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## Note

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NOTE — SECTION 2(C) OF THE ROBINSON-PATMAN ACT:  
THE BROKERAGE SECTION

I. Introduction

Mr. Justice Frankfurter must have had section 2(c) in mind when he opined that, "precision of expression is not an outstanding characteristic of the Robinson-Patman Act. . . ." <sup>1</sup> The esteemed Justice was generous in his understatement; section 2(c) is a prime example of nonintelligible draftsmanship. <sup>2</sup> The Robinson-Patman Act has, of course, provided a fertile field for scholarly commentary and, fortunately, the numerous law review articles and books written on section 2(c) have clarified the meaning of the proviso. <sup>3</sup> A detailed analysis of the section and an explanation of its every phrase would, therefore, add little to the already satiated legal literature on the subject. A cursory explanation of the meaning of the section, however, might serve as a useful supplement to the preceding articles of Messrs. Bison and Rill and as a preface to a discussion of the more narrow questions with which this note is concerned.

A careful reading of section 2(c) discloses that it definitely prohibits a seller from paying a commission or brokerage, or a discount in lieu thereof, to the buyer in a sales transaction or to one who is acting in the buyer's behalf or is under his control. The section also prohibits the buyer or the intermediary from receiving such a grant or, on the other hand, from making such a payment to the seller or his agent. In short, the section forbids the payment by one party of brokerage, or a compensation in lieu thereof, to the adversary party. Thus, brokerage payments, or a discount in lieu thereof, by the buyer to the seller, <sup>4</sup> from the seller to a buyer, <sup>5</sup> from a seller to a buyer's broker, <sup>6</sup> and from a seller's intermediary to the buyer, <sup>7</sup> are all illegal. Of course, the section is concerned only with individuals engaged in interstate commerce.

The Robinson-Patman Act was enacted in 1936 after a Federal Trade Commission investigation of chain stores <sup>8</sup> and exhaustive congressional hearings. <sup>9</sup>

1 Automatic Canteen Co. v. FTC, 346 U.S. 61, 65 (1953).

2 Section 2(c) states:

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

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

3 See, e.g., AUSTIN, PRICE DISCRIMINATION 105 (1959); BAUM, THE ROBINSON-PATMAN ACT 38 (1964); ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 330 (1962); Michael, *Brokerage and the Robinson-Patman Act*, 10 LOYOLA L. REV. 165 (1960-61); Note, *Beleaguered Brokers: The Evisceration of Section 2(c) of the Robinson-Patman Act*, 77 HARV. L. REV. 1308 (1964).

4 *Allgair v. Glenmore Distilleries Co.*, 91 F.Supp. 93 (S.D.N.Y. 1950).

5 *Great Atl. & Pac. Tea Co. v. FTC*, 106 F.2d 667 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

6 *Modern Marketing Service v. FTC*, 149 F.2d 970 (7th Cir. 1945).

7 *FTC v. Henry Broch & Co.*, 363 U.S. 166 (1960).

8 See FTC, FINAL REPORT ON THE CHAIN-STORE INVESTIGATIONS, S. Doc. No. 4, 74th Cong., 1st Sess. (1935).

9 See H.R. REP. No. 2287, 74th Cong., 2d Sess. (1936) and S. REP. No. 1502, 74th Cong., 2d Sess. (1936).

The investigations disclosed that, because of their immense purchasing power, large chain stores could exact discriminatory price concessions from sellers. The large chains frequently manipulated brokerage fees — the compensation paid to a broker for placing or obtaining a purchasing order<sup>10</sup> — to obtain their preferential prices. They were oftentimes successful in securing “dummy brokerage” by establishing illusory brokers whose compensation would actually be paid to the buyer. Obviously, this and other similar abuses of the brokerage function were detrimental to the small buyer who was unable to obtain these “dummy” payments. Section 2(c) or, as it is popularly termed, the “brokerage section,” was included in the act to outlaw these pernicious practices and to preserve the competitive ability and viability of the small buyer.<sup>11</sup>

