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Notes and Comments

DAMAGES UNDER THE ROBINSON-PATMAN ACT

The federal circuit courts of appeals are in conflict concerning the proof required at the "buyer level" to support a verdict for damages for a Robinson-Patman Act violation. Section 4 of the Clayton Act, which allows recovery for violation of the antitrust laws, states that:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.6

As in the case of many other seemingly simple statutes, interpretation of this section has produced much litigation. Despite the "any person" language of the Act, the courts have allowed recovery only to plaintiffs who have been "directly" injured, denying recovery to plaintiffs who have been only indirectly injured.4 On the question of injury itself, the elements of proof which must be present in order to show the amount of damages to which a plaintiff is entitled — as opposed to the fact of injury — may vary depending upon whether a Sherman Act rather than a Robinson-Patman Act violation is alleged. If a price increase which violates the Sherman Act is proven, the amount of that increase can be the measure of damages for that violation.6

The Robinson-Patman Act merely forbids a seller to "discriminate in price," an act which could consist of either the making of an illegal overcharge or the granting of an illegal discount (or a combination of both). To the extent that a Robinson-Patman Act discrimination consists of an overcharge, the measure of damages which will be awarded a plaintiff injured by that overcharge will be the same as that used in measuring damages for price increases which violate the Sherman Act. But some courts hold that mere proof of the fact

1. See text at note 42 infra for a definition of "buyer level."
of an illegal discount — the most common type of Robinson-Patman Act discrimination — is not sufficient to allow recovery of the amount of that discrimination under the Robinson-Patman Act and require the plaintiff to make a direct proof of his loss of profits. As will be examined more fully later in this comment, one rationale offered for making this distinction is that it is more difficult to measure the injury to one illegally denied a discount by the amount of that discount given to another than it is to measure the injury to one required to pay an illegal overcharge by the amount of that overcharge. And yet section 4 of the Clayton Act makes no distinction between a price increase and a price decrease; nor does it distinguish between a Sherman Act and a Robinson-Patman Act violation. Its operation simply is premised upon a violation of the “antitrust laws” that causes injury to “business or property.” It is in the interpretation of what constitutes an injury to “business or property” and of how that injury is to be measured that the conflict has arisen.

The rule of recovery under the Sherman Act was recently reaffirmed in a Supreme Court decision, *Hanover Shoe, Inc. v. United Shoe Machinery Corp.* United had violated section 2 of the Sherman Act by its monopolistic policy of only leasing rather than selling its more complicated machinery. Plaintiff had been forced to rent such machinery for more than it would have cost to buy the same machines from United. The district court awarded Hanover the difference, trebled. On appeal to the Supreme Court, United contended that the plaintiff had not shown that it had suffered any cognizable injury and that, therefore, the plaintiff was entitled to no recovery. United based its contention upon the fact that Hanover had not shown that it had not passed on to its purchasers the expense incurred by the payment of the difference between the purchase price and the rental fee. The Supreme Court rejected this argument:

Section 4 of the Clayton Act provides that any person “who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . .” We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § 4.

If in the face of the overcharge the buyer does nothing and absorbs the loss, he is entitled to treble damages. This much

7. Comment, 60 MICH. L. REV. at 1117, 1125.
9. The district court estimated what the purchase price of these machines would have been by adjusting the last purchase price which Hanover had paid for its machinery by a multiplier (derived from several factors, including the Labor Statistics Consumer Price Index, life expectancy rates, salvage values, and estimated servicing costs) so as to approximate what Hanover would have paid in the contemporary market. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 245 F. Supp. 258 (M.D. Pa. 1965).
seems conceded. The reason is that he has paid more than he should and his property has been illegally diminished, for had the price paid been lower his profits would have been higher. It is also clear that if the buyer, responding to the illegal price, maintains his own price but takes steps to increase his volume or to decrease other costs, his right to damages is not destroyed. Though he may manage to maintain his profit level, he would have made more if his purchases from the defendant had cost him less. We hold that the buyer is equally entitled to damages if he raises the price for his own product. As long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows. At whatever price the buyer sells, the price he pays the seller remains illegally high, and his profits would be greater were his costs lower.\textsuperscript{10}

The Court went on to explain the great difficulty of proving either that the purchaser had, in fact, passed on to its own purchasers the cost of paying the higher price or the effect of that extra cost upon profits, stating that definite conclusions would be “virtually unascertainable.”\textsuperscript{11}

Although the case concerns the legality of a price increase under the Sherman Act, the language, at least, is relevant to a discussion of Robinson-Patman Act damages. When the Court stated that “[a]s long as the seller continues to charge the illegal price, he takes from the buyer more than the law allows . . . and his profits would be greater were his costs lower,” it recognized that at the point of payment of the illegal price the buyer loses profits;\textsuperscript{12} to then look into


\textsuperscript{11} The Court stated: A wide range of factors influence a company’s pricing policies. Normally the impact of a single change in the relevant conditions cannot be measured after the fact; indeed a businessman may be unable to state whether, had one fact been different (a single supply less expensive, general economic conditions more buoyant, or the labor market tighter, for example), he would have chosen a different price. Equally difficult to determine, in the real economic world rather than an economist’s hypothetical model, is what effect a change in a company’s price will have on its total sales. Finally, costs per unit for a different volume of total sales are hard to estimate. Even if it could be shown that the buyer raised his price in response to, and in the amount of, the overcharge and that his margin of profit and total sales had not thereafter declined, there would remain the nearly insuperable difficulty of demonstrating that the particular plaintiff could not or would not have raised his prices absent the overcharge or maintained the higher price had the overcharge been discontinued. Since establishing the applicability of the passing-on defense would require a convincing showing of each of these virtually unascertainable figures, the task would normally prove insurmountable. On the other hand, it is not unlikely that if the existence of the defense is generally confirmed, antitrust defendants will frequently seek to establish its applicability. Treble-damage actions would often require additional long and complicated proceedings involving massive evidence and complicated theories. Id. at 492-93 (emphasis added).

\textsuperscript{12} However, the Court recognized that there are situations in which paying the illegal price might not automatically lead to injury, such as where the plaintiff is operating under a “cost plus” contract, or in which “no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge . . .” Id. at 494. For examples of the latter situation, the Court cited two Robinson-Patman Act cases. An examination of those cases would indicate that the Court was referring to a factual situation in which the seller charged a discrimi-
either the economic effects of the illegal price or the pricing policies of the company would invite "long and complicated proceedings involving massive evidence and complicated theories," a result which the Court was desirous of avoiding.13

The approach of looking no farther than the imposition of the illegal price upon the plaintiff's purchases, in recognition that payment of that price necessarily leads to a loss of profits, is a concept which has been utilized by the Supreme Court not only in Sherman Act cases but also as early as 1947 in a Robinson-Patman Act case. In Bruce's Juices, Inc. v. American Can Co.14 the Court, without then deciding whether a violation of the Robinson-Patman Act had occurred, 


