggling for business and cutting prices on a customer basis and defendant, General, becoming tired of the struggle customer by customer, declared war with a drastic price reduction over the area in which plaintiff competes.

Id. at 825; *see also Surprise Brassiere Co. v. FTC*, 406 F.2d 711, 715 (5th Cir. 1969); *Exquisite Form Brassiere, Inc. v. FTC*, 360 F.2d 492, 493 (D.C. Cir. 1965), *cert. denied*, 384 U.S. 959 (1966); *Standard Motor Prods., Inc. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959); *Ingrain v. Phillips Petroleum Co.*, 259 F. Supp. 176, 183-84 (D.N.M. 1966); *In re Whitaker Cable Corp.*, 51 F.T.C. 958, 966-67 (1955).

II. THE *VANCO BEVERAGE* DECISIONA. *The Seventh Circuit's Analysis in Vanco Beverage.*

The Seventh Circuit Court of Appeals, in *Vanco Beverages, Inc. v. Falls City Industries*,⁷² affirmed⁷³ a district court ruling⁷⁴ and held that a beer manufacturer could not invoke the section 2(b) meeting competition defense when it lowered its prices on a market-wide method rather than on a customer-by-customer basis.⁷⁵ Falls City, the defendant, operated a brewery in Northern Kentucky. Vanco Beverage, the plaintiff, was the only wholesale beer distributor for Falls City beer in nearby Evansville, Indiana. Vanco Beverage alleged that Falls City sold beer to its sole northern Kentucky wholesale distributor, Dawson Springs Beverage Company of Henderson, Kentucky, at prices lower than those charged to Vanco Beverage just across the state border in southern Indiana.⁷⁶ Falls City conceded that it sold beer to its Kentucky distributors at lower prices without any cost justification but maintained that it was only "meeting competition" under section 2(b) of the Robinson-Patman Act because its statewide lower price in Kentucky was adopted "in good faith to meet an equally low price of a competitor."⁷⁷

Vanco Beverage claimed that Falls City had not met the competitor's lower prices in Kentucky, but rather had engaged in offensive price maximization in Indiana. But the district court agreed that Falls City created the price disparity by raising its Indiana prices rather than

72. 654 F.2d 1224 (7th Cir. 1981), *vacated*, 103 S. Ct. 1282 (1983).

73. The Seventh Circuit did modify the lower court ruling on damages, however, remanding the action to the district court for a reassessment of the damages.

74. 1980-2 Trade Cas. (CCH) ¶ 63,357 (S.D. Ind. 1980), *aff'd in part and rev'd in part*, 654 F.2d 1224 (7th Cir. 1981), *vacated and remanded*, 103 S. Ct. 1282 (1983).

75. 654 F.2d at 1230. Although the court of appeals and the district court addressed the issue of proof of business injury and damages in a § 2(a) case, certiorari was not granted on that issue. *See generally* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557 (1981) (discussing requirements of § 2(a)).

76. Only the Ohio River separates Evansville, Indiana, from Henderson, Kentucky. Falls City beer cost approximately thirty percent more in Indiana than in Kentucky between 1972 and 1978 because of Falls City's discriminatory pricing policy. Consequently, many Indiana consumers crossed the state line, in violation of a generally unenforced Indiana law, to purchase Falls City beer from Kentucky retailers. Thus Vanco Beverage, which supplied Indiana retailers, suffered from the discrepancy in price. 103 S. Ct. at 1285. Kentucky and Indiana law required beer retailers to purchase beer for resale only from authorized wholesale distributors in their respective states; Indiana law prohibited Indiana beer wholesalers from selling to out-of-state retailers. 654 F.2d at 1226; *see* IND. CODE §§ 7.1-3-3-5, 7.1-3-4-6 (1982); KY. REV. STAT. § 243.180 (repl. 1981).

