Competitors' Lawful Prices and Lawful Competition

Minn. L. Rev. Editorial Board

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Competitors' Lawful
Prices and Lawful Competition

The United States Supreme Court, in its 1951 Standard Oil opinion, characterized as "lawful" the competitor's lower price which a seller can meet under section 2(b) of the Robinson-Patman Act. After examining the purpose, significance and desirability of the Court's use of the term "lawful," the author of this Note concludes not only that lawfulness of the competitor's price should not be made a requirement of the section 2(b) defense, but that an unlawfulness requirement should be adopted instead.

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, makes it unlawful for a seller to discriminate in price between different purchasers of goods "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person," except when such difference in price is cost justified. Section 2(b) provides that a seller charged with price discrimination under section 2(a) may show that his discriminatory price was granted "in good faith to meet an equally low price of a competitor." 3

In 1951 the United States Supreme Court, in Standard Oil Co. v. Federal Trade Comm'r, held that section 2(b) provided a com-

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2. Section 2(a) provides in pertinent part that:
   It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality, . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person. . . . Provided, that nothing shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery.
   Other justifications available are price reductions in perishable and seasonal goods, distress sales, and closeout sales.
3. 49 Stat. 1526 (1936), 15 U.S.C. § 13(b) (1952);
   Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: Provided, however, That nothing contained in . . . this title shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor. . . .
plete defense to a charge of price discrimination. As a result of this decision the meeting competition defense attained great stature, since the other significant defense available—cost justification—has proved difficult to sustain, and consequently most sellers rely on meeting competition as one, if not the sole, defense against a price discrimination charge.

The Court, in its opinion in *Standard Oil*, characterized as "lawful" the competitor's lower price which can be met under the section 2(b) proviso. This judicial insertion of the word "lawful," its purpose, significance, and desirability, is the subject of this Note.

One point must be made clear from the outset: the Supreme Court's use of the term "lawful" was only dictum; it was not a holding, nor was it necessary to the holding of the case. Furthermore, the Court has not yet ruled on the question whether the competitor's price must be lawful in order for the defense to prevail. But the Court's use of the term has had some important consequences, since at least one lower court has interpreted it to require that the competitor's price be lawful, and a great deal of comment has been written on it.

One explanation for the use of the word "lawful" is that the Court was merely stating the facts of the *Standard Oil* case. This hypothesis is weakened by the fact that no evidence had been introduced regarding the legality of prices offered by Standard's competitors. The FTC had made no findings on the issue, and it was not before the Court. Of course, the Court might have used the term "lawful" if it had assumed, in absence of proof on the question,

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5. The Commission, prior to the 1951 *Standard Oil* decision, interpreted section 2(b) as merely procedural, permitting meeting of competition to be shown in rebuttal of the prima facie case of violation, but not preventing the FTC from then showing that there was injury to competition which would prevent reliance on the defense. See *Standard Oil Co.*, 41 F.T.C. 263, 281–82 (1945).


7. 340 U.S. at 238–51.

8. The Court held that section 2(b) provides an absolute defense to a charge of price discrimination, and referred the case back to the FTC for further findings to determine whether Standard Oil came within the scope of the defense.

9. The *Standard Oil* case was again before the Supreme Court in FTC v. *Standard Oil Co.*, 355 U.S. 306 (1958). The FTC had decided, upon remand of the case in 1951, that Standard had not come within the scope of the defense because it had employed a pricing system. 49 F.T.C. 925 (1953). The court of appeals reversed, holding that there was no pricing system involved, and vacated the FTC order. 233 F.2d 649 (7th Cir. 1956). The Supreme Court affirmed, concluding that the case turned on a question of fact, the determination of which by the court of appeals was made on a fair assessment of the record.

10. See *Standard Oil Co. v. FTC*, 233 F.2d 649 (7th Cir. 1956). But see *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956).

11. See *Standard Oil Co. v. Brown*, 238 F.2d 54, 58 (5th Cir. 1956).

that the competitors’ prices were lawful, although this is doubtful since lawfulness of the competitors’ prices was not relevant to the Court’s decision.