14. 330 U.S. 743 (1947). Since the issue of American Can's liability to Bruce's Juices was not properly before the Court, the case was retried. Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985 (S.D. Fla. 1949). On retrial the district court concluded that "proof of special damage is not essential to recovery" and cited, inter alia, the Supreme Court's opinion in Bruce's Juices and that of the Eighth Circuit Court of Appeals in Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), cert. denied, 326 U.S. 773 (1945), as support for the validity of the "general damages" approach. Bruce's Juices, Inc. v. American Can Co., 87 F. Supp. 985, 990 (S.D. Fla. 1949). However, the court did not set the general damages at an amount equal to the total amount of the discrimination because "there is an overlapping therein which must be taken in consideration and omitted from [the] judgment." Id. at 993. Part of the "overlapping" arose from the plaintiff claiming as a measure of damages not only the amount of the discrimination but also such things as loss of good will. The court determined that the plaintiff's good will had been adversely affected by the defendant's discrimination, but awarded the amount of this loss as consequential, rather than general, damages. Id. at 990-93. On appeal [American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919 (5th Cir.), opinion modified, 190 F.2d 73 (5th Cir.), cert. dismissed, 342 U.S. 875 (1951)], the court of appeals agreed that the judgment rendered was fully in accord with the principles enunciated in the applicable authorities." Id. at 924, citing Bruce's Juices; Elizabeth Arden Sales Corp. v. Gus Blass Co. 150 F.2d 988 (8th Cir.), cert. denied, 326 U.S. 773 (1945); and Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 265 (1946) (a Sherman Act decision in which it was stated that the "wrongdoer shall bear the risk of uncertainty which his own wrong has created"). Since the plaintiff was able to obtain general damages for the discrimination and was also able to recover consequential damages for loss of "good will and reputation," his total recovery was more than the amount of the discrimination alone, even after "overlapping" had been taken into consideration by the court. American Can Co. v. Bruce's Juices, Inc., 187 F.2d 919, 923-24 (5th Cir. 1951). See Comment, 61 YALE L.J. at 1024 n.91. The Hanover Court cited this case for the proposition that "where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer," the words "no differential" apparently meaning "no difference measured in an exact amount of dollars." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968). See note 81 infra.
decided that the Robinson-Patman Act does not authorize the use of its treble-damage remedy as a collateral defense against a contract suit for a purchase price but that the remedy must instead be the subject of an independent suit since the violation was not inherent in the contract sued upon. Discussing the elements of proof which would be necessary to obtain that remedy were the plaintiff to prove that a violation had occurred, the Court stated in dicta that:

... despite petitioner's plaint on the difficulty of proving damages, it would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination.15

The significance of this passage lies in the fact that the Court recognized, as it later did in Hanover, that absent "extraordinary circumstances" the measure of damages would be the "amount of [the] discrimination," and that to recover this amount the plaintiff need prove only the "illegality of the prices." As it did in Hanover, the Court realized the difficulty of proving damages and accordingly provided for a simplified method of proof.

Identity of treatment in Sherman Act and Robinson-Patman Act cases is certainly reasonable if discrimination which is illegal under the Robinson-Patman Act is considered to have the same competitive effect as an increase in cost of operation resulting from a price increase which violates the Sherman Act. This approach is justified by the fact that in both cases the non-favored buyer will be paying more for similar goods than will the favored buyer, so that the non-favored buyer necessarily will have less profit with which to compete than will the favored competitor, which in turn will lessen his competitive position.16

Justification for the distinction between overcharges and discounts in setting the method of measuring damages traditionally has been predicated upon the fact that an overcharge is a direct injury because the non-favored buyer is charged more than he would have paid absent

16. FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 753 (1945): "The Act thus places emphasis on individual competitive situations, rather than upon a general system of competition." In American Can Co. v. Russellville Canning Co., 191 F.2d 38, 61 (8th Cir. 1951), Judge Johnsen in a dissenting opinion agreed with the majority on the issue of the allowance of general damages (see text at note 82 infra) and in so doing stated:

It is possible for illegal discriminations between immediate competitors to have consequential effects also, of such a nature as can properly, I think, give rise to a recovery right beyond the amount or value of the discrimination. Thus, price discriminations, in addition to the direct pecuniary injury to a dealer in his business treasury from being required to pay more for his purchases than his immediate competitor, also conceivably, if sufficiently continued, could operate to destroy or impair his business in the seller's products or the business conducted by him resting upon a collateral use of such products.

the illegal activity, while a discount can be considered not to be immediately injurious since the non-favored customer is charged the price which he normally pays, the favored customer merely receiving a potential advantage. Under this rationale it is not until the favored customer exercises his advantage to the detriment of the non-favored buyer that the latter will be injured.

The Supreme Court not only rejected, in its dictum in *Bruce's Juices*, the validity of this distinction but also suggested a contrary approach in *FTC v. Morton Salt Co.* another Robinson-Patman Act case. There the government complained that Morton Salt discriminated between its buyers when it gave unjustified quantity discounts. The Court stated that in proving "discrimination in price" (the language used in the Robinson-Patman Act) "in a case involving competitive injury between a seller's customers the Commission need only prove that a seller had charged one purchaser a higher price for like goods than he had charged one or more of the purchaser's competitors." By this the Court has translated a price discrimination in favor of one competitor into a "price increase" for the other competitor for the purposes of determining competitive injury. In other words, because "the competitive opportunities of certain merchants were injured when they had to pay [Morton] substantially more for their goods than their competitors had to pay," the Court viewed the "discriminatory discounts" — Morton's quantity discounts at the buyer level — as having had the same effect upon competition as an increase of the price charged to the non-favored competitor.

Although the Court was directing its discussion merely to the determination of whether injury had occurred, its analysis of the competitive injury question dictates a similar answer to the question of how damages are to be measured since, if the non-favored buyer's "competitive opportunities" were "injured" by the discrimination, it is reasonable to conclude that he was damaged at least to the same extent.


18. See ICC v. United States ex rel. Campbell, 289 U.S. 385 (1933); Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 459-60 (2d Cir.), cert. denied, 335 U.S. 965 (1957) (excessive charges are recoverable as direct damages while injuries from discounts must be proven), cited in Atlantic City Elec. Co. v. General Elec. Co., 226 F. Supp. 59, 66-69, appeal denied, 337 F.2d 844 (2d Cir. 1964) ("passing-on" is no defense to a suit based upon an illegal overcharge). But see National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 522 (7th Cir. 1968) (a discount to one competitor, whether or not used by him in setting prices, renders excessive the price charged the non-favored competitor and decreases the latter's profit margin); Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir. 1965) (the favored competitor does not have to use the benefit which he receives from an illegal discrimination to obtain an advantage over the non-favored buyer, because the competitive injury is created by the violation; the court equates the giving of a discount with charging the non-favored competitor an excessive price). Cf. Comment, 60 Mich. L. Rev. at 1117, 1125.


20. Id. at 45.

21. Id. at 46-47. See FTC v. Anheuser-Busch, 363 U.S. 536, 549 (1960); Borden Co. v. FTC, 381 F.2d 175, 177 (1967). *Borden* demonstrates the difference between viewing the discrimination as a "price difference" for purposes of primary-line decisions and as a cost increase for purposes of secondary-line decisions. *See also* FTC v. A.E. Staley Mfg. Co., 324 U.S. 746, 757 (1945) ("a price discrimination is measured by the difference between the high price to one purchaser and the lower price to another").
Actually the rule which should be applied in Robinson-Patman Act cases follows a fortiori from Hanover. In Hanover, United had a monopoly position in the shoe machinery market and most buyers were similarly overcharged. Thus, it was likely that Hanover, as one of those buyers, could have passed on the overcharge and avoided injury because most, and perhaps all, of its competitors had to deal with the overcharge also. And yet the Supreme Court refused to provide for a consideration of the likelihood that such “passing on” occurred in determining the measure of damages. If those damages are measured merely by the amount of the illegal overcharge even where “passing on” is likely to have occurred, then it certainly follows that such proof should be sufficient to allow recovery in situations, such as those involving violations of the Robinson-Patman Act, in which such complete “passing on” of the extra costs by the unfavored buyer is usually less likely to have been possible. It is in the latter cases that it is generally more difficult to prove what the favored competitor’s price would have been had he not received the illegal discount, since those factors which determine how a competitor sets prices are very complex;22 in the Hanover situation this proof would have been difficult enough to accomplish, even though in that case the “overcharge” policy was applied uniformly to all of United's customers. Since the reasoning of Hanover itself suggests that proof of when and how a favored buyer used his advantage to a non-favored buyer’s detriment would be difficult, the damages awarded in a Robinson-Patman Act case should be measured by at least the amount of the illegal difference in price. But strangely enough, despite the language and logic of the Supreme Court decisions,23 the federal circuit courts of appeals are still not in agreement on the elements of proof which are required for recovery in Robinson-Patman Act cases.