77. 1980-2 Trade Cas. (CCH) ¶ 63,357, at 75,811. Falls City commonly set statewide prices in the thirteen states in which it conducted business, even though only Indiana and West Virginia had enacted statewide price uniformity laws.

reducing its prices in Kentucky to meet a competitor's price.⁷⁸ But the district court rejected Vanco Beverage's Sherman Act section 1 claim that Falls City set its Indiana prices in accordance with an agreement with other brewers.⁷⁹

On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the district court's opinion. Chief Judge Walter J. Cummings, writing for the majority,⁸⁰ relied on the Supreme Court's decision in *A.E. Staley*:

[Section 2(b)] "places emphasis on individual situations, rather than upon a general system of competition," and is designed to allow a seller to defend his business against genuine price competition. However, the exception does not justify the maintenance of discriminatory pricing among classes of customers that results merely from the adoption of a competitor's discriminatory pricing structure.⁸¹

The majority opinion found no evidence that Falls City adopted "a non-discriminatory pricing structure and then reduced prices where necessary to defend against competition" in Kentucky.⁸² The majority held that the meeting competition defense did not apply because the price differences between Indiana and Kentucky wholesalers "resulted from price increases in Indiana, not price decreases in Kentucky."⁸³

Judge Swygert acknowledged, in dissent, that a seller may reduce

78. *Id.* at 75,822.

79. *Id.*; see *United States v. General Fire Proofing Co.*, 1962 Trade Cas. (CCH) ¶ 70,489 (W.D.N.Y.) (similar zone systems and price differentials by competitors may be "collusive" under section one of Sherman Act); see also *Wall Prods. Co. v. National Gypsum Co.*, 326 F. Supp. 295, 306-07 (N.D. Cal. 1971). Vanco Beverage's section 1 claim was not appealed to the Seventh Circuit.

80. The Seventh Circuit judges on the panel were divided in the decision. Senior District Judge Wesley E. Brown, who sat by designation on the panel, sided with Chief Judge Cummings, while Senior Judge Swygert of the Seventh Circuit penned a strong dissent.

81. 654 F.2d at 1230 (quoting *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 756 (1945)).

82. *Vanco Beverage*, 654 F.2d at 1230. Thus, the majority opinion in *Vanco Beverage* apparently would have concurred with the Ninth Circuit decision in *Inglis* if Falls City had sufficiently established that its area-wide price reductions in Henderson, Kentucky had been precipitated by similar price cuts by other brewers in Henderson.

83. *Id.* Fall City's president testified that the Indiana price was set higher than the Kentucky price "because we [Falls City] followed the leaders, the pricing of the leaders of the beers in Indiana as far as their dock prices were concerned." Falls City maintained, however, that "Vanco identified its 'competition' as the Evansville [Ind.] distributors of other brands of beer and set its prices to meet their prices in Evansville . . . ; Vanco never adjusted its prices to meet Henderson [Ky.] price competition . . . ; and Evansville wholesale prices moved independently of, wholesale prices in Henderson, Kentucky." Brief for Petitioner at 6, *Falls City Indus. v. Vanco Beverage, Inc.*, No. 81-1271 (U.S. May 14, 1982) [hereinafter cited as "Petitioner's Brief"]. The district court and the court of appeals in *Vanco Beverage* held, however, that Evansville (Ind.) and Henderson (Ky.) formed a single retail beer market even though the wholesalers in these two areas did not sell to the same retail outlets. 654 F.2d at 1228; 1980-2 Trade Cas. (CCH) ¶ 63,357, at 75,815.

prices on an area-wide basis in order to meet competition.⁸⁴ He suggested that the section 2(b) defense should not be limited to meeting competition in individual situations because Falls City did not follow a competitor's illegal pricing system in Indiana and because the district court had not found any Sherman Act section 1 violation.⁸⁵

B. *The Supreme Court's Meeting Competition Analysis in Vanco Beverage.*

The Supreme Court reversed the Seventh Circuit. Justice Blackmun, writing for a unanimous Court, evaluated Falls City's meeting competition defense by dividing the Seventh Circuit's analysis into three distinct components. First, the court of appeals had disallowed the meeting competition defense because it found that the difference in Falls City's wholesale beer prices between Henderson, Kentucky and Evansville, Indiana "resulted from price increases in Indiana, not price decreases in Kentucky."⁸⁶ Second, the court of appeals had addressed whether a seller may employ the meeting competition defense to attract new customers or only to retain old customers.⁸⁷ Third, the court of appeals had held that sellers may not avail themselves of the meeting competition defense by adopting an area-wide price in response to a competitor's prevailing prices throughout its sales territory.

