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PRICE DISCRIMINATION LEGISLATION—1972

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HEARING

BEFORE THE

SUBCOMMITTEE ON
ANTITRUST AND MONOPOLY

ON THE

COMMITTEE ON THE JUDICIARY

UNITED STATES SENATE

NINETY-SECOND CONGRESS

SECOND SESSION

ON

S. 1457

Pursuant to 256

Section 4

JANUARY 31, 1972

Printed for the use of the Committee on the Judiciary



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(II)

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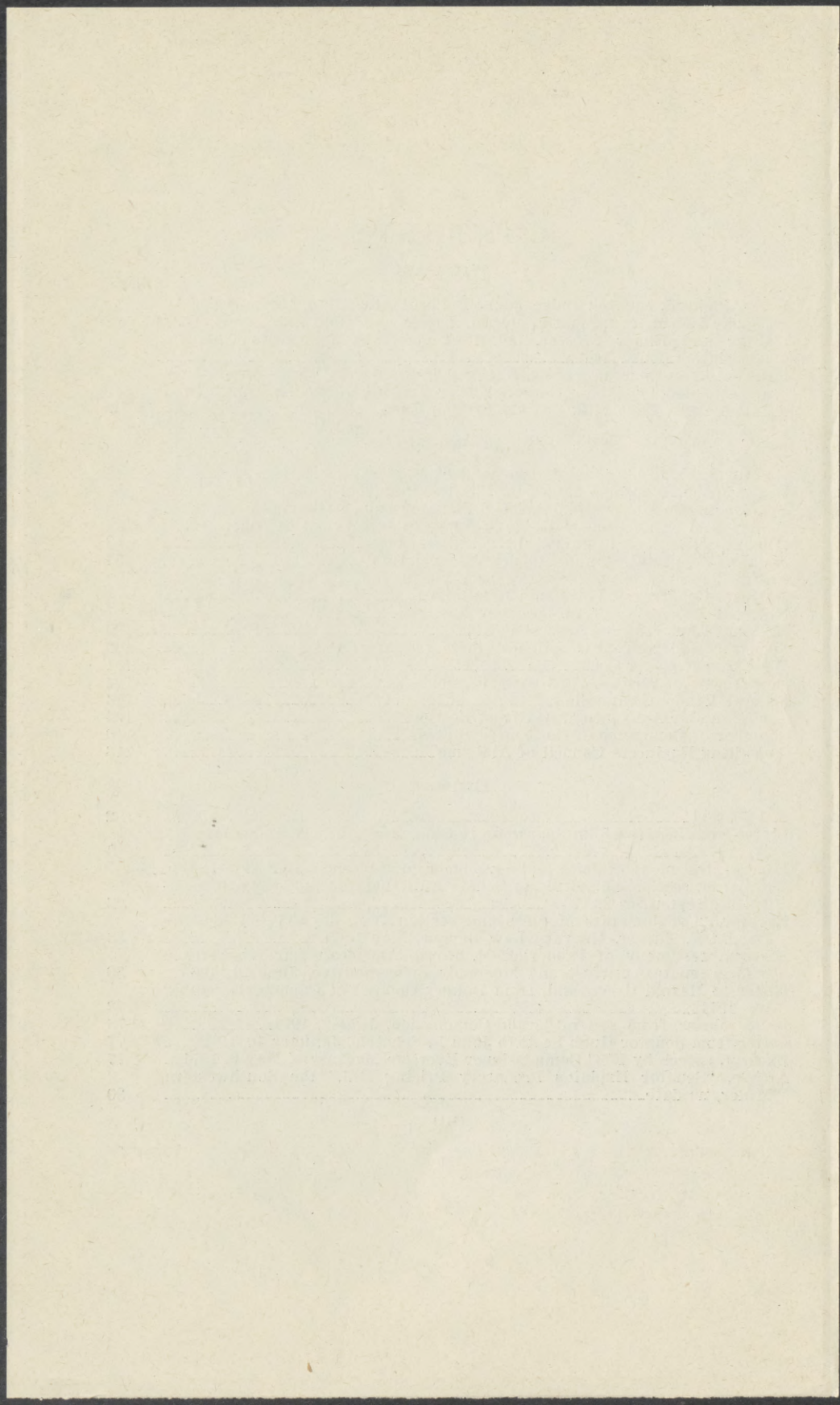
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PRICE DISCRIMINATION LEGISLATION—1972

MONDAY, JANUARY 31, 1972

U.S. SENATE,
SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
COMMITTEE ON THE JUDICIARY,
Washington, D.C.

The subcommittee met, pursuant to recess, at 10:10 a.m., in room 1114, New Senate Office Building, Roman L. Hruska presiding.

Present: Senators Hruska and Gurney.

Also present: Charles E. Bangert, assistant counsel; David D. Martin, chief economist; Dr. Walter S. Measday, economist; Arthur Andersen, economist; Peter N. Chumbris, chief counsel for the minority; Kirley S. Coulter, assistant counsel for the minority; Patricia Bario, editorial director, and Janice Williams, clerk.

Senator HRUSKA. The subcommittee will come to order.

The series of hearings we open this morning are to consider Senate bill No. 1457. The bill will be inserted at the completion of my opening statement.

The purpose of this bill is to overcome the Supreme Court decision in the *Nashville Milk Co. v. Carnation Co.* (355 U.S. 373 decided 1958). The Court held that section 3 of the Robinson-Patman Act is not a part of the Clayton Act, hence, it will not support suits for treble damages. The Senate bill S. 1457 would add a new section 3A to the Clayton Act, as follows:

SEC. 3A. It shall be unlawful for any person engaged in commerce to sell, offer to sell or contract to sell goods below cost for the purpose of destroying competition or eliminating a competitor. The term "cost" as used in this section means fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business.

The Supreme Court decision in the *Nashville Milk* case was reacted to by some Members of Congress, and shortly after the decision Senator John Sparkman of Alabama joined by several of the colleagues, introduced the first of a series of bills, the first being S. 3079 on January 23, 1958, during the 85th Congress, designed to remedy the situation.

Intensive hearings were held in latter years, the more significant of which were in 1964, 1965, and more recently, 1969. Experts, pro and con, appeared during the course of these several controversial hearings since 1958. I am certain that during the course of these hearings the controversy will continue and it would be useful if the witnesses will focus on several key issues which were not a part of the public hearings from 1958 through 1969.

Among these new key issues are:

1. The significant changes in the present bill S. 1457 from its predecessor bills, especially S. 1494.

2. The issue of whether S. 1457 should include a provision to repeal section 3 of the Robinson-Patman Act as recommended by the Attorney General's antitrust study issued March 31, 1955, and many other leading antitrust specialists since that time.

3. The impact on whether section 3 of the Robinson-Patman Act or the provisions of S1457 should be considered at this time in view of the studies and recommendations made by three presidential studies, namely:

(a) President Johnson's Neal Task Force Report on Antitrust Policy reported at page S5642, Congressional Record, May 27, 1969;

(b) President Nixon's Stigler Task Force Report reported in the Congressional Record on June 12, 1969, beginning on page S6350; and,

(c) President Nixon's recommended study by the American Bar Association relating to the Federal Trade Commission, which was published on September 16, 1969.

As the acting chairman of the hearings on S. 1457, I set forth a brief legislative history of this issue and have tried to focus several key points which are relevant to these hearings and at the same time, do it fairly and objectively without expressing a personal viewpoint in this opening statement.

However, I reserve the right during the colloquies and during the questioning of the witnesses to express my views as a member of this committee and the U.S. Senate, and not as the acting chairman.

(The bill, S. 1457, follows:)

S. 1457, 92D CONGRESS, 1ST SESSION

A BILL To amend the Clayton Act by adding a new section to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (38 Stat. 730 et seq.; 15 U.S.C. 12 et seq.), commonly known as the Clayton Act, is amended by inserting therein, immediately after section 3 thereof, the following new section:

"Sec. 3A. It shall be unlawful for any person engaged in commerce to sell, offer to sell or contract to sell goods below cost for the purpose of destroying competition or eliminating a competitor. The term 'cost' as used in this section means fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7, and 8".

Senator HRUSKA. I express the greetings of the chairman of this committee, Mr. Hart, who has other official duties. All of us are beset by high competition for our time. The interests of Senator Hart in this subject has been well demonstrated in previous hearings and, in due time, I am confident he will express his views as they are today again.

I have here a letter dated January 27, signed by Senator John Sparkman. It is addressed to Chairman Hart. I read the text of it:

I was sorry to learn that a schedule conflict of Acting Chairman Hruska and necessitated your changing the opening date of the hearings on S. 1457 from February 1 to January 31, 1972. As you know, it has been my plan to appear personally on the opening day in support of the bill, which I am sponsoring with yourself and 32 other Senators as co-sponsors.

Unfortunately, my own schedule will not permit my attendance on January 31. Accordingly, I shall submit my prepared statement and request that it be printed in the public record of the first day of the hearings. The statement will be submitted on or before Thursday, February 3, for release on that date. I shall provide 125 copies, in accordance with the subcommittee's rules.

If the subcommittee wishes to question me about my statement and we can find a mutually convenient date, I shall be happy to appear at a subsequent session of the hearings for that purpose.

(The complete letter from Senator Sparkman follows:)

U.S. SENATE,
SELECT COMMITTEE ON SMALL BUSINESS,
Washington, D.C., January 27, 1972.

HON. PHILIP A. HART,
Chairman, Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: I was sorry to learn that a schedule conflict of Acting Chairman Hruska had necessitated your changing the opening date of the hearings on S. 1457 from February 1 to January 31, 1972. As you know, it had been my plan to appear personally on the opening day in support of the bill, which I am sponsoring with yourself and 32 other Senators as cosponsors.

Unfortunately, my own schedule will not permit my attendance on January 31. Accordingly, I shall submit my prepared statement and request that it be printed in the public record of the first day of the hearings. The statement will be submitted on or before Thursday, February 3, for release on that date. I shall provide 125 copies, in accordance with the Subcommittee's rules.

If the Subcommittee wishes to question me about my statement and we can find a mutually convenient date, I shall be happy to appear at a subsequent session of the hearings for that purpose.

With best wishes,
Sincerely,

JOHN SPARKMAN.

Senator HRUSKA. In line with the letter, it is hereby ordered that when Senator Sparkman's statement does arrive, it will be inserted in the record in the place as requested by his letter.

(The statement of Senator Sparkman follows. Testimony resumes on p. 12.)

HEARINGS ON S. 1457 BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY,
COMMITTEE ON THE JUDICIARY, U.S. SENATE

STATEMENT IN SUPPORT OF S. 1457 BY SENATOR JOHN SPARKMAN, JANUARY 31, 1972

Mr. Chairman, and Members of the Subcommittee: On the 20th day of January, 1958, the Supreme Court handed down two decisions¹ that were destined to have many effects on many people. Among those whose lives were touched by the *Nashville Milk* and *Safeway Stores* cases, each decided by 5 to 4 votes of the Court on that date, were, most certainly, the members of this distinguished Subcommittee and the witness before you.

Year in and year out I have introduced bills to undo the worst of what the Court did to private antitrust enforcement that day. Year in and year out the Subcommittee has studied those bills—and allowed them to die. I have in-

¹*Nashville Milk Company v. Carnation Company*, 355 U.S. 373; *Safeway Stores, Inc. v. Vance*, 355 U.S. 389.

roduced seven bills² in all, over a 13-year time span, and, counting the present proceedings, the Subcommittee has held hearings³ on four of them and a formal vote, up or down (it turned out to be down)⁴ on one. (Please see appendix 1.) Among us—you, your staff; I, my staff—we must have spent hundreds of hours wrestling with the Court's short answer to a short legal question—and the very large, complex social, economic and public policy questions that that "answer" presented.

By now, my submissions to this Subcommittee on bills to "reverse" *Nashville Milk* and *Safeway* are in some danger of assuming the aspect of tradition, even ritual.

Mr. Chairman, what is it all for? What is it all about? Are we engaged in wheel-spinning or in some experiment with immovable forces and irresistible objects?

I think not. Certainly I have personally learned much from the opposition testimony received at prior hearings, and the bill has undergone change after change as a result of that learning. Just as certainly, the Subcommittee has shown unfailing courtesy, patience and an open mind about considering each new version of this legislation. I hope we don't have to; but, with that kind of spirit, if we must, we can go on this way for quite a few more Congresses!

There is, of course, one personal problem presented to me by my steadfast and persistent advocacy of legislation to undo *Nashville Milk* and *Safeway*, and the Subcommittee's equally steadfast and persistent belief that the legislation, in any of its prior and significantly different versions at least, is not necessary or desirable. The problem is: What else is left to say? Is there anything new to bring out at *this* hearing?

The nature and nuances of the companion *Nashville Milk* and *Safeway* decisions were fully explored at the very first hearings this Subcommittee gave to one of my bills. Those were the hearings of 1964, on my third bill, S. 1935 of the 88th Congress.⁵ In the two cases, the Supreme Court was asked to decide, among other things: Was section 3 of the Robinson-Patman Act⁶ intended by Congress to be a part of the antitrust laws and therefore the subject of civil enforcement in private suits by injured parties? The Court answered: No. Four of the nine Justices dissented, of course, and said the answer was really Yes, which is my legal opinion also. But there is nothing new in that story. The Subcommittee knows it by heart, and anyone else can read all about it in the 1964 hearings, and again in the 1965 and 1969 hearings.

The result of the twin decisions was to terminate what had been a promising counterforce to the many and varied forces pushing this country in the direction of centralization and concentration of economic power. That counterforce was the use of the third provision of section 3 of the Robinson-Patman Act by private antitrust plaintiffs to curb predacious pricing practices. Before 1958, the third provision of section 3, which outlaws sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor," had been accepted by several Federal courts as an "antitrust law," affording grounds for an action seeking treble damages, injunctive relief, or both. But here again, I report nothing new. Full discussion of this point will be found in my own testimony, and that of others, at the prior hearings. I also reviewed it, more recently and briefly, in my statement in the Senate on the occasion of the present bill's introduction.⁷ Without objection, I would ask to insert that statement in this record. (Please see appendix 2.)

We all know, Mr. Chairman, that the legislative process involves compromise, adjustment, give-and-take. A proposal for new law seems essential to Mr. A, but abominable to Mr. B, and simply ineffective and inadequate to Mr. C. Mr. A and his friends, the enthusiastic proponents, lack the power to enact it without the help of either B. or C. Adjustments and amendments are therefore made.

² The numbers, sponsors and full texts of the bills will be found in appendix 1, following this statement.

³ Hearings before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, on S. 1815 and S. 1935, 88th Congress, second session (1964), (hereinafter cited "1964 hearings"); Hearings before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, on S. 995, 89th Congress, first session (1965), (hereinafter cited "1965 hearings"); and Hearings before the Subcommittee on Antitrust and Monopoly, Committee on the Judiciary, U.S. Senate, on S. 1494, 91st Congress, first session (1969), (hereinafter cited "1969 hearings").

⁴ The Subcommittee on Antitrust and Monopoly, meeting in executive session on May 19, 1970, by a 3 to 4 vote defeated a motion to report S. 1494, 91st Congress.

⁵ The 1964 hearings (supra, note 3), pp. 4-9.

⁶ Act of June 19, 1936, c. 592, sec. 3, 49 Stat. 1528; 15 U.S.C. sec. 13a.

⁷ 117 Congressional Record, p. S. 4277 (daily ed., Apr. 1, 1971).

That is how it has been with the bills to overturn the Court's *Nashville Milk* and *Safeway* decisions about section 3. The first appendix to this statement could almost serve as a casebook in the process of legislative compromise by which a law evolves. Our first approach—my co-sponsors'⁸ and mine—was to amend the definition of "antitrust laws" in section 1 of the Clayton Act, expressly to include section 3 of the Robinson-Patman Act. Next we tried repealing section 3 and re-enacting it, in toto, as a new section 3A of the Clayton Act. Next we tried repealing section 3 and re-enacting only the third provision as a new section 3A of the Clayton Act. Next we tried repealing section 3 and re-enacting the third provision as a new section 3A of the Clayton Act, minus its criminal sanctions. Finally we came to the present version, embodied in S. 1457, the bill before you. This is, I respectfully suggest to the Chairman, "a whole new ballgame."

S. 1457 leaves the present Robinson-Patman section 3 unmentioned and intact as a purely criminal statute. Abandoning that approach entirely, this bill engrafts onto the Clayton Act, as section 3A, a significantly modified version of the third provision of Robinson-Patman section 3. The modification is major. It changes the first of two tests of illegality contained in the third provision from sales "at unreasonably low prices" to sales "below cost"—a far more explicit and far more demanding test. The other test contained in the third provision of section 3—proof of a "purpose" to destroy competition or a competitor—is left standing, in identical language.

Mr. Chairman, the bill seems to me to be, at the present point, one that has met all the major objections to prior bills, while retaining its major purpose. Small businessmen, the prospective plaintiffs if this bill becomes law, have gained something over the last version: the retention of the criminal sanctions. You will recall that the repeal of criminal sanctions was a main cause of Justice Department disapproval in the last Congress. Prospective defendants, in turn, have gained a severe tightening of the first of the two main tests of illegality and have retained, unmodified, the second, and even harder test.

It has been argued that this bill, if enacted, might breed capricious litigation, anti-competitive strike suits. That argument seems to me to overlook two very real facts of life: the high cost of legal services in this day and age, and the severity of the bill's tests of illegality. In fact, the second test is so severe, in the eyes of some small businessmen and their lawyers, as to make the bill worthless and me, as its chief sponsor, either a "dupe" or a "part of the process" by which they are being destroyed.

With his permission, I would like to insert in the record a letter I received from Mr. Lee A. Nordgren of Mankato, Minnesota, and I commend it to the particular attention of all who think this bill would be giving a "dish of cream" to antitrust plaintiffs. Quite plainly, it would not. (Please see appendix 3.) In the event that the Subcommittee should wish to make the bill less burdensome to the prospective plaintiffs, and more effective against prospective defendants, Mr. Nordgren has a suggestion for your consideration. For my own part, this year, I will gladly settle for S. 1457 "as is," or with such an amendment, if the Subcommittee is impressed by my correspondent's argument.

And now I come to that "new lead" I said I wanted to find for this "old story." I found it in a publication conceived and promoted by, and created for this Subcommittee, the quinquennial tabulation by the Census Bureau of concentration ratios in manufacturing industry.⁹ The 1967 Census results were not yet available at the 1969 hearings, but are now.

Mr. Chairman, to you and me, on a Federal payroll, our recurrent discussions of legislation to undo *Nashville Milk* and *Safeway* may seem a passing, somewhat academic exercise. But the small business witnesses who, year after year come before this Subcommittee to ask for the right to enforce existing policy against predatory pricing—and year after year go away empty-handed—have been claiming, since the first hearings in 1964, that their business lives were riding on the issue.

I thought it would be interesting to see whether subsequent events, as reported in the Census data, gave any statistical support to all those dark predictions made in the past.

⁸ The 1958 bill had, in addition to the sponsor, 10 cosponsors. Support has grown over the years. The current bill (S. 1457) has, in addition to the principal sponsor, 33 cosponsors. See appendix 1 for numbers, sponsors and texts of all seven bills in the 13-year series.

⁹ U.S. Bureau of the Census, *Census of Manufactures, 1967—Special Report Series: Concentration Ratios in Manufacturing*. MC67 (S)—2.1.

I invite the Subcommittee's attention to Table 5 in Part 1 of the 1967 Census pamphlet on *Concentration Ratios in Manufacturing*.¹⁰ Look at what has been happening in some of the industries whose representatives have been begging this Subcommittee for legislation of the type under consideration.

One of the most earnest petitioners for the relief that this bill would provide has been Mr. Lynn Paulson representing independent dairies. Do the Census data support his claim that small business in his industry needs help? I would say they do.

In 1958, the year those two unfortunate Court decisions were made, there were 997 companies, nationwide, engaged in industry No. 2021, Creamery Butter. In 1967, the number of companies in that industry was 510. The share of the total shipments of that industry accounted for by the top 50 companies increased from 45 to 60 percent in the same period, and the share of the top four companies increased from 11 to 15 percent.

In industry No. 2024, Ice Cream and Frozen Desserts, while the total value of shipments was growing from \$878 million to over \$1 billion between 1958 and 1967, the number of companies in the industry dropped from 1,171 to 713, and the share of the top 50 companies climbed from 69 to 73 percent.

Look at industry No. 2026, Fluid Milk. In 1958 there were 5,008 companies sharing over \$5.8 billion worth of shipments, the share of the top 50 companies being 45 percent. By 1967 the value of shipments had increased to \$7.8 billion (plus), but the number of companies had dropped to 2,988, and the share of the top 50 companies had increased to 51 percent.

Or look at industry No. 2051, Bread, Cake, and Related Products. The Subcommittee is hearing this year from bakers, too, I understand. Do they have any real cause for concern? From the Census data, I would say that they do. In 1958 there were 5,305 companies accounting for shipments valued at about \$3.7 billion in this industry. In 1967 the value of shipments was up to more than \$5.1 billion, but the number of companies was down to 3,445. The share of the top 50 firms increased from 51 to 58 percent in the period, and the share of the top four firms from 22 to 26 percent.

The developments in many local markets are even worse than these aggregate national data would suggest.

The picture is not this bad throughout manufacturing, of course, the scene in Major Group 20, Food and Kindred Products, is certainly one of the worst. But a quick count of all the 230 different manufacturing industries for which both 1958 and 1967 comparable data are presented in Table 5 reveals that the business population declined in 131 of them—well over half. Without checking them all, I seem to note an almost universal increase in concentration at the 50-firm level. While there are many encouraging instances of slightly decreased concentration at the four-firm level, these are all too often balanced by increased concentration at the eight-firm level.

Mr. Chairman, there are many different reasons for the developments in manufacturing, not all of which it is within our power to do anything about. But I submit that we can do something about one clear cause of many small business mortalities: deliberate, willful predatory pricing by the financially powerful for the purpose of destroying a capable but financially weak competitor. One of the best things we can do about it, in my judgment, would be to enact S. 1457.

Not just the hopes and dreams and investments of small businessmen and women are lost in these alarming drops in the company population of industry after industry. The consumer also suffers, as choices diminish. And the quality of freedom, the quality of life in this country suffer, as opportunities to enter one business after another are closed out by the power of the deep purse.

As I said, I have been asking this Subcommittee to report legislation to undo *Nashville Milk* and *Safeway* for many years. It is my plan and expectation to be back in Washington next January, when the 93rd Congress convenes, and if need be, I shall be ready to run this course again. But why should it be necessary? I think the case for the bill—and all the necessary evolution in the bill—have been made.

I ask this Subcommittee, this Committee and the Congress to report and enact S. 1457 this year.

¹⁰ Id. at p. SR2-6, ff.

APPENDIX 1 TO STATEMENT OF SENATOR JOHN SPARKMAN

Following are the complete texts, with the numbers, dates of introduction, and cosponsors, of all seven of the bills introduced by Senator Sparkman from 1958 to 1971 for the purpose of "reversing" the Supreme Court's *Nashville Milk* and *Safeway* decisions. The texts are set forth to illustrate the efforts made by the bills' sponsors, over the years, to adopt good ideas and accommodate the criticisms and suggestions of opponents of the legislation. Especially to be noted is the significant, substantive difference in the currently pending bill, S. 1457, 92d Congress, from its immediate predecessor, S. 1494, 91st Congress, and earlier bills: the basic test for an illegality, which would support a civil action for treble damages or injunctive relief or both, is changed from proof of sales at "unreasonably low prices" to proof of sales "below cost."

S. 3079, 85TH CONGRESS, 2D SESSION

A Bill To amend the Clayton Act to permit the institution of actions for damages for violations of the Robinson-Patman Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of the first section of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by striking out the words "and also this Act", and inserting in lieu thereof the words "this Act; and the Act entitled 'An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes', approved June 19, 1936 (49 Stat. 1526)".

S. 725, 86TH CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act to permit the institution of actions for damages for violations of the Robinson-Patman Act, and for other purposes

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the first paragraph of the first section of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914 (38 Stat. 730; 15 U.S.C. 12), is amended by striking out the words "and also this Act", and inserting in lieu thereof the words "this Act; and the Act entitled 'An Act to amend section 2 of the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes', approved June 19, 1936 (49 Stat. 1526)".

S. 1935, 88TH CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act by making section 3 of the Robinson-Patman Act a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of section 3 of the Robinson-Patman Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a) is repealed.

SEC. 2. (a) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (38 Stat. 730 et seq.; 15 U.S.C. 12 et seq.), commonly known as the Clayton Act, is amended by inserting therein, immediately after section 3 thereof, the following new section:

"SEC. 3A. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that any discount, rebate, allowance, or advertising service

charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition or eliminating a competitor in such part of the United States; or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7, and 8".

SEC. 3. Nothing herein contained shall affect any pending prosecutions, or judgments or orders of any court issued and in effect or pending on appeal, based on section 3 of the Act of June 19, 1936, prior to the effective date of the repeal thereof by section 1 of this Act.

S. 995, 89TH CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act by making section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of section 3 of the Robinson-Patman Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C., title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), is repealed.

SEC. 2. (a) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (38 Stat. 730 et seq.; 15 U.S.C. 12 et seq.), commonly known as the Clayton Act, is amended by inserting therein, immediately after section 3 thereof, the following new section:

"SEC. 3A. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7, and 8".

SEC. 3. Nothing herein contained shall affect any pending prosecutions, or judgments, or orders of any court issued and in effect or pending on appeal, based on section 3 of the Act of June 19, 1936, prior to the effective date of the repeal thereof by section 1 of this Act.

S. 877, 90TH CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act by making section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act, in order to provide for governmental and private civil proceedings for violations of section 3 of the Robinson-Patman Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C. title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), is repealed.

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"SEC. 3A. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States or to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

"Any person violating any of the provisions of this section shall, upon conviction thereof, be fined not more than \$5,000 or imprisoned not more than one year, or both."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7 and 8".

SEC. 3. Nothing herein contained shall affect any pending prosecutions, or judgments, or orders of any court issued and in effect or pending on appeal, based on section 3 of the Act of June 19, 1936, prior to the effective date of the repeal thereof by section 1 of this Act.

S. 1494, 91ST CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act by making section 3 of the Robinson-Patman Act, with amendments, a part of the Clayton Act in order to provide for governmental and private civil proceedings for violations of section 3 of the Robinson-Patman Act

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 3 of the Act entitled "An Act to amend section 2 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes', approved October 15, 1914, as amended (U.S.C. title 15, sec. 13), and for other purposes", approved June 19, 1936 (49 Stat. 1528; 15 U.S.C. 13a), is repealed.

SEC. 2. (a) The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (38 Stat. 730 et seq.; 15 U.S.C. 12 et seq.), commonly known as the Clayton Act, is amended by inserting therein, immediately after section 3 thereof, the following new section:

"SEC. 3A. It shall be unlawful for any person engaged in commerce, in the course of such commerce, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7, and 8".

SEC. 3. Nothing herein contained shall affect any pending prosecutions, or judgments, or orders of any court issued and in effect or pending on appeal, based on section 3 of the Act of June 19, 1936, prior to the effective date of the repeal thereof by section 1 of this Act.

S. 1457, 92D CONGRESS, 1ST SESSION

A Bill to amend the Clayton Act by adding a new section to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That (a) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, as amended (38 Stat. 730 et seq.; 15 U.S.C. 12 et seq.), commonly known as the Clayton Act, is amended by inserting therein, immediately after section 3 thereof, the following new section:

"SEC. 3A. It shall be unlawful for any person engaged in commerce to sell, offer to sell or contract to sell goods below cost for the purpose of destroying competition or eliminating a competitor. The term 'cost' as used in this section means fully distributed cost, which includes the cost of producing or acquiring

or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business."

(b) Sections 11 and 16 of that Act, as amended (15 U.S.C. 21, 26), are amended by striking out the words "sections 2, 3, 7, and 8" wherever they appear therein, and inserting in lieu thereof in each instance the words "sections 2, 3, 3A, 7, and 8".

APPENDIX 2 TO STATEMENT OF SENATOR JOHN SPARKMAN

TO PROHIBIT SALES BELOW COST

Mr. SPARKMAN. Mr. President, I introduce, for appropriate reference, a bill to amend the Clayton Act by adding a new section to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor.

This bill, S. 1457, is a successor to S. 1494 of the 91st Congress, but is not identical. It has been considerably changed, in an effort to serve the major purpose of S. 1494 and earlier bills, while meeting some of the objections that have been raised.

The major purpose of this bill, is to give small business concerns a means of protection themselves against certain types of predatory pricing practices.

Those practices are loss-leader selling and selling below cost for the purpose of eliminating a competitor. These are practices which are against the interests not only of small business but of the consumer. Furthermore, these practices are now illegal under one or a combination of three existing statutes. The purpose of my bill is simply to make sure that the practices, when employed for motives already criminal under existing law, can be enforced directly, through private treble-damage and injunctive relief actions, by the "policemen" most interested in having them enforced: the small businesses that are injured.

EXISTING LAW

The three laws now on the books which can be employed against loss-leader and below-cost selling, under some circumstances, are:

First. Section 2 of the Sherman Act, which outlaws "attempts to monopolize";

Second. Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, which outlaws various forms of price discrimination; and

Third. Section 3 of the Robinson-Patman Act, which outlaws "sales at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Infractions of the first of these, section 2 of the Sherman Act, can be attacked by the Justice Department in either a civil or criminal action, or both; by the Federal Trade Commission—which regards all Sherman Act violations as automatic breaches of its own statute, the Federal Trade Commission Act, section 5; and by civil actions brought by private parties injured by the violations.

Infractions of the Clayton Act, section 2, can be attacked by the Justice Department in a civil but not a criminal action, by the Federal Trade Commission, and by injured private parties.

Infractions of section 3 of the Robinson-Patman Act are now subject to attack only by the Justice Department, as crimes.

ROBINSON-PATMAN ACT BACKGROUND

It was not always so. Between 1936, the year the Robinson-Patman Act was passed, and 1958, some 50 private businessmen filed civil actions against those who had injured them by violating the "sales at unreasonably low prices" ban of section 3. While some Federal courts refused to allow the suits, enough others did allow them to make private business, by 1955, the most important enforcers of section 3. Some of the cases are collected in Rowe, "Price Discrimination Under the Robinson-Patman Act," page 469, footnotes 97 and 99.

Then in 1958, civil enforcement of section 3 came to an end. That year in the companion case of *Nashville Milk Co., v. Carnation Co.*, 355 U.S. 373, and *Safeway Stores, Inc. v. Vance*, 355 U.S. 389, the Supreme Court entered 5-4 decisions holding that section 3 of the Robinson-Patman Act was not a part of the antitrust laws and therefore not subject to enforcement by civil actions filed by persons injured in their business by violation of its provisions.

ATTEMPTS TO OVERTURN CASES BY LEGISLATION

The Court's interpretation of congressional intent was a severe blow to this country's small business community, for it is well recognized that private civil actions are the principal vitalizing force of the Nation's policy against monopoly. Three days after the decision came down, I introduced a bill to make section 3, by express enactment, a part of the antitrust laws and thus subject to civil enforcement.

Over the years, that bill and its successors have had much attention but none has made significant progress down the tortuous legislative path to enactment. Those who see themselves as prospective defendants under the proposed new law have had more persuasive power and influence with the Judiciary Committee than those who see themselves as prospective plaintiffs.

In my judgment, this is unfortunate. I think the perils and pitfalls of providing for civil enforcement of the statutory ban on predatory pricing have been vastly overrated and the advantages overlooked.

The difficult situation of small business concerns in industries in which predatory pricing is a way of life continues, meanwhile, unabated, and a dreadful toll has been taken. There are today, for example, only about a tenth as many independent dairies and independent bakers in existence as there were at the end of World War II.

SIMILARITIES AND DIFFERENCES IN BILLS

The bill introduced today resembles S. 1494, 91st Congress, in that both bills have as their main purpose the express authorization of civil actions to be filed by those injured by predatory pricing against those who practice such pricing. Both bills are aimed at the loss leader and below-cost selling. Both bills would allow the plaintiff to seek and, if successful, obtain treble damages injunctive relief or both. There the similarities end.

S. 1494 would have repealed section 3 of the Robinson-Patman Act and reenacted as a new section 3A of the Clayton Act one provision of section 3: the ban on sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." The new bill does not repeal section 3, and hence leaves alive the little-used criminal sanctions it contains.

S. 1494 used the section 3 language just quoted to describe the prohibited conduct. The new bill uses different and more specific language. It prohibits sales "below cost for the purpose of destroying competition or eliminating a competitor."

A ground for objection to S. 1494 was that the language, "unreasonably low prices," was allegedly too vague. The new bill meets that objection by stating exactly what kind of prices are prohibited, namely, those that are "below cost." The term "below cost" is defined in language borrowed substantially verbatim from the opinion of the Eighth Circuit Court of Appeals in the leading case involving enforcement of section 3 of the Robinson-Patman Act as a criminal statute, *National Dairy Products Corporation v. United States*, 350 F. 2d 321 329, (1965).

As that case makes clear, however, mere proof of sales below cost will not alone suffice to establish liability by a defendant to a plaintiff: there must also be proof of the predatory intent, the "purpose" to destroy competition, or eliminate a competitor.

As the law stands now, we have this anomaly: below-cost selling with predatory intent is a Federal crime, for which the offender can be fined or even imprisoned if the Justice Department elects to prosecute and a court convicts. But the person injured by the crime, the businessman destroyed in his livelihood, is given no remedy. He cannot sue the offender either for damages or injunction. My new bill would end the anomaly. It would give the small businessman the right to sue his predatory competitor, and if he could prove below-cost selling and prove the "purpose" of that pricing was destruction of competition or a competitor, he could obtain an injunction and treble damages. This bill will restore force and meaning to an important part of the Nation's anti-monopoly law.

The forces pushing us toward concentration in industry after industry in our economy are very great. Some of them may be unavoidable; but one such force, the occasional practice of deliberate predatory pricing with the express purpose of destroying competition, is not in that class. It can and should be checked; yet

it is not feasible or even, perhaps, desirable for the Justice Department to initiate a criminal prosecution every time the existing law against such pricing is broken. Unleashing the power of private civil enforcement will bring vitality to an important part of our national policy against economic concentration and monopoly power. To that end, this bill is dedicated.

APPENDIX 3 TO STATEMENT OF SENATOR JOHN SPARKMAN

ARTCRAFT CAMERA SHOP,
Mankato, Minn., January 17, 1972.

Senator SPARKMAN,
Senate Office Building,
Washington, D.C.

DEAR SENATOR SPARKMAN: I'm concerned about your bill S. 1457 regarding adding a section designed to prohibit below cost selling *for the purpose of destroying or eliminating competition*. Do you really feel that a business that is yet functioning has a chance in hell of *proving* the underlined? If you are truly concerned why don't you state it, "for other than the legitimate reduction of temporary overstock". The overstock "routine" is the explanation a price cutter will give—other than so called "meeting competition". Trying to prove intent in that area of "destroying competition" should be like trying to prove Christ walked on water to Arabs. It's possible but I sure wouldn't like to bet anything valuable—like one's business.

I truly feel a short time spent with some business men could reshape the bill so it would be effective. As it is proposed, I can only feel you have been duped or are part of the process.

Most sincerely,

LEE A. NORDGREN.

Senator HRUSKA. We are sorry he is not here. If during the development of this legislation it will be thought wise to seek his advice and counsel and further explanation, he certainly will be informed and an effort will be made to accommodate his convenience for personal appearance.

Senator GURNEY is here, a valued member of this subcommittee. Have you a statement to make at this time, Senator?

Senator GURNEY. No.

Senator HRUSKA. We thank you for being here.

The first witness will be Lynn Paulson, general counsel, National Independent Dairies Association, of Washington, D.C. Mr. Paulson is a consistent and persistent advocate of the type of bill which is before us today. We welcome him here and will ask him to identify those who appear with him.

STATEMENT OF LYNN PAULSON, GENERAL COUNSEL, NATIONAL INDEPENDENT DAIRIES ASSOCIATION, WASHINGTON, D.C.; ACCOMPANIED BY ALBERT GASSOR, PURITY DAIRIES, NASHVILLE, TENN.; AND JAMES PAGE, PAGE MILK CO., COFFEYVILLE, KANS.

Mr. PAULSON. Thank you, Senator Hruska.

At the far right is Mr. Albert Gassor, who is from Purity Dairies, Nashville, Tenn., also the president of the National Independent Dairies Association. Next to me at my right is Jim Page, president of the Page Milk Co., Coffeyville, Kans., who is chairman of our legislative committee.

Senator Hruska, I have a prepared statement to read. It is not long and I would like the privilege of reading it. Then I would like to address myself briefly to the three propositions that you mentioned

in your opening statement. Then, with your permission, I would like to call upon Jim Page and Mr. Gassor to make any remarks they would like to make.

Senator HRUSKA. You may be seated, Mr. Paulson, if you will feel more at ease.

Mr. PAULSON. Thank you.

Senator HRUSKA. The record should show, Mr. Paulson submitted in advance as required by the rules of the committee, copies of his statement. We thank him for that.

You may proceed with the statement, Mr. Paulson.

Mr. PAULSON. S. 1457 is a bill to place a provision in the Clayton Act to prohibit predatory below-cost selling.

The Clayton Act now contains provisions prohibiting price discrimination, mergers, exclusive dealing and interlocking directorates. We think this provision to prohibit loss leaders and other forms of below-cost selling, which like those practices already prohibited, have a dangerous tendency to injure competition and treats monopoly, should be added.

Over the past two decades a rather fundamental change has taken place in the business structure of this country. Nearly all businesses once were single line businesses. Today a great many companies are diversified.

In a business structure where each company has to depend upon one line for profit, there is a built-in damper on below-cost selling. In a business structure where companies are diversified, there is not. A common treasury for a number of product lines makes below-cost pricing available as a tool to reach an overall profit goal.

For a long time we have seen retail stores, who handle many items, sell one item at a loss in order to sell others at a profit. Now we are seeing diversified manufacturers and processors using this anticompetitive practice. For example, in the *FTC National Dairies Jelly* case it was disclosed that National Dairies sold jellies below cost to the tune of a million dollars to obtain a desired share of certain metropolitan markets, *National Dairy Products Corp. v. FTC, CCH, T.R. 1969*. One case free for one purchased was the device used.

We see from the financial reports of diversified companies they lose on two or three lines but make an overall profit. It is apparent they do not restrict themselves to profitable prices on the lines that are not self-supporting.

We must have a curtailment of pocketbook competition. It is undermining our competitive system. Competition which centers around the size of bank rolls forecloses competition grounded on merit. Pocketbook competition spells the end of the ingenious, dedicated entrepreneurs that have been the backbone of our competitive system. If we allow predatory pricing to continue it will be only a matter of time until bureaucratic control of bigness is instituted. Then it will be too late to save our way of life. Our competitive system is what distinguishes us from other nations today. We are a land of opportunity and we should remain that way. In the past we have taken steps to improve the rules of the game and we should continue to do so today.

One of our tasks today is to show this committee how serious the problem of predatory pricing is.

I have in my hand copies of an ad that ran in an Albany, N.Y. paper, the Times Union, on December 25. I would like to hand the committee a copy of it.

(Copies were distributed.)

Mr. PAULSON. It is an example of below-cost pricing by using a product as a loss leader. A retail store advertises grade A fresh milk at 86 cents per gallon. The ad carries the notation, "This price lower than cost." When they sell below cost in New York State they have to so state. New York has a statute to that effect.

This ad was sent to me by a full service dairy processor doing business in the Albany trade area. A full service dairy processor is one who serves hospitals, schools, restaurants and operates home delivery routes as contrasted with the retail food chain processors who sell only through their captive stores.

The prevailing gallon price for milk in Albany when the ad was run was \$1.18 to \$1.22, according to the USDA fluid milk and cream report released December 21, 1971. This ad hurts competitors trying to compete fairly in several ways.

It makes consumers suspicious of prevailing prices. They see a price tag of 86 cents on a gallon of milk and they wonder about the \$1.20 price they have been paying.

The truth is that margins for dairy farmers and dairy processors are very low. Dairy farmers have a low rate of income and processors struggle hard to make a 1 or 2 cent margin on a half gallon. If dairy processors were making good profits we wouldn't have the track record we have which is that in 1950 we had 5,000 dairy processors and today we have less than 500.

The impression created by the ad that milk prices are unduly high is false. The ad diverts trade from the channels established by fair pricing, quality and service. This is serious for full service dairies. They cannot continue to do business in markets where prices are not the result of fair competition.

Not only does an ad like this divert trade at retail but it causes wholesale customers competing with the store running the ad to request lower prices so that they can be competitive. If a local dairy doesn't respond, it risks losing customers. If it does respond, it loses capital.

Loss-leader and below cost selling of dairy products is widespread. In preparation for this hearing I asked members of NIDA to send in examples. They came in from almost all States. Here is a collection representative of the whole picture around the country. I would like to have it included in the record.

Senator HRUSKA. It will be accepted for the committee's files.

Mr. PAULSON. Thank you, sir.

All ads feature milk or other dairy products at a price much lower than the prevailing market price. Some limit quantities, in some the price is conditioned to the purchase of other items totaling \$5, more or less, in others a coupon is required, many have a time limit, some prescribe other limitations or conditions. On their face they exhibit the opposite of sound and fair merchandising. Loss-leadering is a practice with which those desiring to compete fairly on a merit basis should not have to contend. I doubt that this committee will hear loss-leadering or other forms of predatory below-cost selling defended.

I think instead the committee may hear it contended that existing law is adequate to deal with the problem. Such is not the case. There is a need for S. 1457.

Section 2 of the Clayton Act, which prohibits discriminatory pricing, reaches only discriminatory pricing. Most retail pricing is not discriminatory. All customers in a given store or group of stores get the same price.

Lower prices in one locality than another so-called area price discrimination is technically prohibited by section 2 of the Clayton Act. Practically, it is most difficult to build a case that meets the tests prescribed in the law.

No protection is provided by the price discrimination laws against so-called postage stamp pricing, one price for the Nation, a price that now has wide usage.

Section 2 of the Sherman Act prohibits attempts to monopolize. Since the Sherman Act has been law since 1889, the meaning of section 2 is fairly well defined by case law. It is not applicable to the kind of below-cost pricing that is driving independent businesses to the wall. One has to be attempting to gain a monopoly over one product in the entire United States to run afoul of section 2 of the Sherman Act.

Section 5 of the FTC Act was enacted to get at monopoly in its incipiency. The FTC can declare those practices which tend to hurt the competitive system unfair to the competitive system and therefore unlawful. But only the FTC can do this. The FTC Act is not an antitrust statute enforceable by suits for injunction or treble damages. FTC has not seen fit to outlaw the loss-leader practices or pronounce below-cost pricing at wholesale an unfair method of competition. Predatory below-cost selling continues to be a major contributing cause of the erosion of our competitive system. We need a law specifically prohibiting below-cost selling which can be privately enforced.

The third provision of section 3 of the RP Act which prohibits predatory selling at unreasonably low prices, which is on the statute books, became a dead letter when the U.S. Supreme Court declared in 1958 that it was not an antitrust statute.

In this statement I use the term predatory below-cost selling. The actual language in S. 1457 is:

It shall be unlawful for any person engaged in commerce to sell, offer to sell or contract to sell goods below cost for the purpose of destroying competition or eliminating a competitor.

Thus below-cost selling is unlawful when there is an element of predation present.

On the other side of the coin from those who may say existing law is adequate to deal with predatory pricing, there may be some who feel that S. 1457 is not broad enough to close the loophole that exists. Some may feel it will be difficult to make a case under a provision which requires proof of some predation.

I don't feel this way. I think the law is pretty well established that a businessman is presumed to know the consequence of his pricing actions and that intent to destroy competition or eliminate a competitor can be inferred from his acts. This, of course, would be a rebuttable presumption.

But if I am in a market where the prevailing price for milk is \$1.20 per gallon, and I offer it for sale at 86 cents per gallon, a below-cost price, I full well know normal competition is going to be destroyed and individual competitors hurt. I am guilty of offering to sell below cost "for the purpose of destroying competition or eliminating a competitor," in short, guilty of predatory below-cost selling.

I would hope to see case law under S. 1457 developed so that it becomes clear to all that loss-leadering and other forms of below-cost pricing have gone the way of the horse and buggy. Consumers are telling us they want more honesty and fairness in the marketplace. They are tired of the tricks of the trade.

When this bill becomes law, I would expect to see a series of three or four cases brought which will result in establishing the meaning of the law and thereafter a common acceptance of the proposition that business will be done with due regard for the American ethic of fair play.

