

A Quick Look at the Robinson-Patman Act

Hanno F. Kaiser

Latham & Watkins LLP (San Francisco)
UC Berkeley, Boalt Hall School of Law

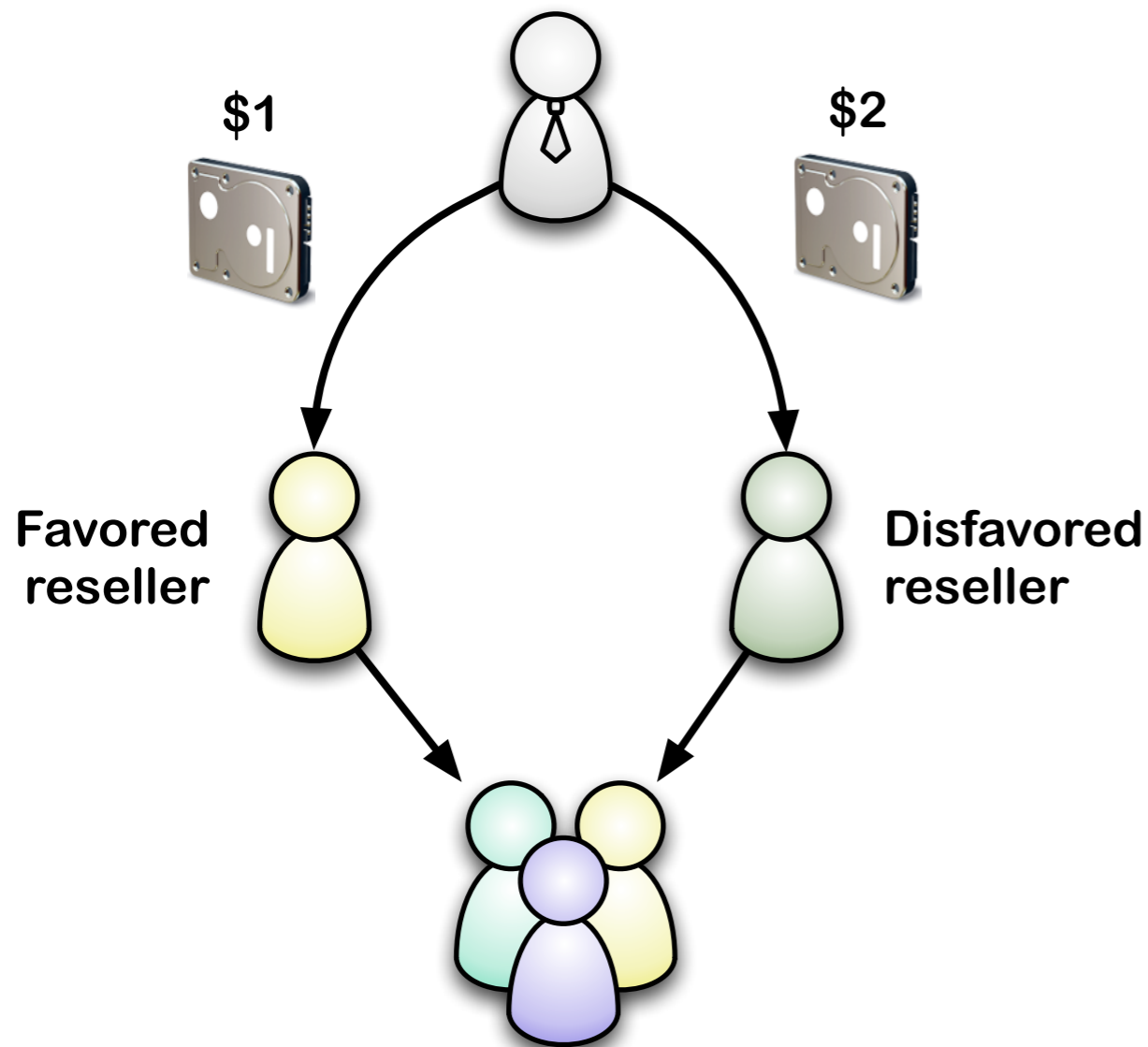
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Contact me at: [hanno \[at\] wobie.com](mailto:hanno@wobie.com)