This reluctance of some courts to apply the liberal damage rule of Hanover in Robinson-Patman Act cases, or to follow the Supreme Court’s dictum in Bruce’s Juices, does not seem to be part of a general judicial disfavor for that Act, for as to other elements of a private action under the Act the courts have been more uniformly willing to dispense with strict requirements of proof.

I. PROOF OF INJURY TO COMPETITION AND TO PLAINTIFF

For a private plaintiff suing under the Robinson-Patman Act to establish a prima facie case, he must satisfy certain jurisdictional requirements;24 and he must prove (1) that the defendant has made a

23. Further, in Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264-65 (1946), the Court stated: “Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim . . . . [by making] wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. . . . [T]he more grievous the wrong done, the less likelihood there would be of a recovery. . . . [T]he wrongdoer shall bear the risk of the uncertainty which his own wrong has created.”
24. In addition, the Act cannot apply unless there are sales of commodities of like grade and quality in commerce. F. Rowe, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 36 (1962) [hereinafter cited as Rowe].
discrimination in price or allowance which is prohibited by the Act, (2) that the making of this discrimination has caused injury to the plaintiff, and (3) the amount of the injury. The felicity with which a plaintiff can establish that the defendant has made a prohibited discrimination varies according to the type of discrimination involved. Section 2(a) bars price discrimination the effect of which "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 who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them," while false brokerage payments are prohibited by section 2(c) and discriminatory allowances and services are prohibited by sections 2(d) and 2(e) respectively. Although the conduct described by section 2(a) is prohibited by that section only if it has certain competitive effects, the remaining sections do not require the conduct which they describe to have such an effect in order for it to be prohibited; the transactions proscribed by those sections are absolute violations regardless of their competitive impact. Since the making of false brokerage payments and the giving of discriminatory allowances and services are themselves relatively easy to prove (the only issue usually being whether the transaction in question was made on "substantially equal terms" with a normal transaction), a plaintiff injured by such conduct generally has little difficulty in establishing the first element of proof: that the defendant has made a prohibited discrimination. But proof of a section 2(a) violation is not as easy since the burden of proving not only that a transaction occurred but that it was injurious to competition can be awesome. Many courts have allowed plaintiffs to overcome this difficulty by permitting the jury to find the fact of competitive injury with relative ease while others have gone further and allowed it to be assumed.

As the law now stands, whether or not competitive injury may simply be assumed depends upon whether primary- or secondary-line competition is involved. The classic primary-line situation — also

31. Rowe, supra note 24, at 36-39.
33. See, e.g., Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786 (7th Cir. 1951), appeal dismissed, 344 U.S. 206 (1952), where the plaintiff was required to pay more for the most expensive component part of his oil burner than was his competitor but yet was allowed no recovery despite this extra cost because he did not prove that the resale price was affected.
referred to as "seller-line competition" — is present when there are two sellers and a common buyer and one of the sellers attempts to undercut the other's price to the common buyer, thereby forcing a reduction of the other seller's profits.\textsuperscript{37} A secondary-line situation — also referred to as buyer- or customer-level competition — involves a common seller who discriminates between at least two competing buyers, so that eventually the non-favored buyer will suffer a loss.\textsuperscript{38} It is in the latter situation that a right to obtain general damages — damages measured by the amount of the discrimination — is most important, for it is in this class of plaintiffs that one usually finds the small businessman who does not have the necessary funds to sustain the lengthy trial which is usually necessary to prove that there has been an injury to competition.

Primary-line decisions have not been totally consistent in their approach to analyzing competitive injury under section 2(a) of the Robinson-Patman Act. Initially it was thought that injury to competition must be proven,\textsuperscript{39} although some courts disagreed.\textsuperscript{40} More recently, the Supreme Court in \textit{Utah Pie Co. v. Continental Baking Co.} held that a showing of the existence of a highly competitive situation, a price discrimination and a declining price structure in the local market is sufficient evidence for the jury to find that competitive injury occurred despite increased sales volume or the existence of profits. The Court reasoned that this evidence could support a finding that the plaintiff seller's profits had been significantly diminished and that this diminution had in turn reduced its ability to compete, thus causing injury to competition.\textsuperscript{42} This holding, although not providing for an actual assumption of competitive injury in primary-level cases (because the Court would require proof of more than just the fact that a price discrimination had occurred in a highly competitive situation), does reduce the burden of proving such injury in those cases and thus allows the Act to reach price discriminations that subtly erode competition as well as those that have a more immediate and obvious destructive effect.\textsuperscript{43} It is also in accordance with the statutory language which bars discrimination the effect of which "may be substantially to lessen competition between competing sellers."\textsuperscript{44}

Robinson-Patman Act case law governing proof of injury to competition in secondary-line situations has been more consistent. It

\begin{itemize}
  \item \textsuperscript{37} \textit{Utah Pie Co. v. Continental Baking Co.}, 386 U.S. 685 (1967).
  \item \textsuperscript{38} \textit{FTC v. Morton Salt Co.}, 334 U.S. 37 (1948); \textit{Fowler Mfg. Co. v. Gorlick}, 415 F.2d 1248 (9th Cir. 1969).
  \item \textsuperscript{39} \textit{Minneapolis-Honeywell Regulator Co. v. FTC}, 191 F.2d 786, 787, 789-90 (7th Cir. 1951); \textit{Rowe, supra note 24, at 127}; \textit{Austern, supra note 36, at 777}.
  \item \textsuperscript{40} \textit{Samuel H. Moss, Inc. v. FTC}, 148 F.2d 378 (2d Cir.), \textit{cert. denied}, 326 U.S. 734 (1945), \textit{cited with approval in FTC v. Morton Salt Co.}, 334 U.S. 37, 45 n.13 (1948).
  \item \textsuperscript{41} 386 U.S. 685 (1967).
  \item \textsuperscript{42} \textit{Id.} at 699-700.
  \item \textsuperscript{43} \textit{Id.} at 703. \textit{See Borden Co. v. FTC}, 381 F.2d 175, 177-80 (5th Cir. 1967).
\end{itemize}
is uniformly held that it is appropriate for the trier of fact to make a finding of illegality, based upon an actual assumption of competitive injury, when the plaintiff, one of two or more competitive buyers, is the victim of a substantial and sustained discrimination.45 Proof that the favored buyer did not undersell need not be conclusive of the issue of injury to the plaintiff or to competition in general since the jury is entitled to infer injury from the mere fact that the favored customer is left with more profits with which to compete.46 What the courts have done in primary47 and secondary-line48 cases is to view both the competitive effect49 of the discrimination and the injury which it causes to the plaintiff from the standpoint of the di-


46. Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (5th Cir.), cert. denied, 382 U.S. 959 (1965). For a decision in which injury to competition was not assumed, see Alexander v. Texas Co., 165 F. Supp. 53 (W.D. La. 1958), which seems to have been overruled by Foremost.