There is one last subject I would like to touch upon and that is the matter of the applicability of a Federal law on the subject of predatory pricing to the entire problem of predatory pricing. Federal law applies only to interstate commerce. Admittedly much predatory pricing occurs in intrastate commerce. To insure the end of predatory below-cost pricing, it will be necessary for States to enact a State S. 1457. Many States already have sales-below-cost laws. It will not be difficult to secure passage of companion laws in those States who don't have them, once Congress has declared its will by enacting a Federal law. When there is uniform coverage of the subject of predatory pricing, State and Federal, it will be a simple matter to effect enforcement.

By passing this bill Congress will be doing more than eliminating a practice which is undermining our competitive system. It will be reasserting its will to preserve the competitive system, and keep this country on the right road.

Thank you.

That is the end of my prepared statement, Senator.

Senator HRUSKA. Thank you, Mr. Paulson.

Mr. Bangert is general counsel for the Subcommittee on Antitrust and Monopoly. I will ask him if he has any questions, either on his own behalf or on behalf of Senator Hart. If so, he may proceed.

Mr. BANGERT. Thank you, Mr. Chairman.

Mr. Paulson, on page 6 of your statement, at the bottom of the page, you indicate that proof of the violation of this proposed bill would result merely from a competitor selling into a market below the prevailing price of milk and that in and of itself would, as I understand it, suffice the burden of proof for the purpose of destroying competition or eliminating a competitor.

Mr. PAULSON. I think it would create a rebuttable presumption that injury is present, yes.

Mr. BANGERT. Well, now, that presupposes, does it not, that the \$1.20 per gallon price being offered by everybody else is a price that is a reasonable price?

Mr. PAULSON. Yes. I think that is a fair presumption, because as yet, until they drive out the rest of the independent dairies, you do have competition in the milk market. Milk is a competitively priced

product and prices which are prevailing in markets today are therefore prices determined by free and fair competition. So I think that it is fair to assume that that is a nonmonopolistic and fair price, a price which businessmen have to have to operate their businesses.

Mr. BANGERT. So you do not envision then that in a suit under this bill, you would have to go further and find actual memorandums or other indications of intent to destroy competition?

Mr. PAULSON. No, I do not think that we would.

Mr. Bangert, you know from the cases that were tried under section 3, prohibiting sales at unreasonably low prices, there were some 12 or 14 cases brought privately which got into the books, went as high as the circuit court. You will recall in those cases, a position of rebuttable presumption was accepted by the courts. When a coal company, for example, sold coal very much below what the court recognized as being a competitive price, they said the businessman would have to overcome the rebuttable presumption that he was not doing it to destroy competition.

Senator HRUSKA. Would counsel yield for a question on that point?

You referred, Mr. Paulson, to 12 or 14 cases. What kind of cases were those?

Mr. PAULSON. They were private suits, Senator Hruska, by individuals who felt they had been injured by sales at unreasonably low prices.

Senator HRUSKA. And were they brought under section 3 or were they brought under section 2, or both?

Mr. PAULSON. Section 3, Senator.

Senator HRUSKA. Exclusively under section 3?

Mr. PAULSON. Those that I have that flash across my mind, some five or six, were exclusively under section 3; yes.

Senator HRUSKA. We had previous testimony here which indicated that there were only three cases, as far as I remember, that were brought solely under section 3. The rest of the cases, some of which you cited, apparently in support of your present statement, or a similar statement, had a joinder of section 2 and section 3. And, as was true in the *National* case, the real point of issue there was whether or not there was a case to be made out under section 2. Then there was a lapse over into an adjudication of section 3.

That is why I asked the question, whether those 12 or 14 cases were based exclusively on section 3 or whether there was a joinder.

Mr. PAULSON. May I just amend what I said. Technically, the attorney drawing the complaint may very well have put in a count under two, Senator, but the case turned—it was not one of those, as we lawyers do, we sort of drop one count and proceed on the other. My point is that I have in mind a certain number of cases that the trial proceeded upon the section 3 count rather than on the section 2 count, you see.

Senator HRUSKA. Well, Mr. Rowe, for example, testified, and I put it here in this record not to be argumentative, but because it is in line with the statement you have made, and this would be a good place to place other views on the subject. You testified in the 1965 hearings, counsel will provide the page number so that they will be specific.

In most instances between 1936 and 1958 and the cases which were pleaded under Section 3, had a companion count thereof, of Section 2 of the Clayton

Act. Section 3 all by itself was utilized in only three cases. Under present law and Section 2A of the Clayton Act, price discriminations of any type were actionable only if they relate to discriminatory goods, prices for goods of "like grade and quality" and are unlawful only if shown to be potentially injurious to competition. Also, as background by virtue of express provisos, a seller may legally justify *prima facie* unlawful prices by showing his cost economies or by demonstrating his necessity of meeting competitor prices and would (not clear) so cut off Clayton Act Section 2 as express statutory authorization.

And in due time I want to ask you a question on that statement. But I just wanted to clarify this rather offhand reference to 12 or 14 cases. Because, unless you want to furnish us a list, which will be a list of those founded and based only on exclusively section 3, then we will have to accept Mr. Rowe's testimony that there are only three such cases.

Mr. PAULSON. Fair enough. I would accept it, because chances are when Fred Rowe analyzed it he found the two points. I will accept his statement.

For the purpose of what I am trying to argue, Senator, I will accept his statement because I have no reason to quarrel with it and it does not contend the point I am trying to make.

Senator, the point I am trying to make is that the country today needs statutory law, such as we are advocating, S. 1457, to contend with what is happening in the marketplace, this loss-leading, this man in Albany selling at 86 cents and saying this is below cost.

Now, he, it seems to me, it is fairminded to say that he is injuring, he is wittingly, knowingly, endangering and injuring competition and threatening to eliminate a competitor. It seems to me that anyone that throws a below-cost price in knows he is upsetting the machinery of fair competition. To answer Mr. Bangert, which is what I am trying to do, I think the courts will accept what I am arguing.

Senator HRUSKA. Well, I thank counsel for allowing me to ask that question. I will turn the questioning back to him.

Mr. BANGERT. Thank you, Senator.

Senator HRUSKA. I will come back to the point you now make because there is something further to be said on it.

Mr. BANGERT. On the question of loss-leaders and from your statement, it would indicate that you clearly feel that one of the problems that your group is suffering is the loss-leader problem. You mention this Albany market selling at 86 cents per gallon.

As a lawyer, I am wondering, how do you make your pattern in a loss-leader? It is my understanding, loss-leaders for the most part are items that are offered for short periods of time and then withdrawn. The milk may be used 1 week and maybe the next, bread will be used and the next, something else will be used. I guess the question that I have is how would you as a lawyer, using this bill, be able to establish a pattern of loss-leading, sufficiently to show that this was sold below cost for the specific intention of eliminating your milk people as a competitor?

Mr. PAULSON. In the collection that I handed out for inclusion, Mr. Bangert, there are some patterns drawn. There is evidence there that some companies in various parts of the country pursue this practice year in and year out and therefore one could, as an attorney, draw a picture of that kind of behavior for that company. Some stores down in the Southwest and others are shown. Even the Kroger Co. has

a record of below-cost pricing through the years, which an attorney could identify in the market.

But, Mr. Bangert, I would even argue and do argue that you do not need a very long pattern to make yourself a case. If this ad runs in Albany as it has now for 6 months off and on, I would submit that that man is guilty of predation, predatory pricing, and that he is injuring the competition that is in the market, he is frustrating it, he is destroying it, suppressing it, and so on, those words that we need, and tending to eliminate competitors by this act. I would argue, and I would think I could win a case on that.

Mr. BANGERT. You would not see a necessity in your joining with, say, people that are selling eggs or people that are selling bread and trying to form a total pattern; you think you could go ahead on your milk alone?

Mr. PAULSON. I do, but I would certainly trace the man's competitive behavior in the marketplace and if he is throwing eggs out and bread into this below cost, yes, I would say his competitive behavior is suppressive of the competitive system, injures the competitive system, and builds a case against him. Yes.

There is nothing, you see, in my thinking, and I as you know, have had about 40 years of experience in this game first at FTC and now with this industry. There is nothing in my experience that shows anything procompetitive about loss-leading. It is anticompetitive, period. Congress has said so twice. The Federal Trade Commission has said so. I think loss-leading is indefensible from the standpoint of the health of our competitive system and I would like to present a case to the courts on it.

Mr. BANGERT. I guess that brings me to my next question. Wherein does the consumer interest lie? If I can go to this market and buy a gallon of milk for 86 cents, when other people are selling it for \$1.20 per gallon, I, as a consumer, do I benefit from this ability to purchase?

Mr. PAULSON. Temporarily, as Justice Brandeis wrote a long time ago, and I used it in a previous statement. Temporarily you benefit but you are helping build monopoly and imprisoning yourself and your sons. That is the short of it. That is what Brandeis said; he said that in 1914. That is what this Congress said and that is what the Supreme Court has said, that it is a fraud, a delusion, and hoax upon the people. So this man is hurting consumers not helping them.

Mr. BANGERT. So you think the short-term gains I might make would be written out in a hurry, once the independent was destroyed?

Mr. PAULSON. Yes, I do, definitely. That is demonstrable.

Mr. BANGERT. Do you have any examples of why this has happened, where predatory pricing does run out an independent competitor and then we see increased prices?

Mr. PAULSON. Mr. Bangert, I have a chance to study that very carefully because in our files we had the price war file. For 10 years I have the record of price wars.

I think in no case has a price war not caused a casualty. Sometimes it is two or three. But a price war drives, depending upon its depth, drives one or more dairies out. Loss-leading leads to warfare in the marketplace and someone becomes a casualty if it runs beyond a weekend, let us say.

So, yes, we can demonstrate. But, you know, the solid proof, if a man goes out of business, someone may say, well, he didn't run a good

shop or he would have been able to stand it. So you have that element of doubt about it. But it drives out competitors, yes.

You will hear from the gentlemen that are with me today, the men who are running the plants, what it means to them to have to contend with this kind of a practice.

Mr. BANGERT. There has, and I assume your answer is going to be in the positive, there has, as I understand, been a definite increase in independent dairies, rather decrease in independent dairies over the last 5 or 10 years; is that correct?

Mr. PAULSON. I think there were 5,000 viable and full-service independent dairies in 1950. I think there are no more than 500 today. So that one in 10 are alive and they are going out at the rate of 40 to 50 a year now.

Mr. BANGERT. The ones that go out of business, are they being acquired by chains or just failing altogether, or is there a pattern?

Mr. PAULSON. Well, some quit processing and become a distributor, either for a national or regional dairy. Some, just like Thompson's here in town did, just sell all of their assets and quit. Some go bankrupt and then it is just a forced sale.

You see, their greatest struggle is for efficiency and they are very intelligent about how to run their plant. If they see that they could be more efficient by putting two operations together, they put the two operations together and blend their routes and do everything to effect efficiency.

Down in the southern area of Texas, they recently did this with Knolle Dairy in San Antonio, and Hygeia in Harlingen. They are going to work toward the greatest possible efficiency. But I talked to the President of the new firm and he said they are under the gun right now at 76 cents a gallon, milk brought in from some far distance and their efficiency would not save having to sell below cost. No matter how efficient they are, if they run out of capital they are in trouble.

Mr. BANGERT. The argument we have heard before and one I am sure we will hear a lot more of later this year, with respect to exclusive territorial allocation bill is that when independent dairies are driven out of business, this in turn hurts many smaller "Mom and Pop" stores, hurts many hospitals, school programs, that the independents are servicing, because the chains would not be willing to do this small type of business. Does this make any sense in the case of milk?

Mr. PAULSON. Yes, it does, but my executive committee members are listening and I am going to ask them. They know more about it than I do and can be more specific. I am going to ask them. I am hoping that they will each get a chance to say a few words. I am hoping one of them now will pick up your question and give you a factual answer rather than a secondhand one I would give you, if that is all right with you.

Mr. BANGERT. I have only one more question I would like to follow up on. On page 7, you say "many States already have sales below cost laws." I am wondering how effective these are in those States that already have some type of statute?

Mr. PAULSON. They are not effective, largely for the reason that there is no interstate law. A State sale-below-cost law is very difficult to enforce because jurisdiction is limited.

We must have, as I said in my statement, you must have a Federal law supplemented with a State law. We do it in the law of contracts, we do it in the law of torts. We must do it in antitrust law. Otherwise, you know and I know, from experience that FTC is constantly unable to do the job simply because you did not have control of what was going on within the State.

So first we need this law. Then we will ask the legislatures to copy this into the State code and we will have one uniform law. Why we should not have uniform laws in antitrust is beyond me. We have them in everything else and the argument is made for them. So what I am trying to do here is start an antipredatory below-cost position and then we will carry it around the Nation and we will be rid of this and we will have a basis again for the ingenious, entrepreneur that made this country great.

Senator HRUSKA. Would counsel yield on that point?

The fact that these State laws apply only to interstate commerce is not the greatest defect, is it? In a little bit we are going to hear testimony from Mr. Greenwald and Mr. Kelly. They both indicate, I do not want to speak for them, but I read their statements and I do not think they will want to repudiate them; they said the great difficulty is proving intent or purpose of destroying competition. And that is also in your bill, the factor of destroying competition.

Would you address yourself to the difficulty in the prosecution of this kind of case under State laws with reference to proving the intent to destroy competition. We do not have to put it in terms of intent, you have to prove more under your bill than simply selling below cost.

Now, will you address yourself to the difficulty in State cases of proving such cases when it comes to the matter of establishing intent or purpose of destroying competition?

Mr. PAULSON. As you probably are aware, Senator, customary language in the State laws, 26 or 28 of them, some 14, I believe, have the language in; "For the purpose or with the effect of injuring competition."

I think that is a familiar phrase. I do not want to be held to my 12 or 14 number; it is used in a lot of State laws. Let me be general about it: "For the purpose or with the effect of injuring competition."

Now, those that have that rather than the other language, which is more like "intent to injure" and not the effect, you see, it is selling below cost with the intent to injure, those are harder to enforce. But these States that have this, "For the purpose or with the effect," none of them have been very effective, Senator.

There is not a good track record on enforcement of these laws, but that is not because those with the law for the effect cannot, when they get into court and when they do go into court, cannot enforce it. It is rather, sales below-cost laws have been rather meaningless in the States for the reason that the State attorney general is entrusted with the enforcement, or the State secretary of agriculture, in some cases. They are understaffed, they cannot get to the work. There are some people that do not have the disposition to enforce it. These laws have not been vigorously enforced. Therefore, we do not have a good case record to look at as to what "or with the effect" means by the judges.

We have very little help on that, Senator.

Senator HRUSKA. You have answered by question by elaborating very, very profusely on many reasons why the State laws are not ef-

fective. My purpose in asking this question was to determine whether or not the defect in State laws is simply and solely because they can deal in intrastate only and not in interstate shipment. And you answered the question.

Mr. PAULSON. I did not intend to be rambling. First, my recollection about one more reason that the State laws have not ended the problem, and that is there is no private enforcement in the State laws. It is left solely in the hands of the State officials, the bureaucracy, and they do not spend their time on it.

So this bill differs from those State bills, Senator, because this would be an antitrust law. We would not have to wait on the FTC or the Department of Justice. We would simply, when we thought we could prove predation, we would pay the bill and go to court.

I hope I have met the point, or at least I wanted to answer the point of the question you are asking me.

Senator HRUSKA. Thank you.

Mr. Paulson, on page 2 of your report, I think it is, you say: "We must have a curtailment of 'pocketbook' competition. It is undermining our competitive system."

I do not know what you mean by "pocketbook" competition. If it is selling below cost, that is one thing; is that what you mean?

Mr. PAULSON. That is included in pocketbook competition, yes, sir.

Senator HRUSKA. And yet under your bill, you go beyond selling below cost; you say that it will be unlawful to sell below cost for the purpose of destroying competition or eliminating a competitor. So you do not stop right there, do you? You do not say we make illegal selling below cost, period. You do not do that.

Mr. PAULSON. No.

Senator HRUSKA. So you do go to the further step of saying, selling below cost is not enough. Selling below cost that is for the purpose of destroying competition or eliminating a competitor, that is unlawful?

Mr. PAULSON. Yes, sir, that is right.

Senator HRUSKA. As a matter of fact, there are many instances of selling below cost which are perfectly legitimate and they are for a number of reasons. Isn't that true?

Mr. PAULSON. Yes, sir.

Senator HRUSKA. I would suggest that there be placed in the record at a suitable place, perhaps at the conclusion of the testimony of Mr. Paulson, excerpts from the article in the *Harvard Law Review* by Donald F. Turner, former head of the Antitrust Division of the Department of Justice. The article was written in May 1965. It appears, excerpts from it appear at page 184 of the 1965 hearings. And, of course, he goes into that quite extensively and points out many, many instances where it is not only legitimate, but where it is inevitable that some selling under cost must be engaged in.

Mr. PAULSON. I still wear a bathrobe, Senator, that I bought in Berlin in 1945 from the Army for \$4.98. They sold it below cost because we were leaving Germany and coming home. It is a legitimate reason for the Army to sell under cost. That does not undermine the competitive system. But loss-leading undermines the competitive system.

Senator HRUSKA. There are many, many examples, of course, and they are justified. Probably they are inevitable and to deny them would be a greater harshness and a greater harm, not only to the producer and the seller and the retailer, but also to the consumer.

Mr. PAULSON. Yes, sir.

Senator HRUSKA. So I just wanted to establish this point.

Mr. PAULSON. Yes.

Senator HRUSKA. In the 1969 hearings, John Bodner, on behalf of the American Bar Association, testified. And there will be inserted in the record, following the insertion of the Turner insert, the pertinent portion of his statement dealing with this particular part. It appears in the 1969 hearings at page 98, in the second to the last full paragraph which starts out like this:

Nor is "below cost" a protest to apply as FTC has recognized sales below cost can be a legitimate method of competition, depending on circumstances.

Then we will insert in the record at that point his testimony for the balance of that page, and page 99.

I think that will set out some of the classic examples and describe thereof where below-cost selling is not only tolerated but it is inevitable.

(The insert follows:)

EXCERPT FROM TESTIMONY OF JOHN BODNER, MEMBER OF AMERICAN BAR ASSOCIATION, ANTI-TRUST SECTION, SUBMITTED TO SENATE ANTI-TRUST AND MONOPOLY SUBCOMMITTEE, SEPTEMBER 23, 1969

Nor is "below cost" a proper test to apply. As the FTC has recognized, sales below cost can be a legitimate method of competition, depending on the circumstances.²² On the other hand, even non-discriminatory, non-below-cost pricing may, in some circumstances, be an unfair method of competition.²³ The definition of "cost" itself has proven to be highly elusive to our courts. There is an indication that the Supreme Court defines "costs" as full distributed costs, but there are difficult allocation problems where costs are joint,²⁴ and thus a strong argument that a marginal cost concept is more appropriate.²⁵ Additional problems are present where a seller arrives at lower fully-distributed costs by avoiding development expenses, or where they result from increased sales due to lower pricing.²⁶ We do know that cost is not, as the plaintiff unsuccessfully suggested in the *Gold Fuel* case,²⁷ a competitor's cost. If such reasoning were allowed, it would make every bid lower than a competitor's cost a sufficient basis for a finding of attempted monopoly.²⁸ Rather, such a claim points out that below-cost sales, as such, have been held to be proper when made in furtherance of a "legitimate commercial objective."²⁹

Neither a "legitimate commercial objective" nor "depending on the circumstances," however, is in itself a useful test as to the "unreasonableness" of a seller's low prices. The objectives which have been said to be legitimate and the circumstances which have been said to be exculpatory are so many, diverse and occasionally conflicting, as to make each case *sui generis* and as to defy prediction. Thus, a "legitimate objective" has included liquidation of excess, obsolete or perishable merchandise,³⁰ close-out sales, stock reduction sales, promotional sales,³¹ meeting the lawful, equally low price of a competitor,³² and preventing

²² FTC Adv. Op. No. 249 (May 21, 1968), CCH Trade Reg. Rep. ¶ 18,350.

²³ *The Quaker Oats Co.*, Dkt. 8112, p. 5 (Opinion dismissing, Nov. 18, 1964).

²⁴ *Ben Hur Coal Co. v. Wells*, 242 F. 2d 481 (10th Cir. 1957), *cert. denied*, 354 U.S. 910 (1957).

²⁵ *National Dairy Products Corp. v. United States*, 350 F. 2d 321 (8th Cir. 1965); cf. *American Commercial Line, Inc. v. Louisville & N.E.R.*, 392 U.S. 571 (1968).

²⁶ *Ben Hur Coal Co. v. Wells*, 242 F. 2d at 484-85.

²⁷ *Gold Fuel v. Esso Standard Oil Co.*, *supra*, n. 21.

²⁸ *Id.* at 64.

²⁹ *United States v. National Dairy Products Corp.*, 372 U.S. 29, 37 (1963).

³⁰ *Id.*

³¹ FTC Adv. Op. 305 (November 12, 1968) CCH Trade Reg. Rep. ¶ 18,578.

³² *United States v. National Dairy Products Corp.*, *supra*, n. 29.

a competitor who has stolen the seller's customers and employees from engaging in unfair competitive methods.³³ It has also been found to include increasing sales with the result of lower unit costs, retention of the seller's proportionate share of customers, maintenance of a certain volume of sales,³⁴ and selling a particular product in volume.³⁵

The definition of justifiable "circumstances" is equally broad. It can refer to an oversupplied market, seasonal conditions, size of package, and a new seller's possession of less customer acceptance than its competitors as justification for the use of below-cost sales for a limited period of time.³⁶ In addition, acceptable "circumstances" for below-cost pricing have allowed promotional offers under a myriad of varying conditions.³⁷

Finally, a "purpose" to destroy competition or eliminate a competitor is not a useful test when compounding the vagueness of the forbidden act of sales at "unreasonably low prices". The required element of "purpose" could be supplied, as under Sherman Act Section 2 monopolization cases, by "the mere intent to do the act",³⁸ simply because it would "make nonsense" of the statute to conclude that a seller sets a lower price for a reason that would not be harmful to a competitor to an extent that could lead to his elimination.

In the *Grinnell* case,³⁹ once it was shown that defendant had a monopoly market share, the trial court proceeded on an "acknowledged" rebuttable presumption of the necessary element of deliberateness to find monopolization. Although the Supreme Court in that case and lower courts in other Sherman Act cases have more uniformly required plaintiffs to show the element of deliberate purpose,⁴⁰ the "purpose of destroying competition or eliminating a competitor" under S. 1494 would clearly not require a showing of such actual consequence, and the "purpose" to do so could be supplied simply by an objective test that men intend the natural consequence of their acts.

Thus, because of the vagueness, ambiguity and even anticompetitive effects of S. 1494, it would not accomplish its intended purpose. Absent an adequate test, counsel cannot advise and businessmen would be unable, however willing, to comply with this provision in the volatile area of pricing.

Moreover, this inherent and inescapable ambiguity of S. 1494 makes its constitutionality dubious. Contrary to some assertions, the Supreme Court's *National Dairy* decision in 1963 did not settle all problems of Section 3's constitutionality. In that case, the Supreme Court's meticulous majority opinion reviewed *only* the "unreasonably low price" clause in Section 3 and confined itself to validating that clause *if applied to deliberate below-cost price cuts for the purpose of destroying a competitor in a price war*.⁴¹ The Court did *not* resolve the constitutionality of Section 3 when applied to any sale made at or above cost. Inevitably, this bill, if enacted, would foment confusion and litigation as to its scope and meaning.

Such considerations of vagueness and dubious constitutionality support the American Bar Association's opposition to S. 1494, and its proposal for the repeal of Section 3. Vigorous competition by American business is inevitably curtailed by the pyramiding of vague and redundant proposals on top of existing antitrust legislation, creating novel and unfathomable liabilities that can chill and dampen dynamic pricing.

Mr. PAULSON. All right.

Senator HRUSKA. Now, then, there are other sources in which we find similar examples and I do not think there will be any dispute about it.

Then, when charges are brought now against a seller who reduces his prices, and it is claimed that it is illegal for him to do it, and, of

³³ *Syfo Water Co. v. Boruch Chakoff*, 1965 Trade Cases ¶ 71,627 (Fla. 1965).

³⁴ *Ben Hur Coal Co. v. Wells*, *supra*, n. 24.

³⁵ *Herschel California Fruit Products Co. v. Hunt Foods*, 111 F. Supp. 732 (N.D. Calif. S.D. 1953).

³⁶ *Id.* at 734-35; FTC Adv. Op. 305, *supra*, n. 31.

³⁷ FTC Adv. Op. 305, *supra*, n. 31; but see *United States v. R. L. Polk and Co.*, 1968 Trade Cases ¶ 72,348 (E.D. Mich. S.D. 1967) (unlawful if free goods and advertising expense are excessive; concept of predatory spending); cf. *National Dairy Products Corp. v. FTC*, 1969 Trade Cases ¶ 72,829 (7th Cir. 1968) (two promotions are not predatory and do not violate Sec. 2, but a third is and does).

³⁸ *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432 (2d Cir. 1945).

³⁹ *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966).

⁴⁰ ABA, *Antitrust Developments 1955-1968*, pp. 33-34 (1968).

⁴¹ 372 U.S. at 37.

course, if it is under section 2, he is not only susceptible to criminal prosecution but also private treble damages, civil cases. When such a charge is made, however, the lowering of charges or the reduction of prices is not illegal unless the commodities are of like grade and quality. There must be proof before illegality is established that the challenged prices cause injurious effect on competition and it is a defense for the man so charged that he is able to reduce his price because of economies in his operation. Finally, he can make a defense that he reduced his price to meet competition in good faith.

Is it contemplated that if your section 3A is enacted into law that these conditions and these defenses will be available to one charged with violating section 3A?

Mr. PAULSON. Yes, it is. They will all be there.

Senator HRUSKA. Would you object to expressing them expressly in the section of 3A?

Mr. PAULSON. Well, I think, Senator, that is a rhetorical, structural, and grammatical impossibility. When you start with language which says:

It shall be unlawful for any person engaged in commerce to sell, offer to sell, or contract to sell goods below cost for the purpose of destroying competition or eliminating a competitor.

And, you stop there. How in the world can you then say, without flunking legislative draftsmanship, how can you possibly add:

Except that he may destroy competition if he is doing so in good faith.

Or

Except that he may eliminate a competitor if he is doing it in good faith.

Senator HRUSKA. You are not reading correctly. There is no language in the law that says he may destroy competition if he is meeting competition in good faith. The law simply says if he meets competition in good faith, it is a legal defense to any charge made against him but that reduced price is illegal. Now, let us not destroy competition. Do not put words in there that are not there, in all fairness to the record and to yourself.

Mr. PAULSON. I understand, Senator, but I would like to invite your attention to the narrow prohibition. This does not prohibit unreasonably low prices; and this prohibits selling or contracting to sell goods below cost for the purpose of destroying competition or eliminating a competitor.

Senator HRUSKA. Mr. Paulson, my question is simply, you say those defenses will continue to exist—

Mr. PAULSON. They will.

Senator HRUSKA. If so, why would it be out of order to put them in express form as a part of section 3A, as they are in express form in section 2? Why is there an inconsistency here? If they exist, why not say these defenses exist, just like you have testified.

And I might say that, if your section becomes law, the courts in construing that section will go to your language and say one of the chief advocates of this bill says these defenses will continue to exist, therefore we will construe and apply the statute in that way.

Now, if that is true, why not simplify things so that my colleagues in the Senate, and my colleagues in the other body, will understand what this means and that fully it means these differences and these conditions available under section 2 are also available under section 3?

Mr. PAULSON. Well, you cannot deal with it as simply as that. I have no objection to letting the Congress put its will into this bill, that they are not prohibiting men from meeting competition in good faith. I have no objection to Congress expressing its will clearly. I am submitting, though, that it is a very difficult thing to find the technical language to use to put it in here. We only prohibit that which is done for the purpose of destroying competition or eliminating the competitor.

Senator HRUSKA. That same language is found in section 2 and, nevertheless, they spell it out.

Mr. PAULSON. No, I beg your pardon. Section 2 starts different. Section 2 is a unique law on the books of this Congress. It is a law which shifts the burden of proof to the other side. It is unique. I do not think there is another one like it on the books.

You see, there is a presumptive guilt written in and you have to prove your innocence. That is why you have the good-faith definition under the discrimination law. You are presumed guilty if you discriminate but you can justify it. But that is not the way we have been writing laws for 200 years here. So we are going back to the traditional.

Therefore, Senator, I would go with you 100 percent in guaranteeing you can make the defense of good faith, but you cannot do it the way you are suggesting. But I will go with you 100 percent.

Senator HRUSKA. If you cannot put it in there, by virtue of what fact or by virtue of what reasoning do you make the statement that these defenses and these conditions would exist and could be pleaded if a case is brought against a man under section 3A that you seek to apply?

Mr. PAULSON. I contend that the exemption is there, the good faith; you could not violate this law if you were selling below cost in good faith.

Again, I am having to repeat myself, you cannot fit a good-faith definition into this kind of a statute. If we are going to get that in, and let me make it clear—

Senator HRUSKA. Let me stop you at that point. You just got through telling us no less than two or three times that these differences would pertain and would exist in prosecution or in lawsuits under section 3A, that you seek to enact. Now you tell us they do not fit. Tell us which side do you want it on? You cannot tell us two things at the same time.

Mr. PAULSON. Right.

Senator HRUSKA. I do not think most reasonable people would like to have even Mr. Paulson say, "I am for this but not for this." It does not quite add up.

Mr. PAULSON. Quite true, Senator. But what I am trying to get across is that I know no way as a draftsman, and I do not believe any draftsman can put in the good-faith definition into this. Let's try it:

It shall be unlawful for any person to engage in commerce to sell or contract to sell goods below cost for the purpose of destroying competition or eliminating competitor, provided, however, if he is doing so in good faith, he is not violating this law.

Now, would that meet what you are wanting to make clear, Senator? If so, there is no problem. But I submit that a court is going to say it never did include selling in good faith. Why did they write this language in? The court, the first thing they are going to say, that it is the surplusage in the law.

But I have no great objection, Senator, to saying:

Provided that selling in good faith to meet competition is not, per se, a violation of this.

Senator HRUSKA. Why would it be at all under section 2? Under the section 2 legislation it is not a matter of per se. It is a good defense, period.

Mr. PAULSON. Good-faith meeting of competition. It is a defense. There is no doubt about it.

Senator HRUSKA. Not per se. It is just a defense. I suggest that that problem, the argument you make, there is no problem in the formulation of Public Law 602 of the 74th Congress, section 2A. And, I ask at this point in the record that there be set out pertinent parts of that section 2 because it is an extended section, and the roman parts can be set up.

But there it says: "It shall be unlawful for any person engaged in commerce" either directly or indirectly to discriminate in price between different purchasers of commodities of like grade and quality.

And then skipping some:

Where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, provided.

And then they give the good-faith definition and these other things.

They have no problem here. Why would it be impossible for you to draw 3A to include the same defenses and the same conditions as are granted in section 2A? The title that I just read.

Mr. PAULSON. Senator, you notice the language in section 2 of Clayton, the price discrimination law, says:

It shall be unlawful to discriminate a price for the purpose or with the effect.

That is what it says in that law. And then it says: "Provided."

Ours does not say "or with the effect." That is a broad law.

Senator HRUSKA. It is broad law—

Mr. PAULSON. Ours is a narrow law, which only condemns. I mean, under the price discrimination law, Senator, the man that added his offers to the discriminatory offers would be helping produce the effect of injuring and he should be entitled to his defense here, because the law is drawn "or with the effect." We do not say "or with the effect." We say it is illegal if he is doing it for the purpose of destroying competition or eliminating a competitor.

Senator HRUSKA. Of course, the defense of meeting the price set by a competitor is not set for the purpose of destroying competition. The Supreme Court has said that. They have said when the price is lowered to meet competition it is meeting competition, not destroying it—meeting. However, if the price is set a penny below that, then he is out of order. But if he meets it, it is not for the purpose of destroying it.

All I am suggesting is if it is fair to so put it in section 2A, with the long line of litigation and interpretation of that statute, why not put those same conditions in section 3A of your bill?

Mr. PAULSON. Again, Senator, there is no "with the effect." We do not prohibit here. I purposely made this suggestion for drawing this bill the way it is, purposely to avoid having the language "for the purpose with the effect." I purposely left that out, "or with the effect," because it has caused all of the trouble in the price discrimination law. You have to have the good-faith defenses of cost savings, all kinds of things, when you write "or with the effect."

I said, in this one, let's do what they did in the Sherman and the rest of the Clayton Act for the purpose of destroying competition or eliminating the competitor. Let's only ban that which could not be saved by a good-faith defense or by a cost defense or anything else. I mean, let's only ban one thing here: The man who sells his stuff on the market for the purpose of destroying competition or eliminating a competitor. This is the only thing we are banning. We are not banning price discrimination that may have such and such effect. The man has to have the predation to be under this law, you see.

Senator, that is the best argument I can give you. But from a substantive standpoint, Senator, I insist the legislative record here should show that this is certainly not eliminating any good-faith defense of a man's competitive behavior or anything of the kind. It does not do that. We are dealing with such a narrow line.

But if it would help to write a proviso after this first sentence:

It shall be unlawful for any person engaged in commerce to sell, offer to sell, or contract to sell goods below cost for the purpose of competition or eliminate competitors.

If we would put a proviso in there:

Provided that a good faith meeting of competition may be presumed to not have been done for the purpose of destroying competition or eliminating a competitor.

If we want to write a presumption in there to save it, I would see no objection to that, Senator.

Senator HRUSKA. Well, the language—

Mr. PAULSON. Wouldn't that make it kind of—

Senator HRUSKA (continuing). The language in the section 2B reads as follows in that regard:

Provided, however, that nothing herein contends shall prevent the seller from rebutting a prima facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchases was made in good faith to meet an equally low price of competitor or the services or facilities furnished by a competitor.

The only advantage of that language would be that it has been on the books a long time, it has been adjudicated, we know what it means and how it is applied.

Mr. PAULSON. Do you know any other law in the statute books of the United States of America that establishes a prima facie case within the law like that one does? I think it is the only law on the books—

Senator HRUSKA. But the citation of other cases, we are dealing in a specific field and there is precedence and it is blessed by clear meaning, interpreted by the courts and what you want to do, appar-

ently—I am going to ask you to say, yes or no, to some questions after awhile—what you want to do is strike out into a new series of decades, where the courts would have to interpret new standards that are put into the section 3A that you propose, and it is going to take decades to do it.

To get at that we are going to have to determine what is below cost, what it cost; it will have to be defined and they will have to interpret it.

Then they will have to define the purpose of destroying competition and then they will have to define the purpose of eliminating a competitor, period. Now, you see, for that reason, it occurs to some people who go into the study of this field, that, let's get on the track, established by something that has been here for a long time and that the courts have worked with and that employers and manufacturers know what it means, and they can rely on it because of the many decisions, instead of uncovering a brandnew field where the painful, harassing, uncertain chaotic conditions will last for decades before the courts will be able to define all of these terms. Very simple.

Mr. PAULSON. Well, Senator, just one observation on that, and that is we started with the Sherman Act in regulating our competitive system. We did not use the nebulous language that got into the Robinson-Patman Act until 1936. Most of our antitrust law, with which the Senator is very familiar, most of this law is a straight prohibition attempt to monopolize, conspiracy in trade, plain and simple language. Only when we got into the Robinson-Patman Act to amend the original section 2 of the Clayton Act did we get into this language which required about six sets of provisos. And I am sure that, when the Department of Justice and all of these studies get over with, you are going to see some changes in the price discrimination statutes.

I cannot quite go along with the Senator that all of those cases—I am not so sure, Senator, that we are walking into a brandnew field and giving up all kinds of good case law. I am not at all sure.

Senator HRUSKA. You did put your finger on something that is right. This whole field is in the state of flux. There has been commission after commission, none of which has disagreed on this proposition that deep study and extensive consideration should be given for revising and revamping the Robinson-Patman Act and other phases of related antitrust law. Some of the most respectable of those authorities say Robinson-Patman should be repealed. And now, as against that background, you come in here and say let's do it piecemeal, let's have 3A put in there to really confuse the situation.

Mr. PAULSON. No, Senator, predatory pricing. This law would cover the whole field. That is all the law you need.

Senator HRUSKA. Sir?

Mr. PAULSON. You can repeal the Clayton Act, section 2, if you will give us this law, and the business world would be better off. The competitive system will be more healthy. You go ahead and repeal section 2 of the Clayton Act and give us this, and we will be healthier.

Senator HRUSKA. I do not know of anybody who wants to repeal section 2. It is section 3 I am talking about. That is the Robinson-Patman Act.

Mr. PAULSON. Wait a minute, Senator—

Senator HRUSKA. Besides, I do not know that we should get into that. I simply say, against a background where everybody agrees this whole field should be thoroughly examined, and in depth, and a major revision made of it, and as against that same background which includes some people who say that the section you seek to amend should be repealed; as against that background, you come in here and ask us to consider passage of a piecemeal proposition.

That is the point I made. I do not want to get into the merits of what these commissions concluded, except the background we have.

Mr. PAULSON. Senator, may I look at it this way? Of all of the practices that businessmen can engage in, they can, for example, buy a lot of advertising, flood the market with brand advertising, and that will get them some business. Or they can send out an extra group of salesmen, flood the field, or they can buy train tickets or plane tickets, whatever you will, Christmas presents, and they can develop some business.

The very best way to steal accounts from the other man is to go very low, go pocketbook, and you will get his accounts away from him that way. The very most potent weapon, all of the writers in antitrust say the same, the jugular vein, the most important thing in competition, is price. The pricing is most important.

I want to get rid of predatory pricing.

Senator HRUSKA. Is there a provision against predatory pricing in the Sherman Antitrust Act?

Mr. PAULSON. No, sir; there is not.

Senator HRUSKA. I beg your pardon?

Mr. PAULSON. Senator, you may be thinking—

Senator HRUSKA. Is there in the Clayton Act?

Mr. PAULSON. No, sir; there is not.

Senator HRUSKA. Well, I was reading all yesterday afternoon, and I am convinced to the contrary. There are ample provisions prohibiting predatory pricing, and imposing criminal sanction for predatory pricing. Isn't that true?

And I would ask that there be placed, at this point in the record, pertinent testimony from Donald Turner in the Harvard Law Review which says that and refers to, not only the provisions, but the rationale thereof.

(The insert follows. Testimony resumes on p. 37.)

[Excerpts, *Harvard Law Review*, May 1965, pp. 1339-1352]

CONGLOMERATE MERGERS AND SECTION 7 OF THE CLAYTON ACT

(By Donald F. Turner)

B. Predatory Pricing and Related Problems

1. *Predatory Pricing: Attempts to Monopolize.*—Apparently it is a rather common belief that a large company selling in several product or geographic markets will be likely to indulge in "predatory pricing" in one or another of them.³⁰ It appears to many to be obvious that the large firm, cushioned by

³⁰ The belief led to the passage of section 2 of the Clayton Act in 1914. See H.R. Rep. No. 627, 63d Cong., 2d Sess. 8 (1914); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960). The legislative history and subsequent interpretation of the Robinson-Patman Act, amending section 2 of the Clayton Act, "reveal a continuing dread of the device." McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J.L. & Econ. 137-38 (1958). For recent manifestations of concern, see e.g., *Reynolds Metals Co. v. FTC*, 309 F. 2d 223, 229-30 (D.C. Cir. 1962); *Foremost Dairies, Inc.*, 60 F.T.C. 944, 1083-84 (1962).

substantial profits from its other lines, will be strongly if not irresistibly tempted to absorb the temporary losses of predatory pricing in order to reap the supposedly greater rewards of monopoly profits when its hapless rivals have been driven out of all or a good share of the market. Nevertheless the belief that predatory pricing is a likely consequence of conglomerate size, and hence of conglomerate merger, is wholly unverified by any careful studies; research and analysis suggest that in all likelihood this belief is just wrong.

Predatory pricing as we are discussing it here does not include the possibility that a large firm will charge abnormally low prices for other than predatory reasons nor does it entail the possibility of severe but temporary price cuts for the purpose of disciplining or frightening small competitors into abiding by the large firm's price policy—matters which I shall take up in succeeding sections. Rather we are concerned at this point with prolonged price cuts maintained for the purpose of permanent exclusion. To be more precise, we may define "predatory pricing" as selling at a lower price than customary profit-maximizing considerations would dictate, for the purpose of driving equally or more efficient competitors out of all or the greater part of the market.

It is important to make clear at the outset those facts that reveal predatory pricing and those that do not. Predatory pricing is not indicated simply by the fact that a company has sold "below cost" or "operated at a loss" for a substantial period of time. The clearest *prima facie* case of predatory pricing is prolonged sales at prices below out-of-pocket costs. (The case is *prima facie*, not conclusive, because a seller may have some noninvidious reason for incurring losses on a particular product; for instance, his losses on one minor item may be more than offset by profits on increased sales of a complementary product. This will be discussed later.) Another *prima facie* case would be one in which a seller made a plant investment in contemplation of selling at prices that would not suffice to cover his investment costs; but, if he has invested in plant on the basis of expectations of profits that are later disappointed, it is not predatory pricing for him to operate the plant until it wears out at the best price he can get that exceeds the additional (out-of-pocket) cost that such operation entails.

Beyond these obvious cases, the probable presence of predatory pricing cannot readily be ascertained. Selling at other than an out-of-pocket loss (*i.e.*, at a loss only when fixed costs are taken into account), even for a substantial period of time, cannot reasonably be called predatory in any case in which a higher price would have produced greater losses, or when the manufacturer had good reason to believe this would be so. Such would be the case, for example, whenever the increased unit profit from the higher price would be more than offset by a decline in total sales, which is almost certain to be the case in an intensely competitive situation involving identical or nearly identical products.

On the other hand, when there is excess capacity in an oligopoly market, and when rational "conscious parallelism" might suffice to produce high, noncompetitive prices, anyone who openly cuts the price is likely to end up with heavier losses than he was suffering before (or lower profits if he had been making profits). But it would be somewhat paradoxical to charge the price-cutting oligopolist with illegal behavior for breaking a noncompetitive price level, at least in the absence of some other pretty good evidence indicating an intent to drive equally or more efficient competitors out of business.

Further, it must be recognized that short run profit and loss considerations cannot conclusively determine the presence of what may reasonably be called predatory pricing. Is it "predatory" for the more efficient oligopolist to drop prices knowing that he will thereby hasten the departure of inefficient firms, when the excess capacity would be driven out in a competitive situation anyway?⁴⁰ Or suppose someone builds a new plant, three times larger and of considerably greater efficiency than those currently in use by competitors. The producer may well calculate that he can maximize his profits in the future, though sacrificing some profits in the short run, by initially setting a low price that will yield an appropriate unit profit only when operating at full capacity; the short run loss may be more than made up by a consequent acceleration of the date when his sales will permit full capacity operation.

To return then to our question, how likely is it that a large firm would indulge in predatory pricing in a particular market in order to take over all to a large part of it? The mere fact that a company can cover its losses with funds obtained

⁴⁰ *Cf. Union Leader Corp. v. Newspapers of New England, Inc.*, 180 F. Supp. 125, 143 (D. Mass. 1959) (Conclusion No. 19), *modified on other grounds*, 284 F. 2d 582 (1st Cir. 1960), *cert. denied*, 365 U.S. 833 (1961).

elsewhere does not necessarily mean that it is going to be eager to do so. Predatory pricing would make economic sense only if the losses incurred in driving competitors out will be exceeded by monopoly profits obtainable thereafter. But a company can anticipate monopoly profits for only so long as its monopoly prices do not bring competition back into the field, and it would seem quite rare that the producer will be free from new competition for a length of time sufficient to permit recovery of his original losses. Such freedom would require high barriers to entry that are particularly unlikely in the situation that presumably worries people most—predatory pricing in a market of small firms. It is probably true that the very presence of a price-war will act as some deterrent to reentry, so that the large firm may not always have to fear the necessity of a repeat performance. But though existing competitors may be driven out quickly in some situations, and though potential small competitors may be frightened off for good, the large firm is likely to have negligible control over new entry by firms that are as strong or nearly as strong as it is.

Even if the conditions for profitable predatory pricing did occur rather frequently, the fact remains that predatory pricing, as an "attempt to monopolize," has long been one of the plainest violations of section 2 of the Sherman Act, subjecting the offending corporation to the risk, if not the likelihood, of severe financial penalties and perhaps even dismemberment.⁴¹ Predatory pricing in one of several geographic markets a fortiori violates the Robinson-Patman Act.⁴² Moreover, unlike price-fixing and similar agreements, the kind of predatory pricing most likely to prove profitable from an economic standpoint would also be impossible to conceal. Though in theory it can simply take the form of less-than-maximum profits, which is hard to identify,⁴³ as a practical matter any firm bent on driving rivals from business and later capturing monopoly profits would probably better its odds considerably by driving out competition as quickly as possible, that is, by predatory pricing of the most obvious sort.