1. "The seller is not required to show that the [price] difference resulted from subtraction rather than addition."⁸⁸ The Supreme Court initially engaged in an extensive analysis of its earlier decision in *A.E. Staley*.⁸⁹ The Court distinguished the *Vanco Beverage* controversy

84. Judge Swygert held that competition among Kentucky brewers was "evidently stiffer than it was in Indiana for the prices charged by all brewers were lower in Kentucky." *Vanco Beverage*, 654 F.2d at 1233. He relied heavily on *Callaway Mills* to analyze the price discrimination issue differently than did Chief Judge Cummings:

The majority opinion and the district court both view the price discrepancies as a result of Falls City's raising its prices to its Indiana wholesalers. That statement is no more accurate than it would be to state that the differentials were caused by lowering the prices to Falls City's Kentucky customers. There was no norm or starting point against which such statements could be tested. Pricing policies are the result of competitive forces that develop over the years. The fact that brewers' prices, including Falls City's, have reached a higher level in Indiana than in Kentucky is only a reflection of those trends.

Id. (emphasis in original).

85. Judge Swygert referred to the Supreme Court's opinion in *Standard Oil Co. v. FTC*, 340 U.S. 231, 250, 259 (1951), to demonstrate that Falls City met competition as a matter of law on a selected basis within the same market.

86. 103 S. Ct. at 1291 (quoting 654 F.2d at 1230).

87. 103 S. Ct. at 1294; see *supra* note 61.

88. 103 S. Ct. at 1293.

89. *Id.* at 1295 (citing *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. at 759-60); see *supra* notes 31-34 and accompanying text.

from *A.E. Staley* stating that “Staley had not priced in response to competitors’ discrete pricing decisions, but from the outset had followed an industry-wide practice of setting its prices according to a single, arbitrary scheme that by its nature *precluded* independent pricing in response to normal competitive forces.”⁹⁰ Vanco Beverage, however, failed to demonstrate that Falls City’s pricing practices in Evansville were collusive or violative of section 1 of the Sherman Act.

Despite the district court finding that Evansville wholesale beer prices were “artificially high,”⁹¹ Vanco Beverage did not establish the existence of an illegal pricing system in Evansville, Indiana.⁹² Further, even though Falls City’s prices in Indiana rose incrementally in response to a competitor’s price increases, the district court should not have focused its attention on the Evansville price increases, but rather on whether Falls City’s Henderson, Kentucky prices “remained lower in response to competitors’ prices.”⁹³ The Supreme Court required Falls City to justify on remand only its lower Henderson, Kentucky prices and not its higher Evansville, Indiana prices, absent any Sherman Act section 1 violation. Even if Falls City had set its Evansville prices collusively, the collusion would be “relevant to Vanco’s Robinson-Patman Act claim only if it affected Falls City’s lower Kentucky price.”⁹⁴

The Court indicated that a seller may invoke the meeting competition defense even when it has implemented small price increases instead of price cuts. The Court found that Falls City’s price increases in Kentucky did not defeat its meeting competition defense, because “nothing in section 2(b) requires a seller to *lower* its price in order to meet competition,” especially in inflationary economic times when “vigorous price competition for a particular customer or customers may take the form of smaller price increases rather than price cuts.”⁹⁵

90. *Vanco Beverage*, 103 S. Ct. at 1292 (emphasis in original).

91. 1980-2 Trade Cas. (CCH) ¶ 63,357 at 75,816.

92. The Court referred to its earlier decisions in *A.E. Staley* and *FTC v. Cement Institute*, 333 U.S. 683, 715 (1948), as two instances where there “may be no other plausible explanation for persistent ‘economic’ price discrimination.” *Vanco Beverage*, 103 S. Ct. at 1293 n.10. Vanco Beverage on remand must carry the burden of proving that Falls City met illegal prices in southern Indiana. *Id.* at 1292 n.9.

93. *Vanco Beverage*, 103 S. Ct. at 1292.

94. *Id.* at 1292-93. The Court concluded that factors other than pricing collusion among brewers in southern Indiana might have accounted for the price discrepancies between Evansville and Henderson, such as pervasive state regulation, competition between Evansville and Henderson, and competition between Henderson County and neighboring Kentucky counties. *See infra* note 121.

