supposition of coverage might have the salutary effect of causing insurance companies to clarify the provisions as to the effective date; i.e., the agent would be instructed to be certain that applicants understand the effective date to be after the medical examination. The applicant would be covered in situations 3 and 4 if the agreed effective date were either the date of the application and premium payment or the date of satisfactory completion of the medical examination.

As Judge Clark points out in his concurring opinion in the *Gaunt* case, "a result placed not squarely upon inequity, but upon interpretation, seems sure to produce continuing uncertainty in the law of insurance contracts." His position points the way to more expeditious handling of a perplexing problem.

**EFFECT OF ROBINSON-PATMAN ACT ON QUANTITY DISCOUNTS**

In a proceeding initiated under the Robinson-Patman amendment to Section 2 of the Clayton Act, the Federal Trade Commission charged the Morton Salt Company with illegal discriminations in price between different customers. The company had established openly announced quantity and cumulative discounts: 1) a quantity discount of $.10 per case from the list price of $1.60 granted to all customers who purchased Blue Package Table Salt in carload lots; 2) an additional $.10 per case cumulative rebate to customers purchasing 5,000-50,000 cases of Blue Package salt in any consecutive 12-month period, or a $.15 rebate to purchasers of more than 50,000 cases; 3) a 5 per cent cumulative rebate on all table salt other than the Blue Package varieties to customers whose total salt purchases during a 12-month period exceeded $50,000. After a full hearing, the Commission ordered the company to cease and desist from discriminating in price between customers. On petition for review, the Seventh Circuit Court of Appeals set aside this order and dismissed the complaint. *Morton Salt Co. v. FTC.*

A major weakness of the Clayton Act's prohibition of price discrimination prior to 1936 was the express exception of quantity discounts from the statute's sanctions, even though such discounts might reflect a windfall for favored large

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18 160 F. 2d 599, 603 (C.C.A. 2d, 1947).
20 Quantity discounts are granted on individual orders exceeding the base quantity, so that they may normally be determined when the order is placed. Cumulative discounts are based on the total volume of a buyer's purchases over a given period of time, and are therefore usually given in the form of retroactive rebates.
22 162 F. 2d 949 (C.C.A. 7th, 1947), cert. granted 68 S. Ct. 355 (1948), noted in Quantity Discounts Under the Robinson-Patman Act, 42 Ill. L. Rev. 556 (1947); 60 Harv. L. Rev. 1167 (1947).
customers. In Goodyear Tire & Rubber Co. v. FTC, a large price differential based on a relatively small saving in cost arising from quantity purchases was held legal under the old Act. The primary purpose of the amendment of Section 2 to form the new Section 2(a) was to close off this loophole by revising the exception to include only quantity discounts justified by actual savings in cost due to the larger quantities sold or delivered. The intended effect of the new Act was recognized by the Sixth Circuit Court of Appeals in a dictum in the Goodyear case, and was apparently adhered to by the FTC and by those companies charged by the Commission with illegal quantity or cumulative discounts. Between passage of the Robinson-Patman Act and the Morton Salt case, no cease and desist order based on such practices was ever challenged in the federal courts.

“That it shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold.” 38 Stat. 730 (1914), 15 U.S.C.A. § 13 (1928) (italics added).

The House Committee on the Judiciary, in reporting the Robinson-Patman Act, stated: “. . . present Section 2 of the Clayton Act . . . places no limit upon quantity differentials of any kind. . . . This proviso is of great importance, for . . . it also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise, such differentials would become instruments of favor and privilege and weapons of competitive oppression.

“In the above exemption the phrase ‘which make only due allowance,’ is carried over from the present act, but as coupled with the remainder of the clause, is here extended to limit quantity differentials to differences in the cost of manufacture, sale, and delivery as provided in said subsection (2).” H. Rep. 2287, 74th Cong. 2d Sess., at 9 (1936).


As amended, the statute reads:

“It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: Provided, That nothing contained [herein] shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantity in which such commodities are to such purchasers sold or delivered.” 49 Stat. 1526 (1936), 15 U.S.C.A. § 13 (1941).


Ferro Enamel Corp., CCH Trade Reg. Serv. 13,362 (FTC, 1946); John B. Stetson Co., CCH Trade Reg. Serv. 13,290 (FTC, 1945); Caradine Hat Co., 39 F.T.C. 86 (1944); Na-
The court's decision to set aside the FTC order in the instant case was based on the theory that the Commission had not met its burden of proving a statutory violation. Under the court's construction of the Robinson-Patman Act, the Commission must show a differential in price between customers, consequent likelihood of injury to competition, and lack of justification for such differential in cost savings. Since this interpretation conflicts with the plain language of the Act as well as its interpretation by other federal courts, both the court's reasoning and decision are difficult to justify.