The infrequency of predatory pricing is suggested, though of course not proved, by the paucity of antitrust cases in which the offense has even arguably been proved. The leading cases are old, and of the few recent decisions, most have involved relatively small firms.⁴⁴ Professor McGee's careful study of the old *Standard Oil* case—supposedly the classic example of the predatory trust—led him to conclude not only that the charge of predatory pricing was not proved, but that there was little reason to suppose that such pricing had occurred at all.⁴⁵ More recently, the Government accused United Shoe Machinery Corporation of predatory pricing on machines with respect to which it faced competition, but none of the instances cited turned out to prove the case.⁴⁶ The Government seemingly convinced a court of appeals that the Great A & P Tea chain had indulged in predatory pricing in some geographic areas, but its case was wholly inadequate as Professor Adelman has convincingly shown.⁴⁷

Nor is it at all clear that predatory pricing was involved in the recent *Reynolds Metals* case, involving Reynolds's acquisition in 1956 of the Arrow Company, a converter of plain aluminum foil into decorative foil for sale to the florist trade.⁴⁸ The Federal Trade Commission found that "below cost prices were maintained by Arrow from October 1957 to mid-1958."⁴⁹ Apparently a price war

⁴¹ *E.g.*, *Standard Oil Co. v. United States*, 221 U.S. 1, 43, 76 (1911); *United States v. New York Great Atl. & Pac. Tea Co.*, 173 F. 2d 79, 88 (7th Cir. 1949); *United States v. Corn Prods. Ref. Co.* 234 Fed. 964, 1010-15 (S.D.N.Y. 1916).

⁴² See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 542-46 (1960), and cases cited therein. See also *Forster Mfg. Co. v. FTC*, 335 F. 2d 47 (1st Cir. 1964).

⁴³ But by no means impossible. See *United States v. Corn Prods. Ref. Co.*, 234 Fed. 964, 985-92 (S.D.N.Y. 1916).

⁴⁴ The cases referred to in notes 41 and 42 *supra* just about exhaust the list. Moreover, some of them involve such unusual circumstances that they can fairly be classed as freaks. In *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954), defendant initiated a price war after plaintiff had obtained agreements from all merchants in plaintiff's locality to purchase his bread exclusively. In *Puerto Rican Am. Tobacco Co. v. American Tobacco Co.*, 30 F. 2d 234 (2d Cir. 1929), defendant retaliated for what it thought was plaintiff's failure vigorously to resist passage of a statute imposing a discriminatorily heavy tax on defendants' more expensive brand of cigarettes.

⁴⁵ McGee, *supra* note 39, at 168-69.

⁴⁶ *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 325-29 (D. Mass. 1953). See also *Kaysen, United States v. United Shoe Machinery Corporation* 130-34 (1956). The court did make the milder finding that United's pricing policy, which involved price discrimination among machine types, was "an evidence of United's monopoly power, a buttress to it, and a cause of its perpetuation," but largely for administrative reasons refused to attempt to deal with it in the remedial decree. 110 F. Supp. at 349.

⁴⁷ Adelman, A & P: A Study in Price-Cost Behavior and Public Policy 360-79 (1959).

⁴⁸ *Reynolds Metals Co.*, 56 F.T.C. 743 (1960), *aff'd*, 309 F. 2d 223 (D.C. Cir. 1962).

⁴⁹ 56 F.T.C. at 775. The facts subsequently stated in the text are drawn from both the trial examiner's opinion and that of the Commission.

had broken out as late as August of 1957. The record did not clearly indicate who started it, but one of Arrow's competitors had cut its price to seventy-five cents per plain-colored roll on August 20, well before Arrow cut to seventy cents, effective as of October 1. The complaint was filed December 27, 1957. Arrow's price went back to seventy-five cents some six months later; the price of one of its competitors, who had met the October cut, did not. The record indeed indicated that Arrow operated at a loss during the period it charged the seventy cent price.

These facts fall far short of demonstrating predatory pricing. It was not found that Arrow sold below out-of-pocket costs. The evidence failed to show that Arrow was not charging the best price it could; or that it intended not to; or that, if the price was not a maximizing price, Arrow's failure to charge a higher one was not justifiable as (1) a departure from an oligopoly price in an excess capacity situation (there were only seven firms) or (2) an attempt to expand sales to the most profitable level of output for a new plan put in operation in January 1958, the middle of the period involved. Moreover, the extreme ease of entry into the florist foil industry makes it quite implausible that Reynolds had embarked on a predatory campaign. If the facts raise an inference of bad behavior, they tend if anything to show an instance of disciplinary price-cutting, intended to punish competitors for being too competitive—which would indeed be a cause for censure but which is something quite different from an attempt to monopolize.

Of course, the difficulty of identifying predatory pricing in some of its possible varieties leads one to suspect that though few or no verifiable examples have come to light,⁵⁰ many exist in the darkness. Nevertheless, this suspicion hardly permits the conclusion that a large firm would *probably* resort to predatory pricing after making a conglomerated or any other acquisition.

Nor does there seem to be any reason to suppose that the probability of predatory pricing is significantly increased if the large firm has monopoly power in the sale of one or more of its other lines. It is hard to see why the profits from monopolized product lines should constitute any more of a stimulus to predatory pricing of the competitive line than profits derived from sales in more or less competitive markets. Certainly a rational economic calculation of the rewards from predatory pricing would be unaffected by the smell of the money that will be used to finance it. The effect if any must therefore be a psychological one, and it must be surmised that a company with one or more protected monopoly positions is more likely to undertake the risks involved in predatory pricing, since if it loses on this gamble it will still have a "sure thing"—its monopoly profits—to fall back on. While there is, perhaps, some plausibility to this speculation, it is still only speculation; and there is at least one off-setting observation, namely that if large firms are cautious about staying clear of the antitrust laws, firms with monopoly power are doubly so.

Why then the persistent belief that predatory pricing by relatively large firms is a likely phenomenon? It may be due to an uncritical acceptance of the testimony of smaller competitors, despite the fact that the evidentiary worth of such testimony is typically minimal.⁵¹ Repeated statements that a large firm was charging prices so low that the small competitors were selling at a loss is evidence that the large company too was selling at a loss only if there is reason to believe that its costs were similar to theirs. This certainly cannot be assumed, however, as the examples of economies achieved by integration or large scale are far too frequent and impressive.

The mistaken belief in the prevalence of predatory pricing rests mainly on its too ready identification with any pricing that involves "selling at a loss." But sales of a product "below cost," even by a large firm, hardly establish the existence of predatory pricing, and may simply reflect generally adverse market conditions, comparative inefficiency (small firms having no corner on this malaise), or the typical losses that a new entrant must endure in order to make his way into a market against the resistance of well-established companies. Or it may simply be a case of a company that is earning what amount it can over out-of-pocket costs until its plant—in which its capital has been irretrievably sunk—finally wears out.

⁵⁰ Professor Adelman has concluded: "I am still waiting for the first verifiable example [of predatory pricing by a large firm]. Many good people know of innumerable examples: Will Rogers said the trouble with most folks was not that they were ignorant, but that they knew so many things that weren't so." Adelman, *Market Issues: An Economist's View*, in *The Impact of Antitrust on Economic Growth* 25, 33 (National Industrial Conference Board, transcript of special conference, March 5, 1964).

⁵¹ *Cf.* *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 366-67 n. 43 (1963).

There may be a somewhat greater danger that a large firm will undertake to monopolize or obtain a large share of a market by sustained promotional losses.⁵² Since the prospective effects of promotional expenditures seem somewhat more speculative than the prospective effects of a price reduction, a company may feel more confident that, if challenged, it could establish that its heavy promotional expense was incurred in the reasonable anticipation of increased profits. Also, heavy promotional expenditures may be more attractive than price reductions because the former tend to increase barriers to entry. However, the possibility of such expenditures is so highly speculative that there seems little or no basis for concluding that predatory behavior of this kind is significantly more likely than any other.

To sum up, predatory pricing seems so improbable a consequence of conglomerate acquisitions that it deserves little weight in formulating antimerger rules based on prospective effects. The only situations in which predatory pricing might deserve recognition are (1) when the acquirer has a record of predatory pricing in the immediate past, or after comparable acquisitions in the past; or (2) when the acquirer can be shown to have indulged in predatory pricing after the acquisition, as was thought to have occurred in *Reynolds Metals*. But it seems very doubtful to me, even in these cases, that section 7 is an appropriate instrument for meeting the problem.

In the first situation, the merger would presumably be forbidden on either of two theories: (1) the past history of predatory pricing indicates a probability that such conduct will be repeated in the market of the newly-acquired company, or (2) denial of the right to acquire small companies is appropriate punishment for the past offense. Neither of these theories is particularly persuasive. Since corporations are involved, the management may have changed in the interim, so that past conduct is hardly very probative of what new managers will do in the future. Even if the management is much the same, if the past history of predatory pricing has been disclosed in an antitrust suit, the violator is even less likely than most to try this practice; indeed he may be under the lash of a prohibitory injunction and subject to the penalties of contempt for violation. The difficulty with the punishment theory, on the other hand, is that it may conflict with the economic purposes of antitrust. It would be somewhat paradoxical, under a punishment theory, to prohibit small acquisitions but not large ones; yet to eliminate the paradox by prohibiting all acquisitions would seem too extreme even if modified by exceptions, such as for failing companies. And if exceptions are to be made, the best vehicle for them would seem to be relief proceedings at the close of a section 2 Sherman Act case, with a reopening whenever, say, a proposed acquisition does not meet with the approval of the enforcement authority.

In the second situation, when the acquirer engages in postacquisition predatory pricing of the product of the acquired company, it may seem easier and more appropriate to invalidate the merger at that point, but the proposition is not without difficulties. In the first place, problems are raised as to the relevance of postacquisition evidence and the date as of which the legality of an acquisition is to be tested.⁵³ If a merger would have been upheld at any time up to the occasion of predatory pricing, this is the equivalent of saying, from a legal standpoint, that expansion by acquisition was no more objectionable than expansion by building. If a company expanded by building and then indulged in predatory pricing, it would not be subject to a rule of automatic divestiture. There seems little more reason to apply such a rule when growth came by an otherwise unobjectionable acquisition. In either event, a section 2 Sherman Act proceeding against the firm for predatory pricing would permit divestiture when it was appropriate or necessary for the restoration of competitive conditions. There

⁵² An allegation that "excessive advertising expenses" had been employed to drive out competition survived a motion to dismiss in *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705, 720 (D. Hawaii 1964).

⁵³ The problems were discussed in *Procter & Gamble Co.*, 3 Trade Reg. Rep. ¶ 16673, at 21,574-75 and 21,586-87 (FTC 1963). It was squarely held in the *du Pont-GM* case that a merger may be attacked "whenever the reasonable likelihood appears that the acquisition will result in a restraint." *United States v. E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 592 (1957); but arguments for limiting this "continuing applicability" doctrine to cases of partial stock acquisition are very strong. See the decision in *Procter & Gamble, supra*, and Bromley, *Business' View of the du Pont-General Motors Decision*, 46 Geo. L.J. 646, 653-54 (1958).

does not seem to be a good case for abandoning such flexibility in favor of an automatic rule.

Moreover, there is legitimate concern that an automatic rule would have undesirable dampening effects on the competitive behavior of acquiring firms; that firms might desist from charging as low a price as their economic circumstances warranted, fearing that they might unjustifiably be found to have been predatory, and therefore be forced to divest. The prevalence of misconceptions about the definition and extent of predatory pricing gives much cause for such concern. Predatory pricing is so undeniably egregious and economically harmful that of course we will pay some price to forestall it. But an automatic divestiture rule would seem to make that price much too high, particularly in light of the fact that true predatory pricing is not sufficiently prevalent to pose a serious threat.

2. *Other Possibilities of Unfairly Low Prices.*—The fears of unfair pricing by large firms are not entirely disposed of by discounting the possibility of purposive predatory behavior; additional considerations must be evaluated. We might suspect a tendency on the part of large diversified firms to charge unduly low prices, not intentionally or for the explicit purpose of driving competitors out of business, but for various other reasons. First, it might be supposed that the management of a diversified firm is under less pressure to maximize profits on any particular product line, and will therefore casually accept below normal profits on any one line if the overall profit rate is satisfactory. A second and related point is that the management of such a firm might be more irrationally reluctant to give up any particular one of its endeavors in the face of prolonged adversity than would the management of a firm engaging in that endeavor only.

Indeed, these are possibilities, and doubtless there have been instances in which they have occurred. But the question is whether they are relatively frequent, whether *in general* large firms are more likely (a) to be indifferent to particular profit rates, or (b) to remain unreasonably optimistic in the face of losses on a particular line. I know of no evidence demonstrating that either proposition is so, and certain characteristics of the large diversified firm suggest that it is in fact more likely than a small single-product firm to make a careful and rational evaluation of the circumstances. The large diversified firm is almost by definition more versatile and thus more capable of shifting easily from less profitable to more profitable activities. The management is less often identified with a single stockholding family than is the small firm management; it is therefore less likely to be influenced by the understandable, but economically irrational, personal considerations that have often blinded single entrepreneurs to the ominous handwriting on the wall, and caused them "to go on operating in the one line of business . . . [they know] until the last despairing gurgle . . ." ⁶⁴

Another possibility is that a large firm might unintentionally charge unreasonably low prices simply because of errors or defects in cost accounting. But there have been steady improvements in cost-accounting procedures which are almost certain to be utilized by large diversified firms, and in any event it seems highly unlikely that serious errors would persist for any great length of time. If a firm was charging a price that did not in fact cover its true costs plus appropriate profit, and its competitors did not meet the price, demand would quickly exceed its plant capacity. It would therefore have a determinable additional investment and other overhead costs that would reveal the error of the past misallocation. If competitors met the firm's low price, thus more or less preserving market shares, enlightenment from investment necessities might be deferred, but in all likelihood would still come rather soon in the form of complaints from those competitors. In learning that all of its competitors are losing money at the reigning price, an economically rational firm may be expected quickly to question the validity of its own cost estimates. It might still conclude mistakenly that it simply was substantially more efficient than its competitors; but will diversified firms *typically* arrive at this conclusion? We do not know the answer and there is no logical basis for concluding one way or the other. But, even if this were typical, the probability seems very low that large firms will generally make and persist in making errors of cost-accounting.

Next, there is the possibility that a large diversified firm may charge abnormally low prices on one of its products for purely profit-maximizing reasons. An abnormally low price (and hence low profits or even losses) on one product may

⁶⁴ Adelman, *supra* note 50, at 33.

in certain circumstances yield more than off-setting profits on other products, Professor Edwards has put it as follows:⁵⁵

"A concern that produces many products and operates across many markets need not regard a particular market as a separate unit for determining business policy and need not attempt to maximize its profits in the sale of each of its products, as has been presupposed in our traditional scheme. It may classify its products into such categories as money-making items, convenience goods, and loss leaders, and may follow different policies in selling the different classes."

As with the other possibilities discussed, it is undeniable that a diversified firm *may* do this, but under what circumstances, if any, is it at all likely that it *will*? There are at least three essential conditions. First, a company would underprice a convenience good or continue to produce and sell a loss leader only when that product is sold to the same customers that purchase one or more of its other products; in other words, a particular product will be sold uneconomically only to increase the sales of related items. Second, the convenience good or loss leader must be a relatively minor item, sold in connection with a principal product or products that have a much greater value than it in terms of total sales. Third, the principal products must almost certainly be produced and sold under oligopoly conditions, since there must be some strong deterrent to attempting to increase sales simply by cutting the price on those products rather than on complementary goods, and correspondingly strong pressures to resort to what is in effect nonprice competition of various sorts.⁵⁶ Finally, it should be noted that the threat of loss-leader selling will be of substantial significance to competing producers of the products sold at a loss only if the sales by the conglomerate firm constitute a substantial share of the total sales of those products.

These conditions simply describe the circumstances in which underpricing in order to encourage sales of related products *may* occur. But there seems to be no firm basis for believing that underpricing in such circumstances is *probable*. Therefore, we should refrain from invalidating conglomerate acquisitions under the described conditions if the problem can be dealt with reasonably well when and if the event occurs. In fact, in some respects it can be dealt with better at a later stage. If the large firm utilizes a loss leader as a tie-in to effect requirements contracts with its customers, it may violate section 3 of the Clayton Act.⁵⁷ If the underpricing leads to serious loss of markets by competing single-product firms, there is no problem at all in attacking it under section 5 of the Federal Trade Commission Act as an "unfair method of competition" or an "unfair act or practice."⁵⁸ Moreover, since there is oligopoly in the sale of the principal products to which the loss leader is related, the customers will be better off in the long run if the main avenues of nonprice competition are not cut off. In light of this countervailing consideration, it may well be unwise to prohibit loss-leader selling simply on the basis of "substantial foreclosure," even though such a test might be thought reasonable if only one market were being affected. Leaving treatment of this problem to proceedings under section 5 will permit a more flexible and sensible approach than is possible under a rigorous section 7 rule prohibiting acquisition on the basis of a possibility of loss-leader selling. Moreover, such a rule might well not afford effective protection to other sellers of the underpriced product. If the product is indeed of minor relative importance to the diversified firm as a direct profit-maker, but is at the same time quite important as an indirect profit-maker in stimulating sales of related principal products, the firm is likely to develop its own facilities for producing it if the merger route is denied.

Our final concern is with the possibility that a large conglomerate firm might sporadically resort to severe temporary price-cuts for the purpose of persuading small competitors to abide by its price policy. It seems reasonable to suppose that this kind of behavior is more likely than predatory pricing of the exclusionary sort. The cost is less, and the reward possibly more certain.

⁵⁵ Edwards, *Conglomerate Bigness as a Source of Power*, in *Business Concentration and Price Policy* 331, 332 (National Bureau of Economic Research 1955). In my view, Professor Stocking's comments on Edwards' provocative article have not received the careful attention they deserve. *Id.* at 352.

⁵⁶ I am speaking of loss-leader selling by manufacturers rather than by retailers. In retailing the practice may appear in what structurally appears to be a competitive market, and may be employed for deception, to entice consumers into a store by a bargain in the hope they will buy nonbargain goods once they get there. This is indeed a problem, but raises issues quite different from the one we are concerned with.

⁵⁷ 38 Stat. 731 (1914), 15 U.S.C. § 14 (1958). See cases cited in note 12, *supra*.

⁵⁸ 38 Stat. 719 (1914), as amended, 52 Stat. 111 (1938), 15 U.S.C. § 45(a) (1958). On the potentially broad scope of section 5, see *FTC v. Cement Institute*, 333 U.S. 683 708 (1948).

Moreover, since such conduct is temporary and would usually take place in a rather chaotic competitive situation, it may be harder to detect (to distinguish from just plain competitive pricing), except in the obvious case of sales below out-of-pocket costs. Nevertheless, there does not seem to be any evidence that disciplinary price-cutting is a prevalent phenomenon, or that it is frequent enough to lead us to conclude that it is a "reasonably probable" result of conglomerate acquisitions by large firms.⁵⁰ Here too, while detection may be difficult and thus the deterrent weak, the fact remains that such behavior is a plain violation of the law that large firms are highly motivated to avoid. Hence, the most that can be said about disciplinary price-cutting is that it is a possibility; that it will tend to occur, if it does occur, in a market where the large firm faces a fairly small number of competitors, all much smaller in size than it; and that the possibility might be kept in mind as an added reason, of very minor weight, for prohibiting an acquisition that would probably have some other anticompetitive consequences of a significant sort.⁵⁰

In summary I have reviewed what appear to be the more significant possibilities of "unfair" pricing that might follow conglomerate acquisition. None seem to be of any substantial significance to the formulation of prohibitory rules.

Mr. PAULSON. Senator, you know that by heart as well as I do. We both could recite it and you know there is no such term as predatory pricing in the Sherman Act. I do not care what Donald Turner says. There isn't any in the Clayton Act. You and I know those by heart.

Senator HRUSKA. I know there are ample statutory provisions that prevent and prohibit and penalize predatory pricing. If you want to put down words, that is something else again. But when you assert that I know that, I would respectfully suggest, let me say that I know, and you say that Mr. Paulson knows and I say that in all good spirit.

Mr. PAULSON. Senator, what Donald Turner and the others say is that in a conspiracy, in a combination, predatory pricing used as a weapon is banned by the Sherman Act. It is not specifically banned. It should be specifically banned is our position. It is time that the U.S. business world has it made perfectly clear to it. They would be happy about this, by the way; they would like to have it made clear that their friend, their enemy, their competitive enemy cannot sell below cost and they will not sell below cost. Isn't it better to have business done on who-is-the-best-man basis rather than who-can-be-the-most-injurious basis?

What businessman likes to have to indulge in a warfare where he has got to cut the business of the other fellow out from under him with his low pricing? The business world does not want this. We have left ourselves for 40 years in this country in jungle warfare that is not wholesome and now the consumers are yelling. So let's eliminate below the belt tactics, predatory pricing.

Senator HRUSKA. Well, the answer will be simple and there will be specific reference to whether there is any statutory provision against predatory pricing or not. The record will clearly show that and I fear that we cannot, by prolongation of this discussion, reach agreement between the witness and the acting chairman.

Let me move to another subject because the bells are ringing from the Senate Chamber, and we had better move on.

⁵⁰ Insofar as litigated cases are concerned, perhaps the best known example of disciplinary price-cutting was carried on by a combination. *FTC v. Cement Institute*, *supra* note 58, at 710.

⁵⁰ Here, as in the case of predatory pricing, it might be asked whether a merger should be declared unlawful because the acquirer has actually indulged in disciplinary price-cutting before or after the merger. I believe my earlier discussion is equally applicable here.

This statute is not limited to bread or milk—

Mr. PAULSON. No, sir.

Senator HRUSKA. It will embrace everything—everything in the field of goods?

Mr. PAULSON. Yes, sir.

Senator HRUSKA. So with that thought in mind, let me ask you whether there is any difficulty at all in the proposition of knowing what cost means in the purview of your section 3A. Before you answer that, let me suggest to you that, in the hearings of 1965, Paul Porter testified he was testifying on behalf of some petroleum companies that got into the matter of prices on joint products like gasoline, and he said that it is pretty difficult—in fact, it had been impossible up until that time—to determine the cost of a gallon of gasoline because of the problem of allocation and one thing and another. It was the contention of most of the major companies that it is impossible to determine the cost of a gallon of gasoline. He goes on to say there were pending before the Federal Trade Commission two proposals for the definition of gasoline costs.

Mind you, this is 7 years ago, 1965. Nothing has come of that, as far as I know. Then he goes on to say, and I am quoting:

Indeed, if procedures for defining cost are not authentically articulated the enactment of 995 would be of little, if any, use to the petroleum industry.

There are many other industries that have joint products. I imagine in some degree, the dairy industry has a joint product, because there are other things they sell and that they derive from milk that would enter into the competition of the cost of a gallon of milk.

Now, then, would you give us a brief discussion—not too long, because I have some other questions to ask—would you give us a brief discussion of price and of cost, and how they are dealt with and how they would be dealt with under your proposal?

Mr. PAULSON. I will be very brief on that, Senator, because in the *National Dairy* case brought by the Department of Justice, under section 3, the so-called *Kansas City* case, the issue arose, what did cost mean under that law which prohibits selling at unreasonably low costs.

The circuit court said it meant fully distributed and Dick McLaren and John Chadwell took it up to the Supreme Court. It was ruled that, it came down, the circuit court was directed to determine more specifically what cost was and they determined that the law meant fully distributed cost.

We picked up that language, the court language; the term “cost” as used in this section means fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs, involved in doing business.

Without saying more, Senator, the language you heard in here comes out of that court case specifically and others.

Senator HRUSKA. Well, Mr. Paulson, if the matter is so simple, why didn't it occur to somebody on the staff of the Federal Trade Commission or the Federal Trade Commission itself—somebody else who has been struggling with it all of these years?

If it is that simple and if it is applicable with sole justice and with sole balance and usefulness to milk and bread, electronic parts, radios,

TV's, automobiles, tires, funeral costs—this subcommittee went into funeral costs one time and here it is—and gasoline and grease and all of the thousands of products on the market, if it is that simple, why didn't it occur to somebody else who simply put it in the language that you did and say now we have the problem solved.

Mr. PAULSON. Well, you have to have a general prohibition that can be enforced. I really do not feel as troubled about cost as some people do. Because today, through IBM and other equipment, they are identifying cost more and more. The Securities and Exchange Commission is in the field of requiring people to file divisional operating costs. Costing has come more to the front, Senator, than when the FTC failed to come up with their rule. That was 8 years ago, 10 years ago.

At any rate, Senator, if I may, before you have to go, would you be so kind as to let a few of these men here in town, a few of these men say a few words? If you are going to have to go, would you allow a few minutes so that these men can speak?

Senator HRUSKA. Well, I do want to get to the other witnesses and we will. But before we do, we ought to get into the matter of private remedies under section 3A because the national policy of the Congress has been for a long time that private remedies are not allowable under these circumstances and should not be. There are those who contend, on the other hand, that it is the only way of getting this type of statute enforced.

I would suggest—in fact there will be inserted in the record—testimony on that topic at this point, beginning at page 37 of the 1965 hearings, and to a point to be determined by staff, limiting it to relevance on this point.

(Testimony resumes on p. 41.)

(The insert follows:)

EXCERPT FROM TESTIMONY OF FREDERICK M. ROWE, AMERICAN BAR ASSOCIATION,
BEFORE SENATE ANTITRUST AND MONOPOLY SUBCOMMITTEE, JUNE 21, 1969

(At this point Senator Dirksen withdrew from the hearing room.)

Mr. ROWE. In like fashion, the FTC or other parties plaintiff may exploit other disparities between the present standards for price discrimination in section 2, and the new criteria which S. 995 would transpose from section 3.

Particularly in private and administrative proceedings, constant pressure for new and easier standards of proof appears inevitable—thereby increasing the legal risks for competitive pricing by American business firms. And while defendants will doubtless fight such broad interpretations of section 3, many moons of litigation will surely pass before a business firm can begin to find its way in this new "uncharted area" of antitrust enforcement.

The legal perils for competitive pricing are magnified by the liberal provisions of the Federal Rules of Civil Procedure. Under the rules, private plaintiffs may launch antitrust actions upon minimal facts and the barest of allegations, as a springboard for discovery that may jeopardize the normal conduct of the defendant's business. Furthermore, the usual complexity of antitrust claims and the ambiguous nature of proof as to economic facts and competitive motivations will often bar the disposition of such cases by way of summary judgment, thereby forcing the defendant through lengthy and costly trials before the legality of his prices are finally adjudged.

If enacted, S. 995 would inevitably invite and facilitate such harassing litigation. With treble-damage suits facilitated by the Federal Rules of Civil Procedure as Senator Hruska pointed out previously, additional dangers would occur from the standpoint of a seller contemplating competitive pricing if by virtue of the easy allegations permitted under the rules, those prices could expose him to treble damage litigation by way of harassing discovery and by way of full-scale trials, which are costly and burdensome, before the legality of his prices would be adjudged in court.

In view of the bill's elimination of important prerequisites for testing competitive prices under the Clayton Act and the deliberate omission of important statutory defenses specified in the Clayton Act, a roman holiday for treble damage plaintiffs would be hardly surprising.

Such aggravated legal perils for competitive pricing are peculiarly detrimental to the public interest in a free enterprise economy.

In a society which depends on the free play of market forces and private initiative for the innovation and productivity which is the hallmark of the American system, free and flexible pricing plays an indispensable part. In a classic antitrust opinion, the Supreme Court characterized the price mechanism as the "central nervous system of our economy."

For example, manufacturers of new products must have a range of price flexibility within which to experiment and probe the consumers' acceptance of their wares at appropriate low prices. Particularly smaller sellers wishing to expand their areas of distribution from local to regional, and regional to national markets, must have the opportunity to test how the markets respond to their efforts to break into new areas with attractive prices. The freedom to vary prices rapidly and experimentally may become peculiarly important for smaller competitors who cannot afford heavy advertising expenditures, but must compete on the basis of low prices for the customer's favor.

Inevitably, however, the legal uncertainty and doubts concerning the meaning of S. 995's criteria would inhibit competitive pricing by sellers fearful of testing their prices against unknown legal criteria at the risk of costly and burdensome litigation.

Actually, since the Clayton Act authorizes private parties to obtain injunctive relief against their competitors' pricing, section 3's "unreasonably low price" proviso could become a new instrument to set an industry price "floor" at artificial levels via court injunctions.

In this connection our statement has cited to the committee's attention the *Frontier* case where such an injunction was issued by the district court and was upheld by the court of appeals, which in effect freezes gasoline prices at preexisting levels in a competitive area in Utah.

In our view, to ensnare the pricing freedom of American business firms with new and confusing antitrust restrictions appears justifiable, if at all, only on the basis of a clearly demonstrated and compelling need.

In fact, however, no trace of such necessity has been shown to exist for S. 995, or for its predecessors. While S. 995 would drop one of the three prohibitions of section 3, Senator Sparkman, the bill's sponsor, agreed last year that two of the three clauses of section 3 were redundant, and that there was a "continuing need" only for the "unreasonably low" price clause.

In any event, as reflected in the record of last year's hearings, monopolistic and predatory pricing tactics are already subject to illegality under at least three Federal antitrust prohibitions, as well as a variety of State enactments. Thus, as the committee knows, section 2 of the Sherman Act imposes criminal, civil, and treble damage remedies against any instances of attempts to monopolize, by predatory pricing tactics or otherwise. Section 2 of the Clayton Act authorizes FTC proceedings, culminating in cease and desist orders carrying heavy penalties for violation of their terms, and also permits civil actions and treble damage suits by private parties. Section 5 of the Federal Trade Commission Act authorizes FTC proceedings and cease and desist orders against any "unfair method of competition," including monopolistic and unfair pricing tactics, and was construed by the Supreme Court this year as a "broad delegation of power" to the FTC to thwart any anticompetitive practice which "runs counter to the public policy" of the antitrust laws, notwithstanding any "business ingenuity and legal gymnastics."

Only weeks ago the Supreme Court interpreted the Clayton Act to aid treble-damage suits by ruling that FTC Clayton Act proceedings suspend the running of the statute of limitations, so that private plaintiffs can now safely wait until the end of an FTC case before filing suit on their own.

Basically, section 3 is unnecessary and redundant to an effective program of antitrust enforcement. In 1955, the Attorney General's National Committee To Study the Antitrust Laws reported that section 3's prohibitions on predatory pricing were "legally redundant." In 1958, the Chairman of the Federal Trade Commission advised a committee of Congress that it was "safe to say that any practice which violated section 3 of the Robinson-Patman Act, as presently written, would constitute either a violation of the Federal Trade Commission Act or

of section 2 of the Clayton Act or both." At the same 1958 hearings, the then Chief of the Antitrust Division could not specify "just what Robinson-Patman section 3 adds to the Sherman Act." And during last year's subcommittee hearings, neither the Justice Department nor the FTC cited any nefarious pricing practice which was immune under existing antitrust prohibitions, but would be prevented by the proposed amendments to section 2.

Above all, we feel the entire record of the subcommittee's hearings last year never pinpoints an existing disease which these Robinson-Patman amendments are needed to cure.

There have been many generalities about the state of competition in the oil industry. There have been statements about the state of competition in the dairy industry. However, this bill is applicable to the American economy in general, and not only to those particular industries. And even within the context of those industries, none of the various predatory pricing practices which has been illustrated in our judgment now enjoys legal immunity and requires the enactment of S. 995 to cure.

In summary, the American Bar Association opposes the enactment of S. 995 because it would confuse and confound existing antitrust laws governing competitive pricing, create new dimensions of overlapping and inconsistent legal restrictions, and spawn legal chaos and confusion which only years of litigation may ultimately resolve.

Yet no showing of need has been made by the proponents, in terms of specific ills to be cured or by reference to an effective national antitrust program, to overbalance the serious restraint on the pricing flexibility of American business which could attend the bill's enactment.

In sum, the harm to American business from S. 995 is plain. Any corresponding benefit to anyone has yet to be shown.

Thank you very much, Mr. Chairman, for permitting me to present this statement.

Senator HRUSKA. I do not imagine we would make much headway comparing your views with the views of the bar association, which were those that were expressed at that time, and others, including Congressmen. But it is not an open and shut case that everybody should be turned loose on any kind of enforcement of any kind of law.

So I want to put that element in here, that it is not quite that simple, and it might get into the picture many harms and detriments which would more than overbalance the imagined benefits from turning the subject over to an individual private civil case.

Mr. PAULSON. You have to balance this also, don't you, Senator, against how are we going to preserve our competitive system or aren't we? And back in 1914, after Wilson and Taft and Teddy Roosevelt ran, you remember, they debated preservation of a competitive system. And so it has been since.

Now, don't we have to be mindful that a competitive system with the rules made 30 years ago may need some new rules? They change football rules all the time or you would lose the game. I think we need to add a rule to the game here. I think that predatory pricing is now threatening the competitive system and I think that it is serious.

Loss-leadering, I fail to see one advantage of loss-leadering or one reason for it at all. It has always seemed to me to be trickery and not merchandising and I think everyone else who studied it thinks so.

What I am trying to get at, Senator, we have to make new rules. Competitive business is like a football game. You have to have rules. You have to keep them up to date. That is all we are here for, Senator.

Senator HRUSKA. Well, on that score, let me suggest that consideration of one measure like this would probably lead one, and it is my own context, it would not be too difficult for a person to reach a conclusion, let us modernize the rules, let us turn the judicial processes

over to private litigants and so on, and bring them up to date. But you see from where we sit we have an overview of the entire operation and of the entire judicial system.

Two summers ago in St. Louis, Chief Justice Warren Burger pointed out the Federal court system is bogging down:

It will come in my judgment based on the studies I have made of it to a point where that system will become almost stultified and rendered immobile because of the constant increase of loads put on that system.

So that we are warranted when a question is asked how are we going to save the competitive system if we do not open private litigation, my question would be, how will we save the judicial system of this country? There are only 399 authorized district court judges in this country. It is double what it was just a few years ago. We could double it again and it would not help too much. There comes a time when we cannot double it any more or increase the judges any more.

That is not the answer. It is a ramified subject and a complex one.

Now, here we ask for an addition to the list of the many new types of cases and jurisdictions enumerated by Chief Justice Burger in St. Louis, Chief Justice Warren Burger addressing the American Bar Association in St. Louis 2 years ago, come summer. And he named a consumer action, class action, host of actions, in pollution cases, anybody can sue anybody for anything in Federal court regardless of amount involved or capacity of the parties or anything else. And he said this cannot go on. It cannot go on.

So you see, even from that standpoint, there are sometimes considerations where some of us who have studied the problem say, wait a minute, let us consider that position. It should not be all determinative. There are other considerations and they will be spelled out in the testimony taken in previous years.

Mr. PAULSON. It is a question of priorities. I put the preservation of the competitive system pretty high on the list of priorities.

Senator HRUSKA. Yes, and I am a deputy and I want to see it continues to function as well as possible.

Mr. PAULSON. Without it, the rest of it is going to be meaningless anyway, Senator.

Senator HRUSKA. That is right.

Mr. PAULSON. But I don't think it will add over three or four cases a year, and that will be for the first few years. I do not think it will take long or a lot of suits. I visualize two or three. The first one would reach the Supreme Court and I doubt whether there would be any more.

Senator HRUSKA. Very well. Thank you, Mr. Paulson. My counsel here tells me, and my recollection tells me, you and I have, I think for the fourth or fifth time now, gone around that racetrack once again. I would hesitate to say which of us won the race. I do not suppose either of us did. The problem is too big for either of us to solve.

My efforts in the questions I have asked and the parts of the record I have included for our attention is for the purpose of completing the record so those reading it will get the full story as opposed to an imbalanced one.

Thank you for coming. I thank you for being here.

Mr. PAULSON. Thank you for letting me be here, Senator.

If I may, again as I say, I think Mr. Page would like to say a few words and then Mr. Gassor would like to say a few words. We have not arranged among the others to each say something, but if it is possible that they think of something they would like to say, very short, perhaps you would receive it.

Senator HRUSKA. Very well.

Mr. PAGE. Senator, ladies and gentlemen. It is a privilege and I thank you for the opportunity to speak in behalf of Senate bill 1457.

I thank Mr. Paulson for the promotion but I am just the vice president of the Page Milk Co. We have plants in Merrill, Wis.; Coffeyville, Kans.; and Tulsa, Okla.

I have served on this legislative committee of the National Independent Dairies for a good many years. It has been our purpose to try to remedy the damage which was done by the 5-to-4 Supreme Court decision back in 1958 in the *Nashville Milk* and *Carnation* case.

We are seeking to reinstate what was the law of the land there for 22 years. We want the right of private enforcement once again. We feel that it is a definite deterrent and, like a police force, it helps to keep people within the law.

Back in the recent hearing on the predecessor bill, S. 1494, Richard McLaren, the Assistant Attorney General, testified opposing this bill saying that it was not needed. He said that if there were any violations reported to his Department that he would promptly take action and see that something was done to correct the situation.

On September 26, 1969, I wrote to Richard McLaren and cited a situation where we were losing a great deal of money. We knew that there were violations of the law, and I want to point this out the law is being violated at the present time with impunity; we cited that there was predatory pricing going on, and we invited his investigation. After many weeks of writing letters and telephone calls to his Department, we finally got a letter in which he said "the matter is being referred to the FTC."

And there it lies today. This is our problem. Nearly 4 years, and it is still being investigated by the FTC.

Now, do we have need for this legislation? Just 10 days ago, David McShanier, a consulting engineer, one of the oldest firms in this business, in the dairy business, was in my office. David McShanier told me that he puts out a quarterly letter to the industry, prospective customers, people whom he feels are big enough to use his services, who have sales over \$3 million per year. In 1960, his mailing list was 1,600 dairies and his last bulletin, his last quarterly bulletin, went out to only 880 people.

Now, I submit this loss is not in the consumer or the public interest. Most of our national companies in the dairy industry are under anti-merger orders. We independents cannot sell out but we can be driven out.

Gentlemen, are we willing, or is this Congress willing, to accept a concentration of economic power resulting from price discrimination practices, but not from mergers? I submit that we should not accept undue concentration from either cause. These destructive price discrimination practices set up barriers of entry for new firms to our industry. There is no one starting in the dairy business today.

The consumers' stake in effective antitrust enforcement is clear. She pays the penalty of higher prices, poor service, and quality product for deceit and fraud in the marketplace. The strength of trade through monopoly or price discrimination by diminishing the force of competition exact an equally higher price. The consumer, in addition to the right to be informed, to be protected from hazardous products, must also have the right to choose between competing products or services. Without effective competition, the consumer's range of choice will be either nonexistent or narrowly circumscribed.

Legislation to protect the consumer from fraud or deception, and law enforcement to perpetuate effective competition, are complementary.

I would like to make a special point on the value of this bill as far as the consumer is concerned. The low-cost sale of milk or dairy products mislead the consumer into thinking she is in a real discount store and the prices she is paying for other commodities are equal bargains. This, of course, is not so.

Another point which is rather obvious is that, once the sales-below-cost program is successful in a given situation and a monopoly is established, prices do go back, possibly even go above what they were before the price war began.

The third point is pure logic and would indicate that no retailer is in business to take a loss. If he is taking a loss on his milk or dairy product sales, then he is making a larger than normal profit on some other item which the consumer must buy. Thus, overall, she saves nothing.

I would like to point out two or three examples of predatory pricing that just came to my attention within the past week or 10 days. I will give these ads to the committee.

Here is a price on a gallon of ice cream for 69 cents. I submit that it is virtually impossible to put just the ingredients together for the 69 cents. Here is a price on our dairy product, an ice milk, of 59 cents a half gallon, at the same time.

And here is a price of ice milk for 39 cents a half gallon.

These prices are destructive to the entire market. When one grocer receives a price concession so that he can reduce the price, then the pressure is put on by other grocers to their suppliers, to protect them in the same manner, and the whole market goes down.

There are other ways of being destructive besides just the matter of a price concession. I have in mind a specific instance where to gain price in the market a loan was made of some \$25,000. That dairy turned around and added 6 percent on top of their current discount program, so that that grocer could return or make payments back on the original loan.

I believe there is a definite need to reestablish the right for us to go into court and I submit we will not jam the courts. In 22 years, there were only 50 cases that had bearing on this section 3A of the Robinson-Patman Act. I also submit that to my recollection of the American Bar report, and the Neal report and the Stigler report, there was no real criticism of section 3A of the Robinson-Patman Act. It bore on a great many other subjects and there was very little consideration dealt with in the matter of 3A.

In Richard McLaren's testimony 2 or 3 years ago, I believe it was, he said he did not want to see section 3A of the Robinson-Patman Act repealed. If you will remember, at the time the bill that was before the Congress would have repealed section 3A. Mr. McLaren said it should not be repealed because it has a deterrent effect and the Justice Department wants it to stay there.

I submit if it is beneficial there, then it would be also doubly beneficial so these people who have used predatory pricing realize that they can be called into court to face the people whom they had been damaging.

I submit that there will be a change in the conduct of business in the marketplace, that the deterioration and the trend toward predatory pricing have just accelerated since 1958.

The National Food Brokers Association got out a bulletin awhile back in which they raised alarm about the possibility, it said, surely anyone who remembers what happened in the 1930's, before we had the Robinson-Patman Act, does not want to return to that chaotic marketing condition. And the fact that we have so little action on the part of the Justice Department with section 3A is one of the reasons that we have this chaotic condition today.

I would also suggest that in the Senator's remarks about putting in these exceptions, it is a truism of law, I believe, and I do not profess to be a lawyer, but it is a truism that when you make exceptions then the courts say it is limited to these exceptions.

We are not narrowing the exceptions at all in the proposal as it now stands. But as one member of the industry, I would not be opposed to having exceptions spelled out. But I do say that that does have a tendency to say these are the exceptions to which the act applies.

Senator HRUSKA. Of course, the purpose of putting the exceptions is to call the attention of the court that there are exceptions.

Mr. PAGE. We would agree on this matter. That is the essence of my comments. I appreciate your hearing me. If you have any questions, I would be most happy to try to answer them.

Senator HRUSKA. I want to say this: I do not know that I included the American Bar Association report as one which advocated the repeal of the Robinson-Patman Act. I think I referred to every commission that we have had since 1955 that I know anything about, as recommending detailed study and revision of the Robinson-Patman Act.

Mr. PAGE. This is true.

Senator HRUSKA. The Neal report does. That was the President's Commission. The Neal report says repeal it, but the others do not go quite so far. The 1955 commission of the Attorney General said repeal it.

Now, if I am mistaken in that, I want the staff to correct my recollection, but that is my recollection.

So if I did confuse the American Bar Association, I misspoke myself.

Mr. PAGE. My point was they were not specifically critical of section 3A of the Robinson-Patman Act, in my recollection.

Senator HRUSKA. This was to repeal 3A, as I understand it.

Mr. PAULSON. Mr. Page is thinking of 3.

Mr. PAGE. Section 3 of the Robinson-Patman Act.

Senator HRUSKA. I would respectfully differ with you because they are critical of it, every one of the reports, including the most recent one of the FTC is critical of it, and if we want to have real, well-advised criticism, we can turn to the words of Congressman Celler in the other body. He, also, is critical of it. He always has been. He opposed the passage originally.

Mr. PAULSON. Senator, you know it is an interesting thing about Congressman Celler. He spoke for stopping loss-leaders. He spoke against price discrimination legislation, but he was vehement in support of stopping loss-leaders. I do not know how he stands today, because I have not been able to get to him, Senator. But the record is there that he was very strong against loss-lenders.

Senator HRUSKA. Loss-leaders doesn't mean anything unless you attach it to something else. How do you define loss-leaders, you see. That is the problem we get into. Because it is not recognized. It is not recognized that there are many justified and inevitable below-cost prices used in the market.

Now, then, how do you define loss-leaders, you see. That is one of the problems.

Mr. PAGE. I do not think we have any problem insofar as we are concerned, and I think it would bear on whether we went into court or not, in that we know what our cost is, and we know that the other fellow cannot be much different. Because all of our costs are pretty much set on the same pattern. Our milk cost is set by the Federal Government, our labor cost is set by the unions. All of these other factors are very much the same.

So that we have a good standard on which to start. But we can quickly see what is a pattern. Does he go into this community and pick off one of the biggest stores and set a price structure there to take the store, and then come over in another community and do likewise, and another, and set a pattern of predation throughout a territory to be destructive, to destroy the man who has a local market situation, whereas they may be nationwide in their activities?