95. *Vanco Beverage*, 103 S. Ct. at 1293 (emphasis in original).

The *Vanco Beverage* Court also rejected the district court's finding that Falls City's profit-generating price increases in Evansville, and simultaneous, smaller price increases in Kentucky, would defeat the meeting competition defense. Citing *Standard Oil v. FTC* to support the proposition that a seller may meet competition on a selective basis, the Court indicated that a seller may "retain a customer by realistically meeting in good faith the price offered to that customer, without necessarily freezing his price to his other customers."⁹⁶ Thus, "section 2(b) does not require a seller, meeting in good faith a competitor's lower price to certain customers, to forego the profits that otherwise would be available in sales to its remaining customers."⁹⁷

2. *A Seller May Employ the Meeting Competition Defense to Attract New Customers.* In the second component of its analysis, the Supreme Court ended a controversy among the circuits. The Ninth, Seventh and Fifth Circuits had held that a seller could utilize the section 2(b) defense to gain new customers, while the Second Circuit refused to permit a seller to offer a competitor's lower price to new buyers.⁹⁸ In *Vanco Beverage*, the Supreme Court held that section 2(b) does not distinguish between a seller who meets a competitor's lower price to retain an old customer and one who meets a competitor's lower price to gain new customers.⁹⁹

3. *Area-wide Price Reductions are not Fatal to the Meeting Competition Defense.* The Supreme Court examined the legislative history of the section 2(b) defense¹⁰⁰ and held that area-wide price reductions or quantity discounts were permissible.¹⁰¹ A seller seeking to establish the

96. *Id.* at 1294 (citing *Standard Oil Co. v. FTC*, 340 U.S. 231, 250 (1951)) (*Standard Oil*, however, did not involve area-wide price reductions. The *Vanco Beverage* Court noted that its result could be similarly, yet awkwardly, achieved under the Seventh Circuit's rule by "instituting across-the-board price increases followed by selective price reductions.").

97. *Vanco Beverage*, 103 S. Ct. at 1294.

98. See *Cadigan v. Texaco, Inc.*, 482 F.2d 383, 387 (9th Cir. 1974); *Hanson v. Pittsburgh Plate Glass Indus.*, 482 F.2d 220, 226-27 (5th Cir. 1973), *cert. denied*, 414 U.S. 1136 (1974); *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48, 51-52 (7th Cir. 1962); *Standard Motor Prods. v. FTC*, 265 F.2d 674, 677 (2d Cir.), *cert. denied*, 361 U.S. 826 (1959).

99. 103 S. Ct. at 1294.

100. *Vanco Beverage*, 103 S. Ct. at 1295. By enacting § 2(b) Congress did not intend to bar "local" price differences that are in fact responses to "local" competitive conditions. H.R. Rep. No. 2287, 74th Cong., 2d Sess. 16 (1936).

101. Both the Ninth and Fifth Circuit Courts of Appeals had already permitted area-wide price reductions or quantity discounts. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1046 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 725-26 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966); *Bahian Ice Cream Co. v. Arden Farms Co.*, 231 F.2d 356, 366 (9th Cir. 1955), *cert. denied*, 350 U.S. 991 (1956).

meeting competition defense should not be required to expend significant efforts to confirm the lower price from each buyer when the seller reasonably knows in good faith from verified sources that its competitor's lower prices have been extended throughout the region.¹⁰² The *Vanco Beverage* Court condemned a seller's area-wide response only when the seller responds to a "preconceived pricing scale which [is] operative regardless of variations in competitor's prices."¹⁰³ Thus, if a seller adopts a region-wide price reduction for existing or new customers in response to a rival's lower prices throughout the area, then the seller may find shelter under the section 2(b) umbrella.¹⁰⁴

The Court, after accepting the general proposition that section 2(b) sanctions area-wide reductions, briefly described the conditions that a seller must satisfy in order to meet competition in good faith on an area-wide basis. First, "a seller must limit its lower price to that group of customers reasonably believed to have the lower price available to it from competitors."¹⁰⁵ Second, the seller must adequately verify the underlying facts on which he reasonably believes that a competitor's lower price is available throughout the territory.¹⁰⁶ Third, the lower, area-wide price "may continue only as long as the competitive circumstances justifying it, as reasonably known by the seller, persist."¹⁰⁷ In *Vanco Beverage*, the Court remanded the case because the lower courts did not examine whether Falls City's lower price in Henderson, Kentucky was a good faith, adequately verified response to its competitor's allegedly lower prices in Kentucky throughout the relevant time period.