Another, and better, explanation of the Court’s use of the term is that it meant to distinguish the case from FTC v. A. E. Staley Mfg. Co.\(^1\) In that case the seller had attempted to use the meeting competition defense against the Commission’s charge of unlawful discrimination by adoption of its competitors’ basing point system.\(^2\) The rationale of the decision was that the defense could not be maintained by a seller adopting an illegal system in its entirety, rather than lowering his price only when necessary to retain customers in individual competitive situations.\(^3\) While it is true that the competitors’ prices were illegal, that was not the Court’s reason for finding that the seller could not use the defense. Staley was not acting in good faith, since many of its discriminatory prices were not necessary to retain its customers.\(^4\)

Although it is inferable from the language in Standard Oil that the Court intended to make lawfulness a requirement in all cases, this is highly unlikely.\(^5\) Whatever the Court intended, however, repeated assumption, discussion, ratification, and acclamation have established a \textit{de facto} lawfulness requirement.\(^6\)

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\item We do not know, of course, why the Supreme Court added the word ‘lawful,’ but we strongly suspect that it was for the purpose of giving emphasis to its previous decisions that a ‘good faith defense was not available to a seller who had met an unlawful price.’ In this connection, it is also pertinent to note that in the instant situation there is no finding, no contention and not even a suspicion but that the competing prices which petitioner met were lawful. 233 F.2d at 653–54. See Rowe, \textit{Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman}, 60 YALE L.J. 929, 967–68, 971 (1951); Morten & Cotton, \textit{Robinson-Patman Act—Anti-Trust or Anti-Consumer?}, 37 MINN. L. REV. 227, 235 (1953).
\item A basing point system is a system of pricing in which delivered prices are determined by adding freight charges from a particular location or basing point, regardless of the actual origin of shipment.
\item The idea that the competitor’s price must be lawful did not originate with the Supreme Court, however. The legislative history of the Robinson-Patman Act contains an assertion that the defense was to be limited to cases where the competitor’s price was lawful. See note 26 infra.
\item Some authorities would make knowledge of the legality of a competitor’s price one aspect of the seller’s good faith. This contention was made at length in the dissent-
\end{enumerate}
Burden of Proof

Under the act the burden of proving facts necessary to sustain the defense is on the seller charged with discrimination. With the addition of the lawfulness requirement, this burden becomes nearly impossible to sustain; the seller cannot practicably prove that his competitor's price was lawful, since this would entail proving all the facts necessary to legality. The FTC has recognized this fact and has therefore modified the burden on the seller so that he need only show that he neither knew nor should have known that the competitor's price was unlawful. Because of the negative character of this burden of proof, the seller can do little more to sustain it than to deny that he had such knowledge. Therefore, of necessity, the burden of coming forward with evidence shifts to the Commission, which must show both unlawfulness of the competitor's price and that the seller had knowledge or reason to know of it. Since the FTC probably could not often sustain such a burden, the result is a virtual negation of the lawfulness requirement.

ing opinion of Commissioner Carretta in Standard Oil Co., 49 F.T.C. 923, 964 (1953). The REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) [hereinafter referred to as the ATTORNEY GENERAL'S REPORT], recommends that, if revision of section 2(b) were made, a proviso be included as follows: "Provided, That a seller shall not be deemed to have acted in good faith if he knew or had reason to believe that the competitor's price or offer was unlawful." Id. at 184–85. See Carlson, Senate Bill No. 11 and Antitrust Policy, 11 VAND. L. REV. 129, 138, at n.47 (1957). This approach would only make lawfulness a requirement of the defense without the necessity of expressly so stating.


20. "Meeting lawful prices, moreover, presupposes prophets, not competitors. Active competitors' books and price records are not open to each others' inspection. And sellers pricing in the haste and pressure of the market do not request affidavits from their customers to prove that competitors' price offers were within the law." Rowe, Price Discrimination, Competition and Confusion: Another Look at Robinson-Patman, 60 YALE L.J. 929, 970 (1951).


22. See the almost totally negative evidence offered by the respondent in C. E. Niehoff & Co., supra note 21, at 1132.

23. "... [A] seller should be deemed to have met a lawful price unless he know or had reason to believe otherwise. ... While the plaintiff challenging the efficacy of a tendered 'meeting competition' justification thus should incur the obligation of questioning the legality of any competitors' prices alleged to be met, the respondent asserting this affirmative defense — as any other — retains the ultimate burden of establishing its component elements." ATTORNEY GENERAL'S REPORT 182.