Senator HRUSKA. You put the case well. Maybe the lawyers in the business ought to turn you over to argue the case before the court.

Mr. PAGE. Thank you.

Senator HRUSKA. I say that in a complimentary way. I know there are practical difficulties, to meet these competitive people. We have a lot in my State. The question is how do we go about it.

Thank you for your remarks.

Mr. PAULSON. Albert Gassor is our president.

Senator HRUSKA. We are running a little short on time. We are going to have a vote.

Mr. GASSOR. I won't take but just a few minutes.

Senator HRUSKA. Four minutes. I have two more witnesses to hear from.

Mr. GASSOR. I am Albert J. Gassor, president of the Independent Dairy Association; also, president of Purity Dairies, Inc., of Nashville, Tenn.

My family has been in the milk business 84 years this year. We operate in 32 counties in Tennessee, don't cross the State line at all anywhere.

Just in the past 3 weeks, the Kroger Co. comes into Nashville from St. Louis with ice cream and milk.

Here is an ad they have right in here. In one case they are quoting gallons at 2-percent milk, regular low price of 98 cents, save 9 cents for 89 cents.

Also, the Sealtest Co. had reduced the price overall on gallons of milk in the entire market of 3 cents effective 2 weeks ago today. Effective tomorrow, the Producers Co-op is raising the price of raw milk 13 cents per hundredweight which will cost my company about \$9,000 a month. It looks like we are going to have to meet this cost, and I am bringing that up to date as recent happenings in the last 2 weeks.

I do not know what they will do with this 2-percent milk price. It is fairly new in our market. They came out with 99 cents a gallon and now it is 89 cents a gallon. They have also reduced the gallon price on the entire market by 3 cents in the last 2 weeks.

That is just one of two things I wanted to say to you.

We have always tried to operate on the very modest of profits, and, of course, being in the game as long as we have, if I could not make any money, I would just sit but I did not do that. But I am asking the consideration and some relief in this matter. I do not know how I can convince you to do it by myself without some help.

That is all I have to comment on right at this time, Senator. Thank you.

Senator HRUSKA. Thank you very much.

Thank you, Mr. Paulson, for your appearance, with your two witnesses.

Mr. PAULSON. Senator, I would like to have you meet, maybe he would like to say a few words, the gentleman from your own State, Mr. C. D. Fisher, president of Roberts Dairy in Omaha, Nebr.

Mr. FISHER. Senator, committee members, I would like to thank you for an audience today. We, too, I think I can state are looking for some method, and some legal method, of rectifying the chaotic American conditions that are damaging small independent companies.

Thank you.

Senator HRUSKA. Thank you very much. Give my regards to Gordon Roberts when you get back to Omaha.

Mr. PAULSON. Bob Cleary is here from New Jersey. We have not heard anybody from that section.

Do you wish to say something to the Senator?

Mr. CLEARY. Senator, I would merely like to say as the head of a business that goes back 82 years, and seeing the cruel attrition in the New Jersey milk industry over the last 30 years, the one thing that we need is the right to protect ourselves. Under the present law and the lack of action on the part of the Justice Department, and on the part of the Federal Trade Commission, we are helpless. Our hands are tied behind our backs. All we want is the right to protect ourselves.

Senator HRUSKA. Thank you very much.

Mr. PAULSON. Excuse me. May I just see whether anyone else is really burning to say something? If not, I appreciate your kindness, Senator.

Senator HRUSKA. Very well.

The next witness will be Richard Kelly, Independent Bakers Association.

STATEMENT OF RICHARD KELLY, COUNSEL, INDEPENDENT BAKERS ASSOCIATION; ACCOMPANIED BY HARRY LITWIN, COUNSEL, GREENWALD, KOVNER, & GOLDSMITH, NEW YORK CITY; AND ELMER PROSSER, BOARD OF DIRECTORS, INDEPENDENT BAKERS ASSOCIATION

Senator HRUSKA. Is Mr. Greenwald here?

Mr. KELLY. Mr. Greenwald apologizes to the committee. With the changing of dates, he found he had an engagement and he could not possibly make it. He offers to come back before the committee in March if you so wish.

Senator HRUSKA. Would you identify those with you?

Mr. KELLY. On my left is Mr. Harry Litwin. Mr. Litwin is a partner in the law firm of Greenwald, Kovner & Goldsmith. He is here on behalf of Mr. Greenwald.

To my right is Elmer Prosser. He is a baker from Ventura, Calif. He is a member of the board of directors of the Independent Bakers Association and a man driven out of business about 2 months ago by the practices we are complaining of today.

My name is Richard Kelly, and I am an attorney with the Independent Bakers Association, associated with Mr. Greenwald's law firm.

Senator HRUSKA. Now we have a practical problem. These statements are quite extensive. Our time is quite limited.

I want to tell these witnesses I broke the Sabbath yesterday. I read both of these statements. I did not break any records by breaking the Sabbath, but I did read these statements and I considered them in the light of previous hearings on similar bills, so that if they are not read verbatim, there is nothing too much will be lost. If I could not get the sense of them by reading them, I certainly would not get the sense of them by listening to them.

So would you please summarize them and then if counsel has any questions, we will go through that routine. In that way, we will finish by 12:40.

Mr. KELLY. Thank you very much. We did not hope to read them today.

Senator HRUSKA. Counsel reminds both statements will be inserted in the record in their entirety.

(The statements follow. Testimony resumes on p. 62.)

PREPARED STATEMENT OF HAROLD GREENWALD, ESQ., COUNSEL, INDEPENDENT BAKERS ASSOCIATION; ACCOMPANIED BY RICHARD B. KELLY, ESQ., ATTORNEY TO IBA, AND ELMER PROSSER, PROSSER'S BAKING CO., VENTURA, CALIF., A MEMBER OF THE BOARD OF DIRECTORS OF INDEPENDENT BAKERS ASSOCIATION

We are appreciative of the opportunity to apprise this Committee of the concern with which the Independent Bakers Association, and its members, view these hearings and the future of the Sparkman Bill, S. 1457.

Our remarks will be brief, but brevity is not to be misconstrued as indifference.

The Independent Bakers Association respectfully submits that it is advisable, indeed necessary, that S. 1457 be enacted into law. It strongly urges, as a first step to this end, its favorable report out of Committee.

SUGGESTED AMENDMENT

While this Bill, as drafted, represents a decided improvement in the anti-trust laws presently on the statute books, it is urged that S. 1457 be amended

by inserting in Section 3A, line 3, after the words "purpose of" the words "or where the effect may be."

The insertion above proposed would bring the language of Sec. 3A into conformity with the Clayton Act, as amended by the Robinson Patman Act, which condemns conduct whenever "*the effect . . . may be substantially to lessen competition or tend to create a monopoly in any line of commerce.*" It is unnecessary under this provision to show an intent to harm a competitor. And the same result was reached by the Court (*Wilson & Co. v. Secretary of Agriculture*, 286 F. (2d) 891) in condemning price cutting below cost, in construing Section 202 of the Packers and Stockyards Act (1921). That Act proscribes "*any unfair, unjustly discriminatory, or deceptive practice or device in commerce.*" The Court reached its conclusion absent any finding that the conduct complained of was for the purpose of eliminating a competitor.

This conclusion is manifestly sound.

It is action which produces a reaction upon the market, not the subjective intent of the actor. Where such reaction is adversely to affect competition, the mischief is achieved whether the perpetrator be a nobleman or a scoundrel.

And, as is now the law, when conduct which substantially lessens competition or tends to create a monopoly in any line of commerce is against public policy, there should be no rational objection to outlawing it and rendering the offender subject to civil suit, as is the case of other offenders whose conduct works similar mischief.

This history of state legislation is illuminating.

A majority of the states—some 30 in number—have outlawed sales below cost as an improper trade practice. In addition, some 33 states prohibit below-cost selling as applied to particular products. Most of those statutes make it an offense to sell, advertise or offer for sale any product below cost or to give away any article for the *purpose of injuring competitors or destroying competition.* The language is similar to that contained in Sec. 3A of S. 1457. Conviction requires (1) the act and (2) proof of intent to injure. Enforcement of this prohibition is generally offered to any injured party by way of civil suit as well as to the attorney general or district attorney by way of criminal prosecution.

Although these state statutes have been adjudicated constitutional (see *Wholesale Tobacco Dealers v. National Candy and Tobacco Co.* 82 Pac. (2d) 3) as a legitimate exercise of police power, they have over the years been of little help in securing effective relief. The difficulty experienced was in proving intent to injure. Because of this obstacle, the Attorney General of Minnesota who, in a two-year period had initiated some 200 cases under his state's sales-below-cost statute without success, discontinued any future attempt to enforce the law.

The experience of the Attorney General of the United States is similar. There is no reasonable basis for anticipating that Sec. 3A as drafted will cure the evil sought to be remedied, or offer greater remedy to those whom the Bill is designed to aid.

That the evil is real and that the need for the remedy is great is beyond peradventure (see *Sales Below Cost*, Hearings of the House Committee on Interstate and Foreign Commerce, 86th Congress, 2nd Session, 1960; *Small Business Problems in Food Distribution*, Hearings, Subcommittee No. 5, House Small Business Committee, 86th Congress, first session, 1959, Part I, II, III and Appendix).

A sales-below-cost statute, properly drafted, would in the judgment of thoughtful economists and business leaders, provide a wise and meaningful antidote to a pernicious commercial virus. Such a statute, unlike fair trade legislation which provides for vertical price fixing with horizontal effect, would open the channels of trade by fostering freedom on the part of the merchant—requiring him, indeed—to act independently in making his own sales price.

The threat to the competitive system of this country is far greater today than it was in 1948 when the Federal Trade Commission (Report on the Merger Movement, 1948, p. 59) pointed out:

"With the economic power which it secures through its operations in many diverse fields, the giant conglomerate corporation may attain an almost in-pregnable economic position. Threatened with competition in any one of its various activities, it may sell below cost in that field, offsetting its losses through profits made in other lines—a practice which is frequently explained as one of meeting competition. The conglomerate corporation is thus in a position to strike out with great force against smaller business in a variety of different industries."

The hazard articulated by the Federal Trade Commission is particularly opposite as regards the baking industry. Even before its acquisition by the International Telephone and Telegraph Company the Continental Baking Company was the giant in the field.

The impotence of existing Federal and State legislation offers sufficient evidence that intent may be inferred from effect. Imposing upon the injured party the burden of proving the secret lucubrations or moral philosophy of the malefactor will doom the Bill, if enacted as presently drafted, as a vain act.

INDEPENDENT BAKERS ASSOCIATION

IBA is a trade association representing the majority of independent wholesale bakeries in the United States. Independent wholesale bakers are generally limited line producers of white pan bread (SIC 2051) and related bakery products, constitute 10% of the nation's food consumption. The baking industry is the 10th largest U.S. manufacturing industry with bread sales in 1971 of approximately \$6 billion, exceeding such giants as the drug, rubber, non-ferrous metal and machinery and appliance industries. According to figures compiled by the U.S. Department of Agriculture, expenditures for all baked foods, including cake and pies, aggregate approximately \$10 billion per annum.

The wholesale baking industry employs more workers than all but four other manufacturing industries (see FTC Economic Report on the Baking Industry—November 1967 p. 37).

This Committee may be assisted in its deliberations by concrete evidence, gathered by the Independent Bakers Association, that S. 1457 is needed at this time in the correction of improper practices existing in various markets, practices inimical to the independent businessman. For this purpose I ask the Committee to permit some brief but cogent remarks by Richard B. Kelly, an attorney trained in the field of trade regulation who has, on behalf of the Independent Bakers Association, conducted investigations of some forty markets throughout the United States during the past two years. And finally, I request the Committee's indulgence in hearing from Mr. Elmer Prosser. Mr. Prosser is a baker from Ventura, California, a member of the IBA Board of Directors, who was forced to close his plant two months ago because of the type of practice which S. 1457 would prohibit. While this proposed legislation can no longer help him, Mr. Prosser has consented to assist in trying to save his colleagues, who are still engaged in the economic turmoil, to avoid his fate and to survive.

GENERAL NEED FOR S. 1457 IN OUR ECONOMY

In suggesting that this Bill is an idea whose time has come, I would point out that its economic necessity is not confined to the United States. The Federal House in Ottawa now has pending before it a similar Bill, C-256. I am including in the record communications from the Bakery Council in Canada, from which the following extracts are quoted:

"Our industry has been plagued with loss leader selling for a number of years. We have made representations to the Federal Government asking for amendments to the Combines legislation. Action was deferred pending the introduction of the new Competition Act. * * * We would like to see provisions in the Competition Act which would give bakers (and other manufacturers and retailers) the right to sue a predatory competitor, if they believe him to be selling below cost * * *"

Numerous studies, reports, and statements reflect the widespread problem which is engendered and fostered by sales below cost. What may commence as an irritant is excited into a cancerous obtrusion upon the economy. (See, for example, the *FTC Report on Anticompetitive Practices in the Marketing of Gasoline*, pp. 13, 21, 26 to 28 and 48 and the astute remarks of FTC Commissioner Everette MacIntyre before the Master Photo Dealers & Finishers Association, April 21, 1971 [copy attached], particularly pages 16-18). Industries which are local in nature, such as baked goods, creamery products, beer and soft drinks are vulnerable to below cost sales. With the current awareness of ecological dangers, even the bottlers of pure water are feeling the adversity of below-cost selling.

The wholesale bread and milk industries have been particularly hard hit due to the unfortunate concurrence of two major factors—the character of the products and the nature of the markets. Unlike the makers of durable goods, such as iron and hardware, the baker and the dairy do not produce for inventory.

Their products are perishable. The baker is in and out of business each day. What he produces must be sold promptly. What is not resold by his customer, generally within 72 hours, is returned to the baker, for full credit. Bread, unlike most other products, is sold on consignment. The wholesale baker cannot hold his production for a better market. If his competitor sells at a price below cost he, too, must sell below cost. The alternative to meeting this competition is to suffer a greater loss by having his products become stale on the grocers' shelves in which event his recovery, at best, is the avails of a forced sale of a food product no longer fit for human consumption.

Those sales below cost can be, and are being, made by those wholesalers who serve a multiplicity of markets, siphon profits derived from one field of their business interests, or from an area cleared of competitors (or shared with wholesalers of similar economic stature), and are thus enabled to subsidize below cost selling in other selective markets in financing an unequal contest against the independent. The latter, confined to his limited trading area, deprived of profitable operations in that area, cannot long survive. The economic struggle is generally short-lived. The outcome is inevitable—competition is erased and the market left to the mercy of the predator.

Moreover, increased production capacities of the national chain bakers, coupled with augmented buying power in the hands of larger but fewer grocery chains, renders the practice of offering below cost and often selective sales by the former, and demanding below cost sales by the latter, a particularly vicious and increasingly prevalent one. Its existence, its tendency toward accelerated adoption, its disastrous agitation in the marketplace, its likelihood of contaminating an industry which is essential to the well-being of the economy and the nation, all cry out for corrective legal action.

In the 25 years from 1939 to 1964, the aggregate value of baking industry production increased five-fold. But over that same period, the number of bakery plants declined by more than half—from over 10,000 to less than 5,000. By 1964, the four largest companies accounted for one-fourth the total production, and the eight largest for more than one-third of the total production. By 1965, the nine largest corporate bakery chains supplied more than half of all bread sold at wholesale. There are today not more than one-tenth the number of independent bakers than there were 25 years ago.

This tendency toward concentration of greater markets among fewer producers is progressing geometrically. The independent bakers have experienced a growing sense of loneliness and helplessness. (See in this regard FTC 1966 *Economic Report on Milk and Bread Prices; Organization and Competition in Food Retailing*, Technical Study No. 7 of the National Commission on Food Marketing, June 1966 page 427 et seq. At page 433 of this study it is indicated that unchecked unlawful practices (such as discriminatory and below cost sales) have become serious artificial barriers to entry into the retail grocery business).

The impact of these practices upon the public may be appreciated from the realization that expenditures for food are almost \$100 billion annually, which, while representing almost 20 percent of all personal consumption expenditures, constitute the largest single category of consumer spending (see the *Structure of Food Manufacturing*, Technical Study No. 8, National Commission on Food Marketing, June 1966, page 1).

The food manufacturing and processing industry overshadows basic industries such as autos, oil, and primary metals, and total employment in food manufacturing is 10 times that of the petroleum industry, twice that of the auto industry, and 40 percent greater than primary metals. *Ibid.* Bread and related products, in turn, are the largest users of wheat flour (utilizing 43 percent of total domestic consumption) and ranks eighth in value of shipments among all "four digit manufacturing industries." (*Organization and Competition in the Milling and Baking Industries*—Technical Study No. 5, National Commission on Food Marketing, June 1966, page 1.) The point is that the food industry is vital to the economy, and wholesale baking is a major part of the food industry.

THE WHOLESALE BAKING INDUSTRY

Although my office, which is located in New York, represents several of the top 500 corporations, some of which deal in and with food products, I claim no great expertise in the food industry.

My primary experience has been, and my task today is, on behalf of the independent segment of the wholesale baking industry, a field in which I am ending my third decade of activity.

I have been counsel to the Independent Bakers Association since its formation some 4 years ago. Members of all three of the wholesale baking cooperatives (Quality Bakers of America with offices in New York City, W. E. Long with offices in Chicago, and American Bakers Cooperative with offices in Teaneck, N.J.), as well as various unaffiliated independents, are members of IBA.

The total annual sales of the plants for which I speak today aggregate some \$2 billion.

These plants are generally as efficient as those of their national competitors (see *FTC Economic Report on the Baking Industry* pp. 37, 41). Based upon my associations over the years, it is my conclusion that most of these plants are able to compete with any baker in the market, whether a national multi-market operator or a captive, vertically-integrated plant, on the basis of cost.

Nevertheless, we have witnessed the distressing elimination of independent wholesale bakers, due not to any inefficiency on their part but, rather, to their inability to compete against the sustained, below cost selling of bakery products.

A long casualty list of bakers who have been driven from the market-place by predatory, below cost selling, persisted in chiefly by their national chain baker competitors, and loss leader selling by chain grocers, can be supplied to this Committee.

My advocacy of the cause of the independent baker does not mean, however, that I equate strength with evil, or weakness with virtue. What certain conglomerates may do by stealth, certain independents may do by inadvertence or worse. The result is equally undesirable. Nor do I argue that technology should be arrested in the interest of the indolent.

All business, large and small, has suffered as a result of sales below cost. The fair competitor, be he dominant in the market or otherwise, is adversely affected by the vice of this practice, which neither begins nor ends with undercutting an honest market price. Tied in with it invariably are such hidden benefits as preferential shelf space, favorable display area and discriminatory promotional allowances, often coupled with dealings in related products.

Business, in general, particularly commerce which is legally carried on, by the mighty as well as by the weak, abhors the loss of markets occasioned by sales below cost. The coincidence of multiplant chain bakers and multi-regional chain grocers, in which the productive capacity of the former and the purchasing power of the latter are brought to bear, offers ready opportunity for exploitation through sales below cost and its attendant effect upon the tone of competition.

The firm which is the target of below-cost selling loses, through no fault of his own, the profit which is legitimately his and which he otherwise would derive. The consumer's food bill will, for a while, be reduced. But when the loss of profits is greater than can be sustained by the company with the shallowest pocket and it is forced to abandon the field, the consumer is left to the mercy of the survivor. History has repeated itself with monotonous regularity. The predator, in a market bereft of competition, grown more powerful and voracious by his successful depredation, has little inhibition about exploiting his market to the hilt. The consumer then pays dearly and his former savings rapidly vanish. The sole victor is the practitioner of the sale below cost—the temporary expedient to permanent market control.

THE MYTH OF THE INEFFICIENT OPERATOR AND S. 1457

Some may contend that business failures in the baking and other industries stem from inability to produce quality product at a fair price. If that, indeed, be the case, the efficient producer has nothing to fear from this bill.

The bill, if enacted into law, would permit the efficient operator to charge any price he would wish, provided the same be above his cost. This bill is aimed only at the invidious practice, too often witnessed in the wholesale baking industry, of selling below the cost of doing business in order to achieve an illegal objective.

By the "cost of doing business" we mean the real cost of doing business. Again, some may contend that material, factory labor and overhead expenses alone should constitute the measure of basic cost, and that any sale above "direct" costs is economically justifiable. However, such incremental cost accounting systems are the antithesis of the Robinson-Patman Act, and as the legislative history of that Act confirms, the improprieties in the grocery industry formed the primary basis for its enactment.

Moreover, the use of incremental cost accounting in a competitive industry, concerned with somewhat homogeneous products such as bread, always leads

to a reaction in the marketplace and inevitably causes an otherwise inexplicable erosion of price in consequent skirmishes. In those situations, the few but powerful national corporations are singularly in the strategic situation of being able to do something about it. That "something" is often total war in the market. If the corporation with the deepest pocket so chooses, it can succeed, within a relatively short time, in putting out of business all but the strongest competitor(s). An ensuing monopoly situation, and higher prices for the housewife, can be anticipated. And this anticipation rarely fails of realization.

Doubtless this problem can be, and sometimes has been, attacked collaterally by use of the other antitrust laws. The wholesale baking industry, like the similarly structured dairy and beer industries, has had an active antitrust history. In the field of predatory pricing, actions have been filed in which the claimants seek redress in injunctive relief and treble damages.

However, these collateral measures fail to cope with the root of the problem. It is the sale below cost as a competitive weapon, utilized by the predator, which is the gravamen of the injury. And it is the elimination of this offense, by means of private action, which is requisite.

It is respectfully submitted that S. 1457 is a necessary and appropriate addition to the legislation governing the standards of conduct in the marketplace; that the current antitrust laws are inadequate in its absence; and that the bill, amended as above proposed, should be approved by this Committee and passed by the Congress.

The Federal Government, in recognition of the public interest in bread as historic staff of life, has adopted and enforced regulations prescribing minimum standards of quality. This concept should be implemented by the passage of S. 1457. The consumer should be assured not only that his basic food staple is nutritious, but also that it is available at a fair price, which is beyond power of monopolists to "football" and control at will.

Surely, if below cost selling is so improper a trade practice as to constitute a criminal offense, is it not perversion to bar the person directly injured from seeking and obtaining judicial redress by private suit? Prosecution by the criminal branch of Department of Justice, as the sole party now competent to take action, offers the victim of the crime little relief. And, for years, even that step has not even been attempted by the Department. Unless the concept of correlative rights and obligations is meaningless, he who commits an act in violation of an obligation imposed by law should be subject to remedial action by him whose rights thereby are invaded. And this should apply with no less force and effect to the predator who commits an act of such grievous nature as presently to be branded criminal, as it is to the predator whose conduct, likewise injurious to the same competitor, yet not so serious in nature as to constitute a crime. The present anomaly, predicted upon judicial legislation (*Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 and *Safeway Stores Inc. v. Vance* 355 U.S. 389 entered upon 5-4 vote) should be removed by Congress.

STATEMENT OF RICHARD B. KELLY ON BEHALF OF THE INDEPENDENT
BAKERS OF THE UNITED STATES

I wish to reiterate our appreciation for the Committee's time and attention to our problems.

Essentially our testimony today is that a shared monopoly is rapidly developing in the bread industry and that we believe S. 1457 is necessary to correct the situation.

I would like to point out to the Committee at the outset that I have been a practicing attorney for what is now approaching five years; that the first half of this period was a staff attorney for the Federal Trade Commission's New York office, and that since that time have been associated with the law firm of Greenwald, Kovner & Goldsmith in New York City spending the vast majority of my time on behalf of the Independent Bakers Association. Prior to my full time attendance at New York University School of Law I had spent four years as a certified public accountant for one of the largest national public accounting firms.

I believe this background is relevant because I am now testifying that based upon visits to and investigations of some 40 markets throughout the United States these past two years I have come to the definite conclusion that sales below cost is the number one problem in the wholesale baking industry today.

The November and December 1971 issues of Baking Industry Magazine feature an interview with Harold Greenwald and I on the attempts of the Independent Bakers Association to ascertain, and where possible correct, some of the more unjustifiable practices that exist in the baking industry. Copies of these articles are attached—as Exhibit A and I will therefore not take the Committee's time with such generalities other than to say that IBA, under the leadership of its president, George N. Graf, a man with 50 years in the baking industry, has prepared two cost studies this past year to assist bakers in determining when a sale is below cost, copies of both of these cost studies and a magazine article summarizing these studies are attached to our testimony for the Committee as Exhibit B1 to B3.

It has been directed that my testimony today deal with specific examples of sales below cost in the wholesale baking industry so that by such representation we can demonstrate to the Committee the need for this legislation. My testimony reflects below cost prices at two levels, wholesale and retail. But despite the label "wholesale bakers" we are talking about food manufacturers and their competition in the distribution of bread and related baked foods.

Mr. Elmer Prosser who will, I expect, testify in a few minutes, will mention the existence of a west coast treble damage antitrust lawsuit. This west coast suit is expected to have major repercussions in the industry. The wholesale baking industry has seen a number of such antitrust law suits in the immediate past. These include the *Old Homestead Baking Co. v. ITT-Continental Baking Company*, *Rainbo Baking Co.*, a subsidiary of *Campbell Taggart, Inc.* and *Interstate Brands* in which case a jury awarded plaintiff over three million dollars against Continental, and \$390,000 to Interstate in a cross claim against Continental. This case is on appeal. There had been a prior suit by Oak Cliff Baking Co. against American Bakeries which resulted in an award by a federal district court judge in Dallas of several hundred thousand dollars plus an injunction. Three other suits brought by independent bakers against the alleged predatory practices of the ITT-Continental Baking Co. in Minneapolis, Minnesota were recently settled. One plaintiff was granted \$200,000 and the terms of settlement of the other two plaintiffs were kept secret at the request of Continental but it is known that an injunction was also given for the Minneapolis trade area. There is an antitrust suit pending by the Junge Baking Co. of Joplin, Missouri and Coffeyville, Kansas against the ITT-Continental Baking Co. There is a Robinson-Patman Act suit pending in Boston by First National Stores against ITT-Continental Baking Co. Several smaller bread producers settled in that case. There are several other minor antitrust suits that have been recently settled or are now pending concerning wholesale bakery operators practices. I am aware of several other law suits now being contemplated.

We are here today because despite the existence of these law suits we do not feel that the existing antitrust laws are sufficient in scope to prevent practices such as sales below cost at a sufficiently early stage to discourage adequately the exit of independent bakers from the industry. While today I refer to specific examples of clear below cost pricing, I respectfully wish to point out to the Committee that there has been no attempt to present an entire market study because of attending factual difficulties presented by the various statutory defenses, etc. Rather, we have attempted to provide examples of representative pricing practices which, we can testify, are clear below cost sales without any apparent justification, legal or economic. We hope thereby to convince the Committee that the passage of S. 1457 is in the public interest.

As the mention of private law suits may have implied there are numerous instances of price wars where the prevailing price of bread in the marketplace is below cost.

For example, the trial testimony in the Denver lawsuit mentioned previously indicates that the price of bread went from 12 to 10 cents a loaf during a price war in 1968, a price which was admittedly well below everyone's cost of doing business. In point of fact the selling price was about half of what it cost to make and distribute those loaves of bread.

In San Francisco several national bakeries had, in the course of pre-trial discovery, admitted costs of 20½ cents for a pound loaf of bread in San Francisco in 1968 at the same time prevailing price throughout the market was 18 cents and 20 cents a loaf. The prevailing net price for white bread, despite an intervening lawsuit, is still in this price range while costs have increased dramatically. Furthermore, the San Francisco market is just one bankruptcy away from being a shared monopoly of the three largest wholesale bakers in the United

States. In this northern California market over a baker's dozen wholesale bread plants have been driven out of this market since 1965. The following list of tombstones tells the story dramatically:

1. Harvest Queen, Fresno, Calif.;
2. Colonial, San Leandro, Calif. 3. Blue Seal, Sacramento, Calif.;
4. Blue Seal, Oakland, Calif.;
5. Sunlite, San Jose, Calif.;
6. Home Kraft, San Leandro, Calif.;
7. Golden Krust, Bakersfield, Calif.;
8. Modern, Santa Cruz, Calif.;
9. Modern, Los Angeles, Calif.;
10. Helms, Montebello, Calif.;
11. Eagle, Los Angeles, Calif.;
12. Cottage, Hayward, Calif. (April, 1971);
13. Prosser, Ventura, Calif. (October, 1971);
14. Welch, Reno, Nev. (January, 1972).

As was mentioned there is one significant independent wholesale bakery competitor left in the northern California market. There is also only one significant, independent wholesale bakery competitor left in the Los Angeles market. We feel time is running out and if sales below cost are not prohibited there will be none. We must have a floor on bread prices and that floor is cost.

It is said that some companies in the greater California market feel that the use of incremental cost accounting wherein certain products are given a "free ride," can be used to justify the flagrant practices that now exist. In the California market large diversified firms are threatening to extinguish the local competition which has a more limited product line, and only one market in which to compete fairly, make a profit, and survive.

The same general point could be made for the cities of Seattle, Wash.; Portland, Oreg. Los Angeles and Ventura, Calif.; Reno, Nev.; Topeka and Coffeyville, Kans.; Joplin, Mo.; Dallas and Houston, Tex.; South Bend, Ind.; Syracuse, N.Y., etc., etc., etc. Now the prevailing price is not always below cost, in all those markets all the time but there are substantial sales below cost being made every day.

In Los Angeles the wholesale price of a one pound loaf of bread in the summer of 1971 was the same price that the same loaf of bread sold for in Los Angeles in 1958, despite the fact that there had been major cost increases in the interim thirteen years so that the one pound loaf of bread produced by the independent and national wholesale bakers was being sold below the cost of doing business.

In my field visits I have found numerous reports of instances where representatives of national bakers have gone to key accounts of an independent and bid at prices so far below cost that they hoped they did not get the business. The independent who cannot lose this volume and stay above the break-even point must then choose between losing the business with instant bankruptcy or meeting the below cost price and slow insolvency.

While all food suppliers are reluctant to criticize customers or potential customers I feel compelled to point out that in a great many cases below cost wholesale prices are not passed on to the consumer (see for example the FTC complaint against a Borden-A&P private label milk program in Chicago, news release attached as Exhibit C which is similar to many such bread programs). We repeat, that the consumer often does not benefit from such sales even in the short run. And, it seems to us, the whole theory of our antitrust laws is that in the long run the resulting monopolization of the bread industry will result in higher, monopoly, prices to the consumer. Nor do I believe the elimination of the independent limited line food suppliers is in the best long term interests of the grocers.

The following quote is germane:

"A bakery industry completely dominated by giant producers, vertically integrated retailers, and captive suppliers possessing monopoly power to control price for one of our most essential food products would clearly not be in anyone's interest."—Address by Federal Trade Commissioner Mary Gardiner Jones to the Quality Bakers of America Cooperative, September 14, 1970.

We believe and suggest to the Committee that the key is to prohibit all deliberate sales below cost as an illegitimate competitive marketing tactic. In fact, the trend of the antitrust laws including the reasoning in such landmark cases as *Fortner Enterprises*, 394 U.S. 495 (1969); and *Utah Pie v. Continental Baking Co. et al*, 386 U.S. 685 (1967) is against the artificial shifting of costs to other products and markets and by such arbitrary pricing allocations injure competition. We believe S. 1457 is in tune with these developments, and if amended as we have suggested here today, would go much of the way toward correcting the inadequacy of our present marketing laws.

While there are numerous other instances of wholesale bread pricing that could be cited to the Committee as below cost, because of the detailed ques-

tions that arise in this area which are more easily resolved by judicial determination, we have elected in the main to present selected retail price developments that are so clearly below the cost of making and distributing a loaf of bread as to be unassailable.

RETAIL PRICE CHART AND COSTS

Retail price

The average retail price of a pound loaf of bread in mid-1971 was 25¢. This price was an average of wholesaler advertised brand bread and lower priced private label and "captive" label breads. The bakery industry operates with an extremely low profit margin on sales and so, if the grocer takes his normal markup to cover in-store costs, this is about the minimum price we should expect to see for a loaf of bread.

In reviewing retail prices on the attached chart it should be remembered that while costs do differ slightly from city to city, they are all within a fairly narrow range of a cent or two.

Concomitant cost

Investigation has shown that on a conservative basis after computing all appropriate costs, very roughly a sale of a "captive" loaf of $1\frac{1}{4}$ lb. bread below 21¢ is below cost. A sale of $1\frac{1}{4}$ lb. of wholesaler brand bread with full rack service below 24¢ is below cost.

The approximate cost of a pound loaf of wholesaler brand bread with full rack service would be at least 20¢ in most markets. The same loaf sold by a vertically integrated grocer ("captive") baker would cost about 3¢ less after allocating a proportionate share of all costs. In both cases there must be an additional markup for the retailer (which is traditionally at least 20% to cover instore costs, etc.

In some cities such as the west coast costs are higher.

It is nevertheless beyond dispute that anyone in the U.S. retailing a one pound loaf of bread for 16¢ is doing so because someone is selling below the total cost of doing business. A $1\frac{1}{4}$ lb. loaf of bread retailing at 20¢ is likewise ordinarily the inevitable result of a sale below cost by the producer or the retailer. We are talking about absolute minimum costs and in the case of the weight breads such as 1 lb. 6 oz. bread the best estimate is that such a loaf of bread, even if it is a "captive" label sold by a vertically integrated grocer, need ordinarily be sold for more than 25¢ to cover all cost of production and distribution. For the one and a half pound ($1\frac{1}{2}$ lb.) loaf the cost would certainly be in excess of 25¢. It is necessary to keep these absolute minimum costs in mind in viewing the following retail prices since when prices get below this level the road leads to economic disaster and bankruptcies.

INSTANCES OF CURRENT RETAIL ADVERTISEMENTS EVIDENCING SALES BELOW COST

[The actual advertisements are included in exhibit D]

Date	Newspaper	City	Retailer	Size loaf	Retail price (cents)
Nov. 5, 1971	Times-Picayune	New Orleans	A. & P	15 ounces	10
Dec. 27, 1971	Tribune	South Bend, Ind.	C. & G.	1 pound	16 $\frac{3}{8}$
Dec. 28, 1971	do	do	Park & Shop	do	20
Do	do	do	S. & S	do	20
Do	do	do	Lou-Ann's	1 $\frac{1}{4}$	20
Do	do	do	A. & P	1 $\frac{1}{2}$	20
Jan. 2, 1972	do	do	Thrift Mart	1 pound	19
Jan. 3, 1972	do	do	A. & P	1	20
Jan. 4, 1972	do	do	Martins	1 $\frac{1}{4}$	20
Jan. 5, 1972	do	do	K Mart	1 $\frac{1}{4}$	25
Do	do	do	Burger Daily	1 $\frac{1}{4}$	24 $\frac{1}{2}$
Do	do	do	Kroger	1 pound	25
Do	do	do	Huys	1 $\frac{1}{4}$	20
Do	do	do	Super National	1 pound	18
Do	do	do	A. & P	1	20
Do	do	do	Thrift Mart	1 $\frac{1}{4}$	20
Jan. 6, 1972	do	do	Country Squire	1 pound	20
Jan. 9, 1972	do	do	Pricketts	1 $\frac{1}{4}$	20
Jan. 11, 1972	do	do	A. & P	1 pound	20
Jan. 12, 1972	Store survey	Goshen, Ind.	Witt's	1 $\frac{1}{4}$	149 $\frac{1}{2}$
Dec. 8	do	Dectaur, Ill.	Tolly's	1 pound	16 $\frac{3}{8}$
Dec. 15	do	do	do	do	16 $\frac{3}{8}$
Do	do	do	Signons	1 $\frac{1}{2}$	22 $\frac{1}{4}$
Do	do	do	Duponts	1 $\frac{1}{2}$	29 $\frac{3}{8}$
Do	do	do	Bi-Rite	1 $\frac{1}{2}$	29 $\frac{3}{8}$
Do	do	do	A. & P	1 $\frac{1}{2}$	33 $\frac{3}{8}$
Do	do	do	do	1 $\frac{1}{4}$	25
Do	do	do	do	1	20
Do	do	do	K. Mart	1	10
Do	do	do	Kay's	1 $\frac{1}{4}$	20
Jan. 13, 1971	Progress	San Francisco	Bell's 1	1 pound	14 $\frac{1}{2}$
Feb. 11, 1971	Record	Stockton, Calif.	K. Mart 2	do	18
Feb. 3, 1971	do	do	Centro-Mart (IGA)	do	15
Mar. 23, 1971	Daily	Madera	Valu Mart	do	13
Do	Bee	Fresno	Shop N. Sav	do	19
Do	do	do	Albertson's	do	29
Do	do	do	Hanoians	1 $\frac{1}{2}$	16
Mar. 31, 1971	do	Sacramento	K. Mart	1	10
June 1971	do	do	do	1	24 $\frac{3}{4}$
June 23, 1971	Daily Review	Hayward	Russell's 1	1 pound	15
Mar. 23, 1971	Store survey	Fresno, Calif.	CC Markets 1	do	19
Do	do	do	Thrift Market 1	do	15
Do	do	do	Hanoian 1	do	21 $\frac{3}{4}$
May 1, 1971	do	Sacramento	Parade Markets 1	do	17
May 10, 1971	do	Modesto, Calif.	New Deals 1	do	25
Do	do	do	Jumbo 1	do	25
May 29, 1971	do	Bakersfield, Calif.	Mayfair All 7	do	15
Do	do	do	T-Mart	do	25
Do	do	do	Stop & Shop 1	do	22
Do	do	do	Sales N-Save	do	25
Do	do	do	Dennys 1	do	22
Do	do	do	Sage 3	do	25
Do	do	do	Greenfrog	do	16 $\frac{3}{8}$
Do	do	do	Youngs 4	do	25
Do	do	do	Vincents	do	25
Do	do	do	Tops 5	do	7
Do	do	do	Center 2 5	do	16 $\frac{3}{8}$
Do	do	do	County Fair B & C	do	23
Jan. 19, 1972	Tribune	Oakland	Food Farm 1	do	24 $\frac{3}{4}$
Do	Daily Review	Hayward	Russell's 1	do	19
July 7, 1971	Union	Sacramento, Calif.	A. & M	do	19
Nov. 3, 1971	Bee	do	K Mart	do	19
Dec. 8, 1971	do	do	do	do	25
Jan. 1972	Store survey	San Francisco	Central Market 3	do	22
Do	do	Merced, Calif.	Giant 3	do	25
Do	do	do	4 Star 3	do	25
Do	do	do	Food Center 3	do	25
Do	do	do	Country Boy 3	do	25
Do	do	Winton, Calif.	Town & Country 3	do	25
Do	do	do	Buddy Boy 3	do	25
Do	do	Livington, Calif.	Bo's Market 1	do	25
Do	do	do	Value 1	do	25
Do	do	Madera, Calif.	Frank's 1	1 $\frac{1}{2}$	33 $\frac{1}{8}$
Do	do	do	Bridge 1	do	33 $\frac{1}{8}$
Do	do	do	Bridge 3	1 pound	20
Do	do	do	Madera Super 1	1 $\frac{1}{2}$	33 $\frac{1}{8}$
Do	do	do	Sure Save 1	do	33 $\frac{3}{8}$
Do	do	do	do 2	1 pound	25
Do	do	do	do 2	1 $\frac{1}{2}$	33 $\frac{3}{8}$
Do	do	Fresno	Thriftments 1	1 pound	25
Do	do	do	do 3	do	25

See footnotes at end of table, p. 60.

INSTANCES OF CURRENT RETAIL ADVERTISEMENTS EVIDENCING SALES BELOW COST—Continued

Date	Newspaper	City	Retailer	Size loaf	Retail price (cents)
Dec. 8, 1971	Star Free Press	Ventura, Calif.	Santa/Cruz Markets	1 pound	20
Do	do	do	Safeway	do	24
Dec. 8, 1971	Store survey	Phila. Pa.	Shop Rite	1½ pounds	23
Do	do	do	Pantry Pride	do	25
Dec. 9, 1971	Times	Reading, Pa.	A. & P.	1 pound	25
Do	do	do	Acme	6 ounces	28½
Do	do	do	A. & P.	do	25
Do	do	do	Shop Rite	do	23
Do	do	do	Two Guys	1 pound	20
Dec. 16, 1971	do	do	Shop Rite	1 pound	23
Do	do	do	A. & P.	do	25
Do	do	do	Two Guys	do	20
Dec. 23, 1971	do	do	do	do	20
Do	Eagle	do	do	do	20
Do	Times	do	A. & P.	do	25
Do	do	do	A. & P Discount	do	25
Do	do	do	Pantry Pride	do	25
Do	Eagle	do	A. & P.	do	25
Do	do	do	A. & P Discount	do	25
Do	do	do	Pantry Pride	do	25
Do	Times	do	Acme	do	33½
Do	Eagle	do	do	do	33½
Dec. 26, 1971	do	do	Ciotta	1 pound	10
Do	Times	do	Shop Rite	1 pound	23
Do	do	do	Pantry Pride	do	25
Do	Eagle	do	Shop Rite	do	23
Do	do	do	Two Guys	do	20
Do	Times	do	Acme	1 pound	27½
Do	do	do	Two Guys	1 pound	20
Dec. 28, 1971	Morning Call	Allentown, Pa.	Shop Well	1 pound	16½
Do	do	do	Traubs	do	16½
Dec. 15, 1971	Press	Pittsburgh, Pa.	A. & P.	do	25
Do	do	do	WEO (A. & P.)	do	20
Dec. 12, 1971	Call Chronicle	do	Two Guys	do	20
Dec. 15, 1971	Express	Easton, Pa.	Acme	1 pound 6 ounces	33½
Do	do	do	Two Guys	do	20
Do	do	do	A. & P.	do	25
Dec. 18, 1971	do	do	Acme	do	33½
Dec. 19, 1971	Call Chronicle	Allentown, Pa.	Shop Rite	do	23
Do	do	do	A. & P.	do	25
Do	do	do	Two Guys	do	20
Dec. 19, 1971	Herald	Hacketstown, Pa.	Shop Rite	do	23
Do	do	do	Acme	do	29
Do	do	do	A. & P.	do	33½
Do	do	do	Grand Union	do	33½
Do	do	do	Penn Fruit	do	19
Jan. 5, 1972	Morning Call	Allentown, Pa.	Shop Rite	do	23
Do	do	do	A. & P.	do	25
Do	Eagle	Reading, Pa.	Two Guys	do	20
Do	do	do	Pantry Pride	do	25
Do	do	do	Shop Rite	do	23
Do	do	do	A. & P.	do	25
Do	do	do	Acme	do	28½
Do	Morning Call	Allentown, Pa.	IGA	1 pound	19
Do	do	do	Traubs	do	16½
Dec. 4, 1971	Store survey	North Carolina	A. & P.	1½	25
Do	do	do	Winn Dixie	1½	24½
Do	do	do	Colonial	1½	25
Do	do	do	Kroger	1½	19
Do	do	do	Big Star	1½	24
Do	do	do	K Mart	1½	24
Do	do	do	Food Fair	1½	19
Do	do	do	Food World	1 pound	16
Dec. 10, 1971	do	do	Our Pride	1½ pound	24
Do	do	do	Dixie	do	24½
Do	do	do	A. & P.	do	25
Do	do	do	Kroger	do	29½
Jan. 6, 1971	Daily Capitol	Topeka, Kans.	Suttons'	1½	32½
July 29, 1971	do	do	do	1½	19
Nov. 9, 1971	Capital Journal	do	IGA	1 pound	20
Jan. 11, 1972	do	do	do	18 ounces	29½
Nov. 18, 1972	Store survey	Georgia	Kroger	1 pound	25
Dec. 1	do	do	Winn Dixie	do	24½
Dec. 2	do	do	do	do	24½
Nov. 26	do	do	Colonial	1½	19

See footnotes at end of table, p. 60

INSTANCES OF CURRENT RETAIL ADVERTISEMENTS EVIDENCING SALES BELOW COST—Continued

Date	Newspaper	City	Retailer	• Size loaf	Retail price (cents)
Dec. 2	Store survey	Georgia	Colonial	1½	22
Dec. 11	do	do	Dixie Darling	1½	24¾
Dec. 13	do	do	do	1½	24¾
Do	do	do	Kroger	1½	29¾
Do	do	do	Our Pride	1½	25
Do	do	do	Kroger	1½	26¾
Do	do	do	A. & P.	1½	33¾
Dec. 29, 1971	do	do	Our Pride	1½	25
Do	do	do	A. & P.	1½	27
Do	do	do	Treasure Island	1½	24¾
Do	do	do	Dixie Darling	1½	33
Do	do	do	Big Apple	1½	25
Oct. 27	do	do	A. & P.	1½	25
Nov. 3	do	do	do	1½	29¾
Nov. 10	do	do	do	1½	25
Nov. 11	do	do	do	1½	25
Nov. 15	do	do	do	1½	25
Nov. 17	do	do	do	1½	25
Nov. 18	do	do	do	1½	25
Nov. 21	do	do	do	1½	29¾
Nov. 22	do	do	do	1½	29¾
Nov. 25	do	do	do	1½	25
Nov. 28	do	do	do	1½	25
Nov. 29	do	do	do	1½	25
Dec. 1	do	do	do	1½	25
Dec. 2	do	do	do	1½	25
Dec. 6	do	do	do	1½	25
Nov. 3	do	do	Big Star	1½	19
Nov. 10	do	do	do	1½	25
Nov. 9	do	do	do	1½	19
Nov. 12	do	do	do	1½	19
Nov. 17	do	do	do	1½	19
Nov. 24	do	do	do	1½	20
Nov. 25	do	do	do	1½	25
Dec. 1	do	do	do	1½	19
Nov. 10	do	do	Colonial	1½	25
Nov. 11	do	do	do	1½	25
Nov. 12	do	do	do	1½	29¾
Nov. 17	do	do	do	1½	20
Nov. 21	do	do	do	1½	20
Nov. 22	do	do	do	1½	20
Nov. 24	do	do	do	1½	25
Nov. 25	do	do	do	1½	25
Nov. 26	do	do	do	1½	25
Nov. 28	do	do	do	1½	25
Dec. 1	do	do	do	1½	20
Dec. 2	do	do	do	1½	20
Nov. 10	do	do	Harveys	2 pounds	33½
Nov. 14	do	do	do	do	33½
Dec. 5	do	do	do	do	33½
Nov. 11	do	do	IGA	1½	29¾
Nov. 11, 1971 through Nov. 25, 1971.	do	do	do	1½	29¾
Nov. 10	do	do	Kroger	1½	25
Nov. 22	do	do	do	1½	22
Nov. 29	do	do	DeChamps	1½	25
Dec. 12	do	do	do	1½	25
Nov. 10 thru Dec. 6.	do	do	Winn Dixie	1½	29¾
Dec. 8	do	Gainesville, Fla.	A. & P.	1½	22½
Do	do	do	Winn Dixie	1½	22
Dec. 15	do	do	Thriftway	1½	22
Do	do	do	A. & P.	1½	22½
Dec. 8	do	Palaka, Fla.	A. & P.	1½	22½
Do	do	do	Winn Dixie	1½	29¾
Dec. 8 to Dec. 18, 1971.	do	St. Augustine	A. & P.	1½	22½
Dec. 8 to Dec. 16	do	Ocala, Fla.	Thriftway	1½	22
Do	do	do	A. & P.	1½	25
Dec. 16	do	Daytona	do	1½	22½
Do	do	do	Thriftway	1½	22
Nov. 1 to Dec. 16.	do	Jacksonville, Fla.	A. & P.	1½	22½
Do	do	do	C. & C.	1½	22½
Do	do	do	Pantry Pride	1½	22
Do	do	do	Banner	1½	22
Do	do	do	Big Star	1½	22

See footnotes at end of table, p. 60.