47. In Utah Pie competition itself was enhanced but at the expense of one of the competitors; the enhancement was instigated by the regional price discrimination of the respondents. The Supreme Court accepted this enhancement as both injury to competition and injury to the plaintiff. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 705 (1967) (Stewart, J., dissenting) (the "Court has fallen into the error of reading the Robinson-Patman Act as protecting competitors, instead of competition"). Since the Act makes actionable both injuries to competition and injuries to the plaintiff's business that affect competition while the other sections do not. See Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (1965).

48. See Comment, 60 Mich. L. Rev. at 1108-10. The whole assumption of injury to competition in the secondary-line case is premised on the theory that a price discrimination in secondary-line cases necessarily causes injury to the plaintiff and that an injury to the plaintiff is necessarily an injury to competition. Further, section 2(a) specifically requires a showing of injury to the plaintiff or to competition while the other sections do not. See Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 680 (1965).


Interestingly, Moss was one of the first primary-line cases to procedurally assume, under section 2(b) of the Robinson-Patman Act, competitive injury upon a showing of discrimination and to establish by this assumption the prima facie case. Upon this showing, it was up to the defendant to rebut the presumption thus created. In Morton the Supreme Court cited the Moss approach as being acceptable in secondary-line cases. But the Supreme Court itself (as well as most commentators) did not apply this so-called "aberrational" procedural assumption, leaving it up to the plaintiff to prove that the discrimination caused competitive injury before he could establish a prima facie case. Rowe, supra note 24, at 108. However, Judge Hand reiterated the rule in Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 460 (2d Cir. 1957). The Supreme Court seems now to have acquiesced and is now willing to permit the threshold injury to be established without great effort when it allows the jury to find competitive injury upon a showing of the requisite discrimination and the existence of both a highly competitive situation and a declining price structure, which thereby lessens the difference between primary- and secondary-line cases with respect to the requirements for establishing competitive injury. Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968); Murray, supra note 49, at 650.
favored plaintiff in their findings of competitive injury. Thus the evidence which is sufficient under the relaxed standard for proving competitive injury on the primary level and which allows the assumption of injury to competition on the secondary level also necessarily satisfies the requirement of proof of injury to plaintiff.

None of the Supreme Court decisions in cases involving the Robinson-Patman Act reflect a policy of restricting chances of recovery by imposing rigorous standards of proof, by the injured buyer, of a prima facie case; i.e., of proof of the requisite jurisdictional elements, of competitive injury and of injury to himself. Further, as suggested earlier, the Supreme Court has extended its use of this liberal approach to the question of the measure of damages, so as to allow "general" damage awards under section 4 of the Clayton Act; it is here, however, that the various federal circuit courts of appeals have been recalcitrant.

II. THE AMOUNT OF THE PRICE DISCRIMINATION
   AS THE MEASURE OF DAMAGES

Although there were earlier decisions in the Sixth Circuit which set the damages at an amount equal to the amount of the price discrimination, the first opinion to discuss the damage question was that of Judge Johnsen in Elizabeth Arden Sales Corp. v. Gus Blass Co. Violations of sections 2(d) and (e) were found where the defendant had discriminated between two competitors in furnishing the pay and services of sales clerks. As discussed earlier, sections 2(d) and (e) do not require that these discriminations cause competitive injury in order to be prohibited; hence the plaintiff did not need to establish that there was any competitive injury in order to show a violation of the Act and thereby prove the first element of a prima facie case. As for the second element, that of injury to the plaintiff itself, the court held that making the illegal discrimination alone constituted the necessary injury to the plaintiff, thus utilizing the established assumption in secondary-line cases. As for the third element, proof of the amount of the injury, the court held that the...
amount of the discrimination could be the measure by which a "general" damage award would be granted. The *Arden* court reasoned that, since the seller had not provided the services equally, the plaintiff had sustained a direct loss in the increased cost of operation to the extent of the differences in the allowances; since the statute required that the seller provide the services on equal terms, to deny recovery of the full amount of these damages would be to weaken the effectiveness of the statute.\(^4\)

The defendant contended that such a damage award was barred by the Supreme Court's rule governing damages awarded under the Interstate Commerce Act, wherein language providing for the recovery of damages is similar to that of the Clayton Act.\(^5\) The Court stated that the rationale and policy of the "Interstate Commerce Act prevents any recognition of a legal right to recover general damages under that Act. . . . To permit a recovery of general damages for the amount of a discriminatory rebate or concession [which are prohibited by the Interstate Commerce Act] would be equivalent to the granting of another rebate or concession,"\(^6\) and thus would contravene the purpose of that Act. On the other hand, sections 2(d) and (e) of the Robinson-Patman Act were not intended to prohibit the furnishing of clerk's services or the paying of clerk's salaries to any customer; rather, their purpose is to assure that these services and salaries are furnished only on equal terms. The court stated that, since the seller is commanded by those sections to provide services and salaries equally, they saw no reason not to effectuate that result through the granting of a general damage award.\(^7\) The court might well have added that, in suits for reparations for overcharges under the Interstate Commerce Act,\(^8\) the Supreme Court has held

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54. *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945).

55. *ICC v. United States ex rel. Campbell*, 289 U.S. 385 (1932); *Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156 (1922); *Southern Pac. Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531 (1918). ICC cases are a precarious precedent. *Campbell* points out that in these cases the rates received by the competing shippers were not in themselves unreasonable; if they had been unreasonable a general damage award would have been warranted. In cases where the rates were reasonable (as determined by the ICC) but discriminatory, the disfavored shipper was required to prove his damages; injury was not assumed from the mere fact that the rates were discriminatory. Since the Robinson-Patman Act proscribes inequality of treatment between competing buyers, prices cannot be discriminatory and yet still be reasonable; there are cases in which, but for the Act, they might have been. *Morton Salt Co.*, 334 U.S. 37 (1948). If prices are discriminatory they are necessarily unreasonable and the disfavored buyer is assumed to have suffered injury. But perhaps *Campbell* has validity in primary-line cases. In such situations the mere fact of the discrimination is unimportant in establishing a right to damages unless the plaintiff can also prove injury.

The rate cases generally do not involve only the local market, buyer-level competitors which the Robinson-Patman Act was designed to protect; rather, the disfavored parties in the rate cases are in "competition . . . with many other producers doing business in distant territory." *ICC v. United States ex rel. Campbell*, 289 U.S. 385, 391 (1932). These considerations led the *Arden* court to restrict the precedent value of the transportation rate cases to their peculiar factual situations.


57. *Id.* at 996.

58. 49 U.S.C. § 1 et seq.
that the amount of overcharge is recoverable despite the absence of ultimate injury.\textsuperscript{59}

Finally, in answer to the defendant's contention that Congress had deleted a provision for general damage recovery from the final draft of the Robinson-Patman Act,\textsuperscript{60} the Arden court reasoned that,


\textsuperscript{60} The damage provision originally read in part:

For purposes of suit under Section 4 of [the Clayton] Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation. ...
in situations where the amount of the discrimination properly can be said to constitute direct damage, the absence of a specific general damage provision would not have any significance. However, in situations where only special or consequential, but not general damages can possibly exist, the effect of its omission simply would be that the amount of such damage must specifically be proved. The court could have additionally reasoned not only that Representative Patman, the Act’s co-sponsor, considered the deletion to have been the result of legislative bargaining but also that the deletion was made in the belief that the courts would not need the authorization of a general damage provision to reach the same result. A contrary argument is that the deletion can be attributed to the belief that damages would be found in accordance with the then existing law. If the distinction between illegal overcharges and illegal discounts was to prevail, perhaps this argument would be formidable. However, if the reasoning that they perform the same disservice to the non-favored competitor by diminishing profits with which to compete is sound, the distinction was not intended to be recognized; the ease of recovery of Sherman Act overcharges can then be associated with suits based upon Robinson-Patman Act discriminations. The then existing law would facilitate the recovery of damages in an amount equal to the amount of the discrimination. As the Arden court appropriately determined, any suggestion that the law existing at the time of the passage of the Robinson-Patman Act was the same as that of the rate cases (where damages from discriminations had to be proven) rather than that of the antitrust overcharge cases is misguided.