24. The burden of proof is apparently the same in private suits for treble damages as in FTC complaints, although no case has so held. See ATTORNEY GENERAL'S REPORT 181, n.174. But see Standard Oil Co. v. Brown, 238 F.2d 54 (5th Cir. 1956), a private suit in which the court held that the defendant was not required to prove that his competitor's price was lawful, apparently on the theory that the Supreme Court had not made lawfulness a requirement in any case.
Legal rationale of the lawfulness requirement

The section 2(b) proviso is considered by many authorities to be a self-defense measure.\textsuperscript{25} Some of these same writers also conclude that a seller may not in good faith meet a competitor's lower unlawful price because “one violation of law cannot be permitted to justify another.”\textsuperscript{26} Of course, this is a venerable and respectable maxim, except in the case of self-defense. It is equally well-established that an act otherwise unlawful is permissible when done in justifiable self-defense, that is, when done to prevent an actual or reasonably supposed violation of law which would adversely affect the interest of the actor.\textsuperscript{27} In short, if the section 2(b) proviso is a self-defense measure, price discrimination should be permitted when the competitor against whom it is used has offered an unlawful price.

Furthermore, the conclusion that it is unlawful to discriminate in price to meet a competitor’s unlawful price does not logically follow from the premise that one violation of law cannot be permitted to justify another, unless it is assumed either that all price discriminations to meet competition are violations of law, an assumption belied by the section 2(b) proviso as interpreted by the Court in Standard Oil, or that only price discriminations to meet unlawful prices are violations of law, a perfect example of question begging. Even if the maxim that one violation of law cannot be permitted to justify another were applicable, it would not prove what its advocates contend that it does. It would merely prevent discriminatory pricing from

\textsuperscript{25} “Congress did not seek by the Robinson-Patman Act either to abolish competition or so radically to curtail it that a seller would have no substantial right of self-defense against a price raid by a competitor.” Standard Oil Co. v. FTC, 340 U.S. 231, 249–50 (1951). “The right of self-defense against competitive price attacks is as vital in a competitive economy as the right of self-defense against personal attack.” Wooden & White, The Basing Point Problem 139 (TNEC Monograph No. 42, 1941). “In . . . [Standard Oil] the Court adopted what is called a ‘self-defense’ concept of the ‘good faith’ proviso of the Robinson-Patman Act. . . .” Statement by Congressman Patman, quoted in J. W. Burns, A Study of the Antitrust Laws 145 (1958).

\textsuperscript{26} One violation of law cannot be permitted to justify another. As in any case of self-defense, while the attack against which the defense is claimed may be shown in evidence, its competency as a bar depends also upon whether it was a legal or illegal attack. A discrimination in violation of this bill is in practical effect a commercial bribe to lure the business of the favored customer away from the competitor, and if one bribe were permitted to justify another the bill would be futile to achieve its plainly intended purposes.

being justified by competitors' unlawful prices; it would not prohibit such action if justified for some other reason.

However, achievement of logical symmetry in the law does not appear to be the primary concern of the proponents of the lawfulness requirement. They contend that if a seller were permitted to discriminate in price to meet a competitor's unlawful price, price discrimination would spread throughout the market and the FTC would be unable to ferret out the original discriminator, the only violator.

Obviously, the limitations placed on price discrimination to meet competition cannot prevent a seller from initially offering an unlawful price to all or most of the customers in a market by selling at discriminatory prices or prices below cost, and, without a lawfulness requirement, every other seller in the market could discriminate to meet those prices, provided he did so in good faith. Furthermore, meeting such prices could result in a greater amount of price discrimination than would have been possible had the unlawful price not been met. If the seller offering the unlawful price could supply only a part of the market's needs, and the unlawful price is met in each case, the seller offering it is able to make an effective offer to more customers than he could supply. Nevertheless, although spreading is possible in some situations, the seriousness of the problem seems greatly overstated.

The limitations imposed by the good faith requirement should allay most of the fears of uncontrollable spread of price discrimination. A seller lacks the requisite good faith unless he must discriminate to obtain or retain a customer. Sellers could offer a lower discriminatory price only to those customers receiving the unlawful offer, and only until the unlawful offer were withdrawn either voluntarily or as a result of FTC action.