INSTANCES OF CURRENT RETAIL ADVERTISEMENTS EVIDENCING SALES BELOW COST—Continued

Date	Newspaper	City	Retailer	Size loaf	Retail price (cents)
February 25, 1971	Store survey	Salem, Oreg	Safeway	22½ ounces ¹	24½
March 1	do	do	do	do	17
March 8	do	do	Tradewell	do	25
March 29	do	do	Safeway	do	25
June 2	do	Portland	Albertson's	do	19¾
June 7	do	do	Foodtown	do	19
June 5	do	do	Ferd Meyer	do	33½
June 21	do	do	Albertsons	15 ounces	10 8
Do	do	do	Tradewell	22½ ounces	24½
Do	do	do	Thriftway	do	24½
Do	do	do	Safeway	do	24½
June 23	do	do	Sonny Boy	do	18
Do	do	Salem	Fred Meyer	do	15
Do	do	do	Food City	do	15
September 1	do	do	Mayfair	30 ounces	45
August 26	do	do	Albertsons	do	20
Do	do	do	Namulus Mkt.	do	17½
September 20	do	Portland	Safeway	do	33½
September 22	do	do	Mayfair	22½ ounces ²	10
October and November	do	Salem	Food City	do	17
Do	do	do	Town & Country	do	15
Do	do	do	do	do	17
Do	do	do	Ed's Market	22½ ounces ³	18+19
Do	do	do	Thriftway	do	17½
Do	do	do	Fred Meyer	do	25
Do	do	Chehalis	Fullers	do	10

¹ Baked by Campbell-Taggart, Inc. of Dallas, Tex.

² Baked by American Bakeries of Chicago, Ill.

³ Baked by ITT-Continental Baking Co. of Rye, N.Y.

⁴ In northern California retail price is 25 cents and the published wholesale price is 24 cents. Yet the actual net wholesale price to volume accounts is approximately 19 cents at this time for all loaves of one pound bread, with concomitant costs of over 22 cents a loaf.

We receive numerous reports from grocers in this trade area that the national competitors are out to destroy the one remaining independent bread producer. We believe that these reports are accurate, and a means must be found to stop such predatory sales below cost, and that this story is relevant to the committees deliberations on whether S. 1457 should be reported out of committee.

⁵ In a market survey of northern Indiana and southern Michigan conducted the week before last I found a prevailing price spread of close to 20 cents a loaf in most stores between private label and brand bread. I purchased a pound and a quarter loaf of bread for 15 cents in Goshen, Ind., (sales slip attached to advertisement exhibit D) and sales of 1¼ pound bread at 5/51 were common throughout the market. I observed a sign 10 loaves for \$1.

⁶ Regular, prevailing, retail price is 31 cents a loaf, and the above prices are demonstrably below the total cost of doing business.

⁷ Free package of oleomargarine with purchase of 1 loaf of bread at regular price.

⁸ In Topeka, Kans. we have seen IGA among others retailing a 1 pound loaf of bread for 10 cents. This price lasted for 1 month and then the supplier, a national corporation, began subsidizing a tie-in with a free package of oleomargarine. Programs of this sort are sometimes labeled merchandising specials by the offeror but it is clearly a reduction in price. In this trade area the Jordan Baking Co. went out of business March of 1971 as a result of such practices. The only remaining independent in this market has had to compete with large cash payments to stores, discriminatory below cost offers which clearly threaten to injure competition irreparably. Again, below cost sales is the primary problem.

⁹ In the Pacific Northwest a 22½ ounce loaf of bread costs over 25 cents to make and distribute wholesale so that when it retails at these low prices there is a substantial percentage loss on each loaf sold. No independent baker, no matter how efficient, can survive for very long if his volume sales are in these products.

In any market such as the Northwest, San Francisco, Ventura, Los Angeles, Reno, Denver, South Bend, Philadelphia, Syracuse, Joplin, Topeka, Dallas, or Houston where the price is allowed to remain for an extended period or time below the total cost of making and selling bread and bakery products, the result is clear and foreseeable. These cents represented on the chart are the lifeblood of a business. Without the requisite profit, any manufacturer who does not have a deep enough pocket or sufficient diversified business opportunities to withstand and support the price war, is eliminated from the marketplace. He just goes out of business, forever.

It is our testimony that this has happened in market after market and these charts are merely representative.

¹⁰ Regular price is 37 cents.

RESTAURANT ACCOUNTS

The actual prices charged restaurants and institutional customers are often more difficult to obtain and explain but our investigations have shown the same problems exist in selling bread, rolls and related baked foods to institutions for on-premise consumption. We believe all the arguments offered apply with equal force to competition for restaurant business.

In many cities from Philadelphia to Cincinnati, South Bend, Denver, Reno, Bakersfield, Los Angeles, etc., etc., bread and roll producers are learning of special deals being offered by several national companies to large chain restaurant accounts. In many instances price reductions of 5, 7, 10, 15 and 20 percent

are being made to select accounts. The magnitude of many of these reductions is clear evidence that such sales are below the total cost of doing business. Just as important, an attempt is made to find a means to gain unfair advantage by taking an industry which has always consisted of separate economic trade areas and combining these territories to prevent local competition. Such regional, coast-wide and nationwide special deals to both restaurant and grocer accounts are clearly designed to suppress not promote competition. Similar sophisticated anticompetitive tactics are being developed at this time by some national bakers. In our chartering of prices we have not stressed the various tie-in and other tactics because of an attempt to limit the scope of the discussion to below cost selling. We believe that leverage used and the central vice in most of these schemes is a below cost price. By striking at the root, below cost selling through S. 1457, that the majority of these practices can be eliminated.

CONCLUSION

We respectfully submit that without help from the law the majors can and give every indication they will eliminate the independent from many of these markets. They can do it in any city in the United States.

Some of the below cost sales at the retail level are the result of supplier subsidization. I have given considerable testimony on this aspect and offer to provide this Committee from our files ten times as many examples as were cited today if it would be of assistance in evaluating the need for this legislation. In my testimony I have also alluded to the common situation where a supplier's below cost price is not passed on to the consumer. I would now like to direct attention to a third and fourth situation.

The grocer situation

Some vertically integrated grocers sell products such as bread which they produce themselves in a "captive" plant. We believe it self evident that such producers also should be required to sell above the total cost of doing business.

The fourth case would be the grocer who is "footballing" bread as a loss leader to build traffic in the store. The grocer may attempt to induce a discriminatory below cost price to subsidize such adventures, but in other instances will absorb the loss and make it up by increasing the price on other items. The effect of such pricing is disastrous to the limited line producer and the attendant market reaction is producing increased concentration at the grocery retail level and monopolization at the bread and bakery product supplier level. When this results we believe it clear that such sales below cost should be unlawful, and that those injured should have self help available in the form of a private cause of action.

I believe the vast majority of businessmen and consumers in the United States recognize and agree with the principle that there is no such thing as a free lunch. There is nothing objectionable in S. 1457 to big business, the food business, the consumer, or contrary to our economic goals of free competition.

I conclude with the facts of a recent sales offering made in Youngstown, Ohio by the largest baker in the United States wherein a price of approximately 16½¢ was offered with full rack service to one of the best retail grocery accounts of an independent baker in the market—a grocer cooperative. This price is four to five cents a loaf below the cost of this national company to produce and distribute this loaf with full rack service. Furthermore a comparable offer was not being made to others but this dominant baker guaranteed the price for several years, "as long as any grocer-baker sold at a lower price." Since there is a traditional spread of at least 2¢ a loaf between wholesaler brand bread and captive label bread this offer in effect guaranteed below cost prices forever. This offer was not accepted for extraneous reasons but if it had been the resulting reaction might well have been a vicious price war and bankruptcy for the independent with results similar to the situation exposed in the Denver lawsuit. Yet there is a legal question whether or not this offer was actionable at law if an injured party chose to resort to litigation. If all of the retail grocery stores accepting the offer were within the state of Ohio and with the bakery plans of this dominant baker that would be serving these customers also within the state of Ohio, discriminatory sales might not cross state lines despite the clear interstate character of this attempt to increase domination of the industry. Therefore, unless a geographic price discrimination case, with many attendant extremely difficult evidentiary problems, could be substantiated, a successful suit seemed unlikely since although the baker is the largest baker in the United States they did not have such a high percentage of the local market as to make a Section 2

monopolization case easily demonstrated. It was of course possible that isolated discriminatory sales from plants outside the state could be located but this is certainly tenuous ground under which to institute a federal lawsuit. And Ohio does not have a relevant state statute.

We have offered this example which is very similar to situations faced by our members every day, merely to point out vividly to the Committee some of the advantages which we believe would inure from the passage of S. 1457.

We also wish to emphasize that loss leader selling of bread and other baked foods by retail grocers should likewise be prohibited whether the grocer is selling a product produced by a non-related supplier or by its own facilities. To the victim, a sale below cost is a sale below cost.

The independent bakers have organized to survive. They have found that in unity there is strength, and they strongly support S. 1457.

We thank the Committee very much for your patience.

Mr. GREENWALD. I now wish to introduce Mr. Elmer Prosser who has some very brief extemporaneous remarks.

Mr. KELLY. We appreciate that very much. We did not hope to read the whole statement today. I would just like to point out the highlights of it. We offered such an extensive statement to demonstrate what we think is a pressing need for this bill.

Mr. Litwin would like to say a few words in behalf of Mr. Greenwald and then I would like to take a few minutes, also.

Mr. LITWIN. I will be extremely brief. The statements, as you say, are extensive.

The independent bakers, for which we speak today, have an annual volume of some \$2 billion. This is a terribly important segment, not only of the food business, but of the national economy.

Senator Sparkman has supplied figures to the Senate and to the Congress, indicating that from 1946 when World War II ended, to the present time, 90 percent of the independents have vanished. We think there is a trend, and an accelerating trend and that action will have to be taken if, as Mr. Paulson said, the competitive system in the United States is to survive and prosper and flourish.

We think we are all committed to the principle. The problem is to find the means to help them to survive and prosper and flourish.

In the bakery business, of which we think we have some knowledge, I suppose the committee knows bread is sold on consignment. The driver comes back to the supermarket, looks at the coding and takes back for full credit every loaf of bread which has not been sold while it was still fresh.

As you will appreciate, Senator, the baker is in a position entirely different from the manufacturer of hardware. When his market softens, he can put his hardware in the warehouse. The baker has got to move his product on the day on which it comes out of the oven, or it is a total loss for him. So predatory competition catches the baker by the juglar vein, and it is a pattern which we have had across the country.

In the bakery business, you have three main sources of product for the housewife: the independent, for whom we speak; what we call the captive which is the bakery owned by A. & P. or Safeway or Kroger, et cetera, which produces only for their store; and the national chains, of which ITT-Continental, Campbell Taggart Associated Bakeries; American Bakeries; and Interstate Brands, are the four big ones.

Of those four, three are presently under FTC order to make no further acquisitions. I believe that there is no outstanding order against

Interstate. I believe further that the order against Continental will expire this June or July, and I am not aware that anything is being done to extend it.

The three large ones, therefore, Senator, under FTC restraints against acquiring bakeries have found a way to walk around those orders and acquire business. You will appreciate that if you owned 40 or 70, or 80 bakeries around the country, you can comfortably afford to sell below cost in one or two or six markets, because those losses are being subsidized by your profitable branches around the country.

So, instead of putting money into the acquisition of buildings and ovens, they are putting their money into the acquisition of markets. And the success of their efforts is well evidenced by these statistics which Senator Sparkman and others have supplied as to the impending death of the independents in the bakery business.

Mr. Prosser, of course, is one of the more recent examples. We have had a series of chapter 11 proceedings in the bakery business, and there are more coming that we know of.

I would like very quickly to deal with four subjects which were of interest to the committee this morning, and then give Mr. Kelly and Mr. Prosser an opportunity to go further.

Mr. Bangert asked Mr. Paulson whether he assumed that prevailing price is a reasonable price in the milk business. Now, I had read Mr. Paulson's statement, which gave me no difficulty.

Mr. Bangert, in the bakery business, the lowest price is the prevailing price. You cannot have in a city four bakers with three selling at 20 cents and one selling at 18½ cents, because almost immediately the price becomes 18½ cents. This is one of the problem areas. The prevailing price is always the bottom. It is not the middle or the top.

You also asked whether the housewife does not benefit from sales, even if they be below cost. And I think the answer was, rightly made. It is a short-term benefit at best. The day will come, and it has happened in large cities in the United States, when no independent remains. And when that point comes, she does not enjoy that benefit of low prices. When the last independent leaves the city, the giants get their money back many times over. This is the trend we fear. This is what we think we are facing.

I would also suggest on a short-term basis there may be no benefit to the housewife when she buys a loss-leader. I think the price of detergent or of hamburger or bananas may be raised sufficiently so that the supermarket suffers no loss on that day. Actually, it is a way of getting her into the store, because there are other things they want to sell her at a profit. And my own conclusion is, after an association of 20 years with the bakery business, that there is no saving to the housewife when she goes to a place which offers loss-leaders.

I did want, very quickly, to comment on the problem which Senator Hruska referred to, namely including in this bill, S. 1457, the good faith defense of meeting competition.

Senator, it seems to me that if you read the bill as I read it, intent to injure competition or to eliminate a competitor has to be proved, because the word purpose as in this bill; it is not in some other sections of the Sherman Act or the Clayton Act.

My point is, Senator, that if the purpose to injure or eliminate can be proved, it negatives a good faith defense of meeting competition,

because where good faith exists, the plaintiff will not be able to prove purpose to injure or eliminate.

I submit, sir; that you could, under a general denial, if we think in terms of pleading, under a general denial, successfully disprove or rebut the allegations of purpose if, in fact, you have a good faith defense. And that the language to which you alluded might not only be surplusage, but might confuse a court as to the intent of the Congress.

Senator HRUSKA. Are you a lawyer?

Mr. LITWIN. Yes, sir.

Senator HRUSKA. You are a lawyer?

Mr. LITWIN. Yes, sir.

Senator HRUSKA. I just wondered about that. I do not attempt to get into a long discussion of it because our time is short. As I understand it, there is not the element of intent in that defense. It simply says if a baker will lower his price to "*w*" cents, another baker who has "*w*"-plus-one can lower his price to "*w*" cents.

Mr. LITWIN. We have not—

Senator HRUSKA. Do I misstate it? Have I the wrong outlook?

Mr. LITWIN. Sir, we have not understood the antitrust law in this sense. We have understood it in this way; that a violation of law by one baker, in dropping his price for discriminatory or conspiratorial or combinational purposes, does not immunize baker No. 2 who also resorts to illegality.

Senator HRUSKA. You put a new element in there. You say, conspiratorial or combinational. You cannot put that in under this proposition. It cannot be done because that is a new element. I will go along with you right away because there you run into the price-fixing statutes.

Mr. LITWIN. I do that in order to satisfy your objection, sir, because you take the case where there is an independent, and there are two chains in a city and, let us say, the price, or the cost of a loaf of bread to the wholesale baker is 20 cents. One of the chains drops the price to 18 cents, clearly below cost.

Chain No. 2 comes down to 18 cents, clearly below cost. The independent has got to go to 18 cents, clearly below cost. In that situation, sir, the two chains subsidized by the various branches around the country can last forever. The independent cannot. And so, the illegality of dropping below cost should in no sense be interpreted to immunize the second tort-feasor. I do not think it was ever intended that way.

Senator HRUSKA. Well, it is a legal problem. It has been thoroughly discussed before and I just carried away that impression. Maybe it is erroneous, but I do not think so as up to now.

Mr. LITWIN. The final point I would cover briefly, and I think it is well understood, there is nothing new in the substance of S. 1457. This Congress thought they had enacted it and thought it was on the book until the Supreme Court, in 1958, said that is not an antitrust statute and not available for private suit.

I respectfully and humbly submit, sir, that in adopting the bill at this time, the Congress would be restoring something that it had thought it enacted a long time ago. We support it most sincerely and as vigorously as we are able.

I have nothing else, sir. I would ask the committee to hear now from Mr. Richard B. Kelly, the associate counsel of the Independent Bakers

Association, who has a brief statement to make, highlighting his written statement.

Thank you very much, sir.

Senator HRUSKA. Thank you for your comments. I might say to you and all of the witnesses here, my recollection of the bakery business goes way back, before the really big combinations, when you could recognize a member of the craft by the size and strength of his hands and by the width of his wrists, indicating that he had worked out many, many times on that mixing board.

Mr. LITWIN. You were kind enough to address the Quality Bakers of America at their stockholders meeting 2 or 3 years ago in New York City. This is one of our clients. A cooperative of some 100 bakers.

Senator HRUSKA. I have talked with a lot of groups of this. Some of them are so naive as to invite me the second and third time.

Mr. LITWIN. We will be glad to do that.

Senator HRUSKA. Thank you very much.

We will listen to both Mr. Kelly and Mr. Prosser, and then I have one or two questions that each of you can address yourselves to.

Mr. KELLY. Senator, I would like to summarize my summarization, because of the time limitation. Very briefly, I will start out by saying we very much appreciate the opportunity to present the case of the Independent Bakers and their very strong support for S. 1457.

I stress the urgency because the Independent Bakers feel so strongly the need for S. 1457 they would gladly accept it as drafted if the alternative is delay, despite Mr. Greenwald's very strong statements in favor of amending the act.

I guess we should point out the vast majority of independent bakers do support S. 1457. And when I say independent bakers, I am thinking in terms of bakers with more than half a million in sales. That would be about 10 routes, and that would be something less than 300 bakers in the United States today.

There is no way for them to survive as the competitive situation exists now. It is happening market after market. We are now experiencing concentration, and our statements, we believe, highlight the threat of monopolization in the bakery industry. We highlight the fact our statement does cite cities, it cites cost, it cites prices, and it cites specific deals that exist today, 1972. We evidence one central point that as a direct result of sales below cost, the bread industry is quickly becoming a shared monopoly.

We suggest this testimony reflects the real world today. My statement reflects visits to some 40 markets in the last 2 years. And bakers like Mr. Prosser 2 years ago was telling his problems. Today other bakers continue to tell the same story; Mr. Prosser tells them to you for the benefit of his colleagues. It does him no good any more.

I make one other point. We feel it necessary to stress we have a homogenous product which is perishable. Within the local trade area, low-cost pricing always compels the action, further action, and reaction, that will inevitably lead to price wars and bankruptcies if allowed to continue long enough. If there are less than 300 independent bakers today, I predict there will be less than 100, 5 to 7 years from now. We have had 90 percent of the breakfast cereal industry controlled by four companies and the FTC issued a complaint last week opposing the continuance of this situation. In 20 years we may have 90 percent of the bread industry controlled by four bakeries which, in

such a situation, we would suggest there would be great reluctance by these large companies who compete in many markets to not follow each other's price lead.

We think this is a classic antitrust situation, that the antitrust laws were designed to prevent. There are a number of antitrust suits pending, but we want to stress the fact we believe it is too little, too late.

Mr. Prosser is engaged in an antitrust suit right now against his competitors, but he is out of business. He may win the suit, get some money, but he is gone forever. We think the only way to cure the problem early enough is to strike at the roots of the problem.

We also believe S. 1457 as drafted does and should prevent loss-leaders by retailers or suppliers whenever statutory requirements are met. Our prepared statement speaks of retail loss leaders in some greater detail. We certainly support the context.

I would make one last point, briefly. I would like Mr. Prosser to make a couple of remarks and we would answer any questions you have. Our last point is the U.S. Supreme Court has already, in the *National Dairy* case, set the criminal statutory test for section 3 with the cost definition, which is the same as that found in S. 1457. It negates incremental cost accounting concepts.

We believe 1457 is desirable legislation and the Independent Bakers would ask only one thing, if they are as efficient as their competitors, they be allowed to survive.

Senator HRUSKA. Mr. Prosser.

Mr. PROSSER. I would just like to comment on the large wholesale bakers. They have a very efficient office and they take and analyze the market areas that the independents are operating in, and they take and find out what type of volume that you realize your profit from.

Back in 1966, we were producing approximately 30,000 loaves of 1-pound bread a day and a national chain dropped that price from 26 to 20 cents. So if you take and figure that out, that is \$1,800 a day of profit that turned into nonprofit.

I also have some other figures here to substantiate how prices vary along the coastline of California, from the base of Los Angeles, which is 6 million people, up along Santa Barbara, I believe every one is familiar with it. I am just 30 miles south of there, up into the Ventura area. As you get almost 200 miles away from the home plant, the prices are cheaper there than they are in the Los Angeles area despite higher transportation costs.

Senator HRUSKA. The exhibit will be accepted for the committee's file.

Mr. KELLY. I forgot to mention, I have exhibits mentioned in our statement.

Senator HRUSKA. Very well.

Have you any?

Mr. LITWIN. No.

(The exhibits above-referred-to will be found in the files of the subcommittee.)

Mr. PROSSER. I might say, too, prices today, I would like to submit, are at the same level as they were in 1958 in the volume items that the independent bakers are doing volume in. And in the Los Angeles area, there are only three independent bakers left today; Gordon, Union Made, and Puritan. Union Made and Puritan have been contacted by ITT-Continental for acquisition after the first of July.

They were interested in finding out whether they would be willing to sell after the restriction order against them has been lifted.

So I feel if they cannot run you out of business, they want then, in turn, to buy you out. In my case, I was pinned in along the coastline and I couldn't fight them.

I also have some other ads here to substantiate a captive bakery of Safeway Stores is selling a pound and a half loaf for 37 cents and in an independent store, Wonder Bread, is being sold, a 24-ounce loaf, is being sold three for a dollar.

In other words, the cost of doing business with ITT-Continental, paying delivery wages and transportation costs, is greater than it is against a captive bakery where the bread is transported on the produce, milk, or even distribution of their grocery items.

I would also like to state that the Independent Bakers Association, of which I am a director, supports the Senate bill 1457.

Thank you.

Senator HRUSKA. Thank you very much.

Mr. BANGERT, have you any questions of these three, or all of them?

Mr. BANGERT. In view of the pressures on the chairman's schedule, if I could pursue just one area at this point, and then perhaps reserve the right to submit questions in writing, that would satisfy me.

Senator HRUSKA. And answers in writing to be inserted in the record at the appropriate place. That would be very satisfactory.

Mr. BANGERT. Fine, Mr. Chairman.

The one area I would like to pursue, since we have obvious legal talent here, is the question as to whether or not present laws are adequate to deal with the subject of predatory pricing; whether or not the Sherman Act, section 2, whether or not the Robinson-Patman Act, both of which create a private right of action, are not sufficient to deal with the problem of predatory pricing. I would like to have your comment on this.

Mr. LITWIN. Mr. Bangert, take the situation where an independent baker goes into a hamlet in which there is a supermarket and some small stores. His only economic justification for going into that hamlet is the supermarket. He cannot justify the expense of having his route truck reach that hamlet because of a few satellite stores there.

So a giant chain comes in and they don't take all of his business, they just take away the supermarket. They leave him to bleed, selling three, four or five "Mom and Pop" stores at a loss. And they take away that which justified serving the hamlet.

I submit, sir, the Federal Trade Commission and the Department of Justice have not the resources to get down to this level. There has got to be an outlawing of selling below cost with the intent to injure competition. My own suggestion is, although I have no crystal ball, the problem raised by the Chief Justice and to which Senator Hruska alluded, of burdening the Federal judicial system, may be helped somewhat.

A clear spoken statute such as this one may reduce some of your enormous antitrust litigation, some of which have tied up a judge for 3 months, for 6 months. We had the case in the southern district of New York, where Judge Medina, then a district judge, was tied up, as I recall it for more than a year, in a case involving the underwriters. So the effect may be to work in very nicely with the problems to which the Chief Justice alluded in St. Louis, as you mentioned, Senator.

Senator HRUSKA. If counsel will yield, I do not quite get your reasoning there. You substitute the exposure to the Federal court at the hands of many, many businessmen, through additional suits. And you say that by some process, that would lessen the load on the Federal courts rather than increase it.

Would you go over that again? I do not quite follow your reasoning.
Mr. LITWIN. Yes. I would be glad to.

Senator, you and I are working under different assumptions and maybe mine is wrong. I assume a plainly written bill will be obeyed and you are assuming it won't be, therefore you foresee more litigation, and I foresee less. This bill is clearly written and the damages can be clearly estimated, and I think some of the predatory competitors may say, perhaps the time has come for us to start earning profits instead of losses and let the independents earn some as well.

So, Senator, neither of us can be said to be right or wrong. The question is whether your assumption or mine is right or wrong.

Senator HRUSKA. I will come back to that after Mr. Bangert.

Mr. LITWIN. Mr. Kelly wanted to comment.

Mr. KELLY. I would say, I believe the last two pages of my statement do give what I think are examples that S. 1457 would be very helpful with.

Mr. BANGERT. That point is, if section 2 of the Sherman Act, or if the Robinson-Patman Act did cover predatory pricing, wouldn't you have trouble, damage action?

Mr. KELLY. Well, assuming you did not have discriminatory sales across State lines or you did not have discrimination in price against competing customers, you would then not have the Robinson-Patman Act unless you were working on geographic pricing cases. We do not have national pricing in the baking industry but each market has a separate pricing situation.

The evidentiary problems would be extreme. This would leave the issue of monopolization. If you have three large bakers in a market and the price is put down, as we have in San Francisco, for example, at this moment, you have a difficult task in proving monopolization. There is a suit pending in San Francisco, the same suit in which Mr. Prosser is also a plaintiff, and we may win.

The point is, many of the bakers who did go out of business, would not go out of business as they now do if they did not feel constrained to carry the burden or bringing the suit only after it was clear monopolization was coming, and at this point they are too far down the road to survive.

If they could have sued early enough, they would have survived. Mr. Prosser is out of business. Even if we were to have successful cause of action, we may have all of the independents gone from the west coast, certainly from California.

Mr. BANGERT. So the point is, as I understand it, there is predatory pricing, but it does not necessarily have to be geographic pricing, so as to be applicable under the Robinson-Patman Act.

Mr. KELLY. I would say it is theoretically possible to prove a geographic price discrimination case but there are different prices in each city. The evidentiary problem to prove would be insurmountable in many cases.

Mr. PROSSER. I have a sheet showing geographical pricing out of the same place.

Mr. BANGERT. As far as the Sherman Act, then, it is my understanding, in order to show the full monopolization, it is too late by that time.

Mr. KELLY. We could probably prove our case but we have a bankrupt baker suing.

Mr. BANGERT. And we have not been doing anything with the phrase "assume to monopolize."

Mr. KELLY. We argued that.

Mr. BANGERT. No further questions.

Senator HRUSKA. Thank you, Mr. Bangert.

Mr. Greenwald's statement went into the matter of the State law. You thought there were about 30 States with the law and said they had given it up as a means to afford relief because of difficulty of proving intent. How do you get away from that in the Federal law?

Mr. LITWIN. I think it was more than that. I think he gave the illustration where the attorney general of Minnesota brought and then abandoned the 300 cases. And as was said in the testimony on behalf of the milk industry, many of those State laws follow the Federal pattern and permit only the attorney general to bring the suit.

Many of those laws do, as apparently Minnesota. Consequently, the independents have not found adequate and early relief in the State laws. The problem is clearly national and clearly one deserving of consideration by the Congress.

Senator HRUSKA. Well, here is the flat statement of Mr. Greenwald. It says, first of all, that such laws, even though they are found to be constitutional, they have been over the years of little help to secure effective relief. This is the sentence I now quote:

The difficulty experienced was in proving intent to injure.

Mr. LITWIN. That is true.

Senator HRUSKA. But now, then, tell me, how does that difficulty disappear because there is a law by Congress and not by the State?

Mr. KELLY. I guess Mr. Litwin agreed, himself, to the first point, the fact of private litigation as opposed to the Attorney General is a major advantage of S. 1457. The second question is the question of intent and proof of intent. I think it is a difficult question. That is one of the reasons we would prefer to see the "effect" language in the act.

But I listened very carefully to Mr. Paulson's testimony this morning, and I think he made the case better than I could, that there is a value to this law in bringing a lawsuit. It is more difficult to prove intent than effect. However, in an industry like bakery, or milk, where you can show everybody is clearly aware of the consequences of their act, we would find some assistance in S. 1457 despite Mr. Greenwald's strong statement.

Senator HRUSKA. Well, it is going to be kind of difficult to get that idea over, I am afraid. I do not know how, because you are going to change forms. How do you get to that essential proof that must be made, either under the bill as proposed here or with the amendment that Mr. Greenwald, I believe, puts in? How do you make that proof of the man who sells below cost, does so "for the purpose of destroying competition of eliminating a competitor"?

Mr. LITWIN. Senator, it is not so impossible. On the west coast, we have the highest wage contracts in the Nation. Prices and costs generally on the west coast, outside of the bakery industry, are also high.

Now, if we can show you, sitting as a judicial officer, national chains with prices on the west coast substantially lower than, let us say, in the Midwest, although their costs are demonstrably higher, you will be satisfied, and you will hold that intent has been proved.

This is a matter which goes to the weight of the evidence, sir, and the evidence exists. We have inches, or feet, of exhibits. They are charging less where they are costing more.

Senator HRUSKA. Those facts are all before the State court. Whatever facts you have, they are before the State court as much as they would be before Federal.

Mr. LITWIN. We all seem in agreement. Mr. Greenwald urges it and I do not think you feel differently, Senator, that State court litigation has not been adequate to solve the problem.

Senator HRUSKA. Why? Why hasn't it been?

Mr. KELLY. I think one point that has not been made, and this is only to my mind: if you had a Federal law and then you had some rulings, I think the State court with the State laws would begin to adopt the body of the law that was developing around the Nation.

I think if you had no adjudication on the issue in a particular State, that you set a difficult task for the judge, and possibly that is one of the problems. I really don't know.

Senator HRUSKA. You mean, he looks to the Federal law?

Mr. KELLY. I think if you had Federal law, the same language as the State laws, and some body of law that developed three or four cases, the State would be more comfortable in arriving at whether or not there has been a violation of the statute.

Senator HRUSKA. You get into this in so many ways. There are laws within a State. They cannot be enforced, so you come to the Federal Government and say, now, you enforce it. When they find an impossibility, flatly saying the difficulty of proving intent to injure and you do not have to prove intent under the proposed bill, but you have to prove the fact. The purpose being to destroy competition or destroy whatever the language is.

Mr. KELLY. I think it will be a difficult evidentiary task but I think we will welcome the opportunity to present the evidence to a judge.

Senator HRUSKA. That is one of the questions we get into. Of course, when we refer to predatory competitors, you see, and predatory competitions, we sort of prejudge the case, don't we? Because you have to define what predatory is, and you have to go on from there.

I refer again, it is already in the record, but I read this, so we can get some idea.

Here is Mr. Turner, who is a very noted man in this field, and he said in his Harvard Law Review article, apparently it is a rather common belief among companies selling in several products or geographic areas will be likely to indulge in predatory pricing in one or another of them. Predatory pricing, skipping something, predatory pricing as we are discussing it here does not include the possibility that a large firm will charge abnormally low prices for other than predatory reasons.

He goes on to say, to be more precise, we may define predatory prices or predatory pricing, as selling at a lower price than customary profit maximizing conditions would dictate, for the purpose of driving out equally or more efficient competitors on the greater part of the market.

And then it says, predatory pricing is not indicated simply by the fact that a company has sold below cost or operated at a loss. So, you see, if you want to equate predatory pricing with selling below cost, the authorities won't let you do that.

Mr. KELLY. I think I agree with your statement.

Senator HRUSKA. The authorities won't let you do that.

Mr. KELLY. I agree with Dr. Turner, as you read it there, completely, Senator. I would just say we would like the opportunity to try to convince the judge there was predatory purpose.

Senator HRUSKA. Then he elaborates and he gives illustrations. Mr. Bodner does the same thing on behalf of the briefs presented by the American Bar Association. But I won't belabor the point further.

It is said that bread is sold on consignment and we know that it is. Therefore, it is a special product. Therein lies further difficulty from the standpoint of a legislator who, if he passes this law, will be covering all forms of goods that are produced and they are by the thousands, and most of them are not sold on consignment. Many of them are possessed of great difficulties.

We don't know, as we have no way of telling, how far this goes until we go into a deep study of it to find out. Is it possible to determine cost for these purposes; will the effect of this opening of the Federal courts really help, or will they hurt at the hands of individual plaintiffs, you see. Will it help or will it hurt? And, that is something that we cannot quite get from listening to witnesses from bread, bakers, and from milk producers, you see.

Mr. KELLY. Senator, I am unfamiliar with the legislative process, but it would seem to me, wouldn't the affected industries be invited, or be alerted to these hearings and testify if they have a problem? I am made aware of the fact the petroleum people will testify. We certainly have in the exhibits as to cost in the bakery industry and we can do it very easily, because we assume flour cost and labor contracts, and so on.

I would hope the subcommittee would be able to get testimony from interested parties and find out if there is a problem. I could not presume to answer that question. But I would hope the hearings would get the testimony of other industries that could not meet the statutory test.

Senator HRUSKA. We meet with this problem so often. We had a series of hearings here, for example, with reference to the problem presented by franchisers. The franchise way of doing business. I suppose you have them in your business, the Dixie Doughnuts, for example.

A good case was made of many instances where malpractice and advantage was taken of people who bought the franchises and this, that, and the other thing. But when you come to put in something in the form of words and say these things cannot be done, and these things must be done, then you, no matter how long you have hear-

ings, have to call to mind that you are dealing with general national legislation, which in the field of franchising embraces a total volume of some \$100 billion in America that is growing every day.

Then you think to yourself, wait a minute, so you have some testimony from restaurants, and some beer distributors, and pop dealers, and this, that, and the other things. But here is an industry with \$100 billion market and you wonder if you are going to cure a warped or even a hand, crippled or malformed hand. What will you do to the whole volume?

That is one of our problems with this case being proposed in S. 1457.

Mr. LITWIN. Senator, I do not want to take a simplistic approach, but I cannot conceive that a company which files a tax return annually cannot determine what its costs are. I do not see how they can file a return unless they know their costs. I cannot conceive that a company which routinely files registration statements with the Securities and Exchange Commission cannot ascertain what their costs are. If they are in that position, I am sure neither their accountants, nor their attorneys would permit them to file.

I think the matter of cost could in a litigation involve a dispute between accountants on each side of the case, but that is not a reason for not having a statute.

Senator HRUSKA. Well, you see, we get even into this. Here is bids coming in from outside of the country and they are sold below cost. We have antidumping statutes, but they cannot be enforced. Why? The way they are set up? Because we cannot get at the cost, although we know they are selling below cost because they are selling in their own country for less. Now, then, are you going to tell your people you cannot meet that competition?

Mr. KELLY. I would not presume to do that. My recollection is the antidumping statute says you cannot sell less here than you sell it overseas. It is a geographic pricing statute, not a below-cost statute. But, the main point you make certainly is covered. If there is no intent to injure competition, if the good faith's meeting competition defense is presumed, as the evidentiary matter in an intent to injure, as Mr. Paulson attested this morning.

Senator HRUSKA. The milk producer got into that kind of a jam and they came over to the Federal Government and said, prevent this stream of imports into their country, and it was done, and some ugly political arose and they said, my, my, they contribute to some campaigns and, therefore, they got special consideration.

Well, maybe that is a way to do it. How do they do it, however, in the field of typewriters or textiles or shoes or even canned sardines, and/or beef? And I come from a beef State.

That is some of the consideration we have to be moved by. We cannot consider it from the standpoint of private enterprise, as desirable as we believe it to be, and we want to preserve it. But we cannot consider it from the standpoint of the baker or the milkman. There are so many other things.

That is our problem. That is why we ask people not to say, when we ask these different views, ask these questions, it is not because we are antagonistic toward breadmakers or toward milk producers, but we have other things to think about and provide, or to present. So it is a real problem.

Well, you have all brought in information here and it is current information. The exhibits will be brought into the files of the record and pertinent parts of the staff will indicate whether it will go in the record or files.

Mr. Bangert, any further questions?

Mr. BANGERT. No, sir.

Senator HRUSKA. If not, we will adjourn, subject to the call of the chairman. It is understood that at a later time this year, the hearings will be resumed with additional witnesses.

Mr. LITWIN. Thank you very much.

Senator HRUSKA. Thank you.

(Whereupon, at 12:55 p.m., the subcommittee adjourned, to reconvene subject to the call of the Chair.)

Mr. HAROLD GREENWALD,
Greenwald, Kovner & Goldsmith, New York, N.Y.

REFERRED TO IN HAROLD GREENWALD TESTIMONY

BAKERY COUNCIL OF CANADA/CONSEIL
CANADIEN DE LA BOULANGERIE,
Toronto, Canada, December 15, 1971.

Mr. HAROLD GREENWALD,
Greenwald, Kovner & Goldsmith, New York, N.Y.

DEAR MR. GREENWALD: As you suggested I enclose a copy of the Combines Investigation Act and a copy of the new Bill C-256 which is being put forward in the Federal House in Ottawa to replace it.

There has been a considerable volume of opposition to the new bill and as a result the responsible minister, The Honorable Ron Basford, has agreed that it die at the end of this session.

It likely will be re-introduced, after being amended, early in 1972.

Our industry has been plagued with loss leader selling for a number years. We have made representations to the Federal Government asking for amendments to the Combines legislation. Action was deferred pending the introduction of the new Competition Act.

Now the new Bill would appear to be giving us something worse than the Combines thing.

Also enclosed is a copy for the first draft of a submission we plan to send to the Minister.

I appreciate your offer to send us a copy of Senator Sparkman's Bill No. 1457. I understand you are appearing soon before a Committee in Washington on this.

I understand from you that there has been a recent favourable judgment in a predatory pricing case and that two other cases are pending.

Any information you supply on these cases will be most helpful to us in the writing of our brief to Basford.

Yours sincerely,

F. E. HALE,
*Chairman, Government Relations Committee,
Bakery Council of Canada.*

EXHIBIT A

* * * long way toward discouraging loss leader selling, as well as below cost selling for whatever improper reason. We would hope in the immediate future to have the wholesale bakers join with other independent businessmen in supporting this law by contacting their Congressmen and Representatives. We have urged our membership to just that course of action.

BI: You have responded to what was to be the next question. If you would like to elaborate on it you may, if not we will go ahead. What would you say would be the biggest problem of the independent wholesale baker?

Kelly: I believe sales below cost would be the number one problem of the wholesale baking industry.

Greenwald: The baking industry, so far as I have been able to determine in the course of my years of practice, is an industry which is sui generis. It is pe-

culiar unto itself. I know of no other business in which the entrepreneur is in and out of business every day. Food products are generally perishable; baker goods products are particularly perishable. The hard goods manufacturer can produce for inventory; the canned food producer can produce for inventory. The baked foods producer cannot, particularly if he is a bread baker. What he produces he must sell. If he does not sell, he suffers almost total loss, particularly under today's marketing situation, in which the bread baker sells on consignment. If his product does not suit the consumer, if for any reason the products don't leave the grocery shelves, the wholesale baker takes them back. Because of this nature of the industry, there are problems which, reflecting the nature of the industry, are also sui generis. This does place a premium on educated, informed management. We don't presume that IBA, or any member of IBA, has all of the answers but we do believe, at least, we do hope, that by collective action among that segment of the industry which has problems in common, many of the answers can be forthcoming which would help the independent to survive. For reasons already given we think that there can be no healthy baking industry unless there is a surviving and healthy independent segment of that industry.

Kelly: An elaboration on this point. One of the major problems faced by the independent baker, who might ask me to visit his market, would be a situation where a large share of the market is being purchased by a competitor or competitors coming into the market and making price concessions on a discriminatory basis to only some competing customers . . . often at sales prices below cost, be it private label and/or brand bread. This invites reaction which often results in some version of a price war and, if it lasts long enough, the weakest bakers in the market can be counted on to go out of business and this is very often the independent. When this situation occurs, the independent is rightfully complaining.

Greenwald: Dick, when you say the weakest competitor, you don't necessarily mean the least efficient competitor.

Kelly: Not at all. I mean the one who has the least war chest.

Greenwald: The one who has the weakest staying power, regardless of efficient production of a quality product.

Kelly: Exactly. I believe that the independent in many markets can compete on a cost basis with any baker in the market, but if the price is not above cost he cannot survive.

BI: What is IBA's relationship with ABA?

Greenwald: Remember that most members of IBA are also members of ABA. I point to the fact that one of the leading independent bakers is presently head of ABA. So are the majority of its directors. I know and have a very high regard for Joe Creed, ABA's legal counsel. I have worked with him on matters of common interest to all bakers, major chains as well as independents. I would be very unhappy if the misconception were that IBA was anti-ABA. Nothing could be farther from the truth. I see our role as parallel in certain respects, divergent in others, but never in opposition one to other.

BI: Let's turn it around, at the risk of your putting words in someone's mouth. What do you think the ABA's relationship is with IBA?

Greenwald: I should hope friendly in the extreme, and so far as my own personal contacts with officials of ABA are concerned, I would say that is the position which the two organizations presently enjoy.

BI: I am a little confused by the multiplicity, maybe duplicity, of organizational representation of the wholesale baker. We have ABA, of course, which represents the wholesale baker in this country by and large, although I am sure there are some marginal retail interests there, especially multi-unit people. We have the IBA, which represents the wholesale independent baker in the country, and we have three national co-ops who represent wholesale bakers in the country. Could you separate out some of these efforts on behalf of the wholesale baker? Is there some duplication or overlapping of service to bakers?