The general damage problem was next considered in the Second Circuit by Judge Learned Hand in Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp., a case in which a manufacturer had supplied demonstrators to competitors of the plaintiff, but not to the plaintiff. Under the rationale of Elizabeth Arden Sales Corp. v. Gus Blass, the amount of damages awarded should have been equal to the amount of the discrimination, here the salary of the demonstrator which was not supplied to the plaintiff. However, the Sun court, speaking through Judge Hand, chose not to follow the Eighth Circuit and instead required the plaintiff to prove actual loss of business, the salary of the demonstrator providing the limit of recovery. The court dismissed the Supreme Court’s statement in Bruce’s Juices on Robinson-Patman Act damages as being mere dictum and “neither discussed the issue [of damages] at any length, nor supported [its] belief with authority.”

63. H. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936).
64. Clark, supra note 62, at 404.
65. See note 55 supra.
66. 178 F.2d 150 (2d Cir. 1949).
After *Sun*, the Second and Eighth Circuits' positions formed the two sides of the damage issue. As the Supreme Court in the original *Bruce's Juices* decision had only dealt with American Can's claim for breach of contract and not with the merits of *Bruce's Juices'* claim that American Can had violated the Robinson-Patman Act, *Bruce's Juices* brought a suit against American Can based upon these violations. In 1951 the Fifth Circuit had *Bruce's Juices* on appeal. Damages were measured according to the dictum of the Supreme Court in the original *Bruce's Juices* case,\(^6\) thus following the lead of the Eighth Circuit in *Arden*.

In the same year the Eighth Circuit again considered the treble damage question in the controversial *American Can Co. v. Russellville Canning Co.*\(^6\) It has been concluded by several writers that the Eighth Circuit's opinion in *Russellville* represented an abandonment of the court's earlier opinion in *Arden*. This conclusion is erroneous; since the *Russellville* court in effect determined that there had been no actionable discrimination, the question of what must be proved in order to establish the amount of damages was, therefore, never reached. The plaintiff in *Russellville* sought to recover for injury alleged to have resulted from American Can's freight equalization practice with respect to canners located in the Ozark section of Arkansas. American Can charged freight to canners in that section as if the cans had been shipped from Fort Smith, a local community. In fact, the cans came directly from Illinois and Indiana. Unfortunately for the plaintiff, the practice favored his local competitors to a greater extent than it did the plaintiff because the plaintiff had to pay freight as measured from Fort Smith to Russellville, while local competitors, located in Fort Smith itself, paid no freight at all and thus were left in a better competitive position. The plaintiff argued that defendant should have equalized freight from St. Louis — the point designated for equalization in their contract for the sale of cans.\(^7\) If this had been done, the plaintiff would have paid nearly two and one-half times as much for freight but would have been left on a parity with its competitors in the Fort Smith area.

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*Although there had been a district court decision, Alexander v. Texas Co., 165 F. Supp. 53 (W.D. La. 1958), which required proof that business was actually lost, the Court of Appeals for the Fifth Circuit indicated, in a subsequent decision discussing competitive injury, that an award of damages would be sustained even in the absence of proof of actual loss of business thereby following the dictum of the Supreme Court in *Bruce's Juices*. Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965).*

69. 191 F.2d 38 (8th Cir. 1951).

70. Alternatively, the plaintiff could have argued for an award of the freight costs from the points of manufacture, Indiana or Illinois, since equalizing freight at these locations would have placed all of the local competitors on a parity. *Id.* at 44.
The court denied relief on the ground that, regardless of whether the other elements of a cause of action were present, the plaintiff had not proved either that it actually had suffered a business loss or the specific amount of that loss. But far from rejecting its reasoning in Arden, the Russellville court specifically acknowledged the validity of the Arden rule that "ordinarily, where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages." The court, however, went on to say that "we think that this is not so here." The court reasoned that, if St. Louis had been the equalization point, it would have enhanced the plaintiff's potential to compete locally but "would unquestionably have impaired its ability to compete with its other named competitors not located in the Ozark region." The court concluded that "[w]hat the plaintiff really complains of is not that it was damaged by such freight equalization, but that it was not benefited by it to the same extent as some of its local competitors." Thus the court determined that measuring the damages by the amount of the discrimination would not, under the circumstances, even reasonably reflect the plaintiff's actual injury because it would account only for its injury in the immediate market but not for the benefit which it derived from the violation in its competition outside the immediate market.

The Russellville court also discussed the applicability of the general damage rule to one other issue. American Can had built a plant so close to the Morgan Packing Company's plant in Austin, Indiana, that "a system of conveyors or runways connected [the Morgan plant] with the production lines of the factory," and through the use of this system Morgan received its cans at reduced rates, referred to as "runway allowances." The plaintiff asserted that this was a discriminatory pricing practice and claimed the amount of the allowance as damages. The court refused to consider the applicability of the general damage approach, saying:

The plaintiff's contention that it was adversely affected by the runway allowance made to Morgan is based upon the theory that Morgan's products, while not the same as the plaintiff's, competed for the "housewives' dollar," and that, if Morgan's

71. Id. at 55. The court also cited favorably the Bruce's Juices passage discussed earlier.
72. Id. The court apparently believed that the fact situation confronting it was one of those "extraordinary circumstances" which the Court in Bruce's Juices referred to.
73. Id.
74. Id. The plaintiff alleged that it was in competition with two local canners and that it was these competitors who received the advantage of the Fort Smith freight equalization. But the court noted that the plaintiff had also alleged itself to be in competition with four non-local canners and that with respect to these competitors the Fort Smith equalization favored the plaintiff; the court was impressed by the fact that, if St. Louis had been the equalization point, the plaintiff would have been placed on a parity not only with its local competitors but also with the non-local competitors, with plaintiff paying nearly two and one-half times more freight charges. Id. at 44, 52-53; Comment, 61 Yale L.J. at 1024 n.90.
75. 191 F.2d at 50.
canned goods were a better buy than the plaintiff's canned spinach or canned green beans, the housewife would pass by the plaintiff's product and buy the Morgan product. There is no evidence in the record that any of the canned goods marketed by Morgan during the period in suit were sold at prices which had the effect of diverting housewives from the canned spinach and canned green beans of the plaintiff, or that the plaintiff sustained any actual damage from the granting of the runway allowance. "The only proper proof of damages is the loss to the plaintiff's business..." Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corporation...

Since the approach which allows the assumptions that injury to competition and injury to the plaintiff in the amount of the discrimination occur when there has been a competitive discrimination may, of course, only be used where there is a showing both that the buyers were in competition and that the defendant has discriminated against the plaintiff, the Russellville court's refusal to make any of these assumptions appears to follow logically from a determination that Russellville and Morgan were not, in fact, in competition with each other. Morgan "was a competitor of the plaintiff only in the sense that both packed and sold canned vegetables." The court did not hold that the amount of the discrimination would not normally be a proper measure of damages had the other elements of a cause of action been present. However, the court seemed willing to allow the plaintiff to reapproach the competition question through the back door, by proving the actual amount of its injury which resulted from American Can's granting of a runway allowance to Morgan. The unstated premise of this approach appears to be that, if actual injury is shown by the plaintiff, the buyers must have been in competition. If this approach were correct, then the plaintiff would indeed have to prove the actual amount of his injury in order to utilize the approach. Obviously this premise is incorrect since the court already found that Russellville and Morgan were not in competition. But as illogical as this reasoning is, it can only be assumed that it was, in fact, the attitude adopted by the court; no other explanation can reveal how the court could quote Sun to the effect that "[t]he only proper proof of damages is the loss to the plaintiff's business..." after having firmly stated earlier in its opinion that, ordinarily, "the amount of the price difference is the measure of damages...