Although the necessity for a showing of discrimination by the FTC is universally accepted, differences in the interpretation of the word "discrimination" lessen this apparent unanimity. The majority decision in the Morton Salt case distinguished between "discrimination" and "differentiation," stating that the former "... occurs as a matter of law only when Section 2(a) of the Clayton Act, as amended, is in fact violated." According to this view, proof of a discrimination would certainly require the showing of price differentiations resulting in injury to, destruction of, or prevention of competition with any person who receives or grants the price differential. In addition, it would probably be necessary to prove that the differential did not make "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered."

However, Section 2(a) declares "It shall be unlawful ... to discriminate in price ... where the effect of such discrimination may be substantially to lessen competition." This language implies that "discrimination in price" may exist without any showing of an effect on competition. The implication was substantiated by Chairman Utterback of the House Committee in charge of the Robinson-Patman Act:

In its meaning as simple English, a discrimination is more than a mere difference. Underlying the meaning ... is the idea that some relationship exists between the parties to the discrimination which entitles them to equal treatment, whereby the difference granted to one casts some burden or disadvantage upon the other. If the two are competing in ... resale ... that relationship exists."

Writers and courts, among them the Seventh Circuit Court prior to the present case, have uniformly dealt with discrimination as a mere price difference be-

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11 Morton Salt Co. v. FTC, 162 F. 2d 949, 955 (1947).
13 80 Cong. Rec. 9416 (1936).
between competing purchasers, treating the effect on competition and possible justification as separate entities. Thus Judge Minton, dissenting in the Morton Salt case, more accurately concluded: "If I, a small buyer of salt, have to pay more for my salt than a larger buyer does because he is a large buyer, it seems clear to me that I have been discriminated against as to price." Judge Minton recognized, as the majority did not, that the presence of a discrimination is a question distinct from that of its illegality.

Another element which the court treated as essential to proof of violation of the Act was an adverse effect on competition caused by the alleged discrimination. Assuming that the court was correct in requiring FTC proof of such an effect, the degree of proof demanded by no means accords with the standards established in other decisions in the same field, despite the majority's efforts to reconcile its stand with previous holdings. Thus, the court emphasized that the discounts were not used to reduce the sale price of the product. In doing so, it read into the Robinson-Patman Act a requirement that actual injury to competition must be shown. Yet the Supreme Court had flatly rejected this argument in Corn Products Refining Co. v. FTC:

But it is asserted that there is no evidence that the allowances ever were reflected in the purchasers' resale prices. This argument loses sight of the statutory command. As we have said, the statute does not require that the discriminations must in fact have harmed competition, but only that there is a reasonable possibility that they


45 Morton Salt Co. v. FTC, 162 F.2d 949, 959 (C.C.A. 7th, 1947).

46 "The discount was not used to reduce the sale price of the product. ... Any businessman would readily admit that to some degree the price paid by a competitor for a product sold by [sic] him affects his business, but that is far from establishing that such price differential would force either of them to re-sell at a substantially reduced profit or to refrain from re-selling. ... This does not inferentially establish that the competitive position of either of them is being or may be injured, or that competition in the wholesale or retail business in the same line of commerce in general is being or may be injured or that the price differentials in question actually affect or may affect the competitive re-sale fluctuations in the trade." Ibid., at 956.

47 Although the court painstakingly referred to the "likelihood" or "threat" of injury, its reasoning and decision are consistent only with the stricter requirement of actual adverse effect on competition. The setting aside of the cease and desist order is even less understandable in light of the ample evidence of actual competitive harm contained in the record. See brief of respondent at p. 9.
“may” have such an effect. . . . It was permissible for the Commission to infer that these discriminatory allowances were a substantial threat to competition.18

In fact, the Seventh Circuit Court of Appeals itself, in Judge Lindley’s majority opinion in the Corn Products case, adopted a position contrary to that of the Morton Salt decision.19

The requirement of actual damage would, if generally accepted, defeat the purpose of the Act. It would allow proceedings by the Commission only if a Morton customer might be found willing to reflect, in his resale price, the higher purchase price paid for salt, so that the Commission might point to his actual loss of customers as a basis for its findings. But the very reason for the Commission’s power to issue cease and desist orders is to prevent harm to competition; to refuse to allow action on the basis of probable future harm would be anomalous. For this reason, this same court, in the Corn Products case, had used the standard that there need be only “reasonable probability” that an adverse effect on competition would result:

