

DISCRIMINATORY SALES OF COMMODITIES IN  
COMMERCE: JURISDICTIONAL CRITERIA UNDER  
THE ROBINSON-PATMAN ACT

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THE Robinson-Patman Act defines the restrictions on permissible price differentiation for business firms engaged in competitive marketing. Passed in 1936 as an amendment to section two of the 1914 Clayton Act, Robinson-Patman prohibits discriminatory prices and collateral arrangements in the sale of commodities in interstate commerce under specified conditions and subject to several statutory defenses.<sup>1</sup> The act is chiefly enforced by the Federal Trade Commission in administrative proceedings,<sup>2</sup> but also permits private parties to sue for threefold their damages from violations.<sup>3</sup> Although the general prohibition of "unfair methods of competition in commerce" in section five of the Federal Trade Commission Act<sup>4</sup> gives the Commission, though not private

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1. 38 STAT. 730 (1914), as amended, 15 U.S.C. §§ 13(a)-(f) (1952); 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952). The huge and proliferating contemporary literature is collected in Rowe, *Price Differentials and Product Differentiation: The Issues Under the Robinson-Patman Act*, 66 YALE L.J. 1, 2 n.5, 19 n.78, 21 n.91, 34 n.141 (1956).

2. See Clayton Act § 11, 38 STAT. 734 (1914), as amended, 15 U.S.C. § 21 (1952); *FTC v. Ruberoid Co.*, 343 U.S. 470 (1952).

3. Section 4 of the Clayton Act authorizes treble damage suits for "injured" persons. 38 STAT. 731 (1914), 15 U.S.C. § 15 (1952). See Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954); Loevinger, *Enforcement of Robinson-Patman Act by Private Parties*, in NEW YORK STATE BAR ASS'N, 1957 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH ROBINSON-PATMAN ACT 145; Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952).

4. 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (1952).

plaintiffs, an auxiliary weapon for striking at discriminatory arrangements,<sup>5</sup> the basic jurisprudence of price discrimination resides in the prolix prose of Robinson-Patman.

Apart from the controversial and unsettled issues affecting substantive liability under the statute,<sup>6</sup> the applicability of the act itself to a particular pricing practice requires an analysis of several jurisdictional factors. Thus, before the legality of a price differential is measured against the statutory tests of liability—whether the differential generates a detrimental competitive effect, was made in good faith to meet competition, or reflects the supplier's lower costs in particular dealings—the coverage of the act itself must be ascertained. This determination turns on three statutory requirements: the discrimination must (1) arise from sales transactions with different purchasers consummated by the same seller (2) involve "commodities" and (3) occur "in commerce."<sup>7</sup>

As a practical matter these jurisdictional criteria not only determine the reach of the act, but also permit business firms, by adopting alternative forms of distribution, to minimize their exposure to Robinson-Patman.

#### SALES TO DIFFERENT PURCHASERS BY THE SAME SELLER

A price discrimination subject to the prohibitions of Robinson-Patman presupposes at least two actual sale-purchase transactions at different prices by the same supplier.<sup>8</sup> Because of this requirement, a variety of contractual arrangements are exempt from the act. Moreover, this limitation may operate to confer significant immunities on corporations operating through independ-

5. See, e.g., *FTC v. Cement Institute*, 333 U.S. 683 (1948); *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 220 (D. Mass. 1949), *aff'd mem.*, 180 F.2d 896 (1st Cir. 1950).

6. In addition to the act's administrative and private remedies, § 3 establishes criminal sanctions. 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952). Section 3 is enforceable only by the Department of Justice, see *United States v. Safeway Stores, Inc.*, CCH TRADE REG. REP. ¶ 45003 (N.D. Tex. 1957), because the Supreme Court recently decided that private treble damage redress is not authorized by this provision, *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958). Congressional moves are under way to overturn the Court's holding. See S. 3079, 85th Cong., 2d Sess. (1958); *Hearings Before a Subcommittee of the Senate Select Committee on Small Business on the Extent to Which Private Enforcement of the Antitrust Laws Offers a Practical Form of Protection to Small Business, Victims of Predatory Pricing Practices and Other Antitrust Wrongdoing*, 85th Cong., 2d Sess. (1958).

7. In pertinent part, the statute declares it "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 . . ." whenever they create the proscribed adverse competitive effects and are not "justified" under one of the several exculpatory provisos. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). (Emphasis added.)

8. Sections 2(a), 2(c), 2(e) and 3 in terms extend only to sale-purchase transactions. This requirement has been interpolated into § 2(d), which is construed in *pari materia*

ent distributors or bona fide sales subsidiaries in dealings with certain classes of customers.

At the outset, since no actionable price discrimination can arise until two completed transactions occur,<sup>9</sup> an outright refusal to sell to one customer cannot constitute a Robinson-Patman violation.<sup>10</sup> Indeed, a supplier may do more than decline to deal with strangers without risking Robinson-Patman liability; the act leaves him free to "cut off" established accounts while continuing to deal with their competitors. The leading case, *Shaw's, Inc. v. Wilson-Jones Co.*, sanctioned a manufacturer's termination of price quotations to an established account under these circumstances, holding that the "discrimination in price prohibited by the subsection is discrimination in respect to commodities sold to purchasers."<sup>11</sup>

Even when transactions are consummated on discriminatory terms, the "sale" requirement places a variety of commercial arrangements beyond the coverage of the statute. For example, courts have ruled that the act does not extend to discriminatory credit transactions,<sup>12</sup> gifts and membership benefits,<sup>13</sup> or to

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with § 2(e). See, e.g., *General Foods Corp.*, FTC Dkt. 6018, at 10 (Feb. 15, 1956), adopting Initial Decision, at 15 (March 2, 1955); cf. *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230, 236 (D.N.J. 1956).

9. See, e.g., *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 7 (7th Cir. 1949); *Klein v. Lionel Corp.*, 138 F. Supp. 560, 563 (D. Del.), *aff'd*, 237 F.2d 13, 15 (3d Cir. 1956).

10. See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 132-37 (1955); Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); Comment, *Refusals To Sell and Public Control of Competition*, 58 YALE L.J. 1121 (1949).

Section 2(a) carries an express proviso preserving the right of customer selection "in bona fide transactions and not in restraint of trade." That clause has not been construed to confer any exemptions beyond those inherent in the limitations of the prohibitory provisions—such as the "sale" requirement at issue in the cases cited note 11 *infra*.

11. 105 F.2d 331, 334 (3d Cir. 1939). (Emphasis added.) See also *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 755 (1947); *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956); *Naifeh v. Ronson Art Metal Works*, 218 F.2d 202 (10th Cir. 1954); *Chicago Seating Co. v. S. Karpén & Bros.*, 177 F.2d 863 (7th Cir. 1949); *United States v. Borden Co.*, 111 F. Supp. 562, 580 (N.D. Ill. 1953), *aff'd*, 347 U.S. 514, 517 (1954); *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890 (D. Mass. 1949); *Sorrentino v. Glen-Gery Shale Brick Corp.*, 46 F. Supp. 709 (E.D. Pa. 1942).