Disregarding for the moment the adverse effects of a lawfulness requirement on competition at the seller's level—effects which certainly ought to be considered in devising a rule to effectuate the policy of the act—spreading of price discrimination via discrimination to meet unlawful prices appears to be remediable in those situ-

ations where it presents a problem. One simple way of preventing extensive spread of serious price discrimination would be to require the seller, as part of his good faith, to notify the FTC within a specified time of each instance of price discrimination to meet unlawful competition, stating the name of the seller offering the allegedly unlawful price, and all other facts available to him on which he based his good faith belief that the price offered was unlawful. With such information the Commission could take early action to stop the unlawful pricing, without which there would be no justification for discrimination by others. Such a requirement would also minimize the force of the argument that the FTC could not without much difficulty ferret out the original discriminator, since it could quickly obtain information which would otherwise take months of investigation to uncover. Such a proposal would impose very little burden on the seller discriminating in price to meet unlawful competition.

That the policy of the Robinson-Patman Act is to preserve competition at all levels is evident from the words of the act itself. Section 2(a) condemns price discrimination "where the effect of such discrimination may . . . tend . . . 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."31 The lawfulness requirement is inconsistent with this purpose. Many proponents of the rule admit that a seller ought to have at least as much right to defend himself against unlawful prices as lawful ones.32 That the lawfulness requirement does not harm competition at the buyer's level, or even that it does some incidental good, is hardly an adequate test of the effectiveness of the act. If the act is considered as being intended to preserve competition at all levels by condemning price discrimination, a different approach must be taken and the lawfulness requirement must be removed.

The lawfulness requirement seems almost to have been designed to encourage price discrimination at the seller's level. The seller faced with stiff but lawful competition may discriminate to meet it, and the seller who unlawfully discriminates initially is protected from competition. To prohibit a seller from meeting unlawful competition is to encourage his competitor to grant an unlawful price

Where a competitor's illegal price is designed to drive the seller out of business, the meeting of that price to hold customers would seemingly demonstrate, and not negate, the seller's good faith. Any legal remedy which might be available to the seller would not only be time consuming and expensive, but might permanently alienate a customer who has already been lost by the seller's failure to meet the illegal price concession.

and thus obtain the seller's customers and the concomitant profits without interference from competition.\textsuperscript{33} The competitor might well believe that the immediate profit to be derived from his unlawful acts more than outweighs the risk of loss from any luckless private suits for treble damages and the relatively mild sting of an eventual FTC cease and desist order.\textsuperscript{34}

If sellers were permitted to meet unlawful prices, unjustified price discrimination would be discouraged. Not only would the competitor offering such a price be subject to FTC and private suits, but he would also have little chance of profiting by his action. The industry would become to a considerable extent self-policing.

\textbf{PROPOSED REQUIREMENT THAT THE COMPETITOR'S PRICE BE UNLAWFUL}

The thesis of the foregoing discussion has been that since the policy of the act is to preserve competition on all levels and since the section 2(b) proviso is generally acknowledged to be a self-defense measure, sellers should be permitted to meet a competitor's lower unlawful price. Removal of the lawfulness restriction on the applicability of the section 2(b) defense would, under the \textit{Standard Oil} decision, permit price discrimination to meet competition in nearly all cases.\textsuperscript{35} The question then is, if the lawfulness requirement is abandoned, should another restriction on the meeting competition defense be substituted for it, and, if so, what that restriction ought to be.

If section 2(b) were simply an application of the usual concept of self-defense, discrimination should not be permitted against lawful prices. But it may be that the meeting competition defense is justified by more than self-defense principles, or that self-defense

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\item \textsuperscript{33} While . . . a seller is apparently not in good faith in meeting an admittedly unlawful price, it should be noted that this gives a competitive advantage to the seller who is willing to run the risk of violating the law. When one seller chooses to gain business by admittedly unlawful price discriminations, a good argument can be made for permitting his competitors to meet that price until the first seller is stopped from doing so. This is particularly true under the Robinson-Patman Act where violations are frequent and interpretations of the law differ so widely. Simon, \textit{Price Discrimination to Meet Competition}, 1950 U. ILL. L.F. 575, 588.
\item \textsuperscript{34} Cease and desist orders, in effect, inform the guilty party that what he has been doing is illegal, and instruct him not to do it again. Of 19 complaints filed by the FTC in 1955, 14 resulted in cease and desist orders. See \textit{Hearings Before Subcommittee No. 1 of the House Select Committee on Small Business}, 84th Cong., 1st Sess., pt. 1 at 37–45 (1956). Regarding the success of private treble damage suits see 41 MINN. L. REV. 830, 832 (1957).
\item \textsuperscript{35} The good faith requirement would, of course, prevent resort to the defense in cases of collusive pricing systems or discrimination not necessary to meet competition, and the meeting rather than beating requirement would prevent discrimination which undercuts competitors' prices.
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as applied to competitive pricing ought to extend to lawful as well as unlawful prices.