Secondary line RPA liability (§2a)



- Elements of a violation
 - Two sales of the same goods at the same time
 - At different price points, where the lower price was not “functionally available” to the disfavored buyer
 - Buyers must be downstream competitors
- Defenses
 - Meeting (but not beating) competition
 - Cost justification
 - Functional discount (e.g., favored reseller performed distribution services to the seller)
- Injury to competition
 - Which may be inferred from injury to a competitor, which may be inferred from a persistent price difference over time (*Morton Salt* Inference)
- Proof of damages (§4a C.A.)

Goods, sales, and buyers

- The RPA only applies to **sales of goods**
 - Sales, **not licenses**, consignments, or agency transactions.
 - Goods, not **services**.
- The goods must be of “like grade and quality”
 - Unlikely for customized products
- The sales must be contemporaneous
 - Within “reasonably short period of time”
 - Spot sales ≠ sales under a long term contract (usually)
- The buyers must be downstream competitors

The RPA targets “differential pricing,” not actual price discrimination

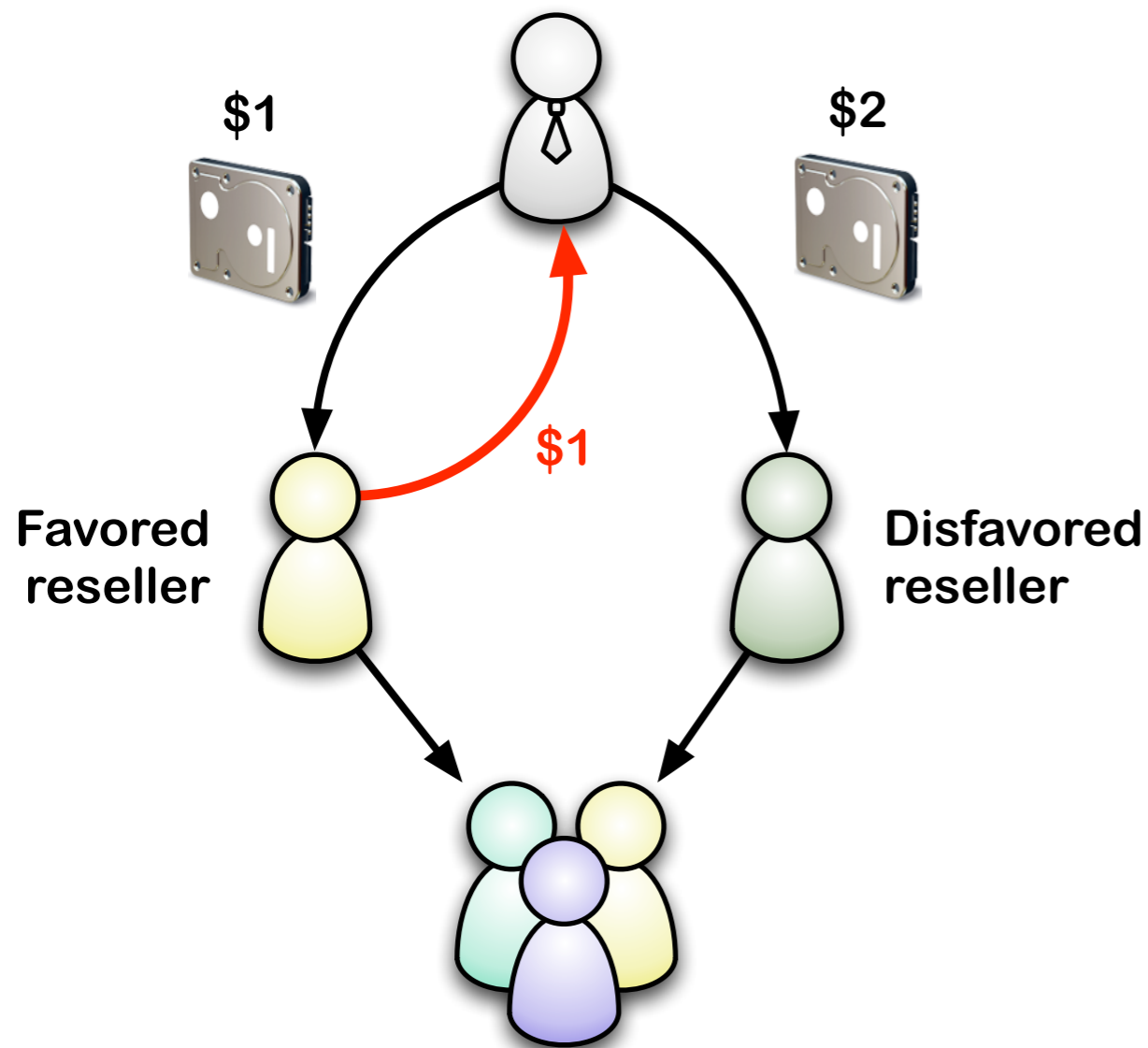
Example 1 (Differential Pricing)	Example 2 (Price Discrimination)
M in New York sells widgets to A in New Jersey for \$10/unit and to B in California for \$12/unit. The \$2 difference accounts for shipping.	M in New York sells widgets to A in New Jersey for \$10/unit and to B in California for \$10/unit. M pays \$2/unit for shipping to California
Price difference without economic price discrimination $MR/MC (NJ) = MR/MC (CA)$	Economic price discrimination without a price difference $MR/MC (NJ) > MR/MC (CA)$
Prima facie price discrimination under the RP Act	No prima facie price discrimination under the RP Act