The brokerage clause quickly became the most litigated provision of the Robinson-Patman Act. In fact, one distinguished authority, Austin, asserted that 2(c) “is the only section as to which no important question of interpretation still remains unsettled.”<sup>12</sup> The courts interpreted the section as having a *per se* quality. That is, the practice of one party paying brokerage, or any allowance in lieu thereof, to the other party or his agent is considered illegal *per se*, regardless of the absence of evidence of discrimination in price<sup>13</sup> or injury to the competitor.<sup>14</sup> Austin characterizes this *per se* quality by stating that: “[I]n the case of a forbidden brokerage payment *only one purchaser need be concerned*, and it may not be shown in defense that no other purchaser was affected or that similar payments, allowances or discounts were granted to all competing purchasers on proportionately equal terms.”<sup>15</sup> Further, the defenses of cost justification<sup>16</sup> and a good faith meeting of a competitor’s price,<sup>17</sup> which serve as defenses to a section 2(a) violation, are not applicable to section 2(c).

On its face, the “except for services rendered” clause seems to present a

10 This definition is borrowed from AUSTIN, *op. cit. supra* note 3, at 107.

11 The House report discloses the purposes of the legislation. For example:

Among the prevalent modes of discrimination at which this bill is directed is the practice of certain large buyers to demand the allowance of brokerage direct to them upon their purchases or its payment to an employee, agent, or corporate subsidiary whom they set up in the guise of a broker, and through whom they demand that sales to them be made. But the positions of buyer and seller are by nature adverse, and it is a contradiction in terms incompatible with his natural function for an intermediary to claim to be rendering services for the seller when he is acting in fact for or under the control of the buyer, and no seller can be expected to pay such an intermediary so controlled for such services unless compelled to do so by coercive influences in compromise of his natural interest. Whether employed by the buyer in good faith to find a source of supply, or by the seller to find a market, the broker so employed discharges a sound economic function and is entitled to appropriate compensation by the one in whose interest he so serves. But to permit its payment or allowance where no such service is rendered where in fact, if a “broker,” so labeled, enters the picture it is one whom the buyer points out to the seller rather than one who brings the buyer to the seller, would render the section a nullity.

H.R. REP. NO. 2287, 74th Cong., 2d Sess., 14-15 (1936).

12 AUSTIN, *op. cit. supra* note 3, at 106.

13 Southgate Brokerage Co. v. FTC, 150 F.2d 607, 609 (4th Cir.), *cert. denied*, 326 U.S. 774 (1945).

14 Biddle Purchasing Co. v. FTC, 96 F.2d 687, 690 (2d Cir.), *cert. denied*, 305 U.S. 634 (1938).

15 AUSTIN, *op. cit. supra* note 3, at 108.

16 Great Atl. & Pac. Tea Co. v. FTC, 106 F.2d 667, 676-77 (3d Cir. 1939), *cert. denied*, 308 U.S. 625 (1940).

17 FTC v. Washington Fish & Oyster Co., 282 F.2d 595, 599 (9th Cir. 1960).

defense to an illegal brokerage charge, but, as Mr. Bison so ably asserts in his article above, the clause has been effectively read out of the act.

Because of the *per se* characteristics of section 2(c), it became the subject of intense castigation by numerous authorities.<sup>18</sup> The most frequent criticism was that, by discouraging intense competition, it was contrary to the general objectives of the antitrust laws<sup>19</sup> and, further, that by giving solely independent brokers an effective monopoly, it impeded the development of new and possibly better methods of product distribution.<sup>20</sup> Whether this criticism has finally reached receptive ears is debatable: however, as Mr. Rill asserts in his paper, it appears that a new approach to section 2(c) is gaining momentum. The *FTC v. Henry Broch & Co.*<sup>21</sup> decision provided the first deviation from the strict *per se* construction of section 2(c) when it inferred that some discrimination must result from the brokerage payment.<sup>22</sup> The *Thomasville Chair Co. v. FTC*<sup>23</sup> and the *Hruby Distributing Co.*<sup>24</sup> cases have also apparently altered the traditional *per se* construction of the section. Since this development and these cases have been superbly analyzed by Mr. Rill, they are simply mentioned here.<sup>25</sup> Suffice it to say that Mr. Austin's contention that there is no important question of interpretation of section 2(c) that remains undetermined, is no longer true. In the words of Mr. Rowe, a noted authority on the Robinson-Patman Act: "In the wake of the Supreme Court's 1960 *Broch* decision, new uncertainty swirls around previously settled applications of Section 2(c)'s vague ban on 'brokerage' or commission payments by one side to the other in a sales transaction."<sup>26</sup>