102. *Vanco Beverage*, 103 S. Ct. 1282, 1296 (1983) (citing *Callaway Mills Co. v. FTC*, 362 F.2d 435, 442 (5th Cir. 1966) ("requirement of customer-by-customer pricing would be burdensome, unreasonable, and practically unfeasible")). This concern is accentuated when "time is of the essence" and a seller must respond quickly to a competitor's region-wide price cuts. See *supra* note 3.

103. 103 S. Ct. at 1296 (1983) (quoting F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 234 (1962)).

104. The Court utilized the phrases "responsive to," "of responding," and "reasonable response" to delineate its test for meeting a competitor's area-wide price reduction. *Vanco Beverage*, 103 S. Ct. at 1296-97.

105. *Vanco Beverage*, 103 S. Ct. at 1296.

106. *Id.*; see *supra* notes 41-45 and accompanying text; see also Skitol & Myers, *High Court Creates New Robinson-Patman Issues*, *Legal Times* of Washington, Aug. 8, 1983, at 19, col. 3 ("Court made clear that sellers still have a rather substantial burden of proof on the overall good faith question").

107. *Vanco Beverage*, 103 S. Ct. at 1297.

III. UNRESOLVED MEETING COMPETITION ISSUES AFTER *VANCO BEVERAGE*

The Court's decision in *Vanco Beverage* is a well-reasoned extension of its earlier holdings in *A.E. Staley, Gypsum*, and *Great Atlantic & Pacific Tea Co.* "Good faith," "reasonableness," and "prudence" remain the governing guidelines for sellers seeking to "meet competition."¹⁰⁸ The unique facts in *Vanco Beverage*, however, may limit part of the Court's holding.

The Court in *Vanco Beverage* acknowledged the difficulties it faced in defining the area of competitive overlap:

The Court of Appeals upheld the District Court's findings that the sale of Falls City beer to Vanco was in interstate commerce and that Henderson County and Vanderburgh County constituted a unified retail market for beer. These holdings are not before us. Falls City does not argue, and never has argued, "that Indiana's consumer-level nonimportation law *compels* a finding that Evansville and Henderson are separate retail beer markets." . . . Nor is the broader question whether Indiana and Kentucky constitute separate markets fairly included within the scope of the questions presented in Falls City's petition for certiorari.¹⁰⁹

Because no competitive injury will result if sellers charge different prices in different markets, the relevant market issue remained critical to the Court's area-wide pricing analysis.

The courts of appeals that have allowed a seller to institute area-wide price reductions to meet competition have done so after extensive analyses of the areas in which the territorial price reductions were offered. This was important because a finding that a seller's price cuts were outside the geographic region in which a competitor's lower prices were offered would preclude a finding of good faith or reasonableness.¹¹⁰ These courts allowed a seller to offer only one area-wide price

108. See *supra* note 33 and accompanying text.

109. 103 S. Ct. at 1289 n.7 (citations omitted) (emphasis in original).

110. See *supra* note 66 and accompanying text. Even if the seller offers the meeting competition price in an overly expansive area, section 2(a) liability would not attach if no primary or secondary line price discrimination exists. Thus, if Sellers A and B compete in Zone 1, and A meets B's price in Zone 1, and further extends the lower price to its buyers in a separate distinct market in which no other sellers compete, A's failure to meet B's price in a perfectly tailored market will not be fatal to A's section 2(b) defense. Similarly, if the defendant bakery in *Inglis* had offered its lower price on private label bread in Nevada and northern California, then the seller's price-cuts may not have been reasonably tailored to the competitive circumstances. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1039, 1046 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57-58 (1982). Likewise, if Forster Mfg. Co. had responded to Penley's "11 for the price of 10" cases offer in Pittsburgh by offering a comparable quantity discount in Pittsburgh and Philadelphia, then the defense might not have been allowed. *Forster Mfg. v. FTC*, 335 F.2d 47, 56 (1st Cir. 1964), *cert. denied*, 380 U.S. 906 (1965).

or quantity discount, or to offer a discount only in a specific region. On the other hand, the Court's holding in *Vanco Beverage* that an area-wide price may be offered without an extensive analysis of the existence of a competitor's price within that same region may encourage a seller to offer different prices to buyers in different regions without examining the geographic boundaries of a competitor's price reductions.