Contrary to one writer's opinion, it is generally accepted that the Russellville court's approach to the general damage question can-

76. Id. at 56 (emphasis added).
77. Id. at 50.
78. See note 73 supra.
79. Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 459 (2d Cir. 1957).
not be taken to overrule its decision in Arden since the court was faced in Russellville with what Bruce's Juices referred to as "extraordinary circumstances," where the setting of freight equalization procedures concerned matters beyond the scope of general damages and where the granting of runway allowances to Morgan did not even support a prima facie case.\(^{81}\) Even Judge Johnsen's dissent in Russellville agreed with the majority's approach but would have gone further so as to allow recovery for the discriminatory freight equalization since the plaintiff had a higher out-of-pocket cost than its immediate competitors notwithstanding the benefit derived by the plaintiff over the more remote competitors.\(^{82}\)

The measure of damage question was not again before the Second Circuit until 1957 in Enterprise Industries, Inc. v. Texas Co.\(^{83}\) There Judge Hand, writing for the majority, discussed more succinctly the measure of damages which he had advocated in Sun: "The [plaintiff's] gross loss was the profit on any sales that it would have made to the nine [favored] competitors' customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors. From this must, however, be deducted what added profit it may have got by being free to charge what it chose...\(^{84}\)

Judge Hand's opinion was based on his previous decision in Sun "that the discrimination was not a proper measure of the loss."\(^{85}\) As was the case in Sun, one obstacle to his reasoning was the conflicting language in Bruce's Juices,\(^{86}\) which he disposed of by again arguing that the Supreme Court really did not have before it the question of the measure of damages when it made the statement and that, in any event, the actual damages in that case might well have been equal to the amount of the price discrimination if the discrimination had not been passed on to Bruce's Juices' customers.\(^{87}\) Some writers believe Judge Hand to have been retreating from Sun by his recognition that whether the added cost was passed on is an issue which is relevant in determining what the measure of damages would be; in Sun his position appears to have been that actual damages must be proved in any case.\(^{88}\) Finally, Judge Hand reinforced his opinion by concluding that "the Eighth Circuit appears to have overruled its earlier view [the Arden rule] in a second majority decision, American Can Co. v. Russellville Canning Co."\(^{89}\) Since, as discussed earlier, the

\(^{81}\) Under this factual setting it is apparent why the Supreme Court in Hanover cited Russellville, as well as the relitigated Bruce's Juices, discussed at notes 12 and 14 supra, as support for the proposition that "where no differential can be proved between the price unlawfully charged and some price that the seller was required by law to charge, establishing damages might require a showing of loss of profits to the buyer." Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 494 (1968).

\(^{82}\) American Can Co. v. Russellville Canning Co., 191 F.2d 38, 62-63 (1951).

\(^{83}\) 240 F.2d 457 (2d Cir.), cert. denied, 353 U.S. 965 (1957).

\(^{84}\) Id. at 458.

\(^{85}\) Id. at 459.

\(^{86}\) See text accompanying note 15 supra.

\(^{87}\) Enterprise Indus., Inc. v. Texas Co., 240 F.2d 457, 459 (2d Cir. 1957).

\(^{88}\) See text accompanying note 96 infra.

\(^{89}\) Id. at 459 (citations omitted); Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co., 202 F. Supp. 514, 517 (E.D. Mo. 1959) (asserting that Russellville does not overrule Arden).
Russellville court did not overrule Arden, this conclusion is erroneous. Whether Judge Hand is legally correct in his requirement that the proof of damages be more extensive than a mere showing of a measurable discrimination is the issue central to this entire discussion; but right or wrong, it has to be conceded that, if his reasoning is to prevail, it certainly will create a hardship for those non-favored competitors who do not have at their disposal the funds required to gather the evidence necessary to favorably answer any of the myriad questions that a court requiring his type of proof of damages might ask. What chance would an individual filling station operator have against a major oil company if put to the burden of making such extensive proof?

With both sides of the damage issue then adequately represented, the Seventh Circuit court in State Wholesale Grocers v. Great Atlantic & Pacific Tea Co. was able to give skillful deference to existing theories in expressing the status of the law in that circuit. The defendant, a supplier of products to A&P, paid for advertising of the supplier's products in Woman's Day, a magazine owned by a subsidiary of A&P. Section 2(d) of the Robinson-Patman Act was violated when payments were not made available on proportionately equal terms to all other customers of the supplier who were also competing with A&P. In awarding damages the court held:

90. For example, the court properly might ask who his competitors are; what is his market area; what are his and his competitors market shares; what effect on his loss of business did the discrimination have; would he have lost the business anyway; was the loss in profits passed on; or was loss due to seasonal adjustments, faulty management or superior management techniques of competitors.

91. See American Oil Co. v. FTC, 325 F.2d 101 (7th Cir. 1963), cert. denied, 377 U.S. 954 (1964) (taking the position that the plaintiff must prove injury), discussed in Foremost Dairies, Inc. v. FTC, 348 F.2d 674, 681 (5th Cir. 1966). The American Oil decision should be confined to the fact situation of that case in light of the Seventh Circuit's decisions in National Dairy Prod. Corp. v. FTC, 395 F.2d 517 (7th Cir. 1968) and State Wholesale Grocers v. Great Atl. & Pac. Tea Co., 202 F. Supp. 768, 776 (N.D. Ill. 1961), in which the Seventh Circuit did not follow Enterprise and Sun. See also Dantzler v. Dictograph Prod., Inc., 309 F.2d 326, 330 (4th Cir. 1962) (citing Enterprise and Sun); Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830 (3d Cir. 1962) (which allowed use of the passing-on defense, a decision which now must be reconsidered in light of Hanover's attitude toward this defense); Kidd v. Esso Standard Oil Co., 295 F.2d 497, 499 (6th Cir. 1961) (although Kidd could be interpreted as authority for requiring proof of damages, it only involved a jury instruction that "damages must be determined with reasonable certainty"); Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345 (E.D.N.Y. 1960) (decided in the Second Circuit and, therefore, following Enterprise); Youngson v. Tidewater Oil Co., 166 F. Supp. 149 (D. Ore. 1958) (also following Enterprise — this decision has been overruled by Fowler Mig. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969) which allowed the granting of general damages); Alexander v. Texas Co., 165 F. Supp. 53 (W.D. La. 1958) (although the plaintiff in Alexander was required to prove damages, Bruce's Juices and Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), cert. denied, 383 U.S. 959 (1963), do not sustain this approach).