“For the purposes of the act, price discrimination means **nothing more than a difference in price charged to different purchasers** ... of the discriminating seller for products of like grade and quality.” *Best Brands Beverage Inc., v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987).

Defenses against a §2(a) claim

- **Cost justification (statutory)**
 - Burden of proof on manufacturer
 - Lower price only makes “due allowance” for costs saved by the manufacturer for sales specifically to the favored customer
 - Evidentiary standards are high (cost studies)
- **Meeting competition (statutory)**
 - Burden of proof on manufacturer
 - Meet-but-not-beat-rule
- **Changing conditions (statutory)**
- **Functional Discount (judicial)**
 - Burden of proof on the plaintiff (if defendant raises the issue of functional discounts)

A functional discount is a payment for services rendered by the buyer



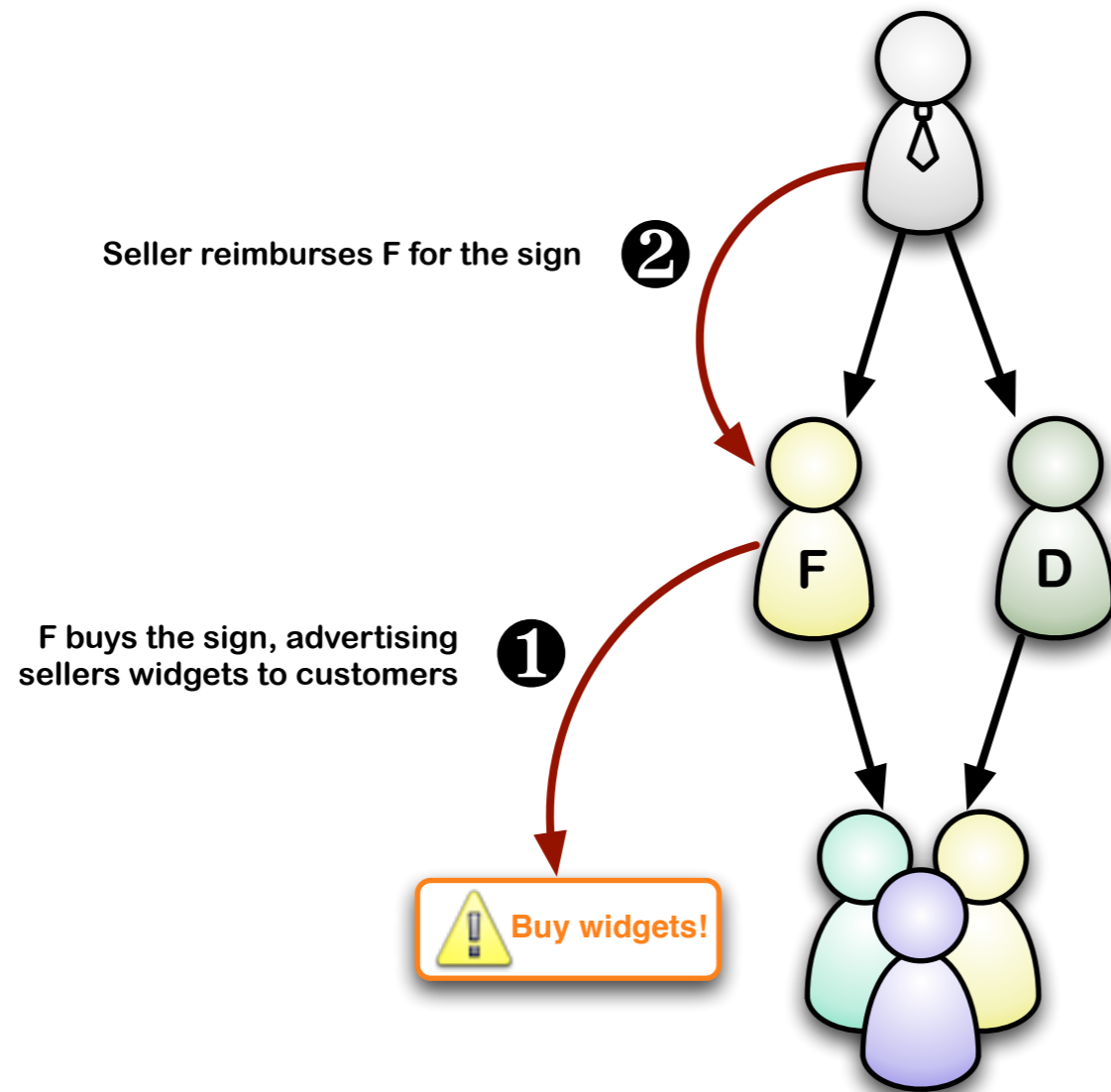
- Definition of a functional discount
 - “A functional discount is one given to a purchaser based on its role in the supplier’s distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier. ... The burden of proof remains with the ... plaintiff.” *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 554, 561 (1990).
- Reimbursement is “reasonable” if value of services to the seller is greater or equal to reduction in price
- Extent of the defense is uncertain
 - The favored buyer must perform “different functions” and bear the associated risks and costs (“functional classification”)
 - If the favored reseller uses the discount to promote and resell the manufacturer’s products, §2(d) applies. Functional discounts likely apply only to warehousing and similar non-resale specific purposes. E.g., *Foremost Pro Color, Inc. v. Eastman Kodak.*, 703 F.2d 534 (9th. Cir. 1983)

Volume discounts and “functional availability”