The courts of appeals decisions to which the Court referred in *Vanco Beverage* would not have supported the area-wide pricing practice if a seller offered differing prices to buyers in various zones within the same geographic area.¹¹¹ One of the purposes behind the allowance of territorial price reductions, which even the *Vanco Beverage* Court acknowledged, is to free the small seller from expending financial and administrative resources to confirm with individual buyers a competitor's area pricing practice.¹¹² The Court in *Vanco Beverage* suggests, however, under the guise of *Standard Oil*, that even within one unified region, a seller may adopt an area-wide price for one-half of the region while charging a different area-wide price for the other one-half of the same territory.¹¹³ By allowing an area-wide pricing response without sufficient analysis of the availability of a competitor's price within the same territory, the Court transformed an area-wide pricing response from a privilege to a right. This result contravenes the policy behind area-wide pricing. If a seller offers the lower price to buyers in selected zones, the seller will have duplicated the individual contacts that the area-wide rule was designed to avoid. The small seller may use the cost-saving rationale as a pretext to offer area-wide pricing on a selected basis.

Another factor which may limit the application of *Vanco Beverage* is that the case was premised on a factual setting that may not be adaptable to other industries. First, Indiana and Kentucky law prohibited wholesalers from selling outside their own states, and an Indiana statute forbade Indiana retailers from purchasing beer from out-of-state

111. The First Circuit in *Forster*, see *supra* notes 50-53 and accompanying text, the Fifth Circuit in *Callaway Mills*, see *supra* notes 54-58 and accompanying text, and the Ninth Circuit in *Inglis*, see *supra* notes 62-68 and accompanying text, do not suggest that a seller may selectively impose area-wide price cuts within the same market. In *Inglis* the seller, which imposed the area-wide price reduction, "made that price available throughout the market." *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1045 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57-58 (1982).

112. 103 S. Ct. at 1296 (citing *Callaway Mills Co. v. FTC*, 362 F.2d 435, 441 (5th Cir. 1966) ("requirement of customer-by-customer pricing 'would be burdensome, unreasonable, and practically unfeasible.'")).

113. The Court in *FTC v. Standard Oil Co.*, 340 U.S. 231 (1951) did not address an area-wide pricing issue.

wholesalers.¹¹⁴ Second, a brewery generally solicits only one distributor from one market. Finally, state law prohibited Falls City from charging varying prices throughout Indiana.¹¹⁵ Absent interstate wholesale sales restrictions, the Dawson Springs distributor in Henderson, Kentucky would have readily sold Falls City's product to Evansville, Indiana retailers at a substantially lower price than Vanco Beverage received from Falls City. Thus, although purchasing patterns suggested one unified market,¹¹⁶ pricing disparities caused by the injection of artificial, state law price restraints indicated the presence of two separate markets.¹¹⁷

The *Vanco Beverage* Court would have achieved a better result if it had battled with the market definition before tackling the area-wide pricing issue. The Court, however, was compelled by the record on review to accept this alleged "unified retail market" with its artificial, state law price restraints, and was expected to express a position on area-wide pricing under section 2(b). Consequently, the Court's decision fails to link an area-wide pricing analysis with the interrelated exercise of defining the relevant area of competitive pricing overlap.¹¹⁸

114. In light of the Supreme Court's ruling in *Edgar v. Mite Corp.*, 457 U.S. 624 (1982), and the Second Circuit's recent reliance on *Mite* in finding that a Connecticut beer pricing law, analogous to the Indiana statute which prohibited retailers from purchasing from out-of-state wholesalers, placed an impermissible burden on interstate commerce, *see* *United States Brewers Ass'n v. Healy*, 692 F.2d 275, 280, 284 (2d Cir. 1982), *aff'd*, 104 S. Ct. 265 (1983) the validity of the Indiana statute and consequently the "unified market" definition are in serious doubt.