## II. Section 2(c) and Cooperative Organizations Controlled by Purchasers

Contributing to this "new uncertainty [which] swirls around previously settled applications of section 2(c) . . ." is the question of the legality of cooperative purchasing organizations formed by small buyers. Until recently, it seemed well established that section 2(c) prohibited payments of any brokerage, or discounts made possible by brokerage savings, by the seller to cooperative buying organizations. Similarly, the brokerage section supposedly prohibits payments by a seller to brokers who are affiliated through stock ownership with individual buyers. Indeed, the section, by its terms, seems to prohibit payments

18 See, e.g., ROWE, *op. cit. supra* note 3, at 539-55; Adelman, *The Consistency of the Robinson-Patman Act*, 6 STAN. L. REV. 3, 5-6 (1953); Oppenheim, *Administration of the Brokerage Provision of the Robinson-Patman Act*, 8 GEO. WASH. L. REV. 511, 536-40 (1940).

19 ROWE, *op. cit. supra* note 3, at 545-46; Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1207 n.178 (1952).

20 Rowe, *op. cit. supra* note 3, at 540.

21 363 U.S. 166 (1960).

22 *Id.* at 175:

This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance "in lieu" of brokerage has been granted. . . . [W]hether such a reduction is tantamount to a *discriminatory* payment of brokerage depends on the circumstances of each case. (Emphasis added.)

23 306 F.2d 541 (5th Cir. 1962).

24 FTC Dkt. 8068 (Dec. 26, 1962).

25 For a discussion of this new approach, see, in addition to Mr. Rill's article, Note, *Be-leaguered Brokers*, *supra* note 3; Comment, 42 N.C.L. Rev. 457 (1964).

26 ROWE, *op. cit. supra* note 3, at 330.

of brokerage, or a discount in lieu thereof, to cooperative purchasing or buyer affiliated organizations where it states that payments of brokerage, or an allowance in lieu thereof to one who "is acting in fact for or in behalf, or subject to the direct or indirect control of . . ." the other party are illegal. The courts have accepted these words on their face and have invalidated cooperative buying organizations or organizations affiliated with the buyer by merely asserting that such organizations are subject to the direct or indirect control of the buyer. A few examples may illustrate the various types of cooperative or broker-affiliated buying arrangements that section 2(c) supposedly proscribes.

*Webb-Crawford v. FTC*<sup>27</sup> serves as an obvious example of the buyer being affiliated with the entity which received the brokerage from the seller. In this case, the three individuals who comprised a brokerage partnership also owned ninety-five percent of the stock of the Webb-Crawford Company, the purchaser. The brokerage partnership was an actual brokerage concern; this was clearly not a case of an illusory broker being "established" by a purchaser. The Webb-Crawford Company bought approximately ten percent of its goods through the brokerage partnership, and the partnership received its usual brokerage fee for these purchases. None of the brokerage fees were actually passed on to the buyer. However, since the partners of the brokerage concern received a fee and since these same partners also controlled the purchasing corporation, the court thought that the results were the same as if the buyers had received the commissions. The court then reasoned that since the results were identical, section 2(c)'s prohibition of payment of brokerage by the seller to the adversary should also be applied to those situations where the one receiving the brokerage owns a controlling interest in the buyer.<sup>28</sup> Similarly, a brokerage payment to a broker who was under the same control as the buyer has been considered violative of the section.<sup>29</sup> A brokerage payment to a subsidiary who purchased goods for its parent corporation, a large food chain, has also been held illegal.<sup>30</sup>