The statute does not require proof of actual injury. . . . It is the congressional intent to halt in its incipiency any possible injury to the public before it may have actually weakened the fabric of fair competition.20

Judge Minton’s dissent in the instant case diverged even further from the majority than does the generally accepted “reasonable probability” doctrine. After pointing out that proof of actual injury was not essential to support the FTC order, the Judge continued, “The quantity discounts . . . are discriminatory and may have the effect denounced by the statute. The fact of the discrimination itself, it seems to me, would have supported an inference that the effect may be to lessen competition.”21 This view would lighten considerably the task of the FTC; yet it is justifiable in a case like the present, involving cumulative discounts. Salt forms only a small portion of the wholesale and retail grocery business, so that the customer discriminated against may not be able to show actual loss of trade even if he does not absorb the price differential. However, salt is the business of the Morton Company, and unjustified discounts to large buyers are no less reprehensible than discrimination between purchasers where the product represents a large part of the customers’ trade.

Although here a . . . price differential . . . might not alone have been sufficient to give the [large] buyer . . . an appreciable competitive advantage in all of its busi.


— Corn Products Refining Co. v. FTC, 144 F. 2d 211, 218 (C.C.A. 7th, 1944).


— Morton Salt Co. v. FTC, 162 F. 2d 949, 960 (C.C.A. 7th, 1947). Contrast Judge Minton’s earlier statement in A. E. Staley Mfg. Co. v. FTC, 135 F. 2d 453, 455 (C.C.A. 7th, 1943): “But it takes discrimination plus the other element as to substantially lessening competition, or tending to create a monopoly, to sustain the complaint. The latter elements are not conclusions to be drawn from the facts of discrimination. They are essential additional elements of fact that must be proved and incorporated in the findings.”
ness, yet an accumulation of several such discounts from many sellers of different commodities, each alone of no effect, would give such buyer a decided competitive advantage. If one such discount cannot be prohibited, none can.22

The third aspect of the case, the court's decision as to what the FTC must sustain as its burden of proof, has provoked most comment.23 Section 2(b) of the Act provides:

Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price . . . . the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination.24

By distorting the concept of "discrimination" to include proof of all the elements of Section 2(a), plus disproof of the applicability of the provisos of that section, the majority opinion effectively nullified Section 2(b) as a procedural aid to the Commission. Such distortion resulted in the extreme position, never before taken by any court, that the Commission must prove 1) a difference in price between competing purchasers 2) which has produced an adverse effect on competition and 3) which does not make due allowance for cost differences. This position is justified neither by the literal meaning of the statute nor by precedent.

Application of the earlier definition of "discrimination" would require the FTC to establish only a price difference between competitors in order to shift the burden of proof to the person charged with violating the statute. The latter party would then have to prove either the lack of effect on competition, justification on the ground that the differential reflected differences in cost, or an honest attempt to meet a competitor's lower price.25 This interpretation has been approved by several writers26 and was adopted by the Second Circuit Court of Appeals in Samuel H. Moss, Inc., v. FTC27 where the court supported its stand with a justification based both on its literal interpretation of Section 2(b) and the practical difficulties facing the Commission:

It is true that § 2(a) makes price discrimination unlawful only in case it lessens, or tends to prevent, competition . . . . But that is often hard to prove . . . . Hence

22 Bayly, Four Years Under the Robinson-Patman Act, 25 Minn. L. Rev. 131, 145 (1941).
23 Quantity Discounts Under the Robinson-Patman Act, 42 Ill. L. Rev. 556 (1947); 60 Harv. L. Rev. 1167 (1947).
25 2 Section 2(b) specifies, in addition to the burden of proof provision, "That nothing contained [herein] shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price . . . . was made in good faith to meet an equally low price of a competitor."
27 148 F. 2d 378 (C.C.A. 2d, 1945).
Congress adopted the common device in such cases of shifting the burden of proof to anyone who sets two prices, and who probably knows why he has done so, and what has been the result. If he can prove that the lower price did not prevent or tend to prevent anyone from taking away the business; he will succeed, for the accuser will not then have brought him within the statute at all. Nevertheless he may succeed even though he fails to establish such a negative; for, although it will then appear that he has lessened, or prevented, competition, the proviso of § 2(b) will still excuse him, if he can show that his lower price did not undercut his competitors, but merely "met" their "equally low price."28