However, this overall exemption for refusals to deal may encounter one qualification. Where a supplier continued to tender goods at a discriminatory price, rather than "cutting off" the old account completely by declining to quote further prices, one court held that the customer need not have gone through with the formality of a purchase at the discriminatory higher price "in order to attain the status of a competing purchaser under the Act, as its failure to do so was directly attributable to defendant's own discriminatory practice." *American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919, 924 (5th Cir. 1951). See also *American Can Co. v. Bruce's Juices, Inc.*, 190 F.2d 73, 74 (5th Cir. 1951); *Sidney Morris & Co. v. National Ass'n of Stationers*, 40 F.2d 620, 625 (7th Cir. 1930).

12. Cf. *United States v. Investors Diversified Services, Inc.*, 102 F. Supp. 645, 647 (D. Minn. 1951).

13. *National Used Car Market Report, Inc. v. National Auto. Dealers Ass'n*, 108 F. Supp. 692 (D.D.C. 1951), *aff'd*, 200 F.2d 359 (D.C. Cir. 1952).

lease and license terms.<sup>14</sup> Of paramount practical importance to the business community is the recent *Students Book* decision by the District of Columbia Circuit, holding that consignees are not "purchasers" within the intendment of the act.<sup>15</sup> This case does more than immunize the pricing terms of a consignment from statutory comparison with prices charged by the supplier to the consignee's competitors. It excepts promotional assistance to consignees from a supplier's statutory obligation to accord such "payments," "services" or "facilities" on "proportionally equal terms" to competing distributors.<sup>16</sup>

Since consignment arrangements are an increasingly popular technique of distribution, their Robinson-Patman status is of special significance. Consignments permit suppliers to finance their distributors' inventories in times of tight credit and provide small businessmen an opportunity to become established with a minimum capital investment of their own.<sup>17</sup> The attractiveness of a bona fide consignment may now be further enhanced by the possibilities it offers for exemption from the terms of the Robinson-Patman Act.<sup>18</sup>

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14. *United States v. United Shoe Mach. Co.*, 264 Fed. 138, 165 (E.D. Mo. 1920), *aff'd*, 258 U.S. 451 (1922); *County Theatre Co. v. Paramount Film Distributing Corp.*, 1956 Trade Cas. ¶ 68500 (E.D. Pa.), and unreported decisions there collected.

15. *Students Book Co. v. Washington Law Book Co.*, 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956). The court of appeals sustained the dismissal of a treble damage suit based on allegations that the defendant sold books to the plaintiff dealer at higher prices and on less favorable collateral terms than he granted to consignees competing in book sales to the public. Actually, the consignment resulted from revisions in the contract which hitherto provided for an ordinary purchaser-seller relationship. See also *FTC v. Curtis Publishing Co.*, 260 U.S. 568, 581 (1923).

16. These requirements are imposed by §§ 2(d), (e), 49 STAT. 1527 (1936), 15 U.S.C. §§ 13(d), (e) (1952). See, generally, Rowe, *How To Comply With Sections 2(c)-(f)*, in NEW YORK STATE BAR ASS'N, 1957 ANTITRUST LAW SYMPOSIUM, HOW TO COMPLY WITH ROBINSON-PATMAN ACT 124.

The *Students Book* decision expressly ruled out the application to consignees of § 2(e) governing "services" and "facilities" to "purchasers." Since § 2(d)'s requirement of "proportionally equal" terms in "payments" refers to "customers" rather than "purchasers," commissions to consignees, if deemed "customers," theoretically might be covered. The FTC's recent *General Foods* ruling, however, held that § 2(d) only bars payments to a customer "made in connection with the resale of goods bought by him" from the supplier—thus excluding consignees. *General Foods Corp.*, FTC Dkt. 6018, at 10 (Feb. 15, 1956) (emphasis added); see Note, 66 YALE L.J. 243 (1956).

17. Consignment arrangements flourish in the publishing industry as well as in the distribution of gasoline. They have been questioned by some as instruments for price maintenance. See H.R. REP. No. 1157, 85th Cong., 1st Sess. 6-7 (1957); *Sun Oil Co.*, 3 CCH TRADE REG. REP. ¶ 26839 (FTC Nov. 8, 1957) (complaint attacking Sun's "C" plan as an "unfair method of competition" in violation of the Federal Trade Commission Act by reason of its alleged abuse through coercive pricing tactics).

18. It is theoretically possible to view the ultimate price quotation to the consumer by the consignee as the supplier's own price in contemplation of law. This price could then be compared with the prices charged to the supplier's dealers in his other sales transactions. Hence, a price "discrimination" could technically exist if the consumer served by the supplier's consignee or agent paid a price different from the price paid by a dealer to the supplier. However, no legal liability can ensue so long as the potentially "dis-

Given two consummated "sales" by a supplier, problems may arise concerning who is properly a "purchaser" within the terms of the statutory prohibition. Ordinarily, the purchasers contemplated by the act are buyers transacting business face to face with a seller, and the typical price discrimination case involves different prices quoted by a supplier to such conventional purchasers.<sup>19</sup> In across-the-board transactions of this sort, a seller's quotation of a single uniform price to all his purchasers, regardless of their business denomination as wholesalers, jobbers, retailers or consumers, cannot create a price discrimination issue under Robinson-Patman.<sup>20</sup> As most recently confirmed by the Third Circuit in the *Lionel* case, the seller remains free to quote a uniform price to wholesalers and retailers alike—notwithstanding the natural consequence that those retailers who buy indirectly through wholesalers will ultimately pay more than retailers purchasing directly from the supplier.<sup>21</sup>

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favored" party, the dealer customer, is paying *less* than the ultimate consumer buying at a consignment outlet. For the dealer obviously cannot challenge a nominal price "discrimination" *in his favor* by demanding a bigger one.

However, even if the distributor pays *more* than ultimate consumers, he cannot be heard to complain. See *Chicago Sugar Co. v. American Sugar Refining Co.*, 176 F.2d 1, 9-10 (7th Cir. 1949); *Jarrett v. Pittsburgh Plate Glass Co.*, 131 F.2d 674 (5th Cir. 1942); *Empire Rayon Yarn Co. v. American Viscose Corp.*, 160 F. Supp. 334, 335 n.1 (S.D.N.Y. 1958); *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, 81 F. Supp. 890, 893 (D. Mass. 1949); AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 46 (rev. ed. 1953); *cf.* *United States Rubber Co.*, 28 F.T.C. 1489, 1501, 1505 (1939). Accordingly, a supplier's direct sales to commercial users or fleet accounts at lower prices than to his distributors for resale do not create a price discrimination under the statute—as implicitly recognized by the terms of a recent FTC order. See *Shell Oil Co.*, FTC Dkt. 6698 (April 2, 1958).

No case has gone so far as to consider the *availability* of certain forms of doing business with a supplier—whether as jobber, direct buyer, or consignee—a "service" or "facility" that must be accorded to everyone with whom he deals. Compare Horowitz, *Robinson-Patman Act Aspects of Long-Term Contracts*, 28 So. CALIF. L. REV. 280, 285-93 (1955), with *Skinner v. United States Steel Corp.*, 233 F.2d 762 (5th Cir. 1956); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 56 (8th Cir. 1951); *Chicago Seating Co. v. S. Karpen & Bros.*, 177 F.2d 863 (7th Cir. 1949).

19. However, sales to governmental bodies are exempt. *Sperry Rand Corp. v. Nassau Research & Development Associates*, 1957 Trade Cas. ¶ 68786 (E.D.N.Y.); *General Shale Products Corp. v. Struck Constr. Co.*, 37 F. Supp. 598, 603 (W.D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942); 38 Ops. ATT'Y GEN. 539 (1936). *But cf.* *A. J. Goodman & Son, Inc. v. United Lacquer Mfg. Corp.*, *supra* note 18.

20. *E.g.*, *Bird & Son, Inc.*, 25 F.T.C. 548 (1937); *cf.* *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 757 (1945). For other aspects of pricing to commercial consumer accounts, see note 18 *supra*.

21. *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir.), *affirming* 138 F. Supp. 560 (D. Del. 1956). *Lionel* is a conventional application of Robinson-Patman doctrine dating back to the *Bird* case of 1937, *supra* note 20. The *Lionel* court's substantive ruling that a retailer buying through a supplier's wholesaler was not a "purchaser" from the supplier must not be confused with the holding of *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D.N.J. 1956). *Krug* decided only that a wholesaler who paid higher prices than some of his supplier's direct retail accounts sustained actionable competitive injury

But in some circumstances even distributors who do not buy directly from the supplier may be considered his "purchasers" and hence entitled to equal price treatment under the act. In a series of rulings, the FTC has evolved the doctrine that if a supplier in effect supplants his distributor's role by directly soliciting or negotiating with the distributor's accounts, these accounts may be considered the supplier's indirect purchasers in contemplation of law.<sup>22</sup> If so, even a uniform price policy among all direct buyers on the part of the seller may become vulnerable to price discrimination charges, for the higher prices at which the distributor's accounts buy from the distributor can then be deemed "discriminatory" in comparison with the supplier's lower price to his direct customers. However, the Commission's "indirect purchaser" doctrine was

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when his own retail customers were harmed by the price advantages secured by their direct-buying competitors. *Krug* thus concerned merely the competitive impact of a price differential quoted by the supplier among his direct purchasers, whereas in *Lionel* no such differential among direct purchasers existed. See 57 COLUM. L. REV. 429 (1957).

Bills have been introduced designed to overrule the *Lionel* case. H.R. 10304, 10305 and S. 3654, 85th Cong., 2d Sess. (1958) would amend § 2(a) of the Robinson-Patman Act so as to include within the prohibited discriminations in price a seller's "failure to impose differentials in price as between purchasers in different functional classes." The purpose of the bills is to compel sellers to give lower prices to "wholesalers" than to large retail establishments that purchase directly from the seller and in many instances perform the same marketing functions, such as bulk storage and store delivery, which conventional wholesalers usually perform. In effect, the bills would reorient the act's major premise of price uniformity by forcing sellers to adopt a two-price policy for the benefit of wholesalers. Whatever the objective of the bills, their introduction of customer classification terms into the law can only spawn new confusion, since simple labels such as "wholesaler" or "retailer" are deceptive and inadequate to describe the actualities of a host of diverse modern business organizations.

22. In *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937), the leading decision, retailers were deemed "indirect purchasers" of the supplier who "by personally soliciting them and by making effective its price policies and schedules as applied to them" had taken over the normal tasks of its intermediate distributor organization. *Id.* at 546. In *Luxor, Ltd.*, 31 F.T.C. 658, 662-63 (1940), the supplier not only directly solicited the business of his distributor's retail accounts but actually controlled the retailers' resale prices. Similar intimate supervision of intermediate distributors, whose customers were subject to the supplier's "approval," converted these into "indirect purchasers" in the *Spark Plug* cases. *Champion Spark Plug Co.*, 50 F.T.C. 30, 44-45 (1953); *General Motors Corp.*, 50 F.T.C. 54, 63 (1953); *The Electric Auto-Lite Co.*, 50 F.T.C. 73, 80 (1953). The Commission's decision in *E. Edelman & Co.*, 51 F.T.C. 978, 1001 (1955), also rested on the "relations and contacts maintained" by the supplier with his distributors' accounts. On the other hand, the FTC in a companion case refused to view as "indirect purchasers" some accounts of the distributor to whom the supplier made direct shipment, inasmuch as the supplier had not "in any way participated in [their] selection" or become a "party to the transaction" between the distributor and his account. *Whitaker Cable Corp.*, 51 F.T.C. 958, 973 (1955). *Accord*, *General Foods Corp.*, FTC Dkt. 6018, at 14 (March 2, 1955), Initial Decision adopted by FTC (Feb. 15, 1956).

For the most recent listing of FTC criteria for discerning an "indirect purchaser" relationship between the distributor's customer and the supplier, see the complaint in *Ronson Corp.*, FTC Dkt. 7066, at 15 (Feb. 19, 1958) (direct solicitation, control over resale prices, direct shipments, direct promotion arrangements).

sharply assailed in the *Lionel* case, which not only cast doubts on its inherent "wisdom" but repudiated the concept entirely in private damage litigation.<sup>23</sup>

A logical corollary of *Lionel* is the recent *Philco* decision, whose recognition of a supplier's sales subsidiary as a separate legal person carries far-reaching implications.<sup>24</sup> At issue in *Philco* were lower prices quoted to Davega, an appliance retail chain, than Philco offered to an individual appliance dealer. The low-priced sales to Davega were made by the Philco Corporation itself, while the dealer bought at higher prices from Philco Distributors, Inc. (PDI), Philco's wholly-owned sales subsidiary. The complaint was dismissed on the court's ruling that the challenged discrimination did not stem from prices quoted by the *same seller*. Refusing to regard parent and wholly-owned subsidiary as a common seller discriminating among common customers, the court stressed that PDI was not shown to have abdicated the formulation of its prices and pricing policies to Philco, even though some of the PDI's directors also sat on Philco's board.<sup>25</sup>

*Philco* and *Lionel* illuminate two avenues of Robinson-Patman immunity deriving from the statutory requirement of discriminatory sale-purchase transactions by the same seller. *Lionel* implements traditional Robinson-Patman concepts by allowing a supplier to sell at a uniform price to all customers, including some large retailers, with whom he wishes to deal directly—although the dealers relegated to buying from wholesalers will inevitably pay more than their competitors buying directly from the supplier. *Philco* simply adds that a sales subsidiary may occupy the role of the supplier's independent wholesaler. Thus, so long as its prices are not prescribed by the supplier, the subsidiary may resell at higher prices to customers on the retail level competing with the supplier's direct accounts paying less.<sup>26</sup>

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23. 237 F.2d at 15.

24. *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957).

25. *Id.* at 544. Compare *United States Rubber Co.*, 28 F.T.C. 1489, 1498 (1939), where the subsidiary's merchandising and pricing policies were found to be "determined, dictated and controlled" by the parent. See also the recent complaint in *Westinghouse Elec. Corp.*, FTC Dkt. 7150 (May 14, 1958) (charging that a sales subsidiary's actions were taken under the parent's "direction, supervision and control").

26. The *Philco* approach in pricing cases is confirmed by the Seventh Circuit's dismissal of an FTC order against the corporate parent of two wholly-owned subsidiaries found guilty of illegal pricing practices. The court ruled that the separate corporate entities could be fused only if there was "evidence of such complete control of the subsidiary by the parent as to render the former a mere tool of the latter, and to compel the conclusion that the corporate identity of the subsidiary is a mere fiction." *National Lead Co. v. FTC*, 227 F.2d 825, 829 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957). This doctrine has been followed by the FTC in a pricing case, *Warren Petroleum Corp.*, FTC Dkt. 6227 (Sept. 17, 1956), adopting Initial Decision, at 3-4 (Jan. 18, 1956). Cf. *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739 (D. Mass. 1955). See also cases cited note 59 *infra*.

The *Philco* concept of viewing sales subsidiaries as separate legal persons is further corroborated by the antitrust "bathtub" rationale deeming corporate affiliates to be distinct entities capable of conspiring among themselves. See, *e.g.*, *Timken Roller Bearing Co. v.*

The teaching of these decisions is that pricing safety under the Robinson-Patman Act may be maximized by the supplier's organizational plan for distribution. To the extent commercial considerations permit, a supplier may wish to employ a uniform price policy among all his *direct* accounts—such as wholesalers, jobbers, and the “integrated” retailers which in actuality perform the “wholesale” function whenever they buy in bulk and provide storage—while utilizing independent distributors or bona fide sales subsidiaries to service other accounts at higher prices.<sup>27</sup> By the *Philco* and *Lionel* rationale, unless the supplier unduly invades the distributor's or subsidiary's autonomy, resulting price differentials will avoid the act.<sup>28</sup>

Nonetheless, neither this type of distribution plan nor consignment arrangements can cloak inherently destructive trade practices without risking liability under the Federal Trade Commission Act. Although its power to use section five as a catch-all provision has been questioned,<sup>29</sup> the FTC has increasingly

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United States, 341 U.S. 593 (1951); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951); *United States v. Yellow Cab Co.*, 332 U.S. 218 (1947); *United States v. General Motors Corp.*, 121 F.2d 376 (7th Cir. 1941). See Comment, *Intra-Enterprise Conspiracy Under the Sherman Act*, 63 YALE L.J. 372 (1954).

27. Entirely different conceptual problems are posed by *purchasing* subsidiaries controlled by buyers. The issue is not whether price quotations are made by the *same person*, but whether prices admittedly quoted by the same person are discriminatory and have inimical competitive effects. The FTC over the years has taken a consistently negative attitude toward purchasing subsidiaries. See, *e.g.*, *Atlas Supply Co.*, 48 F.T.C. 53 (1951); complaints in *Ronson Service*, 3 CCH TRADE REG. REP. ¶ 27069 (FTC Feb. 19, 1958); *March of Toys, Inc.*, 3 CCH TRADE REG. REP. ¶ 27072 (FTC Feb. 20, 1958); *cf.* *Sylvania Electric Products, Inc.*, FTC Dkt. 5728, at 6 (Dec. 8, 1953), *set aside on other grounds*, 51 F.T.C. 282 (1954). See also Note, 67 HARV. L. REV. 294, 305-06 (1953); cases cited in *Fleming, Group Buying Under the Robinson-Patman Act: The Automotive Parts Cases*, 7 BUFFALO L. REV. 231 (1958).

28. See note 25 *supra*.

To be sure, recognition of a sales subsidiary as a separate legal entity also creates the possibility that the parent corporation's prices to the subsidiary may be exposed to Robinson-Patman. Indeed, the theoretical possibilities of such “bathtub” discriminations among corporate affiliates have been ingeniously explored by the Director of the Federal Trade Commission's Bureau of Litigation. Sheehy, *Implications of Intra-Enterprise Conspiracy Doctrine in Clayton Act Sections 2 and 3 Cases*, 8 ABA SECTION OF ANTITRUST LAW PROCEEDINGS 83 (April 1956). As some precedent, albeit ambiguous, stand *United States Steel Corp.*, 8 F.T.C. 1, 29 (1924); *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953), the latter declining to dismiss with prejudice a complaint addressed to asserted discriminations quoted by Shell between its owned service station and an independent Shell dealer. *But cf.* FTC Informal Ruling relating to “subsidiary jobbers,” 81 CONG. REC. APP. 2339 (1937). In any event, price quotations by parent to sales subsidiary may be mere bookkeeping transactions, easily brought into line with the parent's quotations to other distributors so as to avert even a technical price differential to which the act can attach.

29. *National Lead Co. v. FTC*, 227 F.2d 825, 837 (7th Cir. 1955), *rev'd on other grounds*, 352 U.S. 419 (1957); *Harley-Davidson Motor Co.*, 50 F.T.C. 1047, 1067-68 (1954). *But cf.* *FTC v. Motion Picture Advertising Serv. Co.*, 344 U.S. 392, 395 (1953); *Foremost Dairies, Inc.*, FTC Dkt. 6495 (June 4, 1956); Comment, 65 YALE L.J. 34, 38-39 (1955).

resorted to the general prohibitions on "unfair methods of competition" in that section to pursue pricing practices of the type contemplated by the Robinson-Patman Act but somehow exempt from its terms.<sup>30</sup> No absolute legal immunity, therefore, can shield abusive or coercive pricing practices.

But theoretical exposure to the Federal Trade Commission Act is far removed from the virtually automatic illegality threatening price differentials under the Robinson-Patman Act. In the first place, unlike Robinson-Patman, section five affords no basis for a private damage action.<sup>31</sup> Secondly, economic and business factors bearing on the inherent soundness of a challenged pricing method will probably receive more sympathetic consideration under the flexible provisions of section five than in a Robinson-Patman proceeding grooved into administrative rote and legal routine. From the supplier's standpoint, then, possible application of the Federal Trade Commission Act will only partially offset, not neutralize, the pricing freedom secured by immunity from Robinson-Patman.

#### TRANSACTIONS INVOLVING COMMODITIES

Even with the requisite sale-purchase transactions, the Robinson-Patman Act can come into play only if the challenged discrimination stems from a price in the sale of "commodities."<sup>32</sup> Since this commodity concept effectively confines the statute to the sphere of tangible products, a wide range of commercial activities remains exempt from the statutory bans on price discrimination.

While discriminatory sales of services are clearly outside the act, subtler problems appear when transactions comprise both tangible and intangible elements of value. With respect to services, the Third Circuit interpreted the pertinent text of the Clayton Act prior to Robinson-Patman amendments as excluding rate differentials for transportation.<sup>33</sup> Also, the FTC ruled informally in 1937 that publishers' discriminatory rates for advertising space did not involve "commodities" within the meaning of the act.<sup>34</sup> In the same year, however, an uncontested FTC decision applied Robinson-Patman to discriminatory sales of Christmas Club systems, including such tangibles as passbooks, account books, advertising literature and other paraphernalia used by banking institutions.<sup>35</sup>

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30. 38 STAT. 719 (1914), as amended, 15 U.S.C. § 45 (1952). See, *e.g.*, Giant Food Shopping Center, FTC Dkt. 6459 (April 17, 1958); United Cigars-Whelan Stores Corp., FTC Dkt. 6525 (July 31, 1956).

31. *Samson Crane Co. v. Union Nat'l Sales, Inc.*, 87 F. Supp. 218, 220 (D. Mass. 1949), *aff'd mem.*, 180 F.2d 896 (1st Cir. 1950).

32. While §§ 2(d), (e) of the act also cover discriminatory "services" or "facilities," these provisions are addressed to merchandising or promotional aids furnished by the supplier to his customers "in connection with" an underlying "commodity" sale. *Cf. Skinner v. United States Steel Corp.*, 233 F.2d 762, 765-66 (5th Cir. 1956).

33. *Fleetway, Inc. v. Public Serv. Interstate Transp. Co.*, 72 F.2d 761 (3d Cir. 1934). This determination was made under § 2 of the old Clayton Act.

34. 81 CONG. REC. APP. 2336-37 (1937).

35. *Christmas Club*, 25 F.T.C. 1116 (1937).

The issue was further explored in a 1942 appellate decision—*General Shale Products Corp. v. Struck Constr. Co.*<sup>36</sup> The Sixth Circuit held that a discriminatory sale of brick for a construction project was not subject to the act, reasoning that the challenged price quotation covered brick *plus* other materials and work. Since the bid “was not divisible into a contract for work and labor, and a contract for the sale of brick . . .”, the court discerned no actionable commodity sale.<sup>37</sup>

The controlling rationale apparently is that price quotations fusing a physical product with prime intangible factors cannot beget commodity sales governed by the act. This approach confirms the FTC’s opinion that advertising space sales are exempt, for there intangible readership circulation is paramount and the printed page serves only as the vehicle. This reasoning may also immunize fabrication or “conversion” deals in which the buyer supplies the components and contracts with a manufacturer who provides the requisite labor and additional material for a finished product made to the buyer’s specifications. And it corroborates the recent conclusions of a congressional study that sales of broadcast time are beyond the coverage of the act,<sup>38</sup> since the physical

36. 132 F.2d 425 (6th Cir. 1942).

37. *Id.* at 428. The decision rests on the indivisibility of the lumped commodity-service, a rationale rarely pertinent to an exclusive or tying case under § 3 where no individual price need be segregated for comparison with another. In any event, the prohibitions on exclusive and tying arrangements in § 3 are probably of wider applicability than the provisions of § 2; for the text of § 3, framed in 1914, contains no language concerning “grade and quality,” “manufacturing” costs, or “marketability,” “deterioration” or “obsolescence.” See S. REP. NO. 698, 63d Cong., 2d Sess. 44, 55 (1914); *cf.* *Carter Carburetor Corp. v. FTC*, 112 F.2d 722, 731 (8th Cir. 1940); *Stanley Co. v. American Tel. & Tel. Co.*, 4 F. Supp. 80, 82 (D. Del. 1933); *compare* *United States v. Investors Diversified Services, Inc.*, 102 F. Supp. 645 (D. Minn. 1951) (mortgage loans and credit not “commodities” within § 3), *with* *Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co.*, 184 F.2d 552, 559 (4th Cir. 1950) (exclusive arrangements for the sale of electric power are within § 3).

38. See *Hearings Before the Antitrust Subcommittee No. 5 on Monopoly Problems in Regulated Industries of the House Committee on the Judiciary*, 84th Cong., 2d Sess., pt. II (Television) (1956). Though convinced that some discriminatory discounts in broadcast time sales were contrary to the public interest, the committee deemed the Robinson-Patman Act impotent because it “covers only tangible commodities and not services.” *Report of the Antitrust Subcommittee on the Television Broadcasting Industry of the House Committee on the Judiciary*, 85th Cong., 1st Sess. 66 (1957). Subsequently, Rep. Celler, Chairman of the Committee, introduced H.R. 8277, 85th Cong., 1st Sess., designed to amend the statute by defining “commodities” in § 2 to “include services, other than professional services, rendered by independent contractors.” 103 CONG. REC. 8798 (1957).

A recent series of FTC proceedings under § 2(d) collaterally implicate network time arrangements as part of an alleged overall discriminatory scheme by suppliers *in connection with the sale of goods* through retail food stores, and hence do not concern the point at issue. In essence, the FTC charged nine respondents—including Pepsi-Cola, Coca Cola, General Foods, Sunshine Biscuits, as well as beer and cigarette manufacturers—with granting “indirect” promotional payments in favor of grocery chains through purchasing broadcast time from networks which ran spot advertising for the chains that had in turn given

elements in television or radio production are but incidents of the predominant intangible value—access to the viewing or listening public “delivered” by the medium to the advertiser.

Nevertheless, some judicial dicta evidence an apparent disinclination to consider the issue entirely closed. The Supreme Court’s *Times-Picayune* opinion in 1953 dropped a fertile footnote which, adverting to the Government’s concession that advertising space was not a “commodity” under section three of the Clayton Act, commented, “We express no views on that statutory interpretation.”<sup>39</sup> Without statutory or case analysis, the Second Circuit recently noted that price discrimination involving newspaper advertising sales presented “important and apparently unresolved questions under the Clayton Act.”<sup>40</sup>

Strict limitation of Robinson-Patman coverage to tangible products is dictated, however, by the act’s legislative history and textual structure. The hearings and debates preceding its enactment in 1936 relate exclusively to competitive problems then existing in the distribution of “goods”—manufactured products and consumer staples—which conventionally were sold through a supplier-wholesaler-retailer channel that was being invaded by grocery chains and mail order houses.<sup>41</sup> Moreover, as a matter of statutory semantics, any extension beyond the area of tangibles would make nonsense of the act’s “like grade and quality” test, its proviso permitting prices to reflect differences in the cost of “manufacture, sale or, delivery,” and its exemption of price changes responsive to “the marketability of the goods,” such as “deterioration of perishable goods, obsolescence of seasonal goods, [and] distress sales under court process . . . .”<sup>42</sup>

While the preponderance of reasoned precedent as well as the statutory context thus confine the Robinson-Patman Act to discrimination in the sale of tangible goods, here also the Federal Trade Commission Act could come into play. Drawing on its past application of section five’s ban on “unfair methods of competition” to discriminatory practices, the FTC may well invoke this provision in the future against invidious discriminations in the sale of “semi-tangibles” or consumer services.

in-store promotion to the products of the respective respondents. FTC Dkts. 6592-6600 (May 7, 1958).

39. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 609-10 n.27 (1953).

40. *Syracuse Broadcasting Corp. v. Newhouse*, 236 F.2d 522, 527 (2d Cir. 1956).

41. *Hearings Before the House Committee on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 1st Sess. (1935); *Hearings Before a Subcommittee of the House Committee on the Judiciary on Bills To Amend the Clayton Act*, 74th Cong., 2d Sess. (1936). See also PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* cc. 3, 7 (1955); ZORN & FELDMAN, *BUSINESS UNDER THE NEW PRICE LAWS* cc. 1-4 (1937); Fulda, *Food Distribution in the United States, The Struggle Between Independents and Chains*, 99 U. PA. L. REV. 1051, 1082-1109 (1951); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1061-67 (1957).

42. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952). Analogous references contemplating tangible products appear in the text of §§ 2(c), (d), (e), 49 STAT. 1527 (1936), 15 U.S.C. §§ 13(c), (d), (e) (1952).

## DISCRIMINATIONS IN COMMERCE

The final jurisdictional requirement of the Robinson-Patman Act relates to the "commerce" aspects of a discriminatory transaction. Since the Clayton Act defines "commerce" as "trade or commerce among the several States and with foreign nations," the Robinson-Patman amendment theoretically governs both interstate and international business arrangements.<sup>43</sup> But specific textual limitations virtually exempt export sales, while import transactions have only rarely faced liability. By contrast, the interstate commerce criterion of the act has generated frequent litigation centering on the degree of exemption for localized business arrangements.<sup>44</sup>

*Interstate Commerce*

As construed, the commerce coverage of the Robinson-Patman Act falls short of the broad sweep of the Sherman Act. Courts apply Sherman Act proscriptions to restrictive or monopolistic business activities wherever they occur, so long as interstate commerce is "affected."<sup>45</sup> On the other hand, the price discrimination clauses of Robinson-Patman require that the discriminator be "engaged in commerce," that the challenged discrimination occur "in the course of such commerce," and that "either or any of the purchases involved in such discrimination are in commerce . . ."<sup>46</sup>

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43. In full text, the relevant Clayton Act provision states: "'Commerce,' as used [herein] . . . , means trade or commerce among the several States and with foreign nations, or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in [this Act] . . . contained shall apply to the Philippine Islands." 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952).

According to the Report of the Senate Judiciary Committee on 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).

44. As picturesquely overstated during a recent congressional study of the subject, the interstate commerce definition of the statute is "as elastic as an old maid's girdle and nobody knows when it fits." *Hearings Before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary on Bills To Amend Section 2 of the Clayton Act*, 84th Cong., 2d Sess. 343 (1956). See, generally, Note, *Robinson-Patman Treatment of Interstate Firms Injured by Local Competitors*, 67 YALE L.J. 1073 (1958).

45. *E.g.*, *United States v. Employing Lathers Ass'n*, 347 U.S. 198 (1954); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485 (1950); *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

46. A broader interstate commerce sweep of Robinson-Patman is refuted by its legislative history, for the Senate-House Conference struck a clause in the House bill which would have adopted the "effect on commerce" criterion. H.R. REP. No. 2951, 74th Cong., 1st

The first two conditions are of minor import. It is not clear whether a firm is "engaged in commerce" if it resells solely *within* its own state goods purchased from outside the state.<sup>47</sup> Nor does it ordinarily matter, since the act will not apply unless the firm's sales are "in commerce."<sup>48</sup> Conversely, if sales are made "in commerce," the seller is to that extent "engaged in commerce." By the same reasoning, the "course of commerce" phrase adds nothing to the requirements of the "in commerce" test.

Of decisive significance is the condition that a challenged discriminatory transaction must itself occur "in" commerce. Under that test, the applicability of Robinson-Patman is determined by this rule of thumb: at least one of the two transactions which, when compared, disclose a discrimination must cross a state line.<sup>49</sup> As the Supreme Court has recently reaffirmed, whether the higher-priced or lower-priced of these two sales moves across the state boundary is immaterial.<sup>50</sup>

The interstate commerce test may thus be satisfied in several ways. In a case concerned with a seller's discriminations allegedly detrimental to competition

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Sess. 6 (1936). *But cf.* Alabama Independent Serv. Station Ass'n v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939).

Sections 2(c), (d), (f) and 3 in terms incorporate the "engaged in commerce" and "in the course of" commerce limitations, supplied by judicial interpretation in § 2(e) which lacks comparable terminology. See, *e.g.*, Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir. 1945).

47. See, *e.g.*, Northern Cal. Monument Dealers Ass'n v. Interment Ass'n, 120 F. Supp. 93 (N.D. Cal. 1954); Sears, Roebuck & Co. v. Blade, 110 F. Supp. 96, 101-02 (S.D. Cal. 1953).

48. Section 2(f), governing the liabilities of buyers, makes it unlawful for a person "engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination" prohibited by § 2. 49 STAT. 1526 (1936), 15 U.S.C. § 13(f) (1952). If the buyer only resells locally, his liability for receiving discriminatory concessions might turn on a determination of whether he is "engaged in commerce" by purchasing outside the state. *Cf.*, *e.g.*, Associated Merchandising Corp., 40 F.T.C. 578 (1945). Also, narrowly read, § 2(f) would not extend to a recipient of a discrimination located in the same state as the discriminating seller, for such a buyer would not "receive" the discrimination "in the course of" commerce. However, he might well be charged with "inducing" a discrimination "in the course of" commerce if the seller quoted higher prices to buyers in another state.

49. As explained to the Congress just preceding its passage of the bill: "Where a manufacturer sells only to customers within the State, his business is beyond the reach of Federal authority and is not included within the provisions of this bill." 80 CONG. REC. 9416 (1936). See early informal FTC dismissals of charges which disclosed few or no interstate sales. 81 CONG. REC. APP. 2336-41 (1937).

50. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 120 (1954); see also *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 745 (1945). In *Moore*, the Supreme Court found support in the following congressional statement:

"Where, however, a manufacturer sells to customers both within the State and beyond the State, he may not favor either to the disadvantage of the other; he 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 busi-

at the customer level, the act applies whether the seller located in State *A* quotes a lower price to a customer within State *A* than he asks of a competing customer in State *B* or, conversely, whether the seller in State *A* charges the customer in his home state a higher price than the out-of-state purchaser.<sup>51</sup> If the discrimination at issue is of the territorial or predatory type—whereby the seller, to squeeze out his own competitors, offers all buyers in one location a price lower than he quotes in another area—it matters not whether the price cut occurs in the seller's home state or in another state away from home.<sup>52</sup>

Whichever is the interstate leg of a discriminatory transaction, the determination of whether a particular sale actually crossed a state boundary remains. Questions often spring from the establishment by an interstate enterprise of local warehouses and facilities as temporary termini for interstate shipments. From these storage areas, the product is redistributed within the state to local dealers. The Supreme Court's landmark *Standard Oil* decision applied the "flow of commerce" doctrine to such a situation and held that an interstate supplier's local storage does not oust Robinson-Patman jurisdiction.<sup>53</sup> But, notwithstanding the "flow of commerce" concept, price quotations by an interstate enterprise for commodities which it actually produces and resells within a single state are not covered.<sup>54</sup>

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ness within the State, and to protect interstate commerce itself from injury by influences within the State.' 80 Cong. Rec. 9417." 348 U.S. at 120.

The Supreme Court's reversal of the lower court in *Moore*, 208 F.2d 777 (10th Cir. 1953), perforce supersedes the rulings in *Atlantic Co. v. Citizens Ice & Cold Storage Co.*, 178 F.2d 453 (5th Cir. 1949), and *Shlomchik v. Hygrade Bakery Co.*, 1952-53 Trade Cas. ¶ 67632 (E.D. Pa. 1953).

The untenable ruling in *Bowman Dairy Co. v. Hedlin Dairy Co.*, 126 F. Supp. 749 (N.D. Ill. 1954), misconstrues *Moore* as discarding the requirement that the defendant's discriminatory transaction occur "in commerce" whenever a private plaintiff was injured in his interstate business. Compare *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 153 F. Supp. 684 (N.D. Ill. 1957), *rev'd*, CCH TRADE REG. REP. (1958 Trade Cas.) ¶ 69017 (7th Cir. April 23, 1958). See also Note, 67 YALE L.J. 1073 (1958).

51. *Cf. Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 152-53 (2d Cir. 1949).

52. *Cf. Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954).

53. *Standard Oil Co. v. FTC*, 340 U.S. 231, 236 (1951). The Court deemed gasoline storage in local bulk plants an integral part of a larger interstate movement originating with the out-of-state refinery and terminating at the dealer's pump. According to the decision below, the "flow of the stream of commerce kept surging" so as to preserve the "interstate character" of the entire transaction. *Standard Oil Co. v. FTC*, 173 F.2d 210, 214 (7th Cir. 1949). See also *Spencer v. Sun Oil Co.*, 94 F. Supp. 408, 410-11 (D. Conn. 1950); *Hipps v. Bowman Dairy Co.*, 1950-51 Trade Cas. ¶ 62859 (N.D. Ill. 1951); *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N.D. Ill. 1941); *Alabama Independent Serv. Station Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N.D. Ala. 1939); *Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). *But cf. Nachman v. Shell Oil Co.*, 1944-45 Trade Cas. ¶ 57361 (D. Md. 1945); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547 (N.D. Ill. 1943).

54. *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951); *cf. Massachusetts*

By the logic of recent judicial rulings, local distributorships or sales subsidiaries operating on a wholly intrastate basis can provide significant exemptions from the act. The rationale of the *Lionel* and *Philco* rulings is equally applicable in judging whether a discrimination has taken place "in commerce."<sup>55</sup> So long as the supplier can avoid sales transactions across state lines by deploying his franchised distributors or bona fide subsidiaries so that each satisfies only local market demands,<sup>56</sup> the *Lionel-Philco* rationale is in point. This doctrine would insulate the supplier from liability for price differentials affecting customers within the state by viewing these local sales as those of the intrastate distributor or subsidiary rather than the supplier.<sup>57</sup>

Suggestive of the possibility of wholly local sales operations is a recent district court dismissal of a complaint for inadequate interstate commerce allegations. The opinion emphasized that the provisions of the act "say nothing about causing others to discriminate in price" and "make unlawful only the action of the actual seller who sells to two different customers of his own at different prices."<sup>58</sup> The FTC has also indicated that an autonomously operating intrastate subsidiary enjoys immunity from the Robinson-Patman Act.<sup>59</sup>

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Brewers Ass'n v. P. Ballantine & Sons Co., 129 F. Supp. 736 (D. Mass. 1955); Spencer v. Sun Oil Co., *supra* note 53, at 411; Lewis v. Shell Oil Co., *supra* note 53.

In a dubious recent decision, the FTC ruled that a discriminatory advertising allowance granted by a supplier to a local branch of an interstate grocery chain was nonetheless made "in commerce" by reason of the "integrated interstate operation" of the recipient. J. H. Filbert, Inc., FTC Dkt. 6467 (Sept. 19, 1957). This ruling, and the similar *Bowman* and *Central Ice Cream* cases, discussed note 50 *supra*, are hard to reconcile with the citations above or with the text of the act.

55. See discussion at notes 26-28 *supra* and accompanying text.

56. While a supplier may not by agreement limit his distributor's freedom to resell wherever he chooses, *United States v. Bausch & Lomb Optical Co.*, 321 U.S. 707, 721 (1944), he may lawfully terminate dealings with distributors which fail to cultivate their own areas intensively by spreading their efforts too thin, see decree in *United States v. Philco Corp.*, 1956 Trade Cas. ¶ 68409, at § IV(D) (E.D. Pa.).

57. Here, too, of course, the supplier's sale to the distributor or subsidiary may be theoretically subject to the statute. See note 28 *supra*. The Supreme Court's *Moore* ruling, while announcing a broad doctrine to nip predatory pricing practices by a group of affiliated corporations, nevertheless took pains to state that the corporate defendant's discriminatory activities included sales across state lines. *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115, 116-17, 119 (1954).

58. *Massachusetts Brewers Ass'n v. P. Ballantine & Sons Co.*, 129 F. Supp. 736, 739 (D. Mass. 1955).

59. *Dan Dee Pretzel & Potato Chip Co.*, FTC Dkt. 6919 (April 30, 1958), Initial Decision adopted by FTC (June 27, 1958); *Pepsi Cola Co.*, FTC Dkt. 6593 (Nov. 21, 1957), Initial Decision adopted by FTC (Dec. 20, 1957); cf. *Warren Petroleum Corp.*, FTC Dkt. 6227 (Feb. 10, 1956), Initial Decision adopted by FTC (Sept. 17, 1956). *But cf.* *The Borden Co.*, FTC Dkt. 6737 (Nov. 11, 1957), uncontested Initial Decision adopted by FTC (Nov. 18, 1957).

Firmly supporting the separate entity concept also is *National Lead Co. v. FTC*, 27 F.2d 825, 829 (7th Cir. 1955), and the "bathtub" conspiracy cases discussed at note 26 *supra*.

Since the applicability of the Federal Trade Commission Act parallels the interstate commerce reach of Robinson-Patman, no greater legal liabilities arise under section five.<sup>60</sup>

### *Foreign Commerce*

Unlike the oft-litigated interstate commerce aspects of Robinson-Patman, the act's international implications remain undeveloped. While the statutory text curtails its application to export transactions, only principles of comity and the vanishing obstacle of securing service of process on foreign corporations stand between the act and import trade.<sup>61</sup>

The language which effectively exempts export transactions from Robinson-Patman appears in section 2(a). The application of this section, the key ban on price discrimination, is confined to commodities "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 . . ."<sup>62</sup> Hence, American goods sold abroad are exempt from civil price discrimination charges, and American firms may maintain price differentials among their foreign customers or between foreign and domestic buyers.

Liability for such transactions may possibly ensue from the remaining statutory provisions. The criminal bans of section three are not expressly qualified by section 2(a)'s criterion of domestic resale or consumption.<sup>63</sup> Moreover, a district court in the *Baysoy* case held that section 2(c), the so-called brokerage clause, is not governed by the 2(a) limitation and accordingly voided a contract for an export sale of steel which stipulated an illicit rebate to the buyer.<sup>64</sup> Similarly, the subsections of the act proscribing discriminatory "allowances" or "facilities" do not repeat the domestic use standard of section 2(a).<sup>65</sup>

60. Cf. *FTC v. Bunte Bros., Inc.*, 312 U.S. 349 (1941); *Warren Petroleum Corp.*, *supra* note 59.

61. See, e.g., *Matter of Siemens & Halske, A.G.*, 155 F. Supp. 897 (S.D.N.Y. 1957); *United States v. Watchmakers of Switzerland Information Center*, 133 F. Supp. 40 (S.D. N.Y. 1955). See, generally, FUGATE, FOREIGN COMMERCE AND THE ANTITRUST LAWS cc. 2, 3 (1958); Kramer, *The Application of the Sherman Act to Foreign Commerce*, 41 MARQ. L. REV. 270 (1957).

The general definitions of the Clayton Act define "person" to include corporations "existing under or authorized by" the "laws of any foreign country." 38 STAT. 730 (1914), 15 U.S.C. § 12 (1952). There is, of course, no impediment to a proceeding against a domestic buyer for securing illegal discriminations from abroad.

For a recent discussion of parallel legislation, see Ehrenhaft, *Protection Against International Price Discrimination: United States Countervailing and Anti-Dumping Duties*, 58 COLUM. L. REV. 44 (1958).

62. 49 STAT. 1526 (1936), 15 U.S.C. § 13(a) (1952).

63. 49 STAT. 1528 (1936), 15 U.S.C. § 13a (1952).

64. *Baysoy v. Jessop Steel Co.*, 90 F. Supp. 303 (W.D. Pa. 1950).

65. 49 STAT. 1527 (1936), 15 U.S.C. §§ 13(d), (e) (1952).

In the light of an explicit congressional intention to shield American firms' discriminatory export sales or "dumping" from Robinson-Patman consequences,<sup>66</sup> *Baysoy* appears aberrational. Future rulings, in deference to the manifest legislative purpose, may well construe all sections of the act in *pari materia* as to jurisdiction and hence delimited by the exclusion of export transactions in section 2(a).<sup>67</sup>

By contrast, import transactions are clearly controlled by the Robinson-Patman Act. In two conspicuous instances, the price discrimination clauses of the original Clayton Act were invoked against sales by foreign enterprises within the United States. In 1927, the Department of Justice charged a group of German and French potash producers with Sherman and Clayton Act violations and secured a consent decree which in part barred the defendants from "discriminating, directly or indirectly, between purchasers, dealers, or consumers, of potash salts located within the United States" unless justified under one of the statutory provisos.<sup>68</sup> An analogous cartel suit, instituted in 1928 against European as well as American producers of quinine derivatives, was settled by a decree imposing comparable restrictions on discriminatory import sales into this country.<sup>69</sup>

Since the Robinson-Patman amendments fully preserve the import trade jurisdiction of the original Clayton Act,<sup>70</sup> these decrees stand as valid precedents for applying the statute to international arrangements.<sup>71</sup>

#### CONCLUSION

Because disparate statutory provisions and diffuse legal concepts control the jurisdictional limitations of the Robinson-Patman Act, no unifying themes emerge from their exploration. Yet a tour along the frontiers of Robinson-Patman leaves this impression: In contrast with the general but concise anti-trust mandates expressed by Congress in the Sherman Act and the Federal Trade Commission Act, Robinson-Patman codified a crude primer of pricing practices. While the former statutes serve as supple instruments of antitrust policy adaptable to the needs of a dynamic day, Robinson-Patman's wordy and artless prose has created a legal labyrinth.

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66. See 80 CONG. REC. 6333 (1936).

67. Cf. *Klein v. Lionel Corp.*, 237 F.2d 13 (3d Cir. 1956); *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945); *Krug v. International Tel. & Tel. Corp.*, 142 F. Supp. 230 (D. N.J. 1956).

68. *United States v. Deutsches Kalisyndikat Gesellschaft*, 2 Decrees & Judgments in Civil Federal Antitrust Cases 1333 (S.D.N.Y. 1929).

69. *United States v. N. V. Amsterdamsche Chininefabriek*, *id.* at 1352 (S.D.N.Y. 1928).

70. 80 CONG. REC. 6436 (1936); H.R. REP. NO. 2951, 74th Cong., 2d Sess. 5 (1936).

71. Compare the recent FTC complaint challenging under § 7 of the Clayton Act the acquisition of a foreign company by a domestic corporation. *Dresser Industries, Inc.*, FTC Dkt. 7095 (March 26, 1958).

As demonstrated by its jurisdictional criteria, the specificity of the act's provisions places a premium on astute counsel and the skills of the craft to discover lawful byways out of the maze.<sup>72</sup>

But disentanglement from Robinson-Patman does not guarantee total immunity. Any coercive or predatory pricing practice, whatever its Robinson-Patman status, may face liability as an "unfair method of competition" under the Federal Trade Commission Act. To that extent, antitrust policies favoring maximum pricing freedom while forbidding anticompetitive excesses can be recognized and finally reconciled.

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72. As one veteran expert has observed, "After so many annual symposia on the happy ambiguities of the Robinson-Patman Act, it would be arrogant even to attempt to catalog the wide valleys of confusion—and the deep gullies of complete uncertainty—in which lurk the double-headed dragons of Commission action and treble damage suits." Austern, *Dealing With Uncertainties*, in *HOW TO COMPLY WITH THE ANTITRUST LAWS* 343, 356 (Van Cise & Dunn ed. 1954).

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