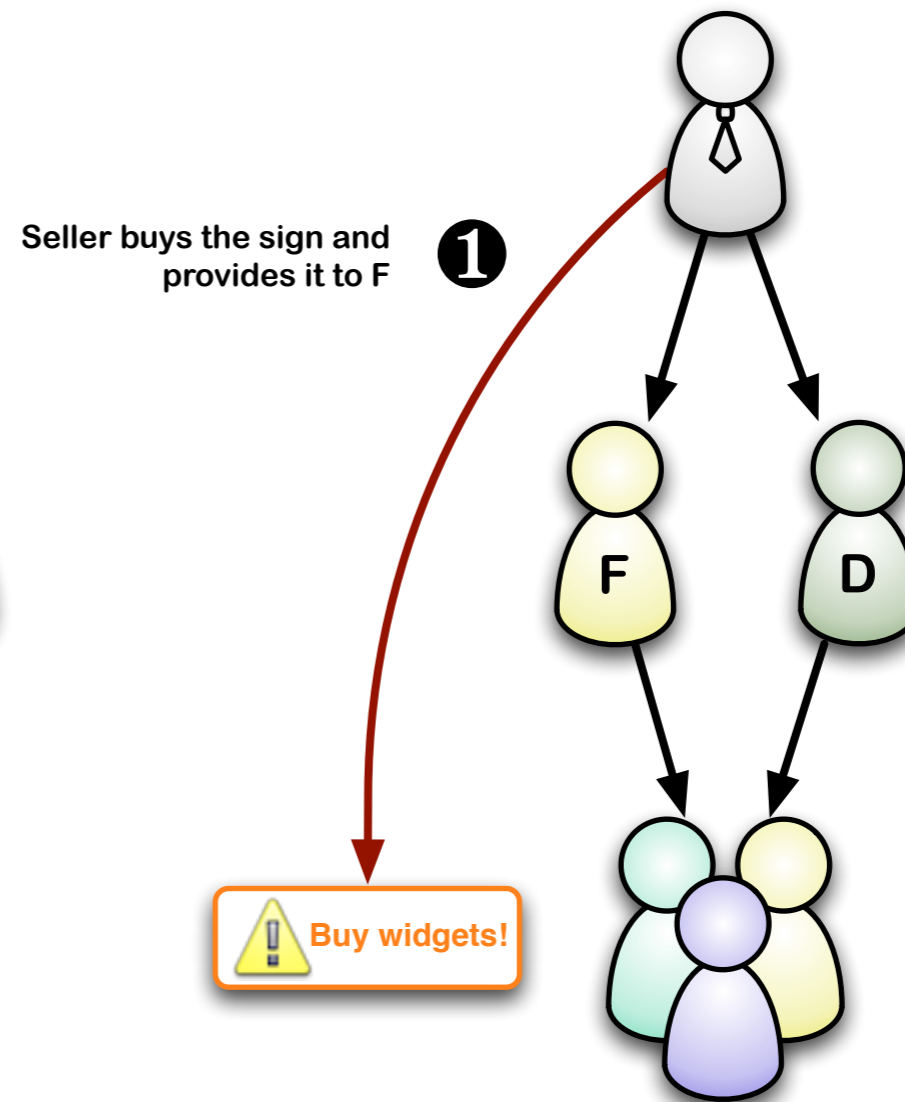
- Volume discounts have long been recognized as permissible under the RP Act under certain conditions
- Volume discounts do not amount to price discrimination if the discount is
 - Functionally available on an equal basis to a significant number of buyers (i.e., no “categories of one”); and
 - The seller informs its customers of the discount
- Linear volume discount programs (without large steps) are much less prone to RPA attack
- Rule: Make sure that the discount is available to others in the same position as the “preferred customer.”

Promotional allowances should be available on equal terms (per se)