... a non-favored customer incurring expenses or costs which it would not have sustained if its supplier had complied with the provisions of Section 2(d) and had reimbursed it for these expenses ... has in fact been damaged, in the absence of proof of other damages, to the extent of the payments it ought to have, but did not, receive from its supplier. As a result of the violation, the non-favored customer is left with less in its treasury — less in profits, less to carry on its business, or less to keep in reserve. The non-favored customer has less money than he would otherwise have, and therefore, has been damaged.94

The court, in selecting the Arden general damage approach, dealt with the assertion that the Eighth Circuit had reversed itself in Russellville by recognizing that Russellville is not inconsistent with Arden but rather "merely carved out an exception to the [Arden rule] which is not applicable to the instant case."95 The last obstacles in the way to the court's full acceptance of a general damages approach, the Sun and Enterprise opinions of Judge Hand, were aptly handled by the court when it stated:

Judge Learned Hand, who wrote the [Sun and Enterprise] opinion[s], concluded, summarily, that the "only proper proof of damage is the loss to the plaintiff's business, and the salary of a 'demonstrator' is not such a loss." The court, in that case, equated business loss to the amount of business diverted, as a result of the discrimination, from the non-favored customer to the favored customer. In reaching these conclusions, Judge Hand neither discussed the issue at any length, nor supported his belief with authority. Opposed to this ruling are the many well-considered authorities herein cited and others, which hold that an out-of-pocket expense or increased cost of business is a proper element of damage under Section 4 of the Clayton Act ... 96

The latest decision97 to discuss the damage question is Fowler Manufacturing Co. v. Gorlick,98 a Ninth Circuit opinion by Judge John-

94. 202 F. Supp. at 774.
95. Id. at 776.
97. There were three cases decided after State Wholesale Grocers and before Fowler that awarded damages, but no significant discussion of the measure of damages accompanied the decisions. Dantzler v. Dictograph Prod., Inc., 309 F.2d 326 (4th Cir. 1962), held that the plaintiff must prove damages; Freedman v. Philadelphia Terminal Auction Co., 301 F.2d 830 (3d Cir. 1962), held that a general damage recovery was permissible if the extra cost had not been passed on; Ben B. Swartz & Sons, Inc. v. Sunkist Growers, Inc., 203 F. Supp. 92 (E.D. Mich. 1962), also accepted a general damages approach.
98. 415 F.2d 1248, 1250 (9th Cir. 1969). The court acknowledged that an opinion of one district court in the Ninth Circuit did not recognize a general damages approach
sen, who also wrote the opinion in Arden and who partially dis- 
sented in Russellville. In Fowler the plaintiff operated wholesale 
plumbing supply houses. The defendant supplied the plaintiff and his 
three principal competitors with water heaters whose similarity of de-
sign caused retail pricing of them to be highly competitive. The 
plaintiff determined that the defendant had discriminated between 
the plaintiff and the three competitors in setting prices and in giving 
allowances, and in an action brought under the Robinson-Patman 
Act sought to recover at least the amount of the discrimination as 
damages. The district court accepted this as the measure of the plain-
tiff's damages and awarded judgment against the defendant for treble 
damages.

In answer to the defendant's challenge, for lack of probative basis, 
of the district court's assumption that competitive injury necessarily 
results from discrimination in highly competitive situations, the Ninth 
Circuit decided that the validity of this "assumption" was immaterial 
since:

... the right of a court to grant a general damage award under 
the Robinson-Patman Act for the amount of an illegal difference 
in prices and allowances does not depend upon its having been 
evidentially established, and the court's being able to find on the 
basis thereof, that a lessening of competition has in fact occurred, 
and that the extent of the injury occasioned thereby in the par-
ticular situation corresponds to the amount of the discrimination. 
The Act permits recovery of the amount of a discrimination in 
prices and allowances without the necessity of any such specific 
proof or finding as a basis therefor.

Exactly what the court meant as to the question of the validity 
of the assumption being "immaterial" is not clear; the difference be-
tween the assumption, the need for which the court disclaimed, that 
jury to competition necessarily results from discrimination in a 
highly competitive situation, and the court's approach of finding a 
competitive injury without "its having been evidentially established," 
is difficult to discover. At the most, this analysis would seem to adopt 
a "per se" approach to competitive injury and may be more extreme 
than even the "assumption" decisions. (Quaere: Would the Fowler 
court allow the defendant to rebut this finding of competitive in-
jury?) In any case, the competitive injury requirement is at least 
consistent with the conclusion of the earlier discussion on the assump-
tion of injury to competition at the buyer level.

The holding is clear that the damages can be measured by the 
amount of the discrimination since, as the court stated, the "direct-

[Youngson v. Tidewater Oil Co., 166 F. Supp. 146 (D. Ore. 1958)], an attitude which 
is inconsistent with the Ninth Circuit's decision in Fowler.

99. Judge Johnsen, Chief Judge of the Eighth Circuit, sat by designation in this 
Ninth Circuit case.


101. For a discussion of this per se approach, see Foremost Dairies, Inc. v. FTC, 
348 F.2d 674, 680-81 (5th Cir. 1965), cert. denied, 382 U.S. 959.
damage right would more effectively serve to curb the discriminations which Congress viewed as being most often exercised against smaller competitors . . . than the more difficult consequential-damage rule of the Enterprise case."102 For further support, the court quoted the Bruce's Juices dictum to the effect that the Supreme Court's reason for use of the general damage approach was premised on the theory that "[i]t is clear Congress intended to use private self-interest as a means of enforcement."103

For some reason, the Fowler court attempted to support its holding by the statement that "we are unable to see any reason for legalistically equating or construing the Robinson-Patman Act upon identical lines with the Sherman Act as to the form of its remedial damage rights."104 This apparently self-defeating statement was included in deference to a similar passage in Bruce's Juices to the same effect.105 But the Supreme Court had been responding to the defendant's attempt to assert a Robinson-Patman Act violation as a defense to non-payment of a contract in Bruce's Juices; the Supreme Court had held that, although in some cases violation of the Sherman Act can be asserted as a defense to a suit for non-payment of an amount due upon a contract, such an assertion cannot be made under the Robinson-Patman Act because "the entire basis for judging under the two Acts is different and . . . the case law as to the Sherman Act does not fit the Robinson-Patman Act."106 No reference was made by the Supreme Court to the consistency or inconsistency of damage remedies under the two acts. And in spite of its own dictum suggesting different measures of damages under the two acts, the Fowler court pointed out that, even under sections 1 and 2 of the Sherman Act, "[e]vidence that a merchant has been required to pay more for goods which he resells is sufficient to establish, prima facie, that he has been damaged . . . [and] that profits on resale were less,"107 which suggests that the Fowler court recognized the close relationship between the amount of the discrimination and the amount of damages under either act.

What the Fowler court intended to accomplish by its distinction between the damage remedies provided by the two acts is not apparent. It seems clear that it was not necessary to make such a statement in order to award general damages under section 4 in light of the Bruce's Juices dictum that in Robinson-Patman Act cases the damages can be equal to the illegal difference in price.108 One explanation for Fowler's concern might be that the court was aware of the require-
ment in Sherman Act cases of proof of loss of profits or business where no overcharge is alleged. But if this were the basis for the court’s statement, it fails to distinguish between Sherman Act cases involving allegations of overcharges and those that do not; the former, where general damages are awarded, analogizes with discrimination cases, whereas the latter, where proof of loss of profits is required, does not. Perhaps the Fowler court was hesitant to utilize this distinction for fear of complicating their opinion with other theories and found it easier, by invoking a less precise distinction, to deny any thought of associating any Sherman Act requirement of proof of loss with recovery under the Robinson-Patman Act.