In addition to preventing the payment of brokerage to a broker who is affiliated with the buyer, the section has been used to thwart the attempts of smaller buyers to form cooperative purchasing organizations. For example, in *Independent Grocers Alliance Dist. Co. v. FTC*,<sup>31</sup> the Seventh Circuit affirmed a Federal Trade Commission order which directed a cooperative purchasing company to cease accepting any brokerage payments from sellers for orders placed for the benefit of those buyers who owned stock in, or were affiliated with, the cooperative. Two holding corporations owned the capital stock of the cooperative, the Independent Grocers Alliance Distributing Company. The controlling stock of these holding corporations was, in turn, owned by wholesale grocery firms which purchased their supplies through the independent Grocers Alliance Distributing Co. The Distributing Company received a brokerage fee from the seller for the sales made to these buying grocers and part of

27 109 F.2d 268 (5th Cir. 1940).

28 *Id.* at 270; see also *Rocky Mountain Wholesale Co.*, 52 F.T.C. 1484 (1956); *Thomas Page Mill Co.*, 33 F.T.C. 1437 (1941).

29 *Institutional Foods Co.*, 53 F.T.C. 1180 (1957).

30 *Food Mart, Inc.*, 54 F.T.C. 1483 (1958).

31 203 F.2d 941 (7th Cir. 1953).

the brokerage was eventually passed on to the buyers in the form of stock dividends. The court concluded that the Distributing Company was acting in behalf of, or under the control of, the buyer and, therefore could "not receive brokerage payments upon the purchase of such buyers."<sup>32</sup>

*Quality Bakers of America v. FTC*<sup>33</sup> is another example of how the section can deter smaller firms from forming their own cooperative purchasing organizations. In *Quality Bakers*, seventy wholesale baking concerns joined in a unincorporated association which, in turn, formed a corporation which acted as the purchasing agent for the members of the association and also provided management assistance to them. The members of the association owned the entire stock of the purchasing corporation and had agreed to pay the corporation twenty-five dollars in dues per week. The corporation also collected brokerage fees or commissions from the producers which sold to it or to its shareholders. These fees were then distributed so that one half of the brokerage fee was credited to the account of the member whose purchasing order produced the fee. The remainder was used by the corporation to pay an eight percent dividend to the stockholders and to pay for the operating expenses of the company. The court found that "the corporation is and has been accepting brokerage fees from sellers on purchases of commodities made by its stockholders through it, while acting as the agent for them and in their behalf and while owned and controlled by such stockholders . . ."<sup>34</sup> and, hence, that such transactions were violative of section 2(c).

Various commentators have denounced these interpretations of the section which have resulted in depriving cooperative purchasing groups of the benefit of brokerage savings.<sup>35</sup> The criticism, of course, emphasizes that one of the main purposes of the Robinson-Patman Act was to enable the smaller firms to compete with the larger chains. Paradoxically, the act, as it has been interpreted, impeded the formation of purchasing cooperatives; yet, cooperation is one means which the smaller buyers can utilize in an attempt to compete with the larger chains. One of the more articulate critics, Mr. Rowe, contends that:

Section 2(c) thwarts purchasing economies in the form of commission or brokerage payments for admittedly valuable intermediary functions, so as to penalize the small merchant, the intended beneficiary of the Robinson-Patman Act. Such a businessman typically cannot match the market coverage and bargaining efficiency of the chain versus the supplier, and must

