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Robinson-Patman Act: In Commerce Jurisdictional Requirement Broadened

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Case Comment

Robinson-Patman Act: "In Commerce" Jurisdictional Requirement Broadened

Plaintiff, an operator of an independent gas station, brought suit for damages under section 2(a) of the Robinson-Patman Act, alleging that defendant oil companies sold gasoline to their service stations located near plaintiff's station at lower prices than those charged other stations in the state. In addition, plaintiff alleged that defendants supported the intrastate price-cutting with profits derived from their interstate operations. The trial court granted summary judgment against plaintiff for failure to allege an interstate sale of a discriminatory nature as required for Robinson-Patman subject matter jurisdiction. The Fifth Circuit reversed, *holding* that a complaint in a suit for damages under section 2(a) of the Robinson-Patman Act need not allege such an interstate sale if it alleges instead that interstate operations were used to "underwrite" discriminatory intrastate sales. *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972).

Price discrimination occurs when a seller offers to sell the same commodities to different buyers at different prices. Such discrimination may be injurious to either primary-line competition (competition among sellers) or secondary-line competition (competition among buyers). Primary-line injury, for example, may occur when price discrimination is initiated by a seller such that lower prices are offered to potential buyers of a competing seller than are offered to non-potential buyers of such a competitor. By contrast, secondary-line injury may occur when a buyer can influence sellers through his market position to receive more favorable prices than competing buyers.

The Robinson-Patman Act[1] was enacted in 1936 to prohibit any seller, subject to certain defenses,[2] from engaging in price discrimination. Originally the Act was principally directed toward secondary-line injury; at the same time, however, it

1. 49 Stat. 1526 (1936), 15 U.S.C. §§ 13, 13a-b, 21a (1970).

2. Section 2 provides three defenses: (1) meeting competition, (2) cost justification, and (3) changing conditions. F. Rowe, Price Discrimination Under the Robinson-Patman Act § 3.2, at 37-38 (1962).

amended the Clayton Act and retained intact the latters proscription of price discrimination that adversely affects primary-line competition.[3] The jurisdictional requirements of the Robinson-Patman Act are contained in section 2(a)[4] and include at least four distinct elements: (1) sales (2) of commodities (3) of like grade and quality (4) in commerce.[5]

The Clayton Act's general definition of "commerce" as "trade or commerce among the several States and with foreign nations" applies to the Robinson-Patman amendments.[6] However, the "in commerce" jurisdictional requirement of the Robinson-Patman Act differs from that of the Sherman Act. The commerce coverage of the latter is coextensive with the federal

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3. [Section 2(a)] when originally enacted as part of the Clayton Act in 1914, was born of a desire by Congress to curb the use by financially powerful corporations of localized price-cutting tactics which had gravely impaired the competitive position of other sellers. It is, of course, quite true . . . that the 1936 Robinson-Patman amendments to the Clayton Act were motivated principally by congressional concern over the impact upon secondary-line competition of the burgeoning of mammoth purchasers, notably chain stores. However, the legislative history of these amendments leaves no doubt that Congress was intent upon strengthening the Clayton Act provisions, not weakening them, and that it was no part of Congress' purpose to curtail the pre-existing applicability of § 2(a) to price discriminations affecting primary-line competition.

FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543-44 (1960) (footnotes omitted).

4. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1970), provides in part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and 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 customers of either of them . . . .

5. F. ROWE, *supra* note 2, § 3.1, at 36.

6. 38 Stat. 730 (1914), 15 U.S.C. § 12 (1970). According to the Report of the Senate Judiciary Committee concerning the Robinson-Patman bill,

> the special definitions of section 1 of the Clayton Act will apply without repetition to the terms concerned where they appear in this bill, since it is designed to become by amendment a part of that act. Thus the term "commerce," as used herein, becomes by force of those definitions interstate and foreign commerce of the United States and commerce in and between its various possessions.

S. REP. No. 1502, 74th Cong., 2d Sess. 3 (1936).

commerce itself[7] as defined in terms of the "affectation" doctrine.[8] Robinson-Patman, on the other hand, contains its own "commerce" test, literally reaching only those price discriminations "where either or any of the purchases involved in such discrimination are *in commerce*."[9]

An allegation of a discriminatory sale in commerce necessarily involves a comparison between at least two separate transactions involving the same commodities at different prices. The commerce test of the Robinson-Patman Act requires that at least one of the two transactions cross a state line.[10] Under this "one interstate sale" rule, however, it is immaterial which of the two transactions, the higher-priced or the lower-priced, occurs in interstate commerce.[11]

In *Moore v. Mead's Fine Bread Co.*,[12] the Supreme Court intimated a possible exception to the "one interstate sale" rule under the Robinson-Patman Act's commerce test in cases of primary-line discrimination. Plaintiff in *Moore* was a local baker

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7. *See, e.g.,* United States v. Frankfort Distilleries, Inc., 324 U.S. 293, 298 (1945).