Greenwald: Let me give that a try. Each of the cooperatives, certainly the cooperative with which I am most fully familiar—the QBA—is so organized as to assist the baker up to the point of sale. It affords engineering services, accounting services, production services, merchandising and many others. It acts pretty much in promoting the interest of the individual baker-member as the central office of the large chain bakers might act for its plants. Unless those activities are well rounded, the progress of the independents may be impeded. Those services may be likened to the spokes of a wheel. If they are well con-

ceived and well executed, the independent will proceed along the road of fair competition with a large chain. But it must be remembered that the cooperative does not make, does not sell, a single loaf of bread. Therefore, when the independent baker produces his product, a quality product, efficiently but does not have the opportunity to sell it at a fair price because of unfair competitive practices, it is obvious that, despite his efficiency, he is going to disappear. It is at that point that the function of IBA takes over to help the independent baker to dispose of hopefully at a profit, the product which the cooperative assists it to manufacture.

BI: Would you say, then, that you are in a sense a marketing or economic extension of the co-ops as far as the wholesale baker is concerned?

Greenwald: That would be somewhat presumptuous. I would hope that we perform an important marketing service, but I'll leave it to the outsider to evaluate our performance.

Kelly: Certainly, we provide a certain legal expertise which the cooperatives would not ordinarily get into. IBA is interested in the marketing of bakery products and therefore is concerned about the practices and patterns of marketing that exist throughout the United States.

Greenwald: To some degree, the future of IBA can be gauged from the reception of the industry to the cost study, to which reference was made.

BI: Both of you have partially answered my next question, but let's put it all together. What has IBA accomplished during its short life?

Kelly: Our thrust has been in three directions. First and primarily, education. Second, communications with the government and, when appropriate, have the government intervene. Third, self-help through legal and economic marketing advice and, when appropriate, assistance in private antitrust treble damage suits. The goal would be to discourage some of the more questionable practices that many independents felt they faced when they founded IBA some three to four years ago. We have already made reference to IBA's first cost study. IBA now is in the process of completing a second cost study on drop delivery. We anticipate publication in the fall. It is the intention of the IBA board of directors that the cost study on drop delivery be accompanied by a companion booklet reviewing some of the legal requirements and economic considerations involved, in order to develop a fuller perspective of what we believe are often erroneous cost comparisons between drop delivery and rack service. We hope to distribute this booklet widely—to grocers as well as to bakers. IBA's study on drop delivery is not concerned with the costs within a store. Rather it is the cost of the drop delivery to the door. However, we hope by the companion booklet to give some perspective to drop delivery. This booklet is in the process of being drafted right now.

Our educational efforts include continuous circulation of current legal developments. Each of the plants now has a manual of well over 200 pages, summarizing marketing laws, requirements and developments that affect the wholesale baker. We keep in constant communication with government representatives and while we do not in any way control them, we do urge them to look into matters we believe deserve their attention. We believe that the FTC has accepted our suggestion and is now investigating some of the alleged predatory practices which have occurred in certain markets in the last several years. IBA keeps a close eye on private treble damage suits. The important Denver suit is only one of what we think will be several more very important cases to be tried within the next year. Our main goal was and is always to suggest a more rational marketing course for the industry—one in which an efficient, independent wholesale baker can survive and prosper to the benefit of himself, his suppliers, his customers and his community. Perhaps we have to talk more in detail to really understand all of our activities, and there are many, but they do fall chiefly in the legal and educational fields.

Greenwald: I would stress the educational. It would be much too bad if the industry finds it necessary, before putting its house in order, that it first tear itself apart by litigation. Our bulletins and case summaries constitute an important guide or educational tool. Through them, our IBA members have an idea as to what they should and should not do, and what their competitors may and may not do.

Editor's note: George Graf, who was general manager of QBA before his retirement, has been president of IBA for the past 2½ years and is one of the association's driving forces. Unfortunately George was ill when this interview was done and could not participate.

FEDERAL TRADE COMMISSION NEWS,
Washington, D.C., Wednesday, June 2, 1971.

PROPOSED RESTRAINT OF TRADE COMPLAINT ANNOUNCED AGAINST
A&P AND BORDEN

A proposed Federal Trade Commission complaint alleges that The Great Atlantic & Pacific Tea Co., Inc., has knowingly induced discriminatory prices for dairy products sold in stores of its Chicago Division, did not give material information to the supplier which granted the price discriminations, and participated in a price-stabilization combination with the supplier, Borden, Inc.

The Commission announced its intention to issue a complaint under its consent order procedure against A&P, 420 Lexington Ave., New York City, and Borden, 350 Madison Ave., New York City.

According to the proposed complaint, A&P has entered into an agreement with Borden to supply milk and other dairy products, packaged under A&P's private label, to the majority of the approximately 260 stores of A&P's Chicago Division (Chicago Unit when the agreement was initiated). When Borden tendered its final offer, it informed A&P the offer was being granted to meet competition in the form of an existing offer or offers then in A&P's possession. A&P accepted Borden's offer knowing that Borden had granted a substantially lower price than the only other competitive bidder and without notifying Borden of this fact. Deliveries began under the agreement on or about November 1, 1965.

The complaint alleges that:

Under these circumstances, A&P's failure to notify Borden that its offer substantially undercut the only other existing competitive bid violates the policy of the amended Clayton Act, and is an unfair practice or method of competition in violation of Section 5 of the FTC Act.

A&P violated Section 2(f) of the Robinson-Patman Amendment to the Clayton Act by knowingly inducing or receiving discriminatory prices which may substantially lessen competition.

A further allegation is that the conduct of A&P and Borden in connection with the private label agreement resulted in an anticompetitive combination, in violation of Section 5 of the FTC Act. The combination allegedly had the effect of (1) stabilizing and maintaining prices for milk and other dairy products, and (2) permitting A&P to retain the substantial monetary and competitive benefits of the discriminatory price advantage which it had obtained as a result of the agreement with Borden.

For its part, A&P made sales at the prevailing retail price level for vendor label milk and dairy products despite the fact it was paying as much as 11 cents per gallon less for private label than for vendor (Borden) label milk, the complaint says. Thus, it sustained and maintained existing retail prices and did not pass on to the consuming public any of the substantial price savings given it by Borden. Borden, for its part, failed to pass on, at the wholesale level, similar price reductions to A&P's competitors in the Chicago market areas.

In addition to halting the alleged practices, the proposed order states that if record facts show that the proposed provisions "might be inadequate fully to protect the consuming public, or the competitive conditions of the retail grocery or dairy industries, the Commission may order such other relief as it finds necessary or appropriate, including restrictions on specific abuses of buying power in bi-lateral negotiations, restrictions on the use of the competitive bidding process, requirements that special price reductions be passed on to the consumer and to competing retailer-purchasers, the posting or publication of net wholesale prices to A&P, and restriction of vertical integration by A&P into the dairy industry if it appears any such provision is necessary or desirable for effective relief herein."

The respondents have been given the opportunity to advise the Commission whether they are interested in having the proceeding disposed of by the entry of a consent order.

(Note: The Commission issues a complaint when it has "reason to believe" that the law has been violated. Such action does not imply adjudication of the matters alleged.)

EXHIBIT C

U.S. SENATE,
COMMITTEE ON FOREIGN RELATIONS,
Washington, D.C., January 10, 1972.

Mr. JOHN F. SCHAIBLE,
Easton, Pa.

DEAR MR. SCHAIBLE: In the interest of a quick response, I am taking this method of replying to your comments.

I am in basic agreement with the position you advocated and would expect to support legislation to this effect on the Senate floor.

With best wishes,
Sincerely,

HUGH SCOTT, U.S. Senator.

REFERRED TO IN HAROLD GREENWALD TESTIMONY

INDEPENDENT BAKERS ASSOCIATION,
New York, N.Y., May 6, 1971.

EXCERPTS FROM A SPEECH BY FEDERAL TRADE COMMISSIONER
EVERETTE MACINTYRE, CHICAGO, APRIL 21, 1971

It is my view that the future turn of events in the utilization of the practices of sales at prices below cost will determine whether any of these bills (Sparkman S. 1457) will be enacted by the Congress. Last month a private attorney wrote me at the insistence of members of a very important industry. With his letter he enclosed copies of correspondence which had passed between officials of firms in that industry regarding complaints they had filed with the Congress and with the Federal Trade Commission about alleged destructive price discrimination practices in their industry. In one of the letters, which incidentally was written on February 26, 1971, appeared the following statement:

"You may be interested in knowing that the Chairman of the Federal Trade Commission, Miles W. Kirkpatrick in a recent letter to Senator Eastland stated in part:

"We have received a number of somewhat similar complaints involving alleged unlawful conduct within the *bread industry*. The complaints suggest that these are often national rather than local problems. Therefore, *staff attorneys in the Bureau of Competition are presently engaged in analyzing these complaints, and hope soon to have a basic enforcement approach ready for consideration*. The objective is to evolve an enforcement policy which, when implemented, will provide a means of correcting some of the fundamental restraint of trade problems in the industry, and which at the same time will minimize the possibility of protracted, and perhaps inconclusive litigation."

In various parts of that series of correspondence were allegations that predatory discrimination in prices was having such disastrous effects on small business firms in that industry that many were not expected to survive the effects of the practice.

FEDERAL TRADE COMMISSION,
Washington, D.C., May 5, 1971.

HAROLD GREENWALD, Esq.,
Greenwald, Kovner & Goldsmith,
New York, N.Y.

DEAR MR. GREENWALD: This is in reference to your letter of March 3, 1971, with enclosures, asking what assistance the Commission can offer for some of the antitrust problems in the baking industry, particularly possible Robinson-Patman Act problems.

I regret not responding to your letter at an earlier date; however, as you realize, the matters which you have raised are not capable of an easy solution. Further, I wanted to review the problems in the baking industry with the staff to determine the best possible approach to be taken by the Commission in this industry.

While we have reached no final determinations, I can advise you in two respects. First, the Commission has not de-emphasized law enforcement in the baking industry. We must, of course, utilize our resources to accomplish the most beneficial results for the public and we cannot investigate every alleged violation of law which may be brought to our attention. We do intend to make inquiry into those matters in the baking industry where it appears our efforts may prove fruitful in the public interest, resources permitting.

Secondly, I can inform you that this Bureau is now initiating investigations in the baking industry to determine if the pricing practices of major chain bakeries in certain regions of the country have been unfair or predatory in nature, and in violation of the statutes enforced by the Commission. If the preliminary inquiry indicates a possible violation, we plan to undertake proceedings expeditiously. Such a proceeding will undoubtedly make clear that the Commission intends to continue to enforce the law with respect to the baking industry.

I trust this information will be helpful to you.

With kind regards,

Sincerely,

ALAN S. WARD,
Director, Bureau of Competition.

[I.B.A. release, April 27, 1971]

THE SOUTHWESTERN MILLER

BREAD AND PREDATORY PRICING

"There are today only about a tenth as many independent bakers in existence as there were at the end of World War II," Senator John Sparkman of Alabama said in introducing a proposed amendment to the Clayton Act. It is probably no coincidence that Senator Sparkman mentioned the dramatic shrinkage in bakery numbers in presenting his bill, S. 1457, since the measure itself has several strong sponsors within the baking industry, including the Independent Bakers Association. The I.B.A., organized several years ago with the goal of working to assure the economic vitality of the independent sector of the industry has pursued in general a realistic approach on what is a difficult path. As Senator Sparkman noted in introducing the measure, "The forces pushing us toward concentration in industry after industry in our economy are very great, and some of them may be unavoidable."

The Sparkman bill is a revision of measures introduced in past sessions which have made no progress on the legislative front. It simply would amend the Clayton Act by adding Section 3A to make it unlawful to sell below cost for the purpose of destroying competition or eliminating a competitor. That prohibition already is contained in the Robinson-Patman Act, but its addition to the Clayton Act would make violators subject to treble damage actions. It is Senator Sparkman's contention that the best way of preventing "the occasional practice of deliberate predatory pricing with the express purpose of destroying competition" is to make it possible for such treble damage suits to be filed. He emphasizes the view that adequate safeguards are involved for potential defendants in those suits, since it is made clear that "mere proof of sales below cost will not alone suffice to establish liability to a defendant by a plaintiff; there must also be proof of the predatory intent."

According to the Independent Bakers Association, "the support of wholesale bakers is vital for passage of this important bill." The association contends that it is in the self-interest of all in baking to see that such a measure is passed, since the organization believes that "the baking industry is currently riddled by unfair pricing."

While no one will want to take issue with the need for eliminating predatory pricing from baking or any other industry for that matter, it would appear that a note of caution also should be sounded. Some endorsements of the Sparkman bill reflect too much reliance on legislative remedies to cure the basic ills of the industries that would be affected. Senator Sparkman himself recognizes that laws cannot reverse basic underlying economic trends that are bringing closings and consolidations in baking at a rate that is breath-taking to behold. Equal attention to sound marketing, basic business and cost-recognizing pricing practices is required. In that effort, the I.B.A. is also actively participating through

its recent issuance of a 20-page bulletin of "Recommended Cost Procedure" for all elements in the baking industry. That study is primarily designed to help bakers to evaluate private label programs—"to be of great interest to wholesale bakeries especially in negotiations with customers and in determining what, if anything, is a proper discount." Many of the problems of baking center on illogical merchandising and marketing practices that are pursued by companies of a wide range of sizes. "The independent baker, like the independent company in any industry, prospers best when attention is given to capitalizing on individual strengths without relying on a statutory crutch.

COMMISSIONER EVERETTE MACINTYRE APRIL 21, 1971

* * * price discrimination practices destructive of competition, but Congress in 1914, did not wish it to be left to the newly created Federal Trade Commission or to the court to hold whether destructive price discrimination practices were "unfair methods of competition" and therefore violative of law. Hence, it enacted the Clayton Antitrust Act within 3 weeks following the passage of the Federal Trade Commission Act in 1914. In doing so, in Section 2 of the Clayton Act it sought to lay a basis for challenging destructive price discriminatory practices. When that legislation was reported to the House of Representatives, the Committee stated:

"Section 2 of the bill is intended to prevent unfair discrimination. The necessity for legislation needs little argument to sustain the wisdom of it. In the past it has been a most common practice of great and powerful combinations engaged in commerce . . . of great influence—to lower prices of their commodities, oftentimes below the cost of prices of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made. Every concern that engages in this evil practice must of necessity recoup its losses in the particular communities or sections where their commodities are sold below cost or without a fair profit by raising the price of the same class of commodities above their fair market value in other sections or communities.

* * * Antitrust Act by passing the Robinson-Patman Act, the House Committee on the Judiciary had held extensive hearings regarding the practice of price discrimination. That Committee advised the House to the following effect:

"Your committee is of the opinion that the evidence is overwhelming that price discrimination practices exist to such an extent that the survival of independent merchants, manufacturers, and other businessmen is seriously imperiled and that remedial legislation is necessary."²

In 1952, the Select Committee on Small Business of the United States Senate made a further study of the practice of price discrimination and in that connection studied its effect on small business and upon competition. It concluded as a part of its study and investigation a staff report from the Federal Trade Commission entitled "Monopolistic Practices and Small Business." On page 8, of that report, appeared the statement:

"The practice of price discrimination is particularly destructive to small firms. When discriminatory price concessions are made they are seldom, if ever, granted to the small buyer. And, having to pay a higher price for his merchandise than his large competitor, the small buyer is handicapped at the very beginning of the competitive race. Moreover, price discrimination is a handy and effective instrument by which small sellers are disciplined and brought into line by their larger rivals. Insofar as the business cycle is concerned, the frequency of price discriminations tends to be the reverse of the denial of supplies, becoming of greatest importance in periods of declining activity."³

² House of Representatives Report No. 2287, accompanying H.R. 8442, 74th Cong., 2nd Sess., p 3.

³ Vol. 8, Select Committee on Small Business, U.S. Senate, Monopoly Subcommittee Prints 1-9, Monopoly Hearings Part 1, 82nd Cong., 2nd Sess., p 8.

Now with that background, let us consider what are alleged to be present day practices and the present status of the law insofar as they would involve sales at prices below cost or at unreasonably low prices.

In recent periods, numerous complaints have been made to the Federal Trade Commission and to Congress to the effect that sales at prices below cost and at unreasonably low levels are widespread in a number of industries. If the evidence should be found sufficient to sustain those complaints what then is the status of the law regarding such situations? It would seem that there are three provisions of law which could be looked to for possible application to the situation. One is Section 5 of the Federal Trade Commission Act which makes unlawful "unfair methods of competition."

The practice of price discrimination involving sales at prices below cost and which may have the destructive impact of destroying competition or subsequently lessening competition would appear to be open to consideration * * *

* * * writings by the critics have been used as teaching materials in schools, colleges, and universities. Out of such surroundings, perhaps, comes some of the growing criticism of the law itself.

It is my view about the law, and the criticism of it aside, that if we have any doubt about our public policy regarding that area of antitrust, then we should re-examine the relevant facts of everyday life. In that way, we may be able to determine anew which is sound and accurate and which is fallacious—the law or the criticism of it. This is a task that should be performed by the Congress. It looked at the facts in 1912-1914, and made legislative findings concerning those facts. Likewise, it looked at the facts again in 1935-1936, and made legislative findings concerning those facts. I would recommend that such be done again now.

The Federal Trade Commission has promised Congress that it will get factual information about how its orders entered in Robinson-Patman cases have operated. In * * *

[The Southwestern Miller]

SENATOR EXPLAINS PREDATORY PRICING BILL

SPARKMAN CLAIMS "UPHILL FIGHT" FOR PASSAGE OF S. 1457 TO PROHIBIT SALES BELOW COST TO DRIVE OUT COMPETITION—SPEAKING TO QUALITY BAKERS OF AMERICA COOPERATIVE ANNUAL CONFERENCE SENATOR ASKS BAKER SUPPORT—SAYS BILL TO ENFORCE STATUTES OF 1936

NEW YORK, October 11.—Describing an address to a bakery audience as "plain talk about S. 1457," his bill against predatory pricing, Senator John Sparkman of Alabama said enactment of the bill would put teeth in the Clayton Act to expressly prohibit below-cost sales, thereby protecting "the small business public against certain vicious practices that are already against the law."

Senator Sparkman addressed the 63rd annual conference of Quality Bakers of America Cooperative, Inc., at the New York Hilton on Oct. 4 His subject was "Ingredient for Healthy Competition: Rationale for a Federal Sale Below Cost Law." His bill, introduced in April, is currently in committee in both the House and Senate. In his talk to the Q.B.A., he exhorted bakers to apply pressure to move the bill out of committee and to the House and Senate floors. "Your Senators and Congressmen must know how you feel," he said. "There is no substitute or alternative for this kind of effort on your part."

Essentially, the Sparkman bill—an amendment to the Clayton Act—would give businesses the right to sue a predatory competitor if it is believed that the competitor is making sales below cost "for the purpose of destroying competition or eliminating a competitor," in the language of the bill.

Excerpts of Sen. Sparkman's address to Q.B.A. follow:

It is a pleasure for me to be here with you and especially pleasant to know that so many of you are interested in listening to some plain talk about S. 1457. In brief, the purpose of this bill is to help assure that all of you who are making an effort to sell good products at a fair price, will still be present at future meetings of Q.B.A.

Cites baker number decline

Since World War II, it has been downhill most of the way. Thousands of independent bakers and perhaps millions of independent farmers and growers

have gone out of business. Federal Trade Commission figure for your industry alone reveal that there were 6,000 independent bakers in 1947, dropping to 4,000 in 1963, the latest year for which figures are available. Undoubtedly, the figure is much lower for 1971.

Some of these failures were probably due to personal factors, others to legitimate market and competitive factors. There is no legislation, however, that can save an entrepreneur who runs a less efficient operation than his competitor.

New type of civil policemen

S. 1457 is not that kind of legislation, although its critics try to present it that way. The purpose of S. 1457 is to create a great new class of civil policemen to protect the small business public against certain vicious practices that are already against the law.

I said "create" a great new class of policemen, but I should have said "re-create." The purpose of my bill is to restore to this nation an effective force for the upholding of the law in the business field. That force was authorized by law and operating before 1958 . . . Then, in 1958, the Supreme Court put it out of business by 5 to 4 vote in a controversial decision. Ever since, an efficient law enforcement arm that costs the taxpayers nothing to maintain has been tied down. And the law against predatory pricing, a law that has been on the books since 1936, has been violated every day ever since, while the Justice Department is busy with other matters that seem to it more important . . .

The purpose of my bill is to untie that great arm of private civil law enforcement. The purpose of S. 1457 is to give small businessmen, the victims of predatory pricing, the right and the power to be their own enforcers of the existing law against predatory pricing.

Reviews antitrust legislation

In 1936, Congress enacted the Robinson-Patman Act. It was called a Magna Carta for small business by some, and a small businessman's Bill of Rights by others. It was born in depression and in a storm of legislative and philosophical conflict and compromise, so it is not surprising that it was not an altogether clear and simple bill to understand and apply.

Actually, the bill as passed was an accommodation of two bills . . .

One approach was to amplify and thereby presumably strengthen the old Clayton Act prohibitions against price discrimination. Those prohibitions had been around since 1914 but, by 1936, a majority of the Congress thought they could be tightened up some and they were, in section 1 of the Robinson-Patman Act.

The other approach was to amplify and thereby presumably strengthen the old Sherman Act prohibitions against running competitors out of business with intent to monopolize. The Sherman Act has been around since 1890, but by 1936 a majority of Congress thought its antimonopoly provisions could be tightened up some and they were, in section 3 of the Robinson-Patman Act.

Section 1 of the Robinson-Patman Act was made, on its face and unmistakably, an amendment to the Clayton Act. What it did, in fact, was simply to rewrite section 2 of the Clayton Act as a new, tougher and more complex section . . .

Limits muscle of big buyer

What section 2 of the Clayton Act, as amended by the Robinson-Patman Act, is all about is price discrimination. It says that the big buyer cannot lawfully use his size and power and volume to extract an unfair price discount or other advantages. It is a law aimed against the unfair use of giant size in business to hurt smaller competitors in the buying, the cost end of business.

Section 3 of the Robinson-Patman Act has three different provisions which prohibit three different kinds of unfair and destructive business conduct. The first two are essentially restatements of the provisions of the amended section 2 of the Clayton Act. They also involve price discrimination; the unfair use of giant size at the buying end of the competitive game.

The third provision of section 3 does not duplicate anything anywhere else in the law. It was something new to the law, appearing for the first time on the day the Robinson-Patman Act became effective in June of 1936.

The third provision of section 3 of the Robinson-Patman Act was a prohibition against the unfair use of giant size in the *selling* end of the competitive game. The language is short, and probably the clearest language in the whole Robinson-Patman Act:

"It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

Large "If" in prosecution

That language is still the law of this land, and if you break that law you are subject to a fine of \$5,000 or imprisonment for one year, or both if—and this is a very large IF—the United States Department of Justice elects to prosecute you and succeeds in convicting you.

Elements of this criminal offense are:

First, you must be making a sale or making a contract to sell goods (not services, but goods—including, I might say, milk or bread or gasoline) "at unreasonably low prices."

Second, in making that sale or that contract to sell goods, you must have the purpose—the intent, the reason—of either destroying competition or eliminating a competitor.

Until January 1958, many lawyers and many United States courts thought that the provisions of section 3 of the Robinson-Patman Act were an "antitrust law," or part of the "antitrust laws of the United States." That would be important, because any violation of the "antitrust laws" subjects the violator to liability to anyone damaged by the violation. The damaged party can file a civil lawsuit for injunctive relief, or treble damages, or both.

In 1958 the Supreme Court decided in two companion cases—each decided by a bare 5 to 4 majority—that section 3 of the Robinson-Patman Act was not a part of the antitrust laws. Therefore, a private party could not bring a civil action to enjoin or collect damages for its violation.

Seven bills in hopper since 1958

Three days after that decision I introduced what was to be the first of many bills intended to overturn it. I agreed with the minority of the Court about what the Congressional intent had been in 1936 . . .

That 1958 bill has now been reintroduced, in forms that have changed a little bit from year to year. I have put in seven bills in all on this subject since 1958. In addition, there have been many counterpart bills introduced in the House of Representatives.

It was not until the third bill, S. 1935 of the 88th Congress that we—my cosponsors of the bill and I—were able to cross the very first hurdle in the obstacle course that stretches between introduction and enactment of every bill. In 1964 we did get hearings before the Senate Judiciary Subcommittee on Antitrust and Monopoly, but the subcommittee never considered the bill.

In the 90th Congress we did not even manage to get hearings. But finally, in the 91st Congress, there were both hearings and a closed meeting of the subcommittee which called for a formal vote on the bill (up or down). The vote was 3 to 4, down.

Twenty-seven cosponsors in 23 States

I introduced S. 1457 on April 1, 1971, with 27 co-sponsors representing 23 states. In prior versions we had removed the first two redundant provisions of section 3 of the Robinson-Patman Act to concentrate on the third, unique one, the prohibition of sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."

In the 91st Congress version, we even tried a "trade-off" with the opponents of the bill. We said we would give up the criminal sanctions if they would agree to civil enforcement.

In the present 92d Congress our new approach and new compromise with the opposition is to change the prohibition from one against sales "at unreasonably low prices" to one against sales "below cost." It is our hope thereby to pull the teeth of one criticism, namely, that the term "unreasonably low prices" is too vague.

Sums up intention of S. 1457

In a nutshell, then, if S. 1457 were enacted, it would give you the right which you do not now have, to sue a predatory competitor if you believed him to be making sales "below cost for the purpose of destroying competition or eliminating a competitor." In your suit, you could ask for an injunction and for damages three times the amount of damages his practices caused you. If you won the suit, you could get either kind of relief, or both.

It is still an uphill fight for this legislation, but I am encouraged by some developments this year. One is the growth in the number of Senate co-sponsors. There were 20 co-sponsors of the 91st Congress bill; there are 31 now on the 92nd Congress bill, a jump from one-fifth to almost one-third of the Senate.

Another encouraging sign is the growth of interest in industries from which we had not previously heard. Small business associations representing master photo finishers, licensed beverage makers and some others are among the new recruits. All the old faithful supporters—independent bakery, dairy and gasoline retailing people notably—are still aboard.

But let us not delude ourselves that this will be an easy reform to make. Many of the most powerful corporations in America and their trade associations still see themselves as prospective defendants in lawsuits that could be brought under this bill, and they don't want it to pass. It can only succeed if those powerful voices saying "It shall not pass" are overcome by sheer numbers of small business voices saying "It shall pass."

Urges bakers to support bill

I urge you to get to know the members of the Senate Committee on the Judiciary and its Subcommittee on Antitrust and Monopoly and make them aware that you know about this bill and care about it. Your own Senators and Congressmen must know how you feel. There is no substitute for this kind of effort on your part.

You should become familiar, if you are not already, with the various steps in the passage of a bill and you must encourage this one through each of those steps. The very first step, the setting of a hearing date, has not yet been taken in the 92nd Congress. If hearings are not held soon there may not be time to finish the work.

I expect to be around at the beginning of the 93rd Congress, and I expect I will be ready to go again on this bill. But why not pass it this time? In this Congress, the 92nd?

Q.B.A. COUNSEL URGES SUPPORT FOR BELOW COST SELLING LAW

NEW YORK, October 11.—"More vigorous support" from independent businessmen, particularly bakers, to a bill which would prohibit sales below cost to drive out competition was urged by Harold Greenwald, counsel for the Independent Bakers Association, speaking Oct. 4 at the annual meeting of the Quality Bakers of America Cooperative, Inc., at the New York Hilton.

Mr. Greenwald also is counsel to Q.B.A. The bill referred to in his presentation is a proposed amendment to the Clayton Act "to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor." Senator John Sparkman of Alabama is sponsor of the bill, S. 1457, now in committee in both the House and Senate.

"Despite a collection of letters from various Senators and Congressmen pledging their favorable vote," Mr. Greenwald said, without the active support of independent businessmen "it may never come up for debate." He termed passage of the legislation "an important I.B.A. objective."

JUSTICE DEPARTMENT IS RELUCTANT

The baking industry needs this sales-below-cost act, Mr. Greenwald asserted, because the Justice Department "has been reluctant to prosecute under the criminal statute, and the price discrimination statutes now on the books do not always fully meet the particular circumstances of the independent who elects to bring a civil suit.

"Moreover, enactment of this bill into law would create a more favorable climate for the voluntary elimination of sales below cost, now so prevalent in the distribution of private label products, with the consequent allocations of shelf space." Public debate on the bill would also, Mr. Greenwald declared, "provide a cost-free public platform open to businessmen to articulate their grievances."

GOAL: SURVIVAL OF THE INDEPENDENT

Speaking on the Q.B.A. program following a presentation by Senator Sparkman on the merits of his bill (a speech summarized in the above article), Mr. Greenwald also touched on the three-and-a-half-year history of I.B.A. and its efforts toward its stated goal of "the survival of the independent segment of the

wholesale baking industry." Toward this end, he said, the I.B.A. efforts are largely educational.

The association's first order of business, he said, was "to summarize and update marketing law requirements and so state them that members would know what conduct was permissible, to them and to their competitors." One purpose of this effort was "to assist members to differentiate between pricing which resulted from business efficiency, and pricing which resulted from anti-trust raiding," Mr. Greenwald said.

Another I.B.A. effort was the drafting of a Code of Fair Trade Practices which has been "endorsed by many state and regional bakery trade associations . . . and approved, without substantial change, by the American Bakers Association," he noted. The code has been submitted to the Federal Trade Commission with the request that it be promulgated as part of an F.T.C. set of industry rules or guidelines, Mr. Greenwald said, but F.T.C. has not so far acted on the request.

OBJECT TO PRIVATE LABEL PRICES

In recounting other I.B.A. activities, Mr. Greenwald cited the filing with F.T.C. of a position paper on private label marketing of bread and baked foods. "Essentially," he said, "I.B.A. stresses that all products should bear their proportionate share of costs and that—all other things being equal—price differentials between private label and brand items must be cost-justified in order to be legal. A spread of 10¢ is, in our view, unsupported, in law or in economics."

The I.B.A. and Q.B.A. counsel also reviewed the association's filed objections with F.T.C. to acquisitions of closed plants in Montebello, Calif., by ITT Continental Baking Co. and, in Tampa, Fla., by both American Bakeries Co. and Continental. I.B.A. briefs opposing each sale, he said, were based on the premise that "the trend of the chain bakery toward enlargement should be arrested whenever it threatened the interest of the independent wholesale baker."

(Editor's note: On the same day Mr. Greenwald addressed the Q.B.A. meeting, Oct. 4, F.T.C. announced approval of the sale of the Tampa plant by Southern Bakeries Co. to Continental, as reported in the Oct. 5 issue of the *Southwestern Miller*. American had earlier withdrawn its petition with F.T.C. to acquire the same plant.)

F.T.C. INVESTIGATES ALLEGATIONS

Mr. Greenwald told Q.B.A. members that I.B.A. had assembled "a dossier of unlawful practices by some national chain bakers" and submitted to F.T.C. "a lengthy report, buttressed by exhibits, in support of I.B.A.'s postulate that predatory practices . . . were causing a depletion of the ranks of the independents." After repeated contact with F.T.C. officials, he said, since submitting the report on April 30, 1970, the F.T.C. formally responded more than a year later, on May 5, 1971, that the I.B.A. allegations were being investigated by the agency through its Bureau of Competition.

"We have been informed by the F.T.C. staff that a handful of cities has been selected for concentrated attention," he said.

IMPORTS OF CANADIAN BAKED FOODS

An important reason for establishing liaison with government agencies, Mr. Greenwald said, is found in the fact that there is no tax or duty on imported Canadian bread. "In consequence, some border states have experienced competition at prices below cost," he said. I.B.A. has filed a memorandum with the U.S. Tariff Commission on "the propriety of such practices," he said, in the face of Section 3379(a) of the Tariff Act. The matter is pending.

ON PREPARATION OF COST STUDIES

Mr. Greenwald also noted the I.B.A.'s development of cost studies, on rack service distribution, which is now used as a teaching aid by the American Institute of Baking. After quoting at length from an editorial in the April 27, 1971, issue of *The Southwestern Miller*, noting I.B.A.'s issuance of the first study, Mr. Greenwald said that a second study on drop delivery distribution should be ready for release this fall. Accompanying it will be a booklet, which will outline "some of the pitfalls, economic and legal, involved in drop delivery, with particular emphasis on captive bakery operation."

The booklet will be mailed to I.B.A. members, competitors and to all large chain grocery stores, he said.

Referring to the West Coast antitrust suit filed Oct. 1 in San Francisco against four national baking companies by five West Coast baking firms. Mr. Greenwald commented: "This suit was brought after years of investigation. With no significant relief otherwise forthcoming, the decision to sue was unavoidable." He termed it "a monumental lawsuit."

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, D.C., June 28, 1972.

Hon. PHILIP A. HART,
U.S. Senate,
Washington, D.C.

DEAR PHIL: I have received from our colleague Senator James B. Pearson a statement on S. 1457 which he desires to file as a part of the Hearings Record of the Senate Antitrust Subcommittee. This statement will be one of several to be submitted by July 15, 1972 which should close the record on this bill, unless otherwise directed by the Chairman.

With kind regards,
Sincerely,

ROMAN L. HRUSKA,
U.S. Senator, Nebraska.

STATEMENT BY SENATOR JAMES B. PEARSON PREPARED FOR HEARINGS ON S. 1457
BEFORE THE SENATE JUDICIARY SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

I thank the distinguished Chairman for the opportunity to support S. 1457. I have followed the hearings on this bill and similar bills in years past with great interest and commend the Subcommittee for its concern in this very important subject.

For fourteen years now, bills have been introduced and hearings have been held in an attempt to overturn the effect of two Supreme Court decisions handed down together in 1958. The decision in the *Nashville Milk* and *Safeway Stores* cases were very close, each being decided by a 5 to 4 majority. What the Court said was simple and clear: Section 3 of the Robinson-Patman Act was not intended by Congress to be a part of the antitrust laws and, therefore, not the subject of civil enforcement in private suits by injured parties. The effect of these decisions was equally simple and clear. Prior to 1958, private parties could seek treble damages, injunctive relief, or both, against parties who, according to the third provision of Section 3, sold products "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." That relief is no longer available to curb unfair pricing practices. In other words, at the present time there exists no effective deterrent to the forces pushing this nation in the direction of centralization and concentration of economic power.

To many businesses, especially small ones, this means economic disaster. Predatory pricing, by which I mean selling goods below cost, is becoming a fact of life in many industries. While some businesses are able to engage in such practices to their great benefit, others within the same industry are severely injured.

The injuries suffered by such predatory pricing are clear. Trade is diverted from channels established by fair pricing, quality and service into a channel created by unfair competition thus penalizing the honest businessman. Most retailers cannot absorb such competition. They must either cut their prices on some articles with the hope of recovering an overall profit on all goods sold, discontinue the product, or ask their supplier for a lower price. The supplier or producer then is caught in a precarious situation. He does not want to see his product discontinued; but if he does not cut his prices, he loses customers. But if he does cut his prices, he loses profits.

The primary consequences of below-cost selling is that it often forces some businesses out of existence. Most frequently, these businesses are the small, independent ones. When even one establishment is forced out of business, it means the capital once flowing to that business will flow to another, in most instances to a larger business. In the business world, growth often breeds growth and so ultimately capital becomes concentrated in the big enterprises.

Concentration of capital is, of course, not necessarily bad per se, but it may have adverse effects on many segments of our society. This is particularly true in rural areas where small businesses play a vital role in the lives of the

people residing there. Small businesses provide not only job opportunities and income but tax revenues as well.

I believe there is a trend towards big business at the expense of small businesses, and my belief is supported by figures supplied by the Bureau of the Census. These tables indicate that in 1958 the 50 largest companies in the fluid milk industry shared 44 percent of the value of the shipments produced; in 1963, only 5 years later, they shared 46 percent of the value of the shipments. Similar statistics may be found for the bakery products, roasted coffee, woven fabric, and metal household furniture industries, to mention but a few.

A look at the independent dairy industry provides an even better illustration of this trend. After World War II, there were about 10,000 independent dairies in this nation. Some of these were barely viable as businesses but at least there were about 5,000 commercial-type independent dairies. Today, however, we find a much different picture. It is possible today to count about 1,000 independent dairies if the really small ones which are barely viable are included. If these are excluded from the count, about 500 viable commercial-type dairies remain. Hence, in the short period since World War II for every ten dairies around after the war, there is one left today.

Now I fully realize that this reduction in the number of independent dairies was not caused solely by unfair pricing practices within the industry. Some dairies have never been viable businesses and have folded from want of sound management, product demand, or for other reasons. Part of the reduction has come from willful consolidation of several dairies to achieve efficiency.

More importantly, the intrusion of the chain stores has hurt the independent processors. Chain stores now market between 60 to 70 percent of the milk sold in metropolitan areas and a little over 50 percent of the milk sold throughout the nation. Further, chain stores now do about 20 to 30 percent of the processing of milk themselves. This would not be such a problem if it were not for the fact that there is no more milk processing now than there was 20 years ago as the per capita consumption has decreased while the population has increased. Therefore, when chain stores begin to process their own milk, the independent dairies lose business.

I want to emphasize that below-cost pricing is not limited to the dairy business. Photoengravers, petroleum dealers, meat packers, tobacco dealers, and bakers are but a few of the people anxiously concerned about below-cost selling.

S. 1457 offers needed relief for the present situation as existing remedies against predatory pricing are inadequate. The pertinent sections of the Sherman and Clayton Acts are either not applicable to the type of pricing we are here concerned with or it is too difficult to build a case under the tests they describe. The Federal Trade Commission Act gave the FTC power to declare those practices which tend to hurt the competitive system unfair to the competitive system, therefore, unlawful. But so far no action has been taken by the FTC in declaring loss-leading illegal or calling selling below cost an unfair method of competition. Even if the existing laws sufficiently encompassed predatory pricing, there would still remain the problem of getting the Justice Department and the FTC to promptly investigate an alleged violation and take action.

The language of S. 1457 is clear. It says that it shall be unlawful for a person to sell goods below cost for the purpose of destroying competition or eliminating a competitor. "Cost" means "fully distributed costs which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business." What S.1457 does is to give a person the right to sue for an injunction, treble damages, or both, if this law is violated. Authorities on antitrust law agree that private relief provisions give antitrust laws their effectiveness.

This bill is the product of a long series of bills that have dealt with predatory pricing. One recurring problem in legislation involving this subject is that of defining "cost." Some would regard cost as a never-never land incapable of definition. The drafters of S. 1457, however, have overcome this problem and have provided a totally adequate definition. "Cost" as used in this bill would mean the cost to the seller of placing the product in the hands of the consumer. What could be more fair or definite? If a retailer could sell at a lower price than his competitor by cutting transportation, handling, or other costs, he should be allowed and encouraged to do so. This is one of the ingredients our competitive system is composed of.

Further, the skillful way in which S. 1457 has been drafted permits no reprisal for honest price reductions. The bill provides two tests: selling below cost and for the purpose of destroying competition or eliminating a competitor. Thus,

both selling below cost and a specific intent would need to be proven in order to recover. To prove intent to destroy competition, it would be possible to show a pattern of loss-leading, showing that other items are being sold below cost, or by having a presumption of such intent arising from the fact that goods are sold below cost. A reduction in price brought about by savings in costs would thus be permissible, unless the reduction drew the price below cost, because of a lack of intent to destroy competition. Even selling below cost in order to reduce an overstock, or to promote a product for a short period of time would not subject the seller to liability as the purpose to eliminate competition would not be present.

Permitting private antitrust suits according to this bill would in no way flood the courts with needless litigation as some would lead us to believe. True, there would probably be a few suits brought immediately after enactment of the bill; but after these first few suits, the law would become more settled and businessmen would be able to determine rather accurately just what they can or cannot do. Besides the difficulty of proving the requisite intent, the high costs of litigation would prevent spurious suits, so only those thought to be well founded would be litigated. I want to point out that even during the twenty-two years when such private actions were permitted, very few suits were actually litigated.

S. 1457 is clearly needed not to protect business but to enable businessmen to act to protect themselves. It gives enterprise the tools to work out its own problems without the need of government intervention. Present criminal remedies are not sufficient as the statutes do not adequately cover selling below cost and cannot always be uniformly nor justly enforced. At the present time, there also exists the anomaly: below-cost selling with predatory intent may in some instances be a Federal crime for which the offender can be fined or even imprisoned if the Federal Government elects to prosecute and a court convicts. But the person injured by the crime, the businessman destroyed in his livelihood, is given no remedy. It is difficult for me to imagine why a victim of a criminal act should not be entitled to sue for damages in the area of antitrust the same as he can in other fields of the criminal law.

With these considerations in mind, I urge a favorable report of this bill. Providing as it does for private suits, it follows that great tradition so much of this nation's business success has been based upon: private initiative. For over fourteen years, this Subcommittee has considered such legislation. Bills have been introduced, refined and reintroduced. S. 1457 is the last in this series and has been redrafted as well as refined. It has the support by way of cosponsorship of almost one-third of the membership of the Senate. By virtue of its support, need, and quality, S. 1457 merits a favorable report so it may be considered by the full Senate.

BAKERY AND CONFECTIONERY WORKERS' INTERNATIONAL
UNION OF AMERICA,
Washington, D.C., January 7, 1972.

HON. PHILIP A. HART,
*U.S. Senate,
Washington, D.C.*

DEAR SENATOR HART: We herewith register our Union's support for S. 1457 and request your cooperation in inserting our plea for Congressional action on this important legislation during the Hearings to be held February 1-3, 1972.

The objectives of S. 1457, to discourage sales below cost, are of vital concern to the wholesale baking industry and to our membership which can continue to earn a living only if a viable industry is preserved.

The baking industry, alike only to the dairy industry, produces a perishable product that requires constant care and frequent service and to that extent market areas are geographically restricted. This localization of markets is still true today despite ever increasing concentration in both the wholesale baking and grocery industries.

However, this trend toward concentration has, quite apart from any economic efficiencies, resulted in frequent unjustifiable sales below cost and occasional full scale price wars that have further reduced the number of wholesale bakeries, to the detriment of those who theretofore found employment therein.

The result to labor has been a disruption of normal industry practices. As bakery plants are deliberately put out of business for reasons other than efficiency, there are unnecessary and costly adjustments which are not in the interest of labor, honest businessmen, the consumer, or the country. The direct and immediate injury to labor is too clear to require delineation.

Since S. 1457 is aimed only at predatory conduct and since this is a major problem of our industry at this time, we do not believe there is any valid reason for not acting upon this bill at this session.

Certainly the Congress should be aware that a monopoly in the production and distribution of bread would not be a legitimate interest of this country. The costs to the country, and to the victim, concerned labor and the consumer most immediately, are all too evident.

Because such sales are so often technically within the boundaries of one state, the existing price discrimination laws are of little assistance. The criminal sales below cost statute has been demonstrably ineffective in curtailing such practices. Therefore, as a practical matter it is extremely difficult to mount an antitrust attack on such practices. The law must be amended to encourage honest competition, rather than an artificial shifting of costs to other products or markets, to the ruination of the limited line producer and his employees.

We therefore request that S. 1457 be favorably reported out of Committee.

Yours very respectfully,

DANIEL E. CONWAY,
International President.

CONSULTING ENGINEERS COUNCIL OF THE UNITED STATES,
Washington, D.C., June 19, 1972.

Senator PHILIP A. HART,
*Old Senate Office Building,
U.S. Senate, Washington, D.C.*

DEAR SENATOR HART: As a member of the Senate Subcommittee on Antitrust and Monopoly, you may be interested in the attached copy of a statement which our organization had hoped to present to your Subcommittee on Wednesday of last week.

The Consulting Engineers Council statement outlines architect-engineer concern over problems resulting from "below cost" sales or offers of "free" services. The purpose of this bill, of which you are, of course, a cosponsor, is to provide recourse for persons or firms economically injured by manufacturers, corporations and suppliers selling products below cost for the purpose of destroying competition or eliminating a competitor.

Our Council has been informed that the Subcommittee has decided to consider this matter an executive session, thus precluding the necessity of further hearings on S. 1457.

Since we will not have an opportunity to discuss this matter with you and other members of your Subcommittee in person, we are taking this means of bringing to your attention a slight modification in wording which would, if approved, provide architects and engineers with a means of effectively contesting "below cost" sales or offers of "free" services when the affects of such offers is to deprive independent private practice firms the opportunity of performing such work and, thereby, denying them their livelihood. Suggested possible rewording to accomplish this goal is contained on page five of the enclosed statement.

We will greatly appreciate any consideration you may be able to give to our statement and to its recommendations prior to the Subcommittee's executive session on this subject.

Yours sincerely,

LARRY N. SPILLER,
Director of Governmental Affairs.

CONSULTING ENGINEERS COUNCIL OF THE UNITED STATES

STATEMENT ON BELOW-COST SALES AND SERVICES BEFORE SENATE SUBCOMMITTEE
ON ANTITRUST AND MONOPOLY, JUNE 14, 1972, WASHINGTON, D.C.