32 *Id.* at 945. The court cited as authority several cases which are analogous to the subject under discussion: *FTC v. Herzog*, 150 F.2d 450 (2d Cir. 1945); *Oliver Bros., Inc. v. FTC*, 102 F.2d 763 (4th Cir. 1939); *Biddle Purchasing Co. v. FTC*, 96 F.2d 687 (2d Cir. 1938). See also: *Kentucky Rural Elec. Coop. Corp. v. Maloney Elec. Co.*, 282 F.2d 481 (6th Cir. 1960), *cert. denied*, 365 U.S. 812 (1961), where it was held illegal for a manufacturer to pay a brokerage or discount to a cooperative distributor which placed orders for other cooperatives which owned the distributor; *Clover Farm Stores Corp.*, 52 F.T.C. 1140 (1956), where the Commission ordered a corporation, which was owned by twenty-seven grocery firms, to cease accepting brokerage on transactions made for the benefit of the owner-grocery firms; *Topco Associates, Inc.*, 51 F.T.C. 83 (1954); *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581 (1951), where the Commission found that producer's payments made to a corporation formed by two hundred and seventy-five grocery stores on sales made to these stores violated § 2(c).

33 114 F.2d 393 (1st Cir. 1940).

34 *Id.* at 397.

35 See ROWE, *op. cit. supra* note 3, at 354-56; Adelman, *Effective Competition and the Antitrust Laws*, 61 HARV. L. REV. 1289, 1336 (1948).

join with others like him in order to gain the advantages of informed and pooled buying direct at the source. Yet it is the joint purchasing arrangement established for this purpose which time after time falls victim to the Brokerage Clause—the special ward of Congress in the Robinson-Patman law becoming the goat of the Brokerage Clause.

In fact, the sole identifiable beneficiary of such perverse Section 2(c) enforcement has been the organized food broker aboard a legal gravy-train protecting his prosperity from the stresses of competition—at the expense of rationally buying distributors and ultimately the consumer.<sup>36</sup>

This reasoning has apparently struck a responsive chord in the Seventh Circuit. In *Central Retailer-Owned Grocers, Inc. v. FTC*,<sup>37</sup> the court set aside the Commission's order directing a cooperative to cease accepting price concessions exacted from suppliers. In *Central*, thirty-five retail-owned wholesale grocers formed the Central Retailer-Owned Grocers, Inc., which acted as a cooperative purchasing agent for its members. Estimating in advance the needs of the members, Central placed orders for the approaching season with the appropriate suppliers. When a member requested delivery, Central would forward a confirmation order to the supplier, who would then deliver the goods to Central's member. Central would pay for the supplies, but the buying member would then compensate Central for the cost of the purchase and also a slight markup which paid for Central's operating expenses. At the end of each year, Central distributed any accumulated funds to its members in the form of patronage dividends.

Central was able to secure low prices from the suppliers supposedly because of the advantages that the cooperative efforts of the buyers afforded the suppliers. The Federal Trade Commission, however, found that these price concessions were the equivalent to the saving of brokerage and thus fell within section 2 (c)'s prohibition of payment of anything of value in lieu of brokerage to an intermediary acting in behalf of the buyer.<sup>38</sup>

The Commission's decision that the price concession was "in lieu of brokerage" and hence within the prohibition of the section, seems consistent with its earlier decisions holding brokers in violation of section 2(c) for translating the elimination of sub-broker's fees into a price concession in favor of certain buyers.<sup>39</sup> Moreover, the Commission's decision would also seem to support the rationale of *Quality Bakers* and *Independent Grocers*. While those cases involved a direct payment of brokerage to the cooperative, there is, as section 2(c) recognizes, no practical difference between a direct payment of brokerage and a discount in lieu thereof. And, although it is difficult to prove, one can presume

36 ROWE, *op. cit. supra* note 3, at 355-56. See also Commissioner Mason's dissenting opinion in *Carpel Frosted Foods, Inc.*, 48 F.T.C. 581 (1951), wherein he contends that:

When the chains came in, they did something to the neighborhood grocers besides putting the marginal operators out of business. They showed the wide-awake small merchant the great value of coordinated market information, sound accounting practices, reduction of unnecessary and uneconomic middleman functions. . . . But the corner grocer soon found out that few of these benefits were available to him except by uniting with others in a cooperative merchandising organization. 48 F.T.C. at 605.