115. *See supra* note 76 and accompanying text.

116. A useful means of defining the relevant market may be found in the Department of Justice's "foiling paradigm" that is set forth in the Department's 1982 Merger Guidelines. *See* 2 TRADE REG. REP. (CCH) ¶ 4502.30.

117. "In these unusual circumstances [state regulation], the prices charged to Vanco and other wholesalers in Vanderburgh County may have been influenced more by market conditions in distant Gary and Fort Wayne than by conditions in nearby Henderson County, Ky." *Vanco Beverage*, 103 S. Ct. at 1293.

118. The Court recognized the "catch-22" that these state pricing laws and unusual market definitions created for Falls City:

In such circumstances, had Falls City raised prices in Kentucky in lock-step with price increases in Indiana, it would have lost sales in Kentucky because its competitors would have been offering far lower prices. Raising its Kentucky prices only in Henderson County would not only have cost Falls City sales there, but also might have exposed Falls City to new Robinson-Patman Act claims, since Dawson Springs competed for sales with wholesalers in neighboring Kentucky counties. Nor, in such circumstances, could Falls City reasonably be required to charge Vanco the lower Kentucky price. Indiana law prohibited Falls City from doing so without simultaneously offering the same price to all other Indiana wholesalers.

Vanco Beverage, 103 S. Ct. at 1297. The result of the Court's ruling, however, may be that sellers are now free under the guise of area-wide pricing and *Standard Oil* to negotiate individualized, selective price cuts with preferred buyers to the detriment of other buyers in the same region.

IV. CONCLUSION

A seller may now unquestionably utilize area-wide price reductions, under the protective umbrella of the section 2(b) meeting competition defense, to attract new customers. No longer must a seller look first to the circuit in question prior to instituting a pricing reduction.¹¹⁹

The Supreme Court in *Vanco Beverage* also answered a debate that, although not particularly pressing in the lower courts, raised some puzzling theoretical questions in inflationary times: A seller is now permitted to meet competition without reducing its prices. Thus, a seller may meet a competitor's slight price increase in a selected market while instituting larger price increases elsewhere without committing an act of price discrimination under section 2(a) of the Robinson-Patman Act.¹²⁰

Finally, the Court legalized a seller's adoption of a regional pricing response to a competitor's price reductions (or increases), even though the region may not be "intensely competitive."¹²¹ The seller, however, must respond to a competitor's area-wide prices in a "well-tailored," reasonable, good faith, and prudent manner. At a minimum, the seller must adequately verify the existence of the competitor's territorial offer, carefully assess the parameters of the competitor's "pricing zone," and offer its price only to buyers within the region in which the competitor's new prices have been offered. In addition, the seller must adequately verify the duration of the competitor's area-wide prices, and limit its response to the same time period.

This commentator would also recommend, unless the unique factual setting of *Vanco Beverage* is present, that a seller offer its matching, area-wide pricing or discount response to all buyers within the selected geographic area. The *Vanco Beverage* area-wide price rule is sui generis, and should not be unthoughtfully extended beyond its intended scope.

119. *Vanco Beverage*, 103 S. Ct. at 1294-95 (citing *Sunshine Biscuits, Inc. v. FTC*, 306 F.2d 48, 51-52 (7th Cir. 1962)); see *supra* note 69.

120. *Vanco Beverage*, 103 S. Ct. at 1295.

121. The Court required neither "intensely competitive" market conditions nor the lack of other alternatives to area-wide pricing. See *supra* notes 49, 70 and accompanying text; see also *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 726 (5th Cir. 1975) ("cooler pad market was very competitive"), *cert. denied*, 424 U.S. 943 (1976). The Court simply required a "response that is reasonably tailored to the competitive situation." *Vanco Beverage*, 103 S. Ct. at 1296. For an example of the "evils" that might result from the *Vanco Beverage* decision, see *supra* note 71. See also Skitol & Meyers, *High Court Creates New Robinson-Patman Issues*, *Legal Times of Washington*, Aug. 8, 1983, at 14, col. 4 (Court's decision will "encourage industrywide and marketwide price parallelism in which pricing patterns . . . are set by dominant firms and then adopted by smaller firms").