The belief that the meeting competition defense is more than a self-defense proviso has many disciples, and their arguments for price discrimination to meet competition generally take either of two forms. The first argument is, essentially, that the Robinson-Patman Act is "anti-competition" rather than anti-trust, and that the only way it can be reconciled with the Sherman Act philosophy is to permit as much "good faith" price discrimination to meet competition as possible. This argument is based on the assumption that price discrimination is an integral and indispensable part of competition. That price discrimination is a natural phenomenon in an unregulated competitive economy cannot be denied. But as long as it is unlawful to discriminate except to meet a lower price, competitive discriminatory pricing must be limited to situations where there is either a lower nondiscriminatory price or a lower unlawful price to meet. An unlawfulness rule would permit discrimination to meet the latter, so that only price discrimination to meet nondiscriminatory prices would be prohibited. Price discrimination to meet a lower nondiscriminatory price cannot promote price competition either by initiating lower prices or by extending them to customers who have not already received a lower offer. It can only induce greater competition for a particular customer's business once he has been offered a lower nondiscriminatory price. The result of this is likely to be a hesitancy on the part of small sellers to offer lower nondiscriminatory prices, thus discouraging rather than promoting price competition. Price discrimination in response to lower lawful prices could promote price competition only if the Robinson-Patman Act were repealed or the section 2(b) proviso were changed from "good faith meeting" to "good faith beating" competition. A better alternative would seem to be to prohibit discrimination to meet law-


38. By nondiscriminatory price is meant any price not unlawful under section 2(a), including cost justified prices. Since a lower discriminatory price justified under section 2(b) must of necessity have met another price, it can never establish a lower price by itself.

ful prices, so that lower prices would be encouraged rather than penalized.

The second argument is that nondiscriminatory pricing results in higher prices and rigid price structures. This is supported by the observation that rigid price structures traditionally are broken down by discrimination, and by the prediction that sellers would be unwilling to openly offer a lower price to all their customers for fear of retaliation. An equally logical explanation of the apparent relationship between rigid prices and absence of price discrimination is that both are manifestations of weak competition. The collapse of rigid price structures might better be attributed to increased competition than to price discrimination. The simple fact that price discrimination is found only in situations of strong competition, or even that it is employed in breaking down price structures, does not prove that inflexible prices must exist in the absence of price discrimination.

But even if it is true that discrimination causes the breakdown of rigid price structures, this can no longer legally be done, because in the ordinary situation there would be no lower price to meet with a discriminatory price. The first seller to offer a discriminatory lower price would be acting unlawfully, inasmuch as he would not be meeting a lower price. And to argue that sellers would be unwilling to openly reduce prices, but that they would be willing to do so with a secret discriminatory price to meet a lower price, is to conclude that they would rather lose business to the competitors offering lower prices than to openly reduce prices and risk price cut retaliation.

Nondiscriminatory pricing would tend to equalize the ability of all sellers, whether large or small, national or local, to compete on the basis of efficiency. It might also tend to lower prices, because one seller, by reducing his price, could compel his competitors to lower their prices in order to meet his, and this in turn would result in price reductions by still other sellers competing with his competitors.