8. The Supreme Court developed the "affectation" doctrine in the Shreveport Rate Cases, 234 U.S. 342 (1914), which held that the federal commerce power extends to all activities, intrastate as well as interstate, if a substantial effect on interstate commerce results. For an historical analysis of the expansion of the interstate commerce concept, see Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 229-35 (1948).

9. 49 Stat. 1526 (1936), 15 U.S.C. § 13(a) (1970) (emphasis added).

> The cases recognize a distinction between the commerce which is covered by the Sherman Act and that covered by the Robinson-Patman Act. "In an action brought under the Robinson-Patman Act it is necessary to allege and prove that the transactions complained of are actually in interstate commerce, while in actions brought under the Sherman Anti-Trust Act it is sufficient if the transactions complained of are shown to have affected interstate commerce."

Willard Dairy Corp. v. National Dairy Prod. Corp., 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied,* 373 U.S. 934 (1963), quoting from Lewis v. Shell Oil Co., 50 F. Supp. 547, 549 (N.D. Ill. 1943). This distinction is supported by the legislative history of the Robinson-Patman Act since the Senate-House Conference Committee deleted a clause in the House bill which would have adopted the "effect on commerce" criterion of the Sherman Act. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

10. F. ROWE, *supra* note 2, § 4.9, at 79.

11. *Id.* In determining the existence of an interstate sale, the Supreme Court has applied a "flow of commerce" theory, making the Act applicable even where commodities are shipped interstate but temporarily stored in local warehouses or other facilities before being redistributed within the state to local dealers. Standard Oil Co. v. FTC, 340 U.S. 231, 238 (1951).

12. 348 U.S. 115 (1954).

doing business solely in Santa Rosa, New Mexico. Defendant, also in the bakery business, sold products in Santa Rosa as well as in Texas. Defendant cut prices in Santa Rosa while maintaining prices elsewhere in New Mexico and in Texas, eventually forcing plaintiff out of business. The Court affirmed judgment for the plaintiff, noting that the defendant was "engaged in commerce, selling bread both locally and interstate. In the course of such business, it made price discriminations, maintaining the price in the *interstate* transactions and cutting the price in the *intrastate* sales."[13] The Court found in addition, however, that defendant, as part of a system of interlocking corporations, was an interstate firm which had adversely affected primary-line competition simply by engaging in purely local or intrastate price-cutting. The Court further determined that such intrastate price-cutting satisfied Robinson-Patman subject-matter jurisdiction because "[t]he profits made in interstate activities would underwrite the losses of local price-cutting campaigns."[14] This method of competition, then, is inherently pernicious because interstate businesses would destroy local businesses not by virtue of greater skill or efficiency but simply through their financial capacity, derived from interstate operations, to wage local price wars.[15] The Court found support for its position that Robinson-Patman prohibits "the use of interstate business to destroy local business" in the following congressional statement:

> [A] manufacturer . . . may not use the privilege of interstate commerce to the injury of his local trade, nor may he favor his local trade to the injury of his interstate trade. The Federal power to regulate interstate commerce is the power both to limit its employment to the injury of business within the State, and to protect interstate commerce itself from injury by influences within the State.[16]

The broad language of *Moore* is susceptible of two widely divergent interpretations. On the one hand, the decision can be restricted to the fact that one of the discriminatory sales actually did occur in interstate commerce such that the case is consistent with the traditional "one interstate sale" rule. On the other hand, *Moore* can be construed broadly to hold that, with respect to primary-line injury, purely local discriminatory sales by a seller engaged in interstate commerce satisfy the Act's

13. *Id.* at 118 (emphasis in original).
14. *Id.* at 119.
15. *Id.*
16. *Id.* at 120, quoting Representative Utterback, the manager of the bill in the House of Representatives.

in commerce test if the seller's interstate profits are used to "underwrite" such sales.