37 319 F.2d 410 (7th Cir. 1963).

38 *Central Retailer-Owned Grocers, Inc.*, FTC Dkt. 7121 (May 14, 1962).

39 *Custom House Packing Corp.*, 43 F.T.C. 164 (1946); *W. E. Robinson & Co.*, 32 F.T.C. 370 (1941); *American Brokerage Co.*, 31 F.T.C. 1581 (1940).

that the elimination of brokerage fees was at least one of the facts that made the discount allowed to Central economically feasible. Nevertheless, the Seventh Circuit expressly rejected the Commission's method of discovering an illegal discount in lieu of brokerage from a comparison between the ordinary fees paid by the seller and the price concession granted to the buyers who deal directly with the seller.<sup>40</sup> The court ignored the aforementioned presumption that at least part of the discount resulted from the elimination of brokerage and found "that Central was able to secure favorable prices from its suppliers, because of (1) their assured volume of business, (2) their lack of any credit risk, (3) a reduction in their billing work, and (4) Central's advance commitments for later requirements."<sup>41</sup> Consequently, the court set aside the Commission's order and declared that:

Reason does not permit our ignoring these facts in order to declare illegal a worthy effort by a number of wholesale grocers, owned by retailers, to reduce the ultimate sale prices to the consumer, by entering into the arrangement with Central, which made them stronger in their competition with large firms.<sup>42</sup>

It is not the purpose of this note to attempt to answer the question of whether *Central Retailer-Owned Grocers* injects the cost justification defense into a section 2(c) proceeding or to explore its effects on the *per se* thrust of the section.<sup>43</sup> To be sure, all the ramifications and the exact meaning of the case have not yet been determined. It does, however, indicate that buyer cooperatives may offer a means of distribution which can compete with the larger integrated firms. While a direct payment of brokerage to a cooperative controlled or owned by the buyer is still within the purview of section 2(c),<sup>44</sup> a price concession may be granted to a cooperative, which operates like Central, if a realistic justification for the reduction in price is present. Admittedly, widespread use of such cooperatives may be detrimental to other groups. For example, smaller firms who fail to form cooperatives would then be at a disadvantage; also, the formation of cooperatives would deprive the independent brokers of their present preferred position. It is submitted, however, that the acceptance of such cooperatives would enable smaller firms — which the Robinson-Patman Act was designed to protect — to better compete with the larger firms. Moreover, the end result will be an improved method of distribution which

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40 *Central Retailer-Owned Grocers, Inc. v. FTC*, 319 F.2d 410, 415 (7th Cir. 1963).

41 *Id.* at 414.

42 *Id.* at 415. Ironically, the court quoted from a speech by Chairman Dixon in which he stated:

[C]ombination in one form or another by small firms may be essential to their survival, particularly in those industries characterized by massive aggregates of corporate power. The growth of the giant food chains, for example, revolutionized the behavior of the small independent grocery stores. They were quickly faced with the alternative of constructing cooperative buying arrangements or extermination. Certainly mainly independent food stores long ago would have withered before the competitive threat of large chains had they not formed retailer-owned cooperative wholesalers. . . .

43 For such an analysis, see ROWE, *op. cit. supra* note 3, at 72 (Supp. 1964).

44 The court distinguished such cases as *Independent Grocers Alliance Dist. Co. v. FTC*, 203 F.2d 941 (7th Cir. 1953), on the basis that in that case a direct payment of brokerage was obviously passed to the buyer. 319 F.2d at 415, n.5.

conforms with the economic realities of the contemporary business world and, hopefully, a method which permits lower consumer prices.