41. Evidence that weak competition causes the absence of price discrimination would in no way, however, lend support to a conclusion that the reverse is also true, that is, that prohibiting price discrimination would cause weak competition.
42. Price discrimination permits a seller with separated markets to compete with a more efficient seller. Thus it not only diminishes the importance of efficiency as a competitive factor between established sellers, but probably more significantly, it permits established sellers to keep out new competition, even though the new seller may be more efficient. See HAMILTON, THE POLITICS OF INDUSTRY 147–48 (1957); Wallace & Douglas, Antitrust Policies and the New Attack on the Federal Trade Commission, 19 U. Chi. L. Rev. 684, 708–10 (1952); Statement of Alfred E. Kahn, ATTORNEY GENERAL'S REPORT 186.
43. [If the lower price is a response to competition, the higher price reflects weaker competition, or, as the economist uses the term, some degree of monopoly]
The remaining question is whether the self-defense concept as applied to price discrimination should extend both to lawful and unlawful prices. The usual rule of self-defense is that one is justified in defending an interest to which harm is threatened only if he knows or has reason to believe that the party threatening the harm is acting unlawfully. It is possible, however, that a seller ought to be permitted to defend himself against lawful prices. But he should not be permitted to employ an otherwise unlawful price in self-defense unless his legitimate interests would be harmed if he did not. And a seller could hardly contend that he has a legitimate interest in protecting himself against harm resulting solely by reason of the fact that his competitor is able to produce goods more efficiently. The interests of individual sellers would be sufficiently safeguarded if they were permitted to discriminate in good faith to meet unlawful prices, such as unjustified discriminatory prices, prices below cost, or prices designed to injure competition or create a monopoly.

In recent years there have been several attempts, including FTC interpretations and bills in Congress, to limit the applicability of the meeting competition defense. The efforts of the FTC were

44. Authorities cited note 27 supra.
47. See notes 5 & 9 supra.
49. A few writers, notably Congressman Patman, have vehemently expressed their disapproval of the present law.

[Standard’s] effort . . . was based on the reasoning that it should be permitted to defend itself from the price action of its small local competitors, even though they were conducting themselves lawfully. When the full impact of that line of reasoning is felt and realized, the average lawyer will be startled by it. It is something new in the way of an argument for excusing wrongful conduct from the application of the law. Ordinarily, injurious action is excusable as a matter of self-defense against unlawful action.

Patman, For H.R. 11 and S. 11 To Strengthen The Robinson-Patman Act and Amend The Antitrust Law Prohibiting Price Discrimination, 11 Vand. L. Rev. 399, 415 (1958). In the Standard Oil case, the Court pointed out that Standard’s smaller competitors were engaged in lawful conduct. Therefore, it held that the situation in that case was different from the situation it found in the Staley case. Indeed, the situation was different because, in the Standard Oil case, Standard’s smaller competi-
frustrated by the Supreme Court's *Standard Oil* decisions,\(^5\) and congressional action to date has also met with failure. Bills which would have restricted the meeting competition defense in various ways and degrees have died in committee.\(^5^1\)

An unlawfulness requirement would be preferable to complete elimination of the defense because it would preserve the seller's right to use discrimination as a self-defense weapon against unlawful pricing by competitors. Such a rule would presumably meet with the approval of those in favor of eliminating or restricting the defense, since their primary criticism of the defense as it now stands is that it permits discriminatory pricing to meet lawful competition.\(^6^2\)

**Burden of proof**

An unlawfulness requirement would present difficulties of administration similar to those encountered under the lawfulness rule, but to a lesser degree. For the same reason that under the present rule the burden of proving that the competitor's price was unlawful has been, in effect, assumed by the FTC, the burden of proof under the proposed unlawfulness rule should be on the seller. But, as is the case under the present rule,\(^6^3\) he should only have to prove that the price was unlawful or that he had reason to believe that it was, whereas the FTC must now show both actual unlawfulness and knowledge or reason to believe that the price was unlawful.

**CONCLUSION**

The purpose of this Note has been to show that the defense in section 2(b) of the Robinson-Patman Act should be interpreted to permit a seller to discriminate in price to meet in good faith only a competitor's lower unlawful price; that is, that an unlawfulness requirement should be substituted for the present lawfulness requirement. In addition to permitting injurious price discrimination in


\(^5^0\) See notes 5 & 9 supra.

\(^5^1\) See note 48 supra.

\(^5^2\) Representative Patman sees the evil of the present interpretation of the act in the fact that the defense is good even though competition or competitors may be injured. He presumably would not be concerned if the discrimination were aimed solely against unlawful competition.

\(^5^3\) See note 21 supra and accompanying text.
derogation of the public policy of section 2(a) of the act, the present interpretation is doubly harmful because it precludes resort to self-defense, the purported purpose of the proviso, in the only cases where it is desirable, and it encourages unlawful price discrimination by shielding the discriminator from competition. Permitting sellers to justify price discrimination by good faith meeting of competition only if the competitor's price is unlawful would effectuate the policy of preventing discrimination which is injurious to competition, permit competition on the basis of efficiency rather than size or geographic dispersion, encourage a general lowering of prices, and be administratively feasible.