Mr. Chairman and Members of the Subcommittee: The Consulting Engineers Council of the U.S. appreciates this opportunity to discuss below-cost competition in the design services industry; a competition which we regard as insidious as below-cost sales of products or materials. Consulting Engineers Council is a national organization representing approximately 2500 U.S. engineering firms.

These firms provide technical-professional services in all fields of engineering practice. Typical projects designed by consultants include: the Chesapeake Bay Bridge-Tunnel, O'Hare International Airport, Shea Stadium in New York City, the water supply for Orange County California, Hawaii-Kai (a new city), the Niagara Power Project, the Chicago Incinerator, Evergreen State College in Washington, and thousands of other facilities.

Our Council is pleased to endorse the intent of S. 1457. We believe it is patently improper for manufacturers, wholesalers, retailers or suppliers to make "below cost" or "loss leader" offers of material or merchandise when, in so doing, the effect is to eliminate from competition another firm (usually smaller) which is unable to absorb such losses and remain in business. This is not to imply that we oppose price or cost reductions normally associated with bargains or sales. These are, of course, an accepted and recognized business practice in which the seller recoups his investment (sometimes with a substantially smaller profit) or clears inventory for new stock. There is seldom any intent in such transactions to capture or control a total market.

It is control of the professional services market which primarily concerns consulting engineers. Consultants do not engage in trade or commerce in the traditional sense. Their product is their technical expertise. Their inventory is, in fact, their trained and experienced engineering personnel. Consulting engineers pride themselves on objectively representing the best interests of their clients. As designers of everything from antennas to waste treatment facilities, they have no affiliations with manufacturers or contractors which might bias their selection of a given product or material. If they think an XYZ fire safety sprinkler system is better for a given type of building than an ABC sprinkler system, the XYZ system is specified. This procedure has worked well for many years with some owners receiving finished products or systems that incorporate elements manufactured by hundreds of different companies.

This allegiance to clients' interests above all else is seldom apparent when manufacturers or utilities provide "free" or "at-cost" engineering services to the general public. Using our example, it is hard to imagine the ABC Spinkler Company specifying XYZ equipment.

Yet prospective building owners, and architects, are regularly contacted by (as an example) lighting equipment manufacturers who are willing to design a lighting system for a proposed building at little or no cost. These designs can be provided at no cost because the lighting fixture manufacturer knows that, if he prepares the plans, he can guarantee specification and installation of his particular products. The sale of such products more than compensates the manufacturer for his below-cost engineering. Under this arrangement a building owner does not have the benefit of an unbiased, independent lighting engineer's judgment as to what would most efficiently and economically serve his needs. Owners who think they received "free" engineering, may, in fact, have more than doubled their equipment or maintenance costs (or both.) More important, an owner is denied the opportunity of considering several alternative approaches, including (still as one example) the use of lighting to help heat a particular structure.

At the same time, the mechanical-electrical consulting engineer is deprived of work which he would normally furnish. In the aforementioned situation, the consultant is frozen out of his market by the larger, lighting equipment manufacturer who can take a loss on engineering in order to insure sale of his product or products.

Frankly, it is our impression that the antitrust laws regard any activity which substantially lessens competition, or tends to create a monopoly in any line of commerce, as against public policy. If that is proper interpretation of existing law, there should be no rational objection to outlawing such competition rendering offenders subject to legal action, as is the case of others whose business conduct works a hardship on the public or on smaller competitors.

The unfair competition which we are citing is in no way limited to a single segment of the design professions. In upstate New York, the Syracuse Supply Company is, "without charge," helping communities to select suitable sites for sanitary landfills and to determine their equipment requirements. Not surprisingly, the Syracuse Supply Company sells dozers, graders, end loaders, dump trucks and other equipment normally used in compacting landfill areas.

The selection of a sanitary landfill site is not simply a task of locating a remote area and dumping wastes into it. There are public health considerations; long-range, area wide planning; the effect on existing water tables; the chemical

composition of soil; types of wastes (pulverization may be necessary); the economics of transporting the waste; the intended future use of the site; the effect on surface drainage; aesthetic and environmental impacts, and lots more. We have no way of knowing if Syracuse Supply is, or is not, analyzing all of these factors, but it goes without saying that a responsible sanitary landfill project requires a substantial investment of time and technical know-how. As such, it is difficult to imagine how any company can undertake such an effort at "no-cost" to a community, unless that company is certain it will recoup its investment through subsequent sales. New York consulting engineers, experienced and qualified (and willing to assume the liability for sanitary landfill site selection) are finding themselves economically pinched by the Syracuse Supply Company's "free" services offer.

Similar examples can be cited in other fields of engineering. A Minnesota electrical utility has provided "free" engineering service to clients for street lighting as a part of its electrical energy sales promotion. No one can design a street lighting project at no cost. Substantial work is involved in selecting the right types of conduit, fixtures, light locations and other factors. Local citizens may or may not be receiving a maximum return on their street-lighting tax dollar. One thing, is certain, however, municipal consulting engineers in the Minnesota area are economically injured by such practice since their market for engineering expertise is cut.

In Arkansas, a consulting engineer discussed with various officials the possibility of designing an air conditioning system for an existing school. A fee was agreed upon and the consultant was to be called when the project was ready to go. Several months later, the Arkansas-Louisiana Gas Company was reported by the newspapers as providing complete engineering design for the school's air-conditioning needs. A subsequent visit, by the consultant, to the school revealed that Arkla Servel equipment was being installed.

At this very moment, the Veterans Administration is contracting for electrical distribution reliability studies at its more than 150 VA hospitals throughout the country. These studies are in the range of \$12,000 to \$16,000 and definitely require the services of registered, qualified electrical engineers. From Virginia, California, Indiana, Louisiana, Michigan and elsewhere, experienced electrical engineering consultants tell us that their prime competitor for the VA power reliability studies is the General Electric Company. According to one consultant, "GE told the local Veterans Administration chief engineer that it would do the VA engineering studies for less than what VA would have to pay to a consultant." In some areas, the VA hospital studies are expected to lead to re-design of existing systems and to the installation of major new equipment. Ignoring the small business implications of this matter, it seems very likely that if GE provides the studies it will also do the subsequent redesign. If that happens you can bet the new plans will not be specifying Westinghouse, Square D or Honeywell products. Meanwhile, several dozen private practice engineering firms are forced to look elsewhere for work, having fallen victim to GE's "loss leader" offer.

The Consulting Engineers Council recognizes that the problem of "free engineering" or "below cost" technical services by larger companies and corporations (thus assuming work historically provided by small, independent firms), is not exactly the practice which S. 1457 originally sought to prohibit. We believe, however, that such infringement by corporations does represent a hardship on individual firms since each has only its technical skill, experience and integrity to market to prospective clients. If this type of below-cost competition proliferates, it is likely that some consulting engineer will be left with no alternative but to get out of the business or go to work for their competitors. The eventual loser will be the general public.

Our purpose in testifying before this Subcommittee is to suggest that the type of situations which we have described should be of as much concern to the Congress as is the sale, by a supermarket chain, of a particular food product at below cost, knowing that in so doing, other smaller markets will be unable to survive the competition.

If you agree, we would respectfully suggest that S. 1457 be adopted with the following modifications: on line two of Sec. 3A, after the word "goods," insert the words, "*or services . . .*" In addition, change line three of Sec. 3A, by inserting, after the words, "purpose of," the words, "*or where the effect may be . . .*" Finally, at the end of Sec. 3A, in the bill, it may be helpful in defining legislative intent to add the following sentence: "*The term 'service' as used*

in this Section shall include services of any nature except those necessarily incident to the production, distribution or maintenance of a product." This latter addition will help clarify the fact that Congress in no way intends to infringe upon the professional services involved in designing or testing a product, nor does it regard this legislation as encompassing the services normally associated with repair or maintenance of products.

Consulting Engineers Council is convinced that S. 1457 represents a proper and viable solution to an increasingly serious threat to the private engineering practitioner. The members of our Council support competition between engineers based on technical competence, experience, equipment, availability to job site, and similar factors. Competition on this basis has worked well for many years. It is now, however, threatened by a problem delineated several years ago (1948) by the Federal Trade Commission when it said:

"With the economic power which it secures through its operations in many diverse fields, the giant conglomerate corporation may attain an almost impregnable economic position. Threatened with competition in any one of its various activities, it may sell below cost in that field, offsetting its losses through profits made in other lines—a practice which is frequently explained as one of meeting competition. The conglomerate corporation is thus in a position to strike out with great force against smaller businesses in a variety of different industries."

Consulting engineers are generally small, local businesses. Less than fifty of the nearly six thousand consulting engineering firms in this country have billings in excess of ten million dollars for services rendered in a given year. We believe that the private engineering practitioner represents a valuable technological resource to the United States. It is a source which merits your careful consideration in light of the economic threats represented by below cost (or "free") design services sales by industries and suppliers.

We thank you for this opportunity to bring this matter to your attention.

STATEMENT TO THE SENATE SUBCOMMITTEE ON ANTITRUST AND
MONOPOLY REGARDING SENATE BILL 1457

(By Roy S. Pung, executive manager, Master Photo Dealer' &
Finishers' Association)

The Master Photo Dealers' & Finishers' Association has in excess of 2500 members, consisting primarily of firms engaged in the processing of amateur photographic film and the retailing of amateur photographic products. Our membership is international in scope, with approximately 85 percent located in the United States, 12 percent in Canada, and the remaining 3 percent in 26 other countries of the free world. Our member firms employ literally ten of thousands of United States citizens. These firms and their employees are vitally concerned about the preservation and enforcement of *Fair* competition in this country.

In a recent survey of our membership, 92 percent of the respondents indicated they favor passage of Senate Bill 1457. This statement explains the basis for this overwhelming support.

While it is true that predatory pricing policies, which this bill intends to correct, have caused immeasurable harm to our members, another strong reason for supporting this legislation is that it seeks to protect the consumer from deceptive retailing practices currently rampant throughout the country.

If passed and properly interpreted, this bill will effectively prevent a carefully planned deception of the American public. This deception is currently being waged by a large number of retail operations which utilize below cost selling practices on a limited number of selected products. One need only look at the net operating figures of these operations to realize that their average markup is in very close proximity to the average markup of the small independent retailer. Yet, when we look at their advertising methods, we find that while pretending to be "the champion of the consumer", these firms are in reality exercising the old "baiting" tactic to delude an uninformed buying public. Among other things, it is common practice for these firms to take a *limited number* of popular items (perhaps no more than a few dozen out of many thousands available in their inventory) and constantly sell these near cost or below cost with the overt intention of giving the consumer the impression that *all* of their prices are much lower than elsewhere on the retail scene.

Photography is America's most enjoyable and rewarding hobby. It produces a most treasured and irreplaceable product for both the avid hobbist and occasional user. Because of photography's popularity photo retailers and photo processors are more likely to be faced with the challenge of vicious predatory pricing attacks that are sellers of other consumer oriented products. It is not uncommon to pick up a newspaper any day of the week—regardless of the metropolitan area in which one lives—and see an advertisement listing the most popular (or sometimes the only available photographic product of a type) being listed at an unreasonably low price. This price frequently will be below the lowest price a manufacturer or distributor offers the product to any retailer, regardless of his purchasing power. The intent of this below cost advertising is to give the impression to consumers that savings of 20 percent, 40 percent, 60 percent, and more are possible on products generally. Yet, when we analyze all products sold by these firms, we find that to counter-balance their below-cost selling program, they will mark up either private brand merchandise or merchandise that cannot easily be identified by brand name or component materials by an amount far beyond that which even the most avaricious operator should demand. The *consuming public* is being victimized by these misleading advertising techniques. We concur with the sponsors of SB 1457 in their attempt to correct this gross violation of consumer confidence.

Today's camera specialty dealer offers the consumer the widest range of photographic products, expertise to assist the consumer to learn to utilize his photographic purchases to their fullest advantage, and service on the products he sells. Industry statistical sources verify that in return he receives only a marginal profit for his efforts.

As noted, there are many firms carrying only a small inventory of a limited number of photographic items as a side line or occasional sales item, who lack expertise in this area and who refuse to give service, that take rifle aim on these popular photographic products and sell them at prices near or below cost. We have no objection to the consuming public receiving a price break but, in fact and in practice, the consuming public does not benefit from this retailing technique. While perhaps gaining a temporary bargain on photo products, the consumers pay exorbitant prices for less popular items so that the predators using photo goods as a loss leader can remain in business. Unchecked, this practice reduces dramatically the number of specialists. The consumer, beyond being deceived by the pricing technique, ultimately finds reduced selection, expertise, service and competition for the goods and services offered by the photo industry.

It seems ironic that the predator is allowed to continue his deception and prosper while other retailers who ask only a fair return on all products are being driven from the retail scene. This is possible because in today's economy the predator is allowed to focus his below cost selling techniques solely on a few popular products. He is not made to follow this technique on all items in his store, nor is he obligated in any way to account to the consumer on how it is possible for him to offer a few selected products at such unreasonably low prices and quite often for less money than he paid for them.

Under current law, the price predator has legal sanction and government approval to erode profits on a few popular items and, thereby, effectively drive out competition. To offset his losses on these items he has the approval to fix prices on items on which he alone has a monopoly through private branding. And if he is a multi-store operation, he is given the prerogative to fix prices on non-identifiable items in literally hundreds of outlets in scores of cities across the country to assure his ability to regain profits lost through loss leader deception.

This leaves the price predator in a good position. He has no competition on his own private brand goods, assuring him a handsome return. He can set prices on unidentifiable goods, further enhancing his profitability potential. And, he is sanctioned to literally destroy anyone who seeks to challenge him by eliminating the profit potential on those goods which he cannot directly control or manipulate by selling many of them below cost.

What is more ironic is that should the independent businessman unite with other independent businessmen to match this predatory pricing operator in buying power size, or to obtain the private brand privilege, he finds an entirely different set of ground rules. Independents acting as a group would find themselves in violation of federal laws were they to attempt to set prices on private brand merchandise in more than one location or more than one area. Yet their multi-store competitor has the privilege of setting prices on private brand merchandise throughout his chain of stores and, thereby, insures that there will be no price

competition in private brand merchandise. Similarly, independents as a group are prohibited from setting prices on other jointly purchased merchandise. In short, they are not permitted to operate under the same rules as their competitors.

Our members do not seek special favors or concessions in the market place. They are astute businessmen. To have survived the pricing abuse inflicted on photographic items in recent years attests to their retail acumen. Given equal rules of play, our members will compete successfully with anyone.

In addition to Senate Bill 1457, changing the rules to make them equal could take the form of demanding that the predators reduce all items equally, not just select product lines; or it could take the form of a "Private Brands" law for independent retailers which would allow them the same price pegging privilege which multi-store operators now use; or it could take the form of allowing established prices on certain unidentifiable items bought in quantity by independent groups to give the independent the same recuperative power the predator has.

There are other measures that could be enacted, most of which have been considered by this Committee in years past. It is important, however, that the rules of the game be changed so that all in the market place have the same privileges.

Senate Bill 1457 is a step toward correcting some of the inequities facing independent retailers. There is, however, a danger that the bill's wording is too vague to be meaningful. In visiting with literally hundreds of our members across the United States, we have heard the constant suggestions that phrases such as "for the purpose of destroying competition or eliminating a competitor" need strengthening and clarification. In one of the countries where many of our members do business, this section of similar legislation has been phrased to read, "having the *effect or tendency* of substantially lessening competition or eliminating a competitor or designed to have such effect". While we do not presume to specifically state what wording should be incorporated, we strongly feel that there is need for more strength and more clarification lest the entire bill be ineffective.

We concur that some formula must be arrived at to determine what represents "true cost." The final paragraph of this amendment, while somewhat vague, does seem to be a nucleus upon which the courts or interpretative bodies could arrive at an acceptable formula.

Legislation of this type is needed. It is needed to protect the American consumer. It is needed to eliminate the current practice of misleading advertising and consumer deception. It is needed to keep competition in the marketplace fair and equitable for all participants. It is needed so that the American consumer will continue to have at his disposal a wide variety of outlets offering a range of services and products, and not simply a few multiline operators offering limited selection, limited service, and much deceptive appeal.

STATEMENT OF JOSEPH KOLODNY, MANAGING DIRECTOR OF THE NATIONAL ASSOCIATION OF TOBACCO DISTRIBUTORS, INC., BEFORE THE ANTITRUST SUBCOMMITTEE OF THE SENATE COMMITTEE ON THE JUDICIARY IN SUPPORT OF S. 1457, INTRODUCED BY SENATOR SPARKMAN, ET AL.

My name is Joseph Kolodny and I am the Managing Director of the National Association of Tobacco Distributors, Inc. The members of the Association, which I am honored to represent, and engaged in satisfying the daily needs for cigarettes, cigars, tobacco products, candy, confectionery and related lines of consumer merchandise to 1,750,000 retail outlets throughout the United States. This vast segment of independent business is endorsing the purpose and purport of Senator Sparkman's bill which seeks to amend the Clayton anti-trust act to provide relief by government and private civil proceedings for violation of section three of the Robinson-Patman Act and making the same a part of the Clayton Act, so as to clearly establish that sales below cost represent a violation of our anti-trust laws.

Selling below cost is often popularly described as the "loss leader" or "bait advertising" practice. It is recognized as a form of commercial fraud, the purpose of which is to lead consumers to believe that the store or place of business which offers such amazing "bargains" has numerous other bargains of equal value. In actual fact, however, it is well known that no merchant, no matter how

great his resources, can continue to sell vast majority of his stock over an extended period of time at less than the cost of such merchandise to him, without inevitably facing ultimate bankruptcy. A large, well financed merchant can, it is true, sell a small portion of his stock in trade at such prices, and compensate for his losses on such sales by raising the prices charged for other unadvertised merchandise, or by later raising all of his prices, after his competitors have been done away with. But meantime, by advertising "loss leaders" he can, with impunity, create the totally false impression that all his prices are considerably lower than those of the small, ethical retailers who are in competition with him.

Such a pricing policy cannot be met by the less well-financed merchant. His inventory is not sufficiently varied. His resources are not strong enough to allow him to be able to reply in kind to this type of cut-throat competition, which seeks to defraud the consuming public into believing that which is not true. This practice has created a palpably unfair condition which renders it impossible for the preponderant majority of small retailers to compete with the favored retailing giants, whose power to suffer losses over the short haul, can wipe out at one blow, the painfully garnered resources of the average independent store owner. The menace of predatory pricing practices hangs like the proverbial Damoclean sword, placing in constant jeopardy not only the members of my association and trade, but emphatically the inarticulate mass—the one-and-three-quarter-million retail outlets that seldom have opportunity to voice in these august halls their aspirations, yearnings and, indeed, their desperate needs. These independent merchants are small, and, in the main, dependent upon the wholesaler distributors who service them. Patently, it is the independent wholesaler who affords these retail merchants an opportunity to survive in business, through the extension of credit, the breaking of bulk and the ready availability of the items which accounts for their commercial life blood and stock in trade. It is thus with very considered judgment that we unequivocally urge the speedy and effective approval of S. 1457.

The issues presented by laws of this character are grounded in a fundamental American inviolate philosophy which, in gradual stages, has been recognized and dramatically acted upon by the Congress of the United States. In this connection, may we note that all elements of our government—the Federal Trade Commission, the Department of Justice, and the Courts—are in agreement that sales of merchandise at unreasonably low prices are an unmitigated evil.

Our law making and law enforcing agencies has condemned, at various times, competition which has driven smaller merchants to the wall by selling groceries below cost in Texas, bread below cost in Arizona, milk below cost in Kansas, gasoline below cost in California, and electrical appliances below cost in New York. In every such case, the practice was condemned because of its disastrous effect on the smaller grocer, baker, milk producer, service station operator and TV dealer who could not continue to sell at a loss and still stay in business.

The precept behind these situations is grounded on that fundamental consideration of Anglo-Saxon law which requires that each person so use his own property as not to cause malicious damage to the person or property of other parties. As such, there can be no doubt of the validity from a constitutional point of view of S. 1457.

The need for this legislation is manifest by the very nature of the distributive revolution in which this great nation has been engaged over the past two decades. The day of the local artisan and the small independent retail store is fast vanishing from our national scene. No longer do the products of commerce identify themselves by that individuality unique to the particular producer. Pride of product has been replaced by a "brand image." He who builds a better mousetrap will no longer see the world beating a pathway to his door without a publicity and advertising program accentuating such meritorious wares.

This utter reversal of roles in marketing, springing from the economic revolution which has produced, in each consumer product category, similarity and interchangeability of a prodigious assortment of units, has drastically altered and modified the marketing channels through which products are made available to the broad range of the consuming public.

The overlapping of channels of distribution and the identification of product solely with the manufacturer have given rise to a congeries of new competitive marketing entities, generally known as discount houses, supermarkets, retailing chains and shopping centers. The name of the product having been instilled in the consumer's mind by the efforts of the manufacturer, it is given cavalier

treatment by the individual dealer who regards it solely as a tool to be used in attracting traffic. This tool too often is misused by the new competitive marketing entities for the purpose of some ulterior end. Where it suits the merchant's purposes, he can, and often does, sell a particular manufacturer's product at sacrificial prices in order to divert trade from his competitors and thus assure himself of a virtual monopoly in his sphere of activity. The faceless, almost mechanical nature of today's commerce makes this technique all the more attractive to the new merchandising entities and renders even more precarious the position of the ethical retailer, whose smaller stock in trade and lesser capacity to sustain losses over a prolonged period makes him vulnerable to precisely such a competitive tactic.

The National Association of Tobacco Distributors has long been cognizant of this evil. Solely for the purpose of demonstration, and as a means of focusing attention on and clarifying the issue, let us dwell upon cigarettes. This product, one of the prime elements of our stock in trade, is peculiarly susceptible to price manipulation. To many of the newer entities in the distribution field, cigarettes represent an infinitesimal portion of the products they market. To most of our member customers, however, and to our members themselves, cigarettes represent a major item of their total stock in trade. It follows, therefore, that anything which depreciates the value of cigarettes has only a tangential effect upon the large corporate retailing entities but assumes disaster proportions for us and the preponderant majority of our customers.

As renowned economists have cited repeatedly, loss leaders generally are confined to those items which are readily available, quickly consumed and recurrently purchased by a vast number of people—items especially whose value is well established in the minds of purchasers through the medium of an overwhelming and continuous advertising campaign.

In our own industry, we have pioneered in the role of a catalyst in the furtherance of state sales below cost laws, with particular application to the sale of cigarettes. Having observed for more than four decades the effect of these laws in local commerce, I can state that where they are effectively enforced, vigorous, free, and healthy competition is evident. Indeed, these laws have been a major factor in the improvement of conditions in our trade and industry.

State sales below cost laws are an effective and potent weapon in the arsenal of small business seeking to survive the maelstrom of the distributive revolution. Obviously, such laws, being local in their application, are not and cannot be the complete answer to this vexing problem. A problem national in scope requires solutions on a national scale. The best possible solution would be a Federal law, adequate in scope, to make applicable to interstate commerce, state sales below cost laws and to prescribe standards by which sales at unreasonably low prices would be banned.

The Congress of the United States, in enacting the anti-trust laws, put in the hands of injured competitors an effective weapon with which to repel pernicious price practices. That weapon is the treble damage suit. By the early 1950's, the potency of the treble damage suit in preventing sales below cost in interstate commerce was manifest by the cases which were appearing with ever recurring frequency in which a loss leader seller was required to repair the damages done to his injured competitors. These cases were based upon section three of the Robinson-Patman Act, which prohibits sales at unreasonably low prices, with the intent of injuring competitors.

This auspicious first step in the right direction has been seriously hobbled by two Supreme Court decisions rendered in 1958, which held that Section 3 of the Robinson-Patman Act is not an integral portion of our antitrust laws and therefore cannot be enforced by the private action of an injured party through a treble damage suit.

It is the purpose of S. 1457 to restore the status quo in the field of below cost selling and to make section 3 of the Robinson-Patman Act once again a vital portion of our anti-trust laws, which, in the tradition of the Minute Men of our revolutionary age, each man can employ, through the medium of a treble damage action, to resist the unprovoked aggression of predatory competitors. On the basis of studies undertaken by our Association, it is my conclusion that much yet remains to be done to eliminate the cancerous practice of sales below cost. Section 3 of the Robinson-Patman Act itself, as a first step in that direction. It has been crippled by judicial interpretation and S. 1457 is a very necessary effort to restore it to its original force and effect. I urge upon you its speedy implementation as a minimum effort toward the safeguarding of our economic, industrial and competitive democracy.

TESTIMONY OF CHARLES BINSTED, PRESIDENT (ACCOMPANIED BY JOHN HUENNRICH, EXECUTIVE DIRECTOR AND JERRY S. COHEN, COUNSEL) NATIONAL CONGRESS OF PETROLEUM RETAILERS, BEFORE THE SENATE ANTITRUST AND MONOPOLY SUBCOMMITTEE HEARINGS ON S. 1457, JUNE 1972

The membership of the National Congress of Petroleum Retailers consists of its affiliated associations representing approximately 60,000 service station dealers. Our members are primarily branded dealers selling gasoline and other products for petroleum companies. In most cases, their stations are leased from the supplier-franchisor. In the United States, there are approximately 165,000 such dealers. In 1971, they had sales of approximately \$27.3 billion. The annual turn over of independent gasoline dealers is approximately 35 percent. In other words, more than one-third of the gasoline dealers operating this year, will not be operating next year.

Our Association has testified on behalf of similar bills before this Subcommittee on several occasions during the past six years. Based on the extensive hearings which have been held, certain propositions can now be accepted as self-evident.

First, predatory pricing, particularly in the form of sales below fully distributed costs, is rampant in this country.

Second, at least since the days of the robber barons, this form of predatory pricing has been the single most utilized anticompetitive weapon to dampen competition and drive competitors out of the market place. Particularly, during the past decade, it has proved to be the most effective and devastating method to diminish and destroy competition.

Third, below cost selling blocks efficiency in the market place. It is a weapon used only by the powerful to drive out or discipline the efficient competitors. To engage in predatory pricing practices, a firm must have discretionary pricing power in other markets. It is then a particularly effective weapon for the conglomerate and multi-market firms not subject to the discipline of any single market.

Fourth, competition can be effective only if efficiency, rather than power, is the prerequisite for commercial success. This means that if competition is to work, those companies which rely on power rather than efficiency must not be allowed to engage in predatory pricing practices. Such practices put a premium on inefficiency and non-competitive behavior.

Furthermore, on the basis of the record before this Subcommittee, it should no longer be necessary to give serious consideration to the arguments against this bill.

First, the argument that this bill would have the effect of protecting the competitor rather than competition is simply nonsense. Competition requires competitors and the record that predatory pricing practices have been used to pick off competitors one at a time until competition is either diminished or dead.

Second, the argument that Section 2 of the Sherman Act, with its prohibitions against monopolization and attempts to monopolize, is sufficient to deal with predatory pricing problems has no relationship to the real world of litigation. Predatory pricing may be one element in the proof of Section 2 offenses, but there are other difficult road blocks to overcome before a Section 2 offense can be proved. It is clear from the cases in this area that even the most blatant predatory pricing practices standing alone are not sufficient to sustain, with the required proof, any of the Section 2 offenses.

Third, the argument that selling below cost assists the consumer is self-contradictory. It must be assumed that corporations are in business to make a profit. The choice then to deliberately sell below cost can only occur if there is a certainty that their loss can be made up in other markets or, in the alternative, a certainty that their loss can be made up in other markets or, in the alternative, over the long term—usually with interest in the form of higher prices added on. Therefore, the short-term break that a consumer may get in one section of the country is offset many times over by the higher prices other consumers must pay in other sections of the country. Further, the lower price over the short-term is more than made up over the long term when the predatory pricing practices have served their purpose of successfully diminishing competition.

Certainly, Congress itself has recognized the seriousness of this problem. It has made sales at unreasonable low prices a crime. However, a crime is really not a crime unless the statute upon which it is based is enforced. Section 3 of the Clayton Act, of course, has seldom been enforced. It stands as a symbol of

the double standard of law and order which we have allowed to endure for too long in this country—one standard for corporate crimes and a stricter standard for personal crimes. Yet, which is the most serious? A thief on the street may pick a pocket or snatch a purse, which affects the ordinary citizen perhaps once in a lifetime. However, a corporate crime, such as selling at unreasonably low prices for predatory purposes, is a continuing crime against the independent businessmen and affects them daily.

Why not then give the independent businessmen the chance to try self-help when this crime is perpetrated upon him? It costs the government nothing and, presumably, private enforcement of this law will be far more effective than public enforcement. The bill before this Subcommittee does nothing more nor less than allow an injured party the opportunity to help himself.

As independent gasoline dealers, we are particularly interested in this type of legislation. It has been documented at other hearings that major integrated petroleum companies sell gasoline below cost to selected purchasers while charging the dealer a much higher price. Yet, the dealers must compete against the low cost gasoline.

In other instances, such as price war situations, the dealer himself may be getting gasoline at below supplier cost. However, he is expected and required to subsidize the loss to his supplier by a reduction of his own margin. In addition, on occasion, the company may sell below cost to some dealers but not to others. Yet, the dealer paying the higher price may be competing against the dealer paying the below cost price.

However, we do not believe that S. 1457, as presently drafted, is satisfactory. It is true that it is improvement over previous bills. The term "unreasonably low prices" has been removed and the more specific term "sale below cost" has been substituted. In addition, the word "cost" has been given a specific meaning. The ambiguity of past bills then has been removed. Nevertheless, the defect of the bill, in our opinion, is retention of the phrase "for the purpose of destroying competition or eliminating a competitor." The practical difficulty of such proof weakens the bill significantly. Sales below cost—like price fixing or group boycotts—should be a per se violation of the antitrust laws regardless of the purpose. Certainly, the effect is as pernicious and without any redeeming value as present per se violations.

As independent businessmen, we believe that our survival is tied closely to the survival of the free enterprise system. This bill, particularly with the change suggested, will add to that chance of survival. We believe also that the time has passed when this nation can afford a double standard of law and order. This bill will help to equalize that standard. Certainly, self-help is deeply ingrained in our American tradition. We would like to see that tradition continue.

TESTIMONY OF JAMES A. GAVIN, LEGISLATIVE DIRECTOR, NATIONAL FEDERATION OF INDEPENDENT BUSINESS, BEFORE SENATE COMMITTEE ON THE JUDICIARY, SUBCOMMITTEE ON ANTITRUST AND MONOPOLY

SUBJECT: S. 1457—TO AMEND THE CLAYTON ACT BY ADDING A NEW SECTION TO PROHIBIT SALES BELOW COST FOR THE PURPOSE OF DESTROYING COMPETITION OR ELIMINATING A COMPETITOR

Mr. Chairman, distinguished members of the subcommittee, I am James A. Gavin, Legislative Director of the National Federation of Independent Business. On behalf of our 310,000 member firms throughout the United States, I wish to thank you for this opportunity to appear today in support of S. 1457.

As a matter of information, the National Federation of Independent Business is the world's largest business organization. Our member firms comprise a vast cross section of the more than 5½ million small, independent businesses in America—businesses which now account for more than 60 percent of the private, non-agricultural work force in the Nation, and which collectively produce nearly 40 percent of the Gross National Product.

N.F.I.B. is a unique federation for we systematically, and on a regular basis, go to our members at the grass roots level to ask them what they think about important pieces of legislation facing the Congress. We accomplish this by Mandate Ballot polling of each of the 312,000 member firms of the Federation.

Thus N.F.I.B.'s position is determined by the position taken by our member firms. It is in this manner, Mr. Chairman, that we are unlike numerous other organizations that may appear before Congressional hearings.

When we testify on certain legislation, we are reflecting the views, not of our Board of Directors, or of our legislative staff, but the views of our individual member firms.

And by Mandate polling, we strive to encourage small, independent businesses to maintain a continuing, active and informed interest in governmental affairs—both State and national.

In the early part of this, the 92nd Congress, we polled S. 1457 to determine N.F.I.B.'s position on the legislation. The returns showed an almost 2-to-1 margin in favor of the bill.

As the distinguished members of this subcommittee know, S. 1457—which has 32 co-sponsors in addition to its chief sponsor, Senator Sparkman—amends the Clayton Act to permit the institution of actions for treble damages for violations of the Robinson-Patman Act by permitting the injured parties in cases of international predatory price policies to initiate legal action on their own. Presently, such action can only be taken by the Department of Justice.

Presently—and regrettably—there is no recourse for the person driven out of business as a result of predatory pricing. Under the law, he cannot initiate suit against the offender for damages, or even seek injunctive relief.

This problem of predatory pricing—instead of subsiding—has become more and more acute.

Over the years, N.F.I.B.'s continuing surveys have indicated that small independent firms were being seriously and adversely affected by unfair pricing policies intentionally designed to drive them out of business. Price discrimination exists to such an extent that the survival of small independent business is seriously imperiled, and that this remedial legislation is imperative.

For continued and successful operation, the small businessman needs the protection afforded by an effective enforcement of Section 3 of the Robinson-Patman Act. Especially is this the case in light of unbridled monopolistic activities of the giants.

Section 3 outlaws sales at “unreasonably low prices for the purpose of destroying competition or eliminating a competitor.”

Section 3 had been accepted—at one time—by Federal Courts as to what amounted to an “anti-trust” law, affording the injured party grounds for action seeking treble damages, injunctive relief, or both.

But, as members of this subcommittee know, the Supreme Court—by two separate 5-to-4 votes back in 1958—nullified Section 3 of Robinson-Patman, thwarting civil action by injured parties. Small firms then fell virtually unprotected against the unfair pricing policies of the predaceous giants intent upon ruthlessly eliminating the smaller competition.

We believe that the Congress, in its wisdom in enacting Robinson-Patman, recognized the urgency and absolute necessity for private parties to supplement Federal enforcement.

Quite obviously, Mr. Chairman, the Congress was correct, for Federal enforcement has been virtually non-existent when one considers that violators of the weakened law have spent a combined total of *less* than two years in jail for antitrust crimes since enactment of the Sherman Antitrust Act some 82 years ago.

Why do the monopolistic giants and multitudinous conglomerates insist today on “under-pricing” or “loss leader” items? N.F.I.B. views the answer as do most small independent businessmen. Predatory pricing is done to drive them out of the market, into possible bankruptcy, thereby closing their doors forever. Meanwhile, the violators go their merry way like a python while setting their sights on another victim.

But under S. 1457, small independent businessmen will have regained the right to become plaintiffs. They will have at their disposal the needed protection in order to survive.

Former Supreme Court Justice, the late Louis D. Brandeis, wrote with respect to the monopolistic aspects of price cutting and underselling:

“Americans should be under no illusions as to the value or effect of price cutting. It has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently. It is so simple, so effective. Farseeing, organized capital secures by this means the operation of the short-sighted unorganized consumer to his own undoing. Thoughtless or weak, he yields to the temptation . . . and becomes himself an instrument of monopoly.”

President Eisenhower, when signing into law the Small Business Act of 1958, said that “it is part of our public policy that competition is basic not only to

the economic well being but also to the security of this Nation . . . It is the declared policy of the Congress that the government should . . . protect, insofar as possible, the interests of small business concerns in order to preserve free competitive enterprise . . ."

But, unfortunately, government has not seen fit to enforce what President Eisenhower said was "the declared policy of the Congress." And, under those 1958 rulings *only* government can aid the small businessman.

In industry after industry, the number of small business mortalities has climbed steadily as concentrated economic power has increased in the hands of the ever-engulfing giants and conglomerates.

I have previously quoted from outstanding individuals who recognized this problem long before it became as serious as it is today. Now, with your permission, Mr. Chairman, I would like to call to the attention of this distinguished committee some actual quotes by small independent businessmen who day after day feel the crunch of the hard-core monopolies.

The spread of the big conglomerates into the distributive fields appears to have aggravated the situation, especially in areas where competing conglomerate-owned, retail outlets are battling to drive each other out of the marketplace.

Comments are being received by the Federation in substantial volume. A typical one comes from a Georgia pharmacist who says, "I believe the violations of the Robinson-Patman Act are so rampant among manufacturers and chains as to 'make a mockery of justice.' I am in no position to know of the deals made on the executive level regarding price discrimination and promotional allowances which favor chains over independents. However, any representatives of any large manufacturing concern will tell you that under the present conditions no independent stands a chance against a chain determined to drive him out because the chain can buy cheaper and so it can sell cheaper . . ."

A Pennsylvania home furnishings retailer comments: "When a very large chain store cuts prices to less than you may buy the item wholesale, you are stuck . . . I am fighting back the best that I can, but they want to keep you small so you may generate as little competition to them as possible . . ."

An Ohio grocer charges: "I think the discount business has crippled the business the worst of anything. They only have one or two bargains, then the customer pays high for everything else he buys. I think they should be curbed in some way. They are causing little business to have to go out of business . . ."

And a Michigan sporting goods dealer says: "The pricing of a product is out of hand in this country . . . If the retail price of a product can't be accomplished, then at least the wholesale price or the dealer's cost should be kept constant so he can compete with the so-called discount stores . . ."

In Texas, the owner of a food market comments: "The small businessman should get some relief some way. My sales have gone up for the last three years, my profits have gone down. At the rate I am going I don't know how I will hold out many years this way . . ."

Unless affirmative action is taken by the Congress in the very near future, many more small businesses will go under. And, as they go under, family breadwinners, as well as many others, will lose jobs, forcing the vast majority of them onto our Nation's unemployment rolls, and thereby causing them to skyrocket.

N.F.I.B. strongly believes that the deliberate, willful predatory pricing by the financially powerful conglomerates and monopolies should be halted. We believe enactment of S. 1457 to be in the best interests, not only of the small independent businesses across America, but in the best interest of all America and in America's future. This bill will rightfully restore force and meaning to a most important part of our Nation's antitrust, anti-monopoly law.

Therefore, Mr. Chairman and distinguished members of the subcommittee, we urge your most careful deliberation and prompt action on S. 1457.

Thank you.

STATEMENT OF JOHN HOLLAND, PRESIDENT, NATIONAL LIQUOR STORES ASSOCIATION, BEFORE THE SENATE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, FEBRUARY 1, 2, 3, 1972—RE S. 1457

Mr. Chairman and Members of the Subcommittee: My name is John Holland. I am President of the National Liquor Stores Association, an organization of retailers who sell alcoholic beverages for off-premise consumption. Our association includes retailers numbering upward of 50,000, in practically all of the open

states. Virtually all of them are classified as small business men. I should like to be recorded on their behalf in favor of S. 1457 which would add a new section to the Clayton Act prohibiting sales "below cost for the purpose of destroying competition or eliminating a competitor". Giving persons, injured by its violation, the right to sue for injunctive relief and damages would go a long way toward curing these destructive practices.

The shocking attrition of independent liquor package store operators in the state of New York the past several years because of their inability to compete with the predatory price cutting of large discount operators points up the necessity for the relief this bill would provide. Similar situations prevail in other states and to permit it to continue will, sooner or later, bring about the demise of more independent merchants whose only sin is lack of capital.

Primarily "predatory price cutting", (the use of loss-leader sales on a considerable number of items for a sustained period of time) in destroying competition creates monopolies which upon achieving their goal of controlling the market then proceed to set higher prices for inferior products which palpably is not in the public interest.

Reduction by 90 percent of independent companies in the dairy and baking industries since World War II lessened considerably the competitive choices of the buying public and in the process marked the end for countless numbers of individual business men who did not have the means which S. 1457 would provide for fighting back.

S. 1457 will put small business men in a competitive position and enhance their efforts to succeed. That the Congress is manifestly concerned regarding their welfare is evidenced by the laws and regulations it has fostered in their behalf.

S. 1457 will insure that the intent of the Congress in passing those laws and regulations to aid small business men will be carried out by plugging the loopholes predatory discount operators use to destroy competition.

We respectfully urge your Subcommittee to recommend adoption of this legislation.

STATEMENT OF SOCIETY OF INDEPENDENT GASOLINE MARKETERS OF AMERICA (SIGMA) BEFORE THE SUBCOMMITTEE ON ANTITRUST AND MONOPOLY, COMMITTEE OF THE JUDICIARY, U.S. SENATE, IN SUPPORT OF S. 1457

Mr. Chairman and members of the subcommittee: The Society of Independent Gasoline Marketers of America (SIGMA) submits this Statement in support of the objectives of S. 1457 and applauds the continuing concern of this Subcommittee, Senator Sparkman and his co-sponsors with the problems of the small businessman in his efforts to survive the competitive and anti-competitive practices of the companies that dominate marketing in many product areas.

SIGMA is a national trade association representing private-brand gasoline marketers with more than 135 member companies. SIGMA was organized in 1958 to provide a united voice for the private brand segment of the gasoline marketing industry. SIGMA member companies operate approximately 11,500 service stations in the United States, market nearly seven billion gallons of gasoline annually to U.S. motorists and provide employment to more than 33,000 full-time employees and contribute nearly \$500 million to the tax receipts of the Federal and State Governments.

As this Subcommittee well knows from previous SIGMA appearances before you in the interest of private brand marketers of gasoline, our members, as much as any in the economy of this nation, are daily faced with the consequences of marketing practices of our major competitors. In view of the Subcommittee's familiarity with these problems we will not detail here the effect of those practices on our survival capability.

Through a variety of marketing mechanisms and practices major oil companies do, from time to time in selected markets and for selective purposes, market their gasoline to the consumer at a lower price than the competing private brander must pay for his product. There are complex reasons, including tax advantages and other benefits to the integrated company, why this can be done and the major marketer can still show a profit while the private brander goes out of business. In this and other legislative forums we have urged action to eliminate these unfair and unjust advantages and to bring into a more equitable balance the competitive relationships of gasoline marketing practices. S. 1457 would be a small but significant step in that direction.

Whether the small business man, the victim of predatory pricing and below-

cost selling by larger competitors, can financially sustain and press the legal rights this legislation would provide to him of course remains to be seen. Undoubtedly S. 1457 would be helpful and hopefully would be a deterrent to the very practices to which it is addressed.

As private brand marketers of gasoline—and, as the Federal Trade Commission has found, the force “keeping marketers competitive, flexible and dynamic”—we tend to become frustrated in our efforts to achieve from the Government protection from competition that is inherently unfair, unjust and illegal. Government tends to be slow to respond and to react and as a consequence each year sees the passing of more truly independent marketers from the scene. This disappearance occurs through merger with the majors and other forms of acquisition, but most importantly as a result of the impact of marketing practices with which the private brander cannot economically compete.

In the hope that S. 1457 would be a deterrent to predatory pricing and at the same time afford the private brand marketer an avenue of civil relief, SIGMA supports the bill and urges its favorable consideration.

THE WEST END BREWING Co.,
Utica, N.Y., December 9, 1971.

Senator PHILIP HART,
Chairman of the Senate Judiciary Committee,
Senate Office Building, Washington, D.C.

DEAR SENATOR HART: I am writing to you, at the suggestion of your counsel, Mr. Bangert. The brewing industry has a severe problem, which might merit the attention of your sub-committee on monopoly. It might be summed up as a concentration of business into the hands of a few giant breweries.

If this concentration were proceeding on a natural basis, there could be little reason for complaint. It is not. The large nationals (primarily Budweiser and Schlitz) are so greedy for volume that they use a potent and vicious weapon to kill off competition. The weapon is selective pricing. I will try to outline the problem, and would gladly furnish additional information for your consideration.

1. The basic problem is the ability of the large national shippers (Budweiser and Schlitz primarily) to undersell in some markets, while charging high prices in others, where they have little competition. Using profits from the high-price areas, they then can subsidize selective price cuts and promotions in markets where there is substantial local and regional competition. This tactic has devastating effects on the competition, as can be judged by the attached table, showing the growth in barrelage and market share of the Big 3. Please note particularly the spectacular increase in Budweiser sales.

2. This selective pricing technique is so effective, because the national brands tend to have more prestige than their regional competitors. They are available everywhere, they are nationally advertised, and they have historically charged a higher price for their beer. Originally, this price reflected freight charges. The public, however, concluded that national beers were superior to regional brands, due to their higher price. Therefore, a national's beer promotion is very attractive to the consumer.

3. The result has been a steady elimination of smaller competitors. In 1957, there were 264 breweries; in 1967—176. In 1971, there are only 78 breweries left, and the trend continues. The same trend took place in Canada about 20 years ago. Canada now has three large breweries, and a few tiny breweries in the remote provinces. In area after area, the Canadian giants would go in and undersell their local competitors until they eliminated them. Today, the Canadian customer pays approximately 50¢ more per case, and beer pricing is regulated by the government.