The first interpretation was explicitly adopted in *Willard Dairy Corp. v. National Dairy Products Corp.*[17] Plaintiff in *Willard* was a local competitor of defendant in the wholesale milk business in Ohio. Defendant engaged in discriminatory price-cutting between two areas in Ohio involving sales from a processing plant also located in Ohio. In sustaining dismissal of plaintiff's action the court followed the "one interstate sale" rule, holding that although defendant was engaged in interstate commerce, it must also be established that the sale "complained of" had occurred in interstate commerce.[18] *Moore* was distinguished on the grounds that there the alleged discriminatory purchases were made in interstate commerce and that interstate sales of like grade and quality were discriminated against.[19] In addition to adopting this restrictive interpretation of *Moore*, the court noted that "[t]he fact that defendant also made interstate shipments from other than its Shelby, Ohio, plant *to areas in which plaintiff did not engage in business* is immaterial to the issue in this case."[20] It has been suggested that the court assumed that the discriminatory higher-priced sale in a primary-line case must not only occur in interstate commerce but must also occur in plaintiff-seller's competitive area.[21] It seems more

17. 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963).
18. *Id.* at 946.
19. *Id.*
20. *Id.* (emphasis added.)
21. This interpretation of *Willard* has been advanced by several commentators. *See, e.g.*, F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 4.9, at 12 (1962, Supp. 1964); Comment, 9 N.Y.L.F. 93 (1963). Such an assumption on the part of the court, however, clearly runs counter to a recognized distinction between primary-line and secondary-line cases. The court in *Willard*, a primary-line case, evidenced its confusion over this distinction by citing a secondary-line case in support of its statement—Davidson v. Kansas City Star Co., 202 F. Supp. 613 (W.D. Mo. 1962). *Davidson* involved fixed, distinct boundaries for paper routes such that newspaper carriers could not sell outside their designated routes and thus did not compete with each other. Plaintiff buyer in *Davidson* was a newspaper carrier who alleged that defendant wholesaler discriminated in price between plaintiff and other carriers who purchased papers from defendant. Dismissal of plaintiffs action was sustained because of the lack of competition between plaintiff buyer and the other buyers. Thus, in secondary-line cases discriminatory prices must occur in sales made to competing buyers—otherwise no competitive injury would occur at the buyer level. But in primary-line cases such as *Willard* involving competition between sellers, it is immaterial whether the *buyers* are competitors or not. It is necessary only that the lower-priced of the two transactions occurs

probable, however, that the court was referring simply to the fact that here, as repeatedly emphasized in the opinion, the interstate sales outside of plaintiff-seller's area were not the ones *"complained of."*[22]

Justice Black, in his dissent to the denial of certiorari in *Willard*, stated that *Willard* was irreconcilable with *Moore.* He felt the appellate court had misconstrued both Robinson-Patman and *Moore*, reasoning that "allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition [is] precisely the sort of thing the Robinson-Patman Act aimed to prevent."[23] Despite such criticism, *Willard's* interpretation of *Moore* was followed recently in *Food Basket, Inc. v. Albertson's, Inc.*,[24] which summarized the progress of the post-*Moore* case law:

> Since [*Moore*], the critical language of 2(a) has been repeatedly construed to mean that the seller must not only be engaged in interstate commerce, but that one of the discriminatory sales must be in commerce. . . .
>
> It seems safe to assume that if the post-[*Moore*] case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari. We take the statute to mean what it says, i.e., that at least one of the discriminatory sales complained of must be in commerce.[25]

Littlejohn is the first case to fully apply the broad interpretation of *Moore* to primary-line discrimination.[26] The alleged

in plaintiff seller's competitive area. *See* Atlas Building Products Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954-55 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

22. This conclusion is prompted by an examination of the procedural context of the case. Plaintiff had failed to include an allegation of the interstate sales in its complaint, leading the court to stress the requirement that "the sale complained of [be] one occurring in interstate commerce." *See* note 18 *supra*, and accompanying text. Thus the interstate sales were perhaps irrelevant, not because they occurred outside of plaintiff-seller's competitive area, but because they were not the sales *complained of* or alleged to be discriminatory in the complaint.

23. 373 U.S. at 935-36.

24. 383 F.2d 785 (10th Cir. 1967).

25. *Id.* at 787.

26. The court treated *Littlejohn* as a primary-line case, even though plaintiff was actually in competition with defendants' buyers, the retail service stations, rather than directly with defendants. The trial court had intimated that plaintiff had no standing to sue because defendants did not "control" the lower retail prices charged by their stations to the public and because he could not, therefore, have been in competition with defendants. The appellate court, however, did not address itself to this issue. Perhaps the case may be best characterized as one involving indirect primary-line competition.

discriminatory sales in *Littlejohn* were purely intrastate, even though defendants were engaged in interstate commerce. Superficially at least, such facts do not satisfy the traditional "one interstate sale" rule as enunciated in *Willard*. Plaintiff also alleged, however, that defendants supported the intrastate price-cutting with profits derived from their interstate operations; *Littlejohn* held this sufficient to establish jurisdiction.

Although this "underwriting" rule apparently has not been acceptable to other circuits, it nevertheless may be viewed simply as an extension of the "one interstate sale" rule: if the interstate business of the defendant which underwrites the local price-cutting consists of sales at a higher price of the same commodities as are involved in the price-cutting, then such sales may satisfy the requirement of a discriminatory interstate sale.[27] This argument is valid, however, only if the geographic location of the higher-priced interstate sale is irrelevant. There would seem to be no significant reason to require that the higher-priced sale be geographically proximate to the local lower-priced sale in primary-line cases, since here the only sale of immediate concern to the plaintiff-seller is the lower-priced sale within his competitive area.[28]

Furthermore, it is possible to read both *Willard* and *Food Basket* consistently with this theory. *Willard* might be interpreted as implying that any higher-priced interstate sale, so long as it is the sale *complained of*,[29] meets the "one interstate sale" rule regardless of the geographic location of the transaction's source. This implication of a liberally conceived "one interstate sale" rule is more explicit in *Food Basket*. Plaintiff in *Food Basket* was an operator of an independent supermarket who attempted to show that defendant, an interstate supermarket chain, cut prices in plaintiff's competitive area in Utah while maintaining higher prices in Idaho. In sustaining summary judgment against plaintiff on its Robinson-Patman claim, the

27. An allegation of "underwriting" may thus be construed as implying a discriminatory interstate sale; such an implication would be sufficient to establish jurisdiction, thereby enabling plaintiff to survive a motion either to dismiss or for summary judgment. *But see* text accompanying note 34 *infra*.

28. *See* notes 21 *supra* and 32 *infra*.

29. *Willard* repeatedly emphasized that the fatal defect in plaintiff's case was that the sale *complained of* had not occurred in interstate commerce. *See* note 22 *supra*. Furthermore, plaintiff failed to raise an "underwriting" issue, which arguably would have implied a discriminatory interstate sale. *See* note 27 *supra*, and accompanying text.

court pointed to plaintiff's failure "to show that any of the Idaho sales were 'in commerce.' "[30] Arguably the commodities sold in Idaho need not have originated in Utah in order to satisfy the rule; all that would have been necessary was one "interstate leg,"[31] no matter how unrelated geographically to the price-cutting in plaintiff's competitive area.

The traditional "one interstate sale" rule restrictively focuses on the respective locations of the two transactions involved in the alleged price discrimination. But only the predatory lower-priced sale within the plaintiff's own competitive area affects his competitive position. With regard to the higher-priced sale, it is irrelevant to plaintiff whether that sale occurs intrastate or interstate.[32] Therefore, the "one interstate sale" rule appears to be simply a mechanical device to define the limits of section 2(a) jurisdiction in a manner completely unrelated to the stated purposes of the Act.[33]

On the other hand, the "underwriting" rule enunciated in *Littlejohn* would seem to better promote the stated purposes of the Robinson-Patman Act. Although the Act perhaps is premised on the faulty assumption that "interstate" business equals "big" business, this rule properly focuses attention on the size and nature of the discriminating seller rather than exclusively on the purely mechanical question of whether one of the discriminatory sales crosses a state line. In accordance with the goals of the Act, the interstate firm's ability to finance local price warfare with funds derived from interstate operations should serve as a basic criterion for invoking the Act's prohibitions.

Acceptance of the "underwriting" concept, however, will not prove to be a general panacea with respect to Robinson-Patman jurisdictional problems. First, the utilization of this concept might in some cases create practically complex evidentiary problems relating to the sufficiency of the interstate profits to underwrite or offset the losses incurred in local price-cutting. Second, the literal requirement in section 2(a) of interstate sales

30. 383 F.2d at 787.

31. *Id.* at 788.

32. In *Moore*, for example, the interstate character of the higher-priced sale, though sufficient for purposes of § 2(a) jurisdiction, had no effect whatsoever on plaintiff's competitive position. Similarly, in *Willard* and *Food Basket* any "interstate leg" would presumably have been sufficient for jurisdictional purposes.

33. *See* text accompanying note 16 *supra*.

of commodities of like grade and quality must still be met;[34] that is, the interstate profits used in the underwriting must be derived from such sales. Third, an interstate business could avoid *Littlejohn's* "underwriting" rule by supporting local price-cutting solely with profits derived from intrastate sales, albeit in several states. Finally, the assumption that higher prices elsewhere always subsidize the lower price in plaintiff's competitive area certainly is not valid. Such price disparities can, for example, be wholly the product of diverse local competitive conditions facing a seller with scattered operations.[35]

34. *See* text accompanying note 5 *supra.*
35. Such local competitive conditions would constitute a valid statutory defense. *See* note 2 *supra.*