### III. *Is Intent an Element of a Section 2(c) Violation?*

A frequent statement is that intent or scienter need not be proved to show a section 2(c) violation.<sup>45</sup> Manifestly, to violate section 2(c), one need not have the specific intent to do so. Similarly, ignorance of the illegality of a particular transaction is irrelevant in determining the culpability of the respondent.<sup>46</sup> It is a more difficult case, however, where the respondent does not have knowledge of all the facts that constitute the illegal passage of brokerage. Such a case might arise, for example, where the seller and the buyer's broker or the seller and the seller's broker agree to reduce the brokerage fee and the saving is passed on to the buyer in the form of a price concession.<sup>47</sup> In these situations, the seller and the broker would, of course, violate the section; the lack of the buyer's knowledge would not affect the liability of the conspiring broker and seller.<sup>48</sup> It is another matter, however, to hold liable the buyer, who unknowingly benefitted from an illicit brokerage deal. There are no cases in point, which fact suggests that this particular question will rarely, if ever, arise. The buyer is usually aware of any arrangement made for his benefit by the seller and the broker. Moreover, if the buyer actually did not know of the arrangement which resulted in the price concession, it would be eminently more practical to bring the action against the culpable seller or the broker rather than the buyer. However, one can speculate as to the feasibility of bringing the action against the innocent buyer. Where the agreement is between the seller and the buyer's broker, the buyer's civil liability could possibly be founded on the doctrine of respondeat superior — the principal, the buyer, might be vicariously liable for the acts of his agent, the broker. However, where the agreement is between the seller and the seller's broker, it would be even more difficult to hold the buyer liable. The *Broch* decision contains some dicta which suggest that the buyer would not be liable in such a situation. In holding a seller's broker liable for reducing his brokerage commission and passing the saving on to the buyer, the Supreme Court said that while the buyer's intent is not material in determining the culpability of the broker, "the buyer's intent might be relevant were he charged with receiving an allowance in violation of § 2(c),"<sup>49</sup> Rowe has opined that this statement at least suggests that "no section 2(c) culpability should attach to an innocent participant in a transaction which is ultimately unmasked to be a brokerage violation though he had no reason to suspect its true charac-

45 See, e.g., BAUM, *op. cit. supra* note 3, at 43.

46 *Dixie Central Produce Co.*, FTC Dkt. 8475 (July 13, 1962).

47 Mr. Bison admitted, in answer to a question at the Symposium, that such a hypothetical case would be a difficult one for the Commission to decide, but he also asserted that the buyer could be held liable on the doctrine of respondeat superior or because of his negligence in failing to discover the illicit arrangement. Mr. Rill, on the other hand, contended that "knowledge of the facts" is a prerequisite to a section 2(c) violation. Remarks of Messrs. Bison and Rill, Transcript of Symposium Proceedings, September 24-25, 1965, on file in the office of the *Notre Dame Lawyer*.

48 *FTC v. Henry Broch & Co.*, 363 U.S. 166, 174 (1960).

49 *Ibid.*

ter."<sup>50</sup> This would seem to be the more equitable decision. And since the action can probably be successfully brought against either the seller or the broker, it is also the more practical alternative.

#### IV. *Summary*

The brokerage clause was enacted primarily to prohibit payments of illusory or unmerited brokerage, or discounts in lieu thereof, to large chain buyers. The section has been effective in attaining this primary purpose; however, it has also had other effects which have caused various commentators to denounce the section. The most frequent criticism is that, by stifling competition, the brokerage clause conflicts with the more general antitrust policy and that the section is actually detrimental to the small buyer, whom the act was designed to protect.

Various recent decisions have heeded these criticisms and have shattered the certainty established by the early interpretations of section 2(c). The section is now apparently in a state of development and the extent to which this development will change the previously settled interpretation is yet to be determined. Among the questions still to be determined are whether scienter is required for a violation of the section and the exact role that cooperative purchasing organizations can play in the distribution system. The first question will arise infrequently and is of little practical importance; the second question, the role of purchasing cooperatives, is of utmost importance. Future decisions must delineate the status of these purchasing intermediaries.

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<sup>50</sup> Rowe, *op. cit. supra* note 3, at 347.