4. The large brewers claim to be much more efficient than the regionals, which might excuse their pricing tactics, and promise ultimate lower prices for the consumer. Their claim of efficiency is questionable. Their shipping costs are higher, and a substantial part of all inplant costs are not open to efficiency improvement. For us, a rough breakdown of inplant costs would be:—excise taxes 33% packaging materials (cans, bottles, paper wrappings) 25%; production labor 9%; brewing materials 7%; advertising and marketing 10%; administration and selling expense 6% and plant depreciation, power, steam, etc. 10%. While the nationals have some economies of scale, their packaging materials cost is higher, since a much higher percentage of their product is put in non-returnable containers.

5. The practices of selective and predatory pricing have gone on in many places, although not at the same time. In Wisconsin, Schlitz has been a prime offender. In Texas, Schlitz and Budweiser have cut prices so viciously, that Pearl Brewing Company, a Texas regional, has filed an \$18 million treble damages suit against them for loss of business. In Florida, Budweiser underpriced their competition to the extent that they now have 50% of the market. The practice is currently going on in Virginia, Maryland, and very heavily in our own New York State. The technique is well known by all industry observers, and is casually and openly referred to by Wall Street analysis.

6. There have been repeated complaints made to the Federal Trade Commission about the pricing practices of Budweiser and Schlitz, but as yet no effective action has been taken. For example, around 1961, the F.T.C. ordered Schlitz to stop selling their Old Milwaukee brand, through company-owned branches, for prices considerably under the local Wisconsin brands. Shortly thereafter, they sold these branches to employees, who then became distributors and carried on the same practices. Many Wisconsin breweries have failed as a result. At least as early as 1967, the F.T.C. has received complaints about Budweiser. At present, the Small Brewers Association of America has hired counsel to try to push the F.T.C. into action. We are skeptical.

7. The nationals claim that, by entering a market at low prices, they actually increase competition. This is a fallacy. What often happens is that the national's low prices drive the regional below his break-even point, thereby destroying him and reducing competition. Furthermore, the nationals are available almost everywhere, so there should be no need for their pricing tactics, unless their intent is to eliminate competition.

8. Attached is a description of our plant tour. We have steadily modernized and have spent approximately \$15 million on buildings and machinery since World War II, often being ahead of the large breweries in buying new and efficient machinery.

Concentration is a fact of life on the American business scene. As a relatively small business, we do not think that anyone has an obligation to protect us, if we are inefficient, or if our product does not please the public. We do feel, though, that it is unfair when a large competitor, using profits generated by over-charging in other markets, is allowed to destroy us by using a price level which neither he nor we can live with. Furthermore, the problem in our industry has implications for all business. If Budweiser and Schlitz succeed in destroying their competition, no small business in any industry will be safe from the larger competitor who uses this tactic.

Very truly yours,

THE WEST END BREWING CO.,
F. X. MATT II,
Vice President/Production.

BARRELS SOLD AND MARKET SHARE OF BIG 3 BREWERIES

[Millions of barrels]

Year	Budweiser		Schlitz		Pabst		Total U.S. production
	Number	Percent	Number	Percent	Number	Percent	
1970.....	22.2	18.3	15.1	12.5	10.5	8.7	120.0
1965.....	11.8	11.8	8.6	8.6	8.2	8.2	100.4
1960.....	8.4	9.6	5.7	6.5	4.4	5.0	87.9

OFFICE OF THE DEPUTY ATTORNEY GENERAL,
Washington, D.C.

HON. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate,
Washington, D.C.

DEAR SENATOR: This is in response to your request for the views of the Department of Justice on S. 1457, bill "To amend the Clayton Act by adding a new section to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor."

This proposal, in addition to amending the Clayton Act by adding a new section prohibiting sales below cost to destroy competition or eliminate a competi-

tor, would provide a civil cause of action to both the Government and private parties for such pricing.

In most cases below-cost selling with intent to destroy competition or eliminate a competitor is presently subject to both criminal and civil actions under Section 2 of the Sherman Act in cases brought by the Government and is subject to civil treble damage actions by private plaintiffs.

The language of S. 1457 is unsatisfactory for two reasons. First, by defining "cost" as "fully distributed cost," the bill would subject firms to liability for using marginal cost pricing where marginal cost was lower than fully distributed costs. Since firms in a competitive market may find it more efficient to engage in marginal cost pricing, especially where they have substantial fixed costs, enactment of the bill could result in higher consumer prices and inefficient resource allocation. Moreover, enactment of a "fully distributed cost" criterion would limit firm pricing flexibility thereby fostering undesirable price rigidity.

The second problem raised by the bill is the fact that it would require a finding that the defendant had engaged in below-cost pricing for the "purpose" of destroying competition. Under Section 2 of the Sherman Act the Government would argue that evidence of sustained below-cost pricing in itself would satisfy any need to show predatory intent, i.e., that since such pricing was not economically rational except as a means of hurting competitors there is no need to prove specific predatory intent. Enactment of a bill which requires proof of a predatory "purpose" could be interpreted by the courts as an expression of a Congressional intent to require proof of specific intent; a result which would impose additional prosecutorial difficulties apparently unintended by the bill's sponsors.

The definition of "cost" and the requirement for proving predatory purpose are interrelated. In view of the difficulty of proving predatory intent, judges may make the findings on the question of below-cost pricing determinative. Thus, it is particularly important that the definition of "cost" be an economically sound one which does not raise the risk of making firm pricing unduly rigid.

For the reasons stated above, the Department of Justice recommends against enactment of this legislation.

The Office of Management and Budget has advised that there is no objection to the submission of this report.

Sincerely,

RALPH E. ERICKSON,
Deputy Attorney General.

FEDERAL TRADE COMMISSION,
Washington, D.C., July 13, 1972.

Hon. JAMES O. EASTLAND,
Chairman, Committee on the Judiciary,
U.S. Senate, Washington, D.C.

DEAR MR. CHAIRMAN: This reply is in response to your request for the Commission's views on S. 1457, 92d Congress, 1st Session, a bill "To amend the Clayton Act by adding a new section to prohibit sales below cost for the purpose of destroying competition or eliminating a competitor."

The subject bill would amend Section 3 of the Clayton Act by adding a new section making it unlawful to "sell goods below cost for the purpose of destroying competition or eliminating a competitor." The bill defines the term "cost," to include allocated delivery, selling and administrative expenses.

The Commission already has the authority to deal with predatory sales below cost under Section 5 of the Federal Trade Commission Act; therefore, no additional authority or statutory responsibility would be placed upon the Commission by S. 1457. The principal impact of the subject bill would relate to treble damage private litigation permitted under Section 4 of the Clayton Act.

Specifically, Section 4 of the Clayton Act authorizes treble damage private suits for injuries caused by reason of anything forbidden in the antitrust laws. While the Federal Trade Commission Act embraces in its broad condemnation of unfair methods of competition and unfair or deceptive acts many practices which fall within the category of activities declared unlawful under the Sherman or Clayton Acts, it is not defined as an antitrust law.¹ Thus, while the Commission can deal with the problem of illegal sales below cost under Section 5 of the Federal Trade Commission Act, competitors who may be injured as a result of such practice cannot sue for treble damages.

¹ See *Nashville Milk Co. v. Carnation Company*, 355 U.S. 373 (1958.)

To the extent, therefore, that the subject bill permits treble damage private suits for injuries caused by illegal sales below cost, it would have a salutary impact upon competition. Accordingly, the Commission endorses S. 1457.

By direction of the Commission.

CHARLES A. TOBIN,
Secretary.

STATEMENT OF ANTITRUST SECTION OF THE AMERICAN BAR ASSOCIATION

The Antitrust Section of the American Bar Association appreciates the privilege of presenting its views concerning S. 1457. The American Bar Association is opposed to the enactment of S. 1457 for the following reasons:

(1) This bill would have a far-reaching, chilling effect on legitimate price competition and would counteract national fiscal and monetary policies at a time when inflation is a critical problem in the United States.

(2) This bill is not based on any concept of discrimination and does not contain the cost justification and meeting competition defenses of Section 2 of the Clayton Act (Robinson-Patman Act). Because of the absence of these defenses and the vague definition of "cost", S. 1457 would be extremely difficult to comply with and equally difficult to enforce.

(3) This bill's prohibition unnecessarily duplicates or overlaps existing antitrust laws, and will inevitably foment confusion and wasteful litigation to determine its scope and interpret its meaning. Any actual abuses at which this bill is ostensibly aimed, such as predatory or other unfair pricing practices, are prohibited under existing laws—including the Sherman Act's ban on attempted monopolization, the Clayton Act's ban on injurious price discrimination, and the Federal Trade Commission Act's ban on unfair methods of competition. It is thus clear that no need exists for this legislation.

In a statement filed with this Subcommittee on October 23, 1969, the American Bar Association opposed enactment of a similar measure, S. 1494. The positions presented then and the positions presented herein by the Antitrust Section are authorized by a Resolution adopted by the Association's Board of Governors on October 16, 1969, which provides as follows:

Resolved, That the American Bar Association opposes enactment of S. 1494, 91st Congress, or any other bill having the same purpose, insofar as it would amend the Clayton Act by enacting such a law enforceable by Government and private suits for damages and injunctions, and supports repeal of § 3 of the Robinson-Patman Act.

Further Resolved, That the Officers and Council of the Section of Antitrust Law are directed to urge such opposition and support, respectively, upon the proper committees of the Congress."

S. 1457

S. 1457 would in effect revise the enforcement scheme of the Clayton Act so as to convert the criminal provision of Section 3 of the Robinson-Patman Act directed at sales at "unreasonably low prices" into a civil antitrust law. S. 1457 would proscribe "sales below cost", and would be enforceable by civil injunction suits, administrative proceedings, and private treble damage actions.

Before discussing separately the three primary reasons for the Association's opposition to S. 1457, it is instructive and useful to review the history of Section 3 of the Robinson-Patman Act, from which S. 1457 is derived.

BACKGROUND ON SECTION 3 OF THE ROBINSON-PATMAN ACT

In 1936, Section 3 was added to the Robinson-Patman Act to expedite passage of the bitterly opposed provisions of that bill. Opposition had arisen because, while the bill was designed to protect independent businessmen from the competition of chain stores and mass merchandisers, it was also challenged as anti-competitive, and in conflict with the interests of the American consumer.

Thus, Representative Emanuel Celler vigorously asserted that the Robinson-Patman bill was "intended, under cover of devious but innocent appearing wording, to assure profitable business to a trade class regardless of the efficiency of service rendered the consumer. . . ." ¹ He also pointed out that: "Unfortunately,

¹ H.R. Rep. No. 2287, 74th Cong., 2d sess., pt. 2, at 26, 27 (1936).

housewives and the consumer generally are not organized. Their voice is not articulate."²

Representative Celler contended that the bill would "result in price raising and, in some cases, actual price fixing"³ and would strike "directly at the primary interest of the public by denying consumers the assurance of obtaining the benefits of lowest prices the most efficient methods and equipment can bring about under free, but fair, competition."⁴

Subsequently, Senators Borah and Van Nuys introduced a substitute bill which provided for criminal penalties instead of the civil sanctions of the original bill. This criminal measure was included as Section 3 of the original bill, which was then approved by the Congress.⁵

Therefore, the Robinson-Patman Act, as finally enacted, contains partially overlapping civil and criminal provisions which are, nonetheless, significantly different from one another. Section 3 deals with general and geographical price discriminations, but does not have the protective "cost justification" and "meeting competition" defenses of the civil portion of the statute which is now Section 2 of the Clayton Act. Further, Section 3 contains a vague and confusing prohibition, not found in the civil portion of the statute, which bars all sales "at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." This broad, ambiguous provision was designed to counter the "extravagant and unwarranted use of so-called loss leaders—selling below cost, advertised, trade-marked, or copy-righted articles that are the subjects of great advertisement and radio programs."⁶

After reviewing the final bill, Representative Celler called it a "hodgepodge" containing "many inconsistencies" and predicted that "the courts will have the devil's own job to unravel the tangle . . . the herculean task to make it yield sense."⁷

Significantly, in the more than thirty-five years since the enactment of the enactment of the Robinson-Patman Act, Section 3 has been almost completely ignored by the Department of Justice. While the FTC has used the civil portion of the Act as the basis for nearly 2000 proceedings, during the same period the Department of Justice has filed only seven indictments charging criminal violations of the vague and undefinable language of Section 3.

Moreover, Section 3 has served no function in private suits, for the Supreme Court held in the *Nashville Milk Co.* case⁸ that it is not an antitrust law. Also, in that case, the Supreme Court emphasized "the possibility of abuse inherent in a private cause of action based upon this vague provision."⁹

Yet, even in light of this unimpressive and unfavorable historical background, it is the provision in Section 3 of the Robinson-Patman Act, barring sales at "unreasonably low prices," which S. 1457 seeks to further implement by making it available for agency and private treble damage actions. This is the case because the Supreme Court held in *National Dairy* that this term is constitutional only when applied to sales below cost with predatory intent to destroy competition.¹⁰ Thus S. 1457 would simply convert the "unreasonably low prices" provision into a civil antitrust law by prohibiting sales below cost for the purpose of destroying competition or a competitor.

It is submitted that a provision which is inherently anticompetitive—which contains no concept of discriminatory pricing—which does not provide the defenses of cost justification or meeting competition—and which in its 36-year history has made no substantial contribution to the goal of a free competitive system—should not be further proliferated by inclusion in the Clayton Act.

We now turn to a discussion of the primary reasons for which the American Bar Association opposes enactment of S. 1457.

I. SUPPRESSION OF PRICE COMPETITION

Enactment of S. 1457 would irreconcilably conflict with national economic goals and consumer interests. In effect, if not in express purpose, S. 1457 could well foster subtle forms of price-restricting behavior. The elimination of a single

² *Id.* at 6.

³ 80 Cong. Rec. 8109 (1936).

⁴ H.R. Rep. No. 2287, 74th Cong., 2d sess., pt. 2, at 26, 27 (1936).

⁵ 80 Cong. Rec. 3447 (1936).

⁶ *Id.* at 8229.

⁷ *Id.* at 8419.

⁸ *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958).

⁹ *Id.* at 378.

¹⁰ *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

competitor is equated with injury, without any consideration of whether the competitive process or the particular industry involved has been injured. Private antitrust litigation, intended to be a pro-competitive force, could instead become a weapon to stifle and chill competition. Sellers would inevitably be reluctant to reduce prices or to sell at "low" prices, absent the meeting competition and cost justification provisions, for fear that such prices might turn out to be below fully distributed costs, or that some competitor might claim injury from the mere fact or a lower price, even if non-discriminatory.

A private action under S. 1457 would restrain competitive activity because the filing of a suit against one seller in a market could deter all sellers therein from announcing lower prices. Sellers already reluctant to lower their prices would have that reluctance re-enforced by the fear of suit. A seller considering the reduction of his price could be deterred therefrom by receipt of an actual threat of suit by a competitor. Sellers competing against a firm nearing insolvency would be deterred from price competition by the fear of later suits by a trustee in bankruptcy.

Price reductions are the most common and most effective form of competitive activity. Yet, an individual competitor could, under S. 1457, challenge a lower price even if it served to enhance the vigor of competition generally. Free and open competition is the vital source of strength in the American economy. The antitrust laws serve as the most significant embodiment of our national commitment to the promotion of competition. Vigorous antitrust enforcement properly exerts a strong *downward pressure on prices* by breaking up price-fixing conspiracies and reducing concentration. To this end, price fixing and related attempts to substitute the collective judgment of competitors for the uncertainty of the market place have long been held by the courts to be *per se* unlawful under the antitrust laws. When antitrust actions are properly utilized to increase competition and to maintain a *depressing influence on prices*, they support the effort to control the serious problem of inflation.

The seriousness of today's inflationary problems need not be dwelled upon. President Nixon's Executive Orders issued since August 15, 1971, implementing Phase I and now Phase II of his Economic Stabilization Program, illustrate the struggle this nation faces in maintaining control on prices.

S. 1457 would certainly not aid the commitment of the antitrust laws to greater price competition. Rather, this bill would expand the limitations on downward price movements that are already often the result of resale price maintenance statutes and the Robinson-Patman Act. In today's inflated economy, the value and contribution to competitive processes of even these laws, enacted during the depression of the 1930's to assist small firms struggling to survive, have been strongly questioned by two Presidential task forces and an American Bar Association Commission appointed in response to a Presidential request.

The Council of Economic Advisers has declared that resale price maintenance costs consumers about \$1.5 billion annually because of higher prices in States with "Fair Trade" acts.¹¹ Making low-price competition into a hazardous venture by the adoption of S. 1457 would encourage retail price maintenance even without the presence of coercive action by manufacturers. Both manufacturers and sellers interested in uniform price adherence would have the force of law to support them, and, in the words of the Supreme Court in the *Parke, Davis* case,¹² products would, to an added degree, come "packaged in a competition-free wrapping. . ."

Even the Robinson-Patman Act, as embodied in Section 2 of the Clayton Act, although it has a legitimate goal of preventing large buyers from receiving preferential price concessions granted solely because of their size, has been criticized frequently because it has tended to freeze price movements in some markets S. 1457 would accentuate these price rigidities.

Nevertheless, those voicing support of S. 1457 claim that "competitive evils" will result if this measure is not enacted. In *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940), however, the Supreme Court pointed out that:

"Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing. If the so-called competitive abuses were to be appraised here, the reasonableness of prices would necessarily become an issue in every price-fixing case. In that event the Sherman Act would soon be emasculated; its philosophy would be supplanted by one which is wholly alien to a system of free competition; it would not be the charter of freedom which its framers intended" (Emphasis added).

¹¹ The annual report of the Council of Economic Advisers, p. 108 (Jan. 10, 1969).

¹² *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960).

In short, S. 1457 under the rubric of an antitrust law would have greater anticompetitive implications than possible pro-competitive effects. To stifle legitimate price competition can hardly be considered to be in the interests of the consumer. To discourage price reductions is not only inconsistent with our current national economic goals, but it is also contrary to the very policy behind the antitrust laws of promoting free and open competition. This bill necessarily equates injury to a particular competitor with injury to the competitive process, without regard to how healthy that process might be.

II. THIS PRICING PROHIBITION ELIMINATING ROBINSON-PATMAN ACT DEFENSES WOULD MAKE BOTH COMPLIANCE AND ENFORCEMENT DIFFICULT

In considering the scope and application of Section 3 of the Robinson-Patman Act, the Supreme Court in the *Nashville Milk* case¹³ clearly recognized that "the possibility of abuse inherent in a private cause of action based upon this vague provision" was a factor which caused the Congress to leave enforcement of this provision solely to the Justice Department.

An inherent source of potential abuse in private causes of action is that S. 1457 abandons completely the Robinson-Patman Act concept of unlawful discriminatory pricing. A seller may be in complete compliance with that law and still have his prices challenged under S. 1457. For example, if a seller has a single, uniform price to all customers, he is in conformity with Robinson-Patman requirements, and neither his competitors nor his customers have or should have any basis for complaint under that Act. Yet, under S. 1457, a competitor could challenge this heretofore lawful price as being "below cost." This dilemma would confront a national seller with a uniform delivered price which, though perfectly lawful under the Robinson-Patman Act, might be challenged as being "below cost" by a disgruntled competitor in a limited geographic section of the country.

Another reason for potential private abuse is that S. 1457 does not contain the exculpatory provisions found in the Robinson-Patman Act. Under that Act, price discriminations by a seller are lawful unless shown to be injurious to competition, and may be legally justified, in any event, by the seller's cost economies or the necessity of meeting a competitor's prices in good faith. Similarly, a seller's advertising or promotional allowances are lawful whenever available to competing customers on "proportionally equal terms," and even if not so available, may be legally justified by the necessities of good faith meeting of competition.

Another major defect in S. 1457 relates to the term "cost", which is defined to mean "fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business."

It is, in fact, difficult to see how a company or its legal counsel could determine to a certainty whether it was selling below "cost" as defined. Even if at one time its sale prices were above "fully distributed costs," it would need to engage in continual reassessment of its prices in light of this vague standard. Moreover, further uncertainty would be likely to arise because the cost accounting would always be open to question. For example: Should research and development costs have been included in production costs? Or, were administrative costs properly allocated? Accountants regularly disagree on what should be included in administrative costs.

Thrusting such uncertainty upon companies might be necessary if S. 1457 would have favorable effects on our competitive system. A "price reduction," however, is not illegal conduct and it violates no antitrust law.¹⁴ Price reductions are, on the other hand, normally indicative of competition, and not of monopoly, attempts to monopolize, or an intent to eliminate competition. In fact, the FTC and Supreme Court have recognized that sales below cost can be a legitimate method of competition when made in furtherance of a legitimate commercial objective, such as liquidation of excess, obsolete or perishable merchandise, close-out sales, stock reduction sales, promotional sales, and the need to meet a lawful, equally low price of a competitor.¹⁵

A final deficiency in S. 1457 concerns its use of the term "purpose," in the context of "purpose of destroying competition or eliminating a competitor." A "pur-

¹³ 355 U.S. at 378, 379 (1958).

¹⁴ *Schine Chain Theatres v. United States*, 334 U.S. 110, 120 (1948); *Gold Fuel v. Esso Standard Oil Co.*, 306 F. 2d 61, 64 (3d Cir. 1962), cert. denied, 371 U.S. 951 (1963).

¹⁵ FTC Adv. Op. No. 249 (May 21, 1968), CCH Trade Reg. Rep. ¶ 18,350; FTC Adv. Op. No. 305, CCH Trade Reg. Rep. ¶ 18,578; *United States v. National Dairy Products Corp.*, 372 U.S. 29, 37 (1963).

pose" to destroy competition or eliminate a competitor is not a meaningful test. The required element of "purpose" could be supplied, as under Sherman Act Section 2 monopolization cases, by "the mere intent to do the act,"¹⁶ simply because it would "make nonsense" of the statute to conclude that a seller sets a lower price for a reason that would not be harmful to a competitor to an extent that could lead to his elimination.

In the *Grinnell* case,¹⁷ once it was shown that defendant had a monopoly market share, the trial court proceeded on an "acknowledged" rebuttal presumption of the necessary element of deliberateness to find monopolization. Although the Supreme Court in that case and lower courts in other Sherman Act cases have more uniformly required plaintiffs to show the element of deliberate purpose,¹⁸ the "purpose of destroying competition or eliminating a competitor" under S. 1457 would clearly not require a showing of such actual consequence, and the "purpose" to do so could be supplied simply by an objective test that sellers intend the natural consequences of their acts. This proposal should be compared with the more reasonable language in Section 2(a) of the Clayton Act, which makes discriminatory pricing unlawful *only* "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them. . . ."¹⁹

In sum, the uncertainty which accompanies S. 1457, its lack of a requirement of discriminatory pricing, its lack of cost justification and meeting competition defenses, and its lack of a requirement to show "injurious effects," demonstrate that compliance and enforcement would be extremely difficult and wholly anti-competitive.

III. DUPLICATION AND OVERLAPPING OF EXISTING ANTITRUST LAWS

It is the position of the American Bar Association that existing antitrust laws can eliminate the types of competitive practices at which S. 1457 is directed. Indeed, even former Chairman and present member of the Federal Trade Commission, Paul Rand Dixon, acknowledged that a prior, similar proposal, S. 1494, was "legally redundant,"²⁰ and that he supported the legislation because it would "reinforce" existing law.

Such redundancy is totally unnecessary, however, for it is clear that existing laws provide a complete remedy against all the predatory pricing practices which the proponents of the S. 1457 bill would prohibit. Predatory pricing and sales below cost without justification violate the Sherman Act.²¹ Section 2 of the Sherman Act prohibits the use of predatory pricing practices to aid integration of two corporate units, to create a monopoly, to attempt to monopolize, or to destroy competition, and provides criminal, civil, and treble damage remedies.²² Moreover, Section 2 liability for predatory practices does not presuppose giant corporations or monopolists, but can also reach the predatory activities by smaller firms.²³

¹⁶ *United States v. Aluminum Co. of America*, 148 F. 2d 416, 432 (2d Cir. 1945).

¹⁷ *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *aff'd*, 384 U.S. 563 (1966).

¹⁸ ABA, Antitrust Developments 1955-1968, pp. 33-34 (1968).

¹⁹ 15 U.S.C. sec. 13(a) (emphasis added).

²⁰ Statement of Paul Rand Dixon, Chairman, Federal Trade Commission, before the Senate Antitrust and Monopoly Subcommittee, pp. 3-4 (Sept. 23, 1969).

²¹ See report of the Attorney General's National Committee to Study the Antitrust Laws, 201, n. 230 (1955); *Schine Chain Theatres v. United States*, 334 U.S. 110 (1948); *Stony Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963).

²² *United States v. Paramount Pictures*, 334 U.S. 131 (1948) (condemning integration where purpose or effect is to use strength of one corporate unit to exclude competitors of another corporate unit from the market); compare *United States v. Aluminum Co. of America*, 148 F. 2d 416, 437-438 (2d Cir. 1945) with *Bausch Machine Tool Co. v. Aluminum Co. of America*, 79 F. 2d 217 (2d Cir. 1935) (charging of high prices for raw material by company with control of the market and low prices by that company in fabricated products market to exclude competition from and monopolize products market; *United States v. New York Great A & P Tea Co.*, 173 F. 2d 79 (7th Cir. 1949); and *United States v. United Shoe Machinery Co.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (operating a competing branch, department, or subsidiary at a loss and recouping by subsidy from, or allocation of cost to, a noncompetitive stage of integration).

²³ *E.g.*, *Gamco, Inc. v. Providence Fruit & Produce Bldg., Inc.*, 194 F. 2d 484 (1st Cir. 1952), *cert. denied*, 344 U.S. 817 (1952); *White Bear Theatre Corp. v. State Theatre Corp.*, 129 F. 2d 600 (8th Cir. 1942); *United States v. Klearflax Linen Looms, Inc.*, 63 F. Supp. 32 (D. Minn. 1945).

The Sherman Act encompasses not only predatory pricing, but also predatory spending designed with an anticompetitive goal in mind.²⁴ Moreover, while S. 1457 is directed only at the sale of "goods," the Sherman Act covers both goods and services.²⁵

Predatory discriminatory pricing practices which are potentially injurious to competition are prohibited by the Robinson-Patman Act, unless based upon cost justification or the seller's good faith meeting of a competitor's price. This statute fully enforceable by civil proceedings, administrative proceedings, and private treble damage suits. As stated in the 1955 Report of the Attorney General's Committee, predatory below-cost pricing "inevitably frustrates competition" and may therefore be the basis for finding competitive injury under the Robinson-Patman Act.²⁶ The Court of Appeals for the Ninth Circuit recently reaffirmed that if there were sales below cost, predatory intent could be inferred, and the requisite anticompetitive effect could be inferred from proof of such predatory intent.²⁷

Competitive injury may also be found even in those cases where the predatory conduct affects only one competitor,²⁸ or where a large and prolonged price reduction is directed at a new competitor.²⁹ The *Utah Pie* case also establishes a cause of action on behalf of small local companies which have been subjected to predatory pricing by large national firms, seeking to retain or expand their sales in a single or local market. This was true in that case even though the plaintiffs' total sales rose substantially during the period of predatory conduct and their market share (which dropped from 67 percent in 1958 to 34 percent in 1959, and rose to 45 percent in 1960 and 1961) remained the largest of any company in the market.

Section 5 of the Federal Trade Commission Act prohibits any "unfair method of competition" in commerce, including predatory pricing practices.³⁰ Further, sales below cost without legitimate competitive purpose, intent or effect, violate the statutes of the majority of the states, are grounds for private injunction suits in many, and are grounds for the recovery of damages in some.³¹ And finally, the intentional destruction of a competitor without justifiable excuse and with the intent and purpose of injuring him (so that malice can be inferred) creates a claim at common law.³²

That the "legal redundancy" of Section 3 adds nothing to effective antitrust enforcement against predatory or discriminatory practices is manifest. In 1958, the Chairman of the Federal Trade Commission advised a Committee of Congress that it was "safe to say that any practice which violated Section 3 of the Robinson-Patman Act, as presently written, would constitute either a violation of the Federal Trade Commission Act or of Section 2 of the Clayton Act or both."³³ As indicated, former FTC Chairman Dixon testified in 1969, with respect to an earlier version of S. 1457 that "The proposed legislation, like the existing Section 3, is legally redundant."³⁴ Similarly, when former Assistant Attorney

²⁴ See *Bailey's Bakery, Ltd. v. Continental Baking Co.*, 235 F. Supp. 705 (D. Hawaii 1964). (A district court refused to dismiss a treble damage complaint charging violations of secs. 1 and 2 of the Sherman Act by defendant's introduction of many new types of bread into a particular market, at tremendous advertising costs, in a short period of time, for the purpose of preventing and eliminating competition.)

Compare *United States v. R. L. Polk and Co.*, 1968 Trade Cases ¶ 72,348 (E.D. Mich., S.D. 1967). (Consent decree barring the publisher of a city directory from making sales below cost, meant either sales at an unreasonably low price or attributing unreasonably high expenses to a given publishing project, based on reasonably estimated sales, for the purpose or with the effect of eliminating competition.)

²⁵ See, e.g., *Southern Flowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966).

²⁶ Report of the Attorney General's National Committee to Study the Antitrust Laws, 165 (1955); ABA, *Antitrust Developments 1955-1968*, pp. 128-130 (1968); see *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *United States v. Borden Co.*, 370 U.S. 460 (1962); *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *National Dairy Products v. FTC*, 1969 Trade Cas. ¶ 72,829 (7th Cir.); *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957); *Atlas Building Products Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960).

²⁷ *Cornwell Quality Tools Co. v. C.T.S. Co.*, 446 F.2d 825, 831 (9th Cir. 1971).

²⁸ *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964), aff'g in part and rev'g in part, CCH Trade Reg. Rep. ¶ 16,243 (FTC 1963).

²⁹ *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 346 F.2d 661 (6th Cir. 1965), cert. denied, 382 U.S. 904 (1965).

³⁰ See, e.g., *E. R. Muller Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

³¹ See 2 CCH Trade Reg. Rep. ¶ 6821, 6825; 4 CCH Trade Reg. Rep. ¶ 30,000 et seq.

³² See *Tuttle v. Buck*, 107 Minn. 145, 119 N.W. 946 (1909); *Mackey v. Sears, Roebuck & Co.*, 1956 Trade Cases ¶ 68,519 (7th Cir. 1956).

³³ Testimony by Chairman Gwynne, hearings before a subcommittee of the Senate Select Committee on Small Business on the role of antitrust enforcement in protecting small business 1958, 85th Cong. 2d sess. 175 (1958).

³⁴ Statement of Paul Rand Dixon, Chairman, Federal Trade Commission before the Senate Antitrust and Monopoly Subcommittee, p. 3, Sept. 23, 1969.

General Richard W. McLaren testified before this Subcommittee in 1969, he stated that pending review of the entire subject of price discrimination, "we see no compelling necessity for incorporating into the antitrust laws the prohibition against predatorily unreasonably low prices. In appropriate cases, Section 2 of the Clayton Act and/or Section 2 of the Sherman Act are available to both private litigants and the Government for civil relief against such trade practices."

CONCLUSION

For the foregoing reasons, the American Bar Association urges that Section 3 of the Robinson-Patman Act not be extended and proliferated by legislative proposals such as S. 1457.

Respectfully submitted,

Section of Antitrust Law
American Bar Association

STATEMENT OF JOHN F. BYSET¹

CHAMBER POSITION

The prohibition of sales below cost with the intent and capacity of destroying competition is an appropriate objective of the antitrust and trade regulation laws—and the Chamber of Commerce of the United States supports this objective. Added protection against predatory pricing as proposed in S. 1457, however, is not needed because adequate remedy is already available in existing law—not only by the criminal process under Section 3 of the Robinson-Patman, but by Federal Trade Commission orders to cease and desist and private suits for treble damages as well. Moreover, the proposal, if enacted, would foster price rigidity and lessen the prospect of legitimate price reductions.

The National Chamber, therefore, opposes the enactment of S. 1457. We recommend instead a broad scale review of the antitrust laws generally—including the price discrimination laws—to determine their effectiveness in reaching the goals of competitive enterprise and their compatibility with other national goals.

An appropriate vehicle for obtaining review is already pending before this Subcommittee. Here, we are referring to S. 1486, a bill to establish an Antitrust Review Commission sponsored jointly by Senators Javits, Hruska, Cooper, Dole, Pell, McGee and Tower. We commend this bill to the Subcommittee's thoughtful consideration, and strongly urge its approval.

THE ISSUE

One goal of a competitive economy is to bring goods to the market at minimum consumer price. Standing alone, however, a low price for a particular goods may be an ambiguous circumstance. It may mean that the price has been derived in a legitimate manner consistent with the system. Or, it might mean that the price has been set by artificial influences which will ultimately work against the minimum price goal.

Legitimately, a low price may simply reflect an efficient way of doing business, an effort to retain clientele under competitive pressures, an end of season clearance, or an attempt to salvage some return on slow moving products. All of these reasons are consistent with the system and serve to illustrate whether it is working.

On the other hand, a low price may be the result of motives that are inimical to the system. A firm, for example, may sell at unreasonably low prices—even below cost—for the purpose of destroying competition. Once the purpose is achieved, prices may rise above the level that would normally prevail in a competitive scene. Two victims of this process are apparent: competitors who have been eliminated and consumers who have been forced to pay higher prices.

The pending bill is designed purportedly to combat this predatory selling. It would do so by adding a new Section 3A to the Clayton Antitrust Act with direct administrative and judicial remedies. Briefly, the bill would make it unlawful "to sell, offer to sell or contract to sell goods *below cost* for the purpose of destroying competition or eliminating a competitor." Violators would be liable to cease and desist proceedings by the Federal Trade Commission, civil actions in the federal courts by the Department of Justice, and private actions in the federal courts for treble damages by business competitors.

¹ Committee Executive, Antitrust and Trade Regulation Committee, Chamber of Commerce of the United States.

Express remedy for predatory selling is already available in Section 3 of the Robinson-Patman Act. In pertinent part, this Section makes it unlawful "to sell, or contract to sell, goods at *unreasonably low prices* for the purpose of destroying competition or eliminating a competitor." This Section, however, is enforceable only through criminal prosecution. The fundamental purpose of the bill, therefore, is to provide added remedies—particularly the added remedy of actions by business competitors for treble damages.

The language change from sales at "unreasonably low prices" to sales "below cost" was made to accommodate a judicial interpretation in a case which challenged the phrase "unreasonably low prices" as being unconstitutionally vague.

To further accommodate the same judicial interpretation, the pending bill also defines the term "cost." Under the bill, the term would mean:

"Fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business."

ADEQUACY OF EXISTING LAW AND EFFECT OF S. 1457

All who have given thought to this issue agree that existing federal law furnishes sanctions against predatory selling below cost. Not only are sanctions available, but the precise remedies proposed by S. 1457 may be had under other existing provisions of the federal antitrust or trade regulatory laws. This is illustrated in comments entered by Senator Sparkman in the *Congressional Record* when he introduced the bill on April 1, 1971. Besides Section 3 of the Robinson-Patman Act, the criminal statute described above, the Senator cited the Sherman Act, the Federal Trade Commission Act, and the price discrimination provisions of the Clayton Act as other weapons against predatory pricing.

The question for the Subcommittee, then, is not whether remedies are available. Rather, the Subcommittee is concerned with (1) the adequacy of existing remedies, and (2) the effect of adding the new remedies proposed in S. 1457.

We will discuss these two questions in terms of the competitive situations cited in the introductory comments: attempts to monopolize and price discrimination.

Attempts to monopolize

The principal sponsor of S. 1457 said that Section 2 of the Sherman Act and Section 5 of the Federal Trade Commission Act may be employed against predatory low prices as attempts to monopolize "under some circumstances." This means that all of the remedies sought by S. 1457—FTC orders, court injunctions, private awards of treble damages—can now be used against sales below cost if the "circumstances" are right.

The right circumstances which activate the remedies are more than adequate to meet the need—since we still adhere to the notion that the antitrust laws are intended to protect and encourage the broad competitive process. Capacity to injure this broad competitive process is one of the principal circumstances in any proceeding where an alleged attempt to monopolize is involved. Simply put, an attempt to monopolize is an unfair effort by a firm to obtain market dominance for its product. In the context of this investigation, the use of sales below cost to drive out competition may be an attempt to monopolize. But the law, as evolved, is reasonable; there must be a likelihood that the effort will succeed. In other words, the low price firm must have the capacity and staying power to absorb losses or minimum returns sufficient to indicate that the anti-competitive purpose may be achieved. Without this capacity low prices enhance, rather than threaten, the competitive process. The ultimate beneficiary is the consumer.

Unlike proceedings under the Sherman and FTC Acts, capacity to injure competition would not be an element in the sales "below cost" provisions of S. 1457. At least, it would not be an element initially because the bill does not contain language dealing with capacity to injure the broad competitive process. Possibly, the bill would be interpreted as including capacity to injure among its elements, but this would likely entail a process of lengthy judicial evolution. Moreover, such an interpretation does not seem probable, because the bill may be regarded as "remedial" legislation. In such circumstances, it is more probable that S. 1457 would be interpreted to exclude the capacity element now included in existing law.

If intent to injure, without corresponding capacity, became a criterion of unlawfulness, price cuts would be too hazardous for the wary business firm and consumers would suffer. This would result because intent to injure can be inferred from most competitive price cuts. That is, a firm usually cuts prices to take business away from other firms. If it succeeds the other firms are injured

to the extent that their profits are reduced—although they may be able to prosper and make satisfactory cuts of their own.¹ This is simply desirable competition at work, but it would be risky under S. 1457.² It is almost as if we are about to abandon the competitive process, and substitute an insulation against competition.

It is true that intent to injure by low prices is not the only element of liability under S. 1457. The low prices must also be below cost. From this it might be argued that the burden of proving that a particular sale was actually below cost would discourage all but the most meritorious cases. The difficulty of establishing cost, for example, is shown by the bill itself where the term is defined and some of the items to be considered are enumerated. Consequently, every proceeding under the bill would be an accounting exercise with arbitrary assignments of administrative costs to the various products sold by a defending firm.³

But instead of discouraging frivolous lawsuits, the proof difficulties would actually be an encouragement. Knowing that it could obtain access to a rival's records by the discovery route, a firm faced with disagreeable price competition might be inclined to sue even in doubtful cases. In some instances, the defending firm's desire to protect sensitive and confidential cost data might be the only leverage needed by the suing firm to exact a profitable settlement out of court. In other instances, the disclosure of a rival's cost figures might be the suing firm's principal motive in proceeding. We urge the Subcommittee to be especially mindful of this possibility that passage of S. 1457 could be an invitation for abuse of the discovery process.

While the difficulty of establishing cost could be either an advantage or a disadvantage for plaintiffs, it could only be a disadvantage for defendants and consumers. Presumably, a low profit margin firm will know its costs with fair certainty. But, it will not know how those costs will be allocated by the courts and the Federal Trade Commission. Accounting methods, sound to the firm itself, may be viewed otherwise in litigation, especially under a law designed to make cases easier to prove. With such uncertainty about how costs would be assigned in litigation, the cautious firm would charge prices sufficiently high to cover all possibilities. The firm would lose the competitive advantage that its efficiencies might have made possible, and consumers would lose the prospect of competitive pricing.

In summary, consumer interests and the broad competitive process would be better protected if left to existing law governing attempts to monopolize. By distinguishing between injury to the competitive process and reduced profits for individual firms, the law leaves open the prospect of consumer benefit through price competition. The pending bill makes no such distinction, and would tend to discourage competitive pricing.

Price Discrimination

While the Sherman and FTC Acts are sufficiently broad to reach all threats to the competitive process, the price discrimination provisions of the Clayton Act give further protection. In general, the price discrimination law prohibits a supplier from selling to different reselling customers at different prices—if competitive injury may result. All of the remedies proposed by S. 1457 are available to enforce the law.

In some respects, the price discrimination law gives even greater protection than would be available under S. 1457. By the bill, for example, proof of intent to destroy would be an element of liability. In Clayton Act proceedings, on the other hand, innocent intentions may be vulnerable. In addition, a Clayton Act proceeding does not depend on proof of a sale below cost, only that there be two sales at different prices.

The scope of protection possible under the Clayton Act in the predatory selling context is illustrated by the case of *Utah Pie Company v. Continental Baking Company et al.*⁴ There, three national firms sold frozen pies in the Salt Lake City area at prices lower than those charged in other areas. A local competitor brought suit charging that it had been injured by the low prices in Salt Lake City. The Supreme Court held that the local firm had a right to collect damages,

¹ This raises a question about the measure of damages in S. 1457. Would it be the difference between profits without price competition and profits with competition?

² Even the well recognized antitrust defense of reducing prices to meet competition could be jeopardized by this bill.

³ For multiproduct and service organizations, the problem of allocation would be especially complex.

⁴ 386 U.S. 685, 87 Sup. Ct. 1326; rehearing denied 387 U.S. 949.

even though it enjoyed an increasing sales volume and a healthy financial condition during the period of area price discrimination by the national firms.

This case argues strongly that additional private remedy is not necessary. According to some, it argues that the remedies are already too strong and that they will injure consumers, unless readjusted to accommodate the competitive process.

CONCLUSION

The National Chamber opposes the enactment of S. 1457. Instead, we recommend respectfully that the Subcommittee consider the approval of S. 1486, a bill providing for review of all the antitrust laws to determine their effectiveness in reaching the goals of competitive enterprise and their compatibility with other national goals.

The rejection of S. 1457 is justified on two grounds: (1) existing remedies to prevent predatory selling are fully adequate to meet the need, and (2) the pending bill would injure consumers by inhibiting legitimate price reductions. In the latter connection, it is ironic that while our current wage and price control policies aim at reducing inflation, S. 1457 would likely have the opposite effect.

BIRMINGHAM, ALA., June 27, 1972.

HON. JOHN SPARKMAN,
U.S. Senate, Senate Office Building,
Washington, D.C.

DEAR SENATOR SPARKMAN: You are the sponsor of S. 1457, filed in the 1st Session of the 92d Congress which was a bill to amend the Clayton Act by prohibiting the sale of goods below cost, for the purpose of destroying competition or eliminating competitors.

I am informed that Mr. Larry Spiller and others representing Consulting Engineers Council of the United States have met with you in an effort to have the bill amended so as to include "services" as a part of the prohibition, as contained in your bill.

I represent the Consulting Engineers Council of Alabama. The membership of this organization is composed of representatives either living in or servicing every county in the State of Alabama. These men are professional design consultants in all phases of engineering, who are being slowly strangled by large conglomerates who are advocating a "turn key" method of contracting or by large manufacturing concerns who, in their zeal to capture competitive markets, have begun to offer, free of charge, engineering services to the consumer or his representative, in return for the sale of a product. It would be a tremendous disservice to the public to have the individual consulting engineer forced out of the economy because of the marketing methods used by these sales people. I feel sure that no manufacturer would admit to the practice, or that they were attempting to accomplish this result, but accomplish it they are, in fact, doing.

I recently had the responsibility of writing to a major manufacturer in the mechanical field inquiring as to their policy concerning professional engineering. We had obtained factual information from two reputable architects that sales personnel from this company was soliciting business on the basis of offering free engineering service. This company responded to my inquiry after approximately one month, a copy of the response attached hereto. You will note the company expresses a general policy of maintaining a "proper and necessary relationship" between members of the industry. The third paragraph of the letter contradicts this by stating they can only exert minimal control over their independent dealers. This would seem singularly strange to me, since most franchised dealers are bound to the manufacturers policies rather completely, and would thus negative the statement contained in this letter.

I write you at this time on behalf the members of Consulting Engineers Council of Alabama, urging that you give your most serious and effective consideration to the addition of the word "services" as a part of your legislation.

I have always been a very strong supporter of you and your efforts in the United States Senate. I look forward to supporting you in this forthcoming election as I am sure you have reached that maturity in office to more ably serve the needs of this great State.

Very truly yours,

ERNEST W. WEIR.

Enclosure.

THE TRANE CO.,
La Crosse, Wis., June 13, 1972.

MR. ERNEST W. WEIR,
*Attorney at Law,
Birmingham, Ala.*

DEAR MR. WEIR: We appreciate the opportunity to clarify any misunderstanding which might exist concerning our policy with respect to our role in this industry.

The responsibility of The Trane Company franchise holder, and his employees, is the selling and servicing of equipment manufactured by The Trane Company. By policy we require these responsibilities to be discharged in a professional and ethical manner as it involves the maintenance of the proper and necessary relationship between Owners, Architects, Consulting Engineers, Contractors and other principals involved in the construction industry.

It should be recognized, however, that The Trane Company can exert minimal control over the activities of any independent dealer who is serving the industry as a contractor.

I hope this clarifies any misunderstanding which might have existed.

Yours truly,

R. J. CAMPBELL.