However, most courts have adopted a construction of Section 2(b) which gives discrimination different meanings in Sections 2(a) and 2(b), requiring the FTC to prove probable injury to competition as well as a mere price differential in order to establish a prima-facie case. This interpretation, supported by the history of the Robinson-Patman Act29 and the use of the word " justification" in Section 2(b), which indicates that an unlawful discrimination has already been shown,30 was used by the Seventh Circuit Court of Appeals in earlier cases.31 In addition, the Commission’s assumption of such a burden in two cases before the Supreme Court was not disapproved by that Court.32 Judge Minton's dissent in the Morton Salt case follows this view, with the finding of competitive injury based on a permissible inference from the nature of the discrimination.33

But the most serious problem presented by the decision is not the strained majority interpretation of the Robinson-Patman Act. Even the top-heavy burden placed on the FTC might be met34 except for the complete lack of respect

28 Ibid., at 379.
29 "Section 2(a) .... like present section 2 of the Clayton Act .... contains a general prohibition against such discriminations, from which certain specified exceptions are then carved, thus throwing upon any who claim the benefit of these exceptions the burden of showing that their case falls within them." S. Rep. 1502, 74th Cong. 2d Sess., at 3 (1936).
31 A. E. Staley Mfg. Co. v. FTC, 144 F. 2d 221, 224 (C.C.A. 7th, 1944); Corn Products Refining Co. v. FTC, 144 F. 2d 211, 217 (C.C.A. 7th, 1944); A. E. Staley Mfg. Co. v. FTC 135 F. 2d 453, 455 (C.C.A. 7th, 1943); American Can Co. v. Ladoga Canning Co., 44 F. 2d 763, 768 (C.C.A. 7th, 1930) (under old Clayton Act).
33 The same process of inferring the requisite effect on competition from the nature of the discrimination itself was followed by the Supreme Court in the Corn Products case. See text at n. 17, supra. In the present case, Judge Minton was able to strengthen his dissenting position by pointing to "abundant evidence in the record to support the finding."
34 In the Morton Salt case, 1) price differentials between competing purchasers were concededly present. 2) In addition to a possible inference of injury to competition, the testimony disclosed many instances of actual injury. 3) Cumulative discounts by definition do not necessarily reflect actual savings in cost of sale or delivery. The customer who orders 50,000 cases of
given the Commission's findings by the court. Section 5 of the Federal Trade Commission Act provides that "The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." The Supreme Court last year declined to rule on the validity of a cumulative discount system similar to Morton's, stating: "The economic effects on competition of such discounts are for the Trade Commission to judge. Until the Commission has determined the question, courts are not given guidance as to what the public interest does require concerning the harm or benefit of these quantity discounts on the ultimate public interests sought to be protected in the Act." In addition, the Court has often reiterated the long-standing doctrine that "The appraisal of the evidence and the inferences to be drawn from it are for the Commission, not the courts." Yet the Seventh Circuit Court, stating that "this provision as interpreted by the Courts does not relieve the Commission of making a substantial showing and proper findings," selected a small, inconclusive portion of the evidence, drew from it an inference contrary to the Commission's findings, and set aside the FTC's order as lacking substantial supporting evidence. Hostile decisions like the instant one can only thwart the attempts of administrative tribunals to carry out the mandates of Congress. The net result represents an unwise encroachment by the judiciary on the legislative function delegated to the FTC.

salt in a 12-month period may do so by placing fifty separate orders, each requiring separate sales attention, handling, and shipping; another customer may buy 40,000 cases in ten orders. Although the salt company's unit costs are lower in the latter case, only the former receives the $ .15 per case rebate. 4) No contention was made that the price discriminations reflected attempts to meet lower competitive prices.


Morton Salt Co. v. FTC, 162 F. 2d 949, 958 (C.C.A. 7th, 1947).

The court pointed to the fact that non-discount customers of the Morton Salt Co. in the trade areas investigated showed increases in sales from 1937-41, drawing the inference that "the quantity discount system of petitioner tended to increase, not injure, competition." Ibid., at 957. More careful analysis would have disclosed that total salt sales had also increased, and that there had been a shift in percentage of total sales toward discount customers. The possibility of conflicting conclusions emphasizes that the court exceeded its function by attempting any such analysis, careful or otherwise.

Contrast the attitude of the present court toward the Commission with that of Supreme Court in FTC v. Standard Education Society, 302 U.S. 112, 117 (1937):

"The courts do not have a right to ignore the plain mandate of the statute which makes the findings of the Commission conclusive as to the facts if supported by testimony. The courts cannot pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission."