

# A Quick Look at the Robinson-Patman Act

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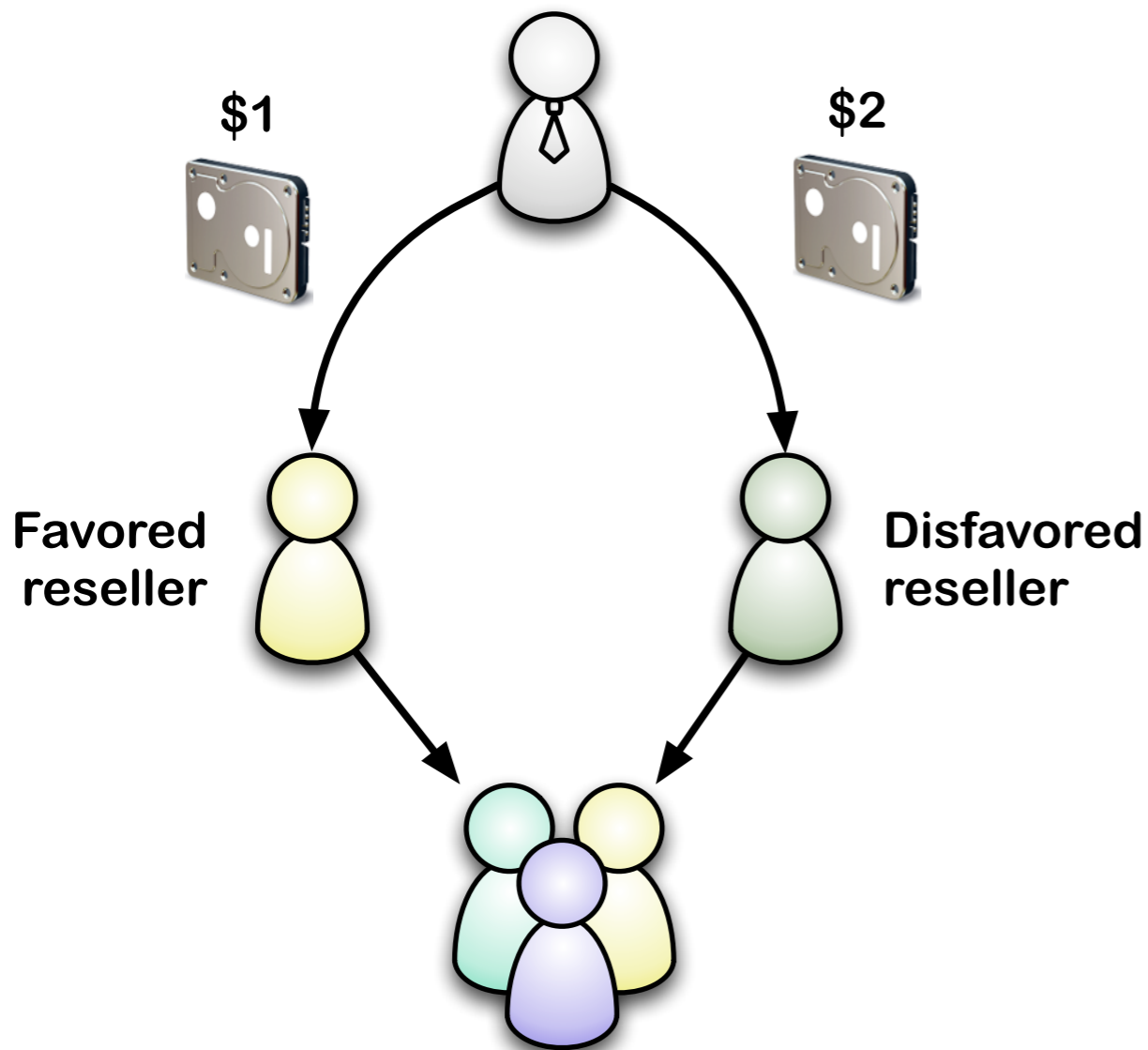
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# Secondary line RPA liability (§2a)



- 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

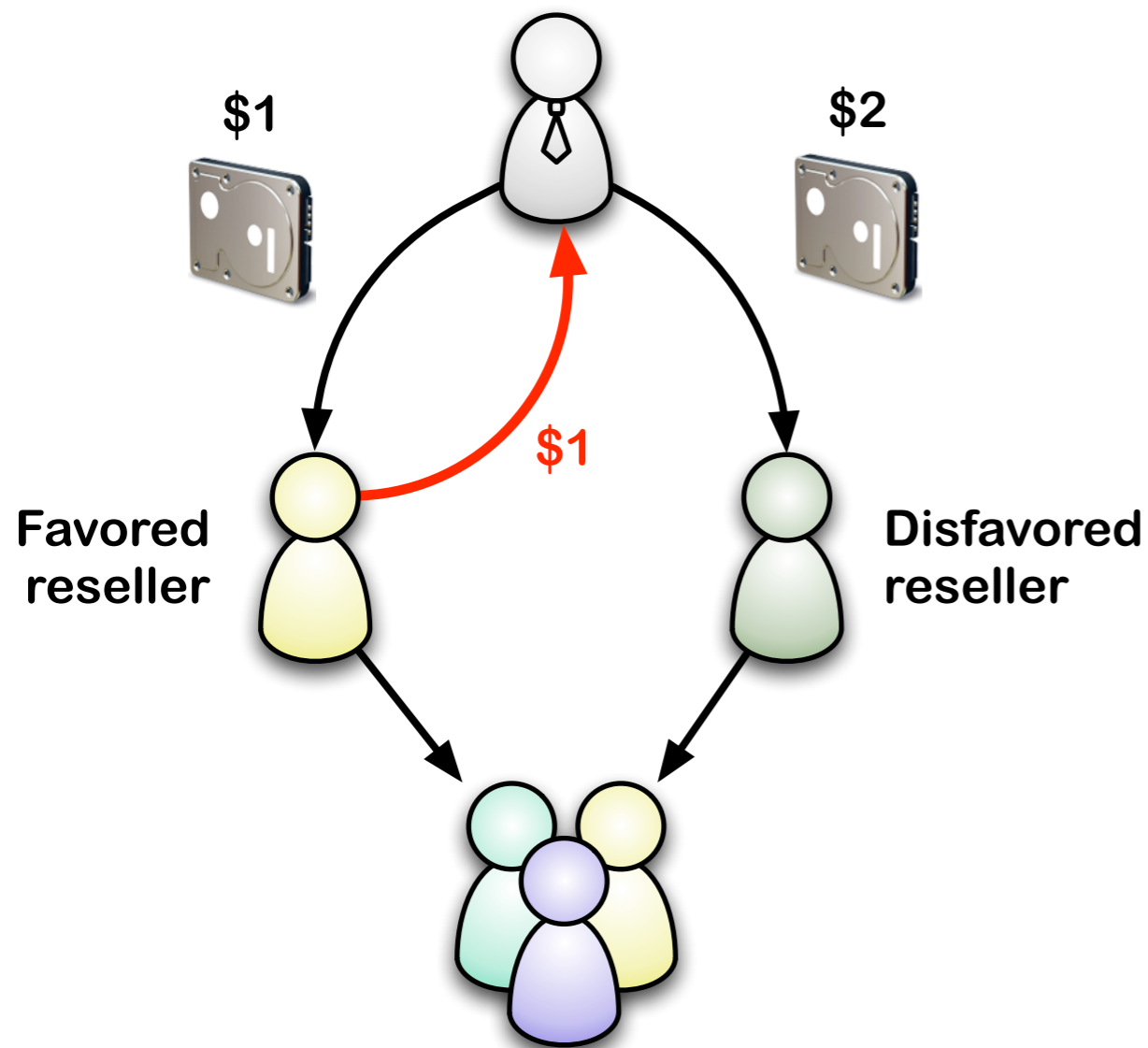
Example 1 (Differential Pricing)	Example 2 (Price Discrimination)
M in New York sells widgets to A in New Jersey for \$10/unit and to B in California for \$12/unit. The \$2 difference accounts for shipping.	M in New York sells widgets to A in New Jersey for \$10/unit and to B in California for \$10/unit. 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



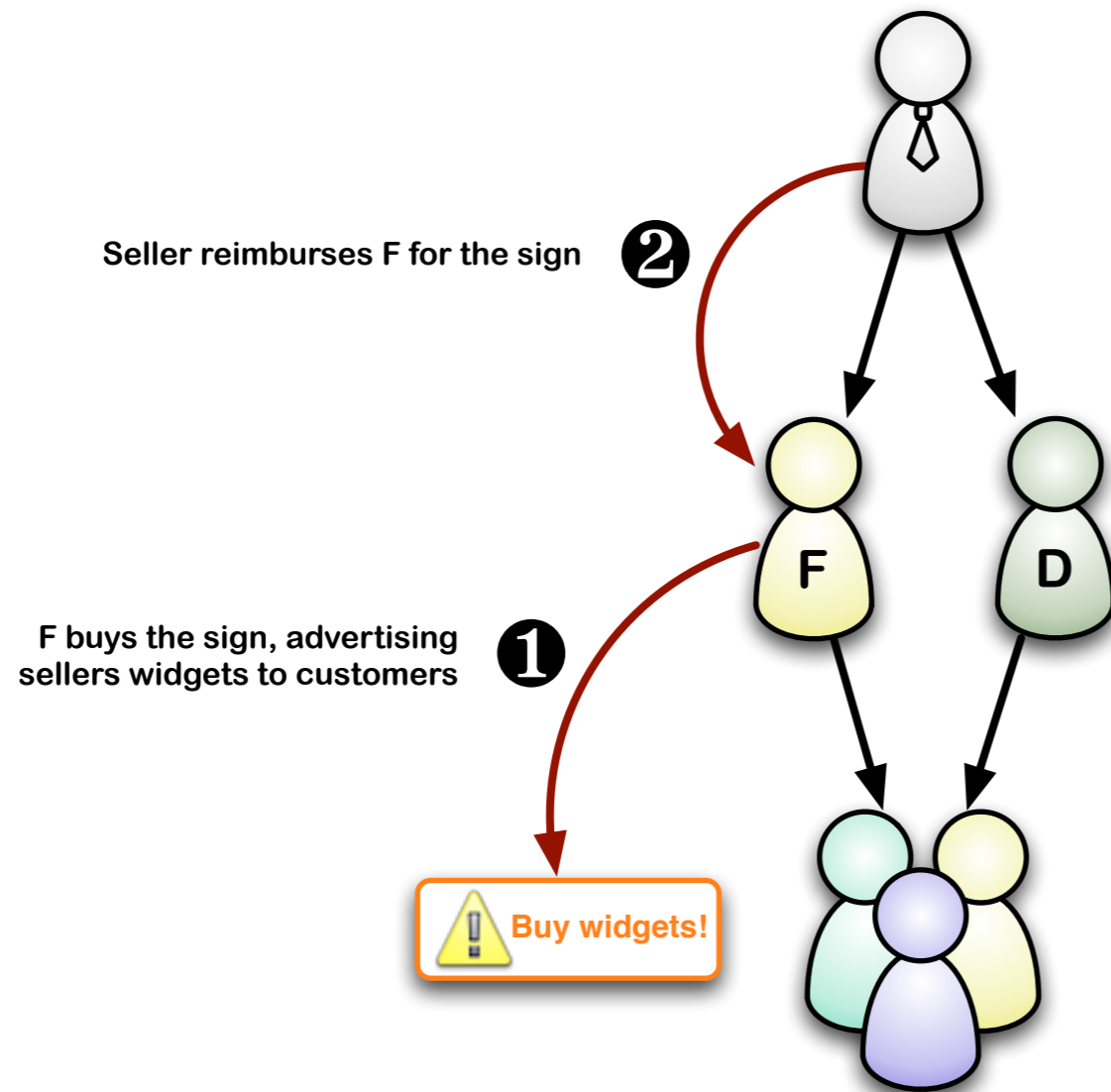
- Definition of a functional discount
  - “A functional discount is one given to a purchaser based on its role in the supplier’s distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier. ... The burden of proof remains with the ... plaintiff.” *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”

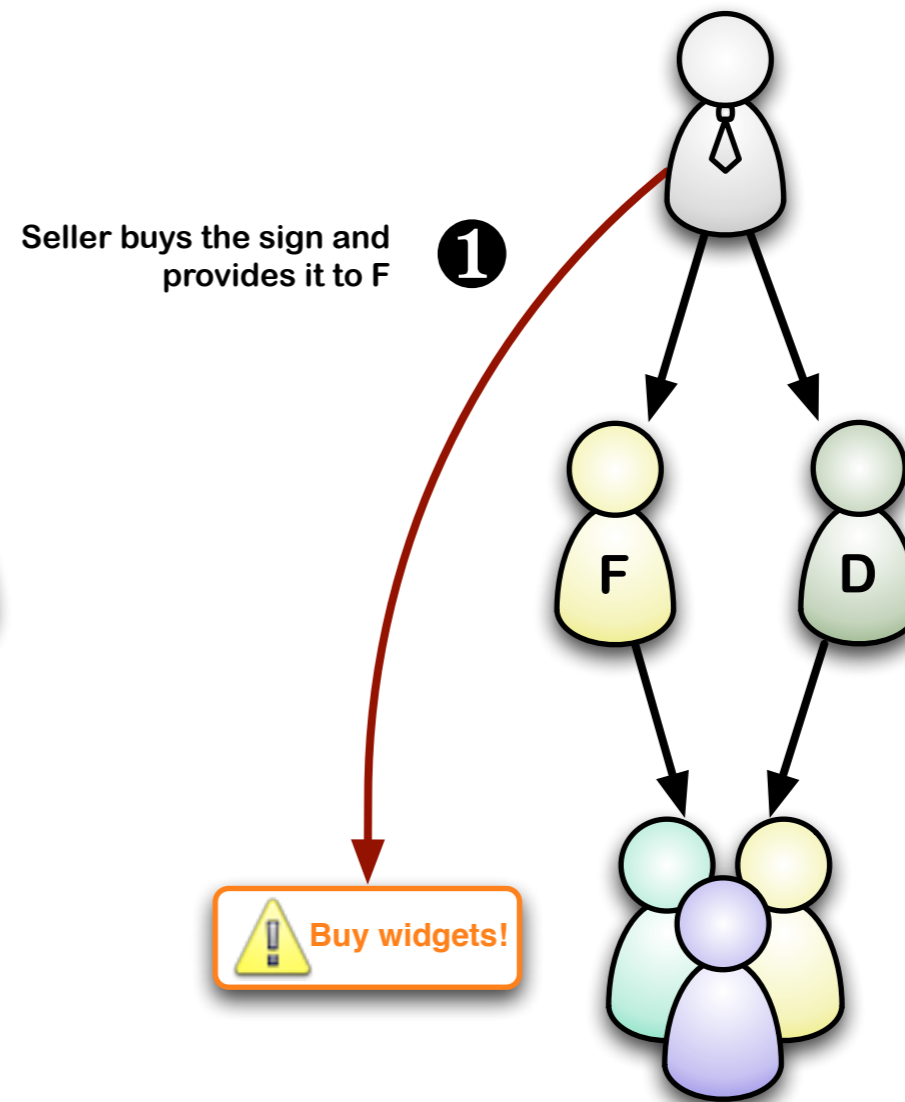
- Volume discounts have long been recognized as permissible under the RP Act under certain conditions
- Volume discounts do not amount to price discrimination if the discount is
  - Functionally available on an equal basis to a significant number of buyers (i.e., no “categories of one”); and
  - The 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

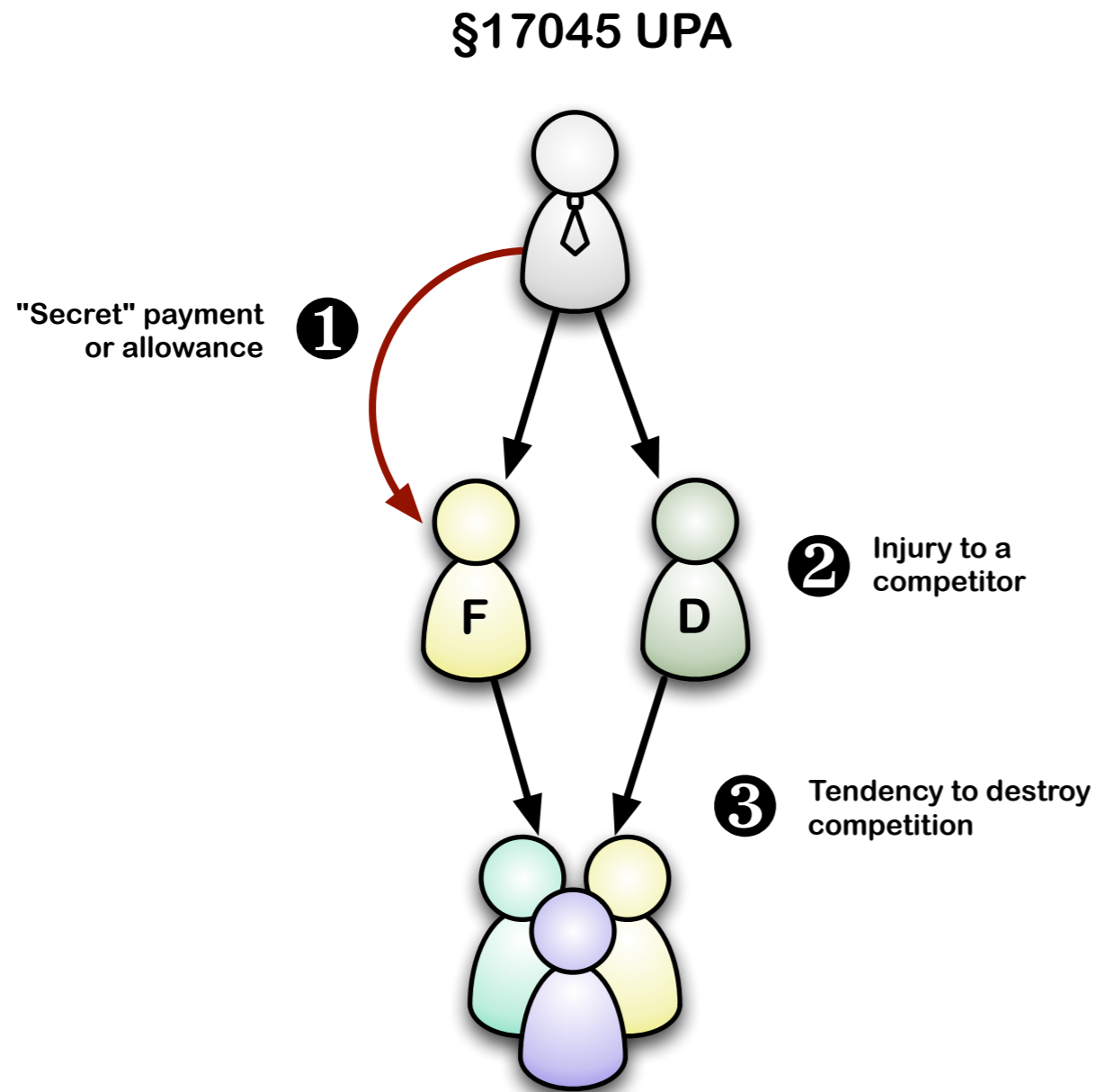


§2(e) RPA





# 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 (≠ 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