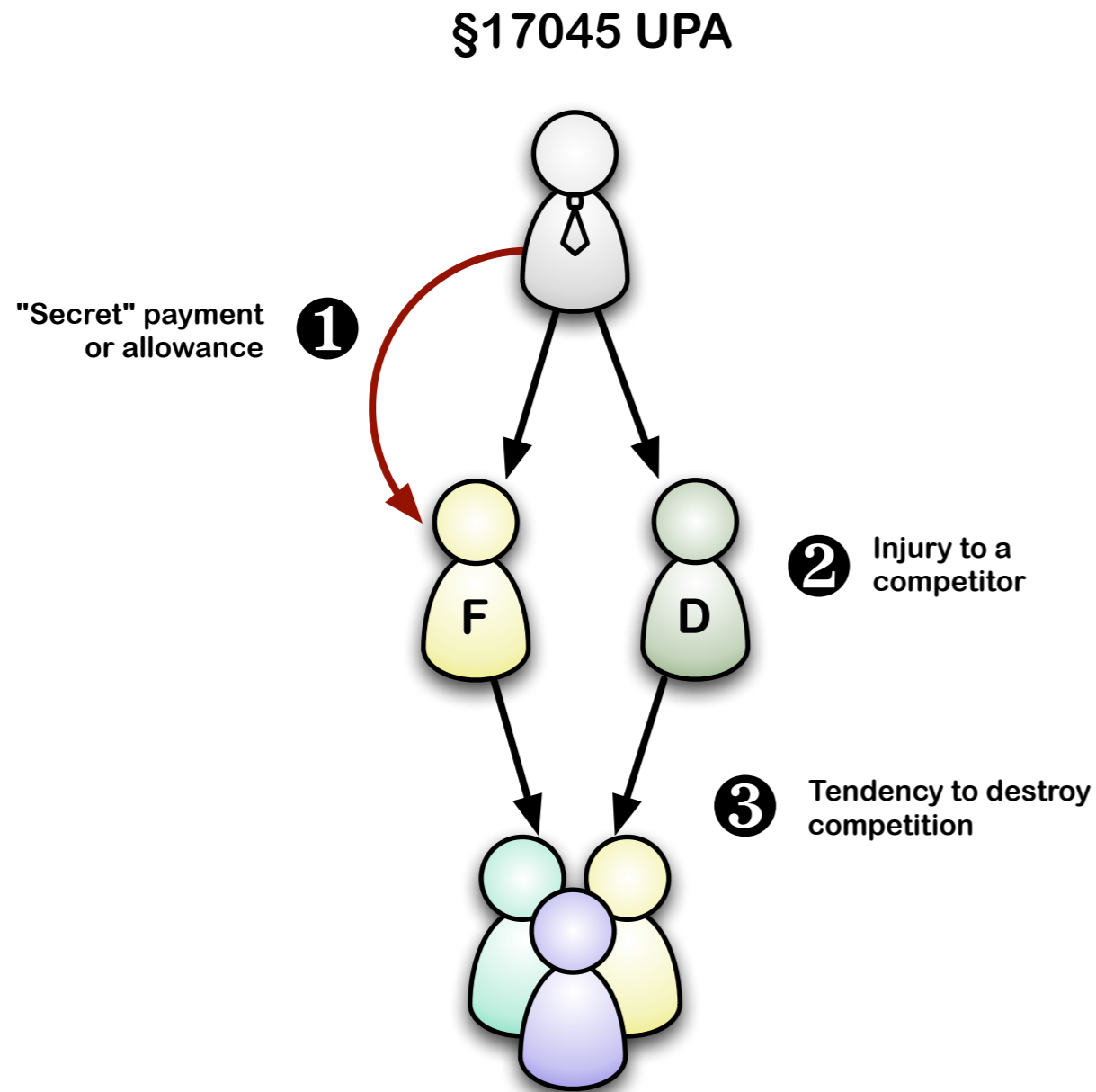
§2(d) RPA



§2(e) RPA



Beyond goods and sales: Secret rebates under the UPA



- Liability under the UPA

- The UPA applies to services and licenses

- Private right of action, treble damages, attorney's fees

- No violation if the discount is generally available and not concealed (\neq secret)

Concessions in confidential negotiations with suppliers and customers may come under the UPA

- Injury to "fair and honest" competition

- Defenses

- Meeting "legal" competition (courts)

- Liquidation sales

- Functional classification – *Eddins v. Redstone*, 134 Cal. App. 4th 290 (2005)

- Ensure that the "essential terms" of available deals are known