Neither Fowler nor its predecessors would require general damage awards in all illegal price discrimination cases. The Fowler holding is expressly limited to highly competitive situations. Where it is apparent from the nature of a particular business or market that passing on would, of necessity, have to have taken place (as, for example, in the situation where the plaintiff’s profits were earned under a “cost plus” contract), passing-on may still prevent recovery even under the Sherman Act. As the Hanover decision to refuse to accept passing-on as a defense was based in part on the difficulty, which a plaintiff faced with that defense would encounter, of proving loss of profits as consequential damages, its holding may not reach the situation where no such difficulty is present. Furthermore, the rule allowing general damages in the amount of the discrimination does not prevent the use of defenses such as justifications based upon changes in the defendant’s costs or in his competitor’s pricing, or claims that like goods were available to the plaintiff at the lower price from another source.

When consideration is given to various cases that have deliberated the general damage issue, it becomes apparent that the only judicial expressions which are adverse to setting damages at a figure equal to the amount of the discrimination are Judge Hand’s unsupported assertions in Sun and Enterprise in the Second Circuit and the Fourth Circuit’s cryptic statement in Dantzler v. Dictograph Products, Inc. that “[t]he need for one who claims damages . . . to show the causal connection between the losses he suffers and the illegal acts of the defendant is clearly shown,” a statement which, without comment, relied upon Enterprise. Contrary to those are the opinions of the Fifth, Sixth, Seventh, Eighth and Ninth Circuits, which

111. Comment, 60 Mich. L. Rev. at 367, 404.
113. 309 F.2d 326 (4th Cir. 1962). There is also the ambiguous Kidd v. Esso Standard Oil Co., 295 F.2d 497 (6th Cir. 1961), discussed at notes 51 and 91 supra.
114. 309 F.2d at 330.
115. Cases cited at note 68 supra.
116. Cases cited at note 51 supra.
117. Cases cited at notes 92 and 93 supra.
118. Cases cited at notes 53 and 69 supra.
119. Cases cited at note 98 supra.
are favorable to general damage awards; the First, Third, and Tenth Circuits have not considered the issue. Since Judge Hand apparently recognized in Enterprise the validity of general damage awards if there has been no passing on of the increased cost, the position on the issue of even the Enterprise court is shrouded with doubt in light of Hanover's recent negation of the passing-on defense. Moreover, the weakness of the requirement of proof of consequential damages is revealed by those courts that have adopted it; all of the courts requiring such proof utilized as authority for their decision either the unsupported conclusion of Judge Hand in Enterprise or their own uncorroborated assertions. Since, as will be seen, the policy behind the statute is, in fact, contrary to such a strict interpretation of damage remedies, policy arguments were not available for support.

This all leads to the conclusion that, although the courts have not literally equated remedies under the Sherman Act for illegal overcharges with Robinson-Patman Act remedies for price discounts, in effect they have done so by allowing the difference between the legal and illegal prices to constitute the measure of damages, on the theory that discount discrimination causes an increased cost of operation. When Hanover's language on the difficulty of determining pricing policies and its reference to the amount of the overcharge as the measure of damages are compared with the Bruce's Juices dictum to the same effect and with the reasoning of Morton Salt which equates a discrimination in favor of one buyer with the charging of an illegally high price to his competitor, it appears that the Supreme Court has reached the same conclusion. By this analysis, section 4 becomes a unified cohesive instrument for damage recovery for either a Sherman Act price increase or a Robinson-Patman Act price discrimination. Accordingly, the respective case law principles pertaining to these damage remedies would be virtually interchangeable; as suggested earlier, a literal reading of section 4 does not suggest a contrary result. Hanover's language then "fits" price discrimination cases, "passing-on" is no longer a defense, and the amount of the discrimination becomes the measure by which damages are determined.

Indications of the appropriateness of this method of recovery under the Robinson-Patman Act are additionally found in an examination of the policy behind the statute. One view is that, since Congress intended to use private self-interest as a means of maintaining equal treatment in the market place, this can only be facilitated

120. Freedman v. Philadelphia Terminals Auction Co., 301 F.2d 830 (3d Cir. 1962) (although the opinion contains no discussion of the validity of a general damage approach, the court did allow the use of a passing-on defense).
121. See cases cited at note 91 supra.
122. See text accompanying note 12 supra.
123. See text accompanying note 15 supra.
124. See text accompanying note 21 supra.
by allowing easier methods of recovery. Additionally, from the standpoint of providing intensive surveillance of those firms which have the power and propensity to discriminate, this technique is a valuable one.\textsuperscript{126} Considering that violations of some sections of the Robinson-Patman Act are not crimes, those sections are not criminally enforceable and, therefore, private actions become of correspondingly greater significance.\textsuperscript{127} Moreover, if the deterrent effect of the treble damage statute is to be fully realized,\textsuperscript{128} it may be improvident to depend upon accurate compensation of the ultimate consumer (to whom the discrimination may have been "passed on") since they will be unlikely to sue.\textsuperscript{129} Accordingly, the first purchaser must be allowed to recover what may amount to a windfall, or the violator will escape liability altogether.\textsuperscript{130} Of course, under the \textit{Hanover} rationale it is doubtful that the recovery of the amount of any discrimination could ever amount to a windfall since in reality there is always a loss of profits.\textsuperscript{131} Since the Act's principal objectives — small business protection and compensation — were intended to be obtained through private enforcement of the Act, and since these goals have not been attained to any meaningful extent,\textsuperscript{132} there is a real need for the easier method of recovery in accord with that of the \textit{Utah Pie} and \textit{Morton Salt} cases (with respect to proof of competitive injury) and with that of the \textit{Hanover} and \textit{Bruce's Juices} cases (with respect to recovery of damages).\textsuperscript{133}

\textsuperscript{126} See Flintkote v. Lysfjord, 246 F.2d 368, 398 (9th Cir.), cert. denied, 355 U.S. 835 (1957); Barber, supra note 125, at 183, 221.

\textsuperscript{127} See Atlas Building Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), cert. denied, 360 U.S. 843 (1960); Rowe, supra note 24, at 459–61; Barber, supra note 125, at 184 n.11.

\textsuperscript{128} See Fowler Mfg. Co. v. Gorlick, 415 F.2d 1248 (9th Cir. 1969); National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 523 (7th Cir. 1968); \textit{Patman, Complete Guide to the Robinson-Patman Act} 923 (1938), \textit{referred to in Bruce's Juices, Inc. v. American Can Co.,} 87 F. Supp. 985, 988 (1949). The purpose of the Act is to insure equality of treatment and opportunity to small businessmen. \textit{Id.} at 991–92. See also Barber, supra note 125, at 216; Comment, 60 Mich. L. Rev. at 1113.

\textsuperscript{129} Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 208 (7th Cir. 1964); Note, 70 Yale L.J., supra note 125, at 477. See Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 265 (1946); Barber, supra note 125, at 220–21. It is certainly logical not to wait for the ultimate consumer to sue for recovery of the illegal difference in price since his cost increase may be measured only in pennies; when this is the case, his motivation to bring suit will be at a minimum.

\textsuperscript{130} \textit{Id.} See Story Parchment Co. v. Patterson Paper Co., 282 U.S. 555, 564 (1931).

\textsuperscript{131} A buyer who resells either under a cost-plus contract or in an inelastic market would receive a windfall if he were awarded the amount of the illegal discrimination as damages. \textit{See} National Dairy Prods. Corp. v. FTC, 395 F.2d 517, 522 (7th Cir. 1968).

\textsuperscript{132} See Barber, supra note 125, at 197, 215–16.

\textsuperscript{133} See FTC v. Morton Salt Co., 334 U.S. 37, 44–47 n.13 (1948). \textit{See also} Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264–65 (1945), holding that a jury may make a reasonable estimate of damages based upon its consideration of relevant data; the wrongdoer bears the risk of uncertainty. The court indicated its willingness to lessen plaintiff's burden of proof.