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A Complaint under the Robinson-Patman Act Need Not Allege That One of the Sales Involved Was Interstate in Character as Long as It Charges That Interstate Sales Were Used to Underwrite Allegedly Discriminatory Intrastate Price-Cutting Tactics.

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TRADE REGULATIONS—PRICE DISCRIMINATION—ROBINSON-PATMAN ACT JURISDICTIONAL SCOPE—A COMPLAINT UNDER THE ROBINSON-PATMAN ACT NEED NOT ALLEGE THAT ONE OF THE SALES INVOLVED WAS INTERSTATE IN CHARACTER AS LONG AS IT CHARGES THAT INTERSTATE SALES WERE USED TO UNDERWRITE ALLEGEDLY DISCRIMINATORY INTRASTATE PRICE-CUTTING TACTICS. *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972).

The operator of an independent gas station in Dallas County, Texas, allegedly was forced to close his station due to discriminatory intrastate price-cutting by his competitors. In a suit for damages under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,[1] the plaintiff, Littlejohn, alleged that the defendants, Shell Oil Co. and American Oil Co., were engaged in interstate commerce and that profits derived therefrom were used to underwrite losses incurred through discriminatory intrastate sales. The district court concluded that it was without subject matter jurisdiction based upon the failure of the plaintiff to allege that at least one of the sales involved was interstate in character.[2] Summary judgment was granted for the defendants. Held —*Reversed.* Profits obtained through interstate commerce may not be used to underwrite an intrastate price war.[3] Congress, as guardian of the commerce clause, certainly has the power to say that no instrumentality of interstate commerce should be used to destroy the local merchant and expand the domain of the combine.[4] Accordingly, a complaint under the Robinson-Patman Act need not allege that one of the sales involved was interstate in character as long as it charges that interstate sales were used to *underwrite* allegedly discriminatory *intrastate* price-cutting tactics.[5]

History has revealed that as the concept of commerce has developed, the businessman has consistently been made to conform to precepts of trade regulation. The clay tablets of history in Sumeria as well as the famous Code of Hammurabi regulated trade, wages and prices.[6] In ancient Rome, the Emperor Zeno banned price-fixing and monopolizing by competitors.[7] Consequently, the numerous existing commercial regulatory statutes of the United States are of no surprise.

As originally enacted in 1914, section 2 of the Clayton Act made it unlawful for any person engaged in interstate commerce to discriminate

1 Robinson-Patman Act, 15 U.S.C. § 13a (1970), *amending* Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914).
2 Littlejohn v. Shell Oil Co., 456 F.2d 225, 227 (5th Cir. 1972).
3 *Id.* at 228.
4 *Id.* at 228.
5 *Id.* at 229.
6 Van Cise, *Understanding the Anti-Trust Laws*, in PRACTICING LAW INSTITUTE 3 (1963).
7 *Id.*

in prices where the effect of such discrimination might be to lessen competition or to create a monopoly.[8] A further proviso was added to the Clayton Act excepting price discrimination based on differences in quantity of goods sold.[9] The eventual effect of the provision was to create higher prices on small quantity lots than on larger lots through price concessions exacted by large chain store buyers.[10] A lengthy investigation in the 1930's by the Federal Trade Commission revealed the avenues by which the purposes of the Clayton Act were being circumvented.[11] Finally in 1936 the Robinson-Patman Act was enacted to eliminate the inequities fostered by the Clayton Act.[12] Its main purposes are: (1) To strengthen the provisions of the Clayton Act regarding price discrimination;[13] (2) To protect small businesses which are unable to buy in quantity against competing operators of large interstate concerns;[14] (3) To prevent sellers from yielding to the economic pressures of a large buying organization by granting preference connected with the sale of goods.[15]

The jurisdictional scope of the Robinson-Patman Act is reflected as follows:

It shall be unlawful for any person *engaged in commerce, in the*

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8 Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914), *as amended* Robinson-Patman Act, 15 U.S.C. § 13a (1970).

9 *Id.* The proviso declared that "nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for difference in the cost of selling or transportation, or discrimination in price in the same or different communities made in good faith to meet competition."

10 FTC v. Simplicity Pattern Co., 360 U.S. 55, 69, 79 S. Ct. 1005, 1013, 3 L. Ed.2d 1079, 1088 (1959). In examining the effect of the proviso in connection with the Act, the Court stated:

> Several large chain store buyers were effectively avoiding Section 2 by taking advantage of gaps in its coverage. Because of their enormous purchasing power, these chains were able to exact price concessions, based on differences in quantity, which far exceeded any related cost savings to the seller. Consequently, the seller was forced to raise prices even further on smaller quantity lots in order to cover the concessions made to the large purchasers.

11 *Id.* at 69, 79 S. Ct. at 1014, 3 L. Ed.2d at 1088. Another method used to circumvent the effect of the Clayton Act occurred when large purchasers secured rebates for "brokerage fees" even though no brokerage services had been performed; advertising allowances in return for promotional services; and special services or facilities available only to large purchasers.

12 Robinson-Patman Act, 15 U.S.C. § 13a (1970).

13 United States v. National Dairy Prod. Corp., 372 U.S. 29, 33, 83 S. Ct. 594, 598, 9 L. Ed.2d 561, 566 (1963). Where defendants were charged with selling goods at an unreasonably low cost, the Court reasoned that, "the Robinson-Patman Act indicates that selling below cost . . . was intended to be prohibited. Congress passed Section 2 to cover price discrimination by large companies which compete by lowering prices, 'oftentimes below the cost of production . . . with the intent to destroy and make unprofitable the business of their competitors.'" *See also* H.R. REP. No. 627, 63rd Cong., 2d Sess. 8 (1936), where it is noted, "The 1936 enactment of the Robinson-Patman Act was for the purpose of *strengthening the Clayton Act provisions.*" (Emphasis added.)

14 Standard Oil Co. v. FTC, 340 U.S. 231, 249, 71 S. Ct. 240, 249, 95 L. Ed. 239, 251 (1951).

15 FTC v. Henry Brock & Co., 363 U.S. 166, 168, 80 S. Ct. 1158, 1160, 4 L. Ed.2d 1124, 1127 (1960).

> *course of such commerce* . . . to sell . . . goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States, for the purpose of destroying competition, or eliminating competition, or eliminating a competitor in such part of the United States; or to sell . . . goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.[16]

The words "engaged in commerce"[17] have been construed to apply to acts done while engaged in interstate commerce.[18] Hence, for the Robinson-Patman Act to apply, the primary jurisdictional requisite is that one of the persons or businesses involved must be engaged in "trade or commerce among the several states."[19] Additionally, the proscribed conduct complained of must have occurred "within the course of such conduct."[20]

Given this rather broad jurisdictional limit within which to implement the Act, the courts have attempted to clarify and narrow the circumstances in which the Robinson-Patman Act may be invoked. A prevalent interpretation requires that not only must a Robinson-Patman claimant show that the defendant was engaged in interstate commerce, but he must also show that at least one of the alleged discriminatory transactions took place in interstate commerce.[21] The Supreme Court, however, has ruled that even in the absence of such an interstate transaction, if an *interstate corporation* which maintains its price in *intrastate* sales so as to wage a price war with an intrastate competitor, eventually forcing the intrastate competitor to close his business, the Robinson-Patman Act has been violated.[22] The contention of the

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16 Robinson-Patman Act, 15 U.S.C. § 13a (1970) (emphasis added).

17 *Id.*

18 Standard Oil Co. v. FTC, 340 U.S. 231, 236, 71 S. Ct. 240, 243, 95 L. Ed. 239, 244 (1951).

19 The definition of *interstate commerce* being, "trade or commerce among the several states" was first voiced in Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 194, 6 L. Ed. 23, 69 (1824). The Court reasoned, "The word 'among' means intermingled with. A thing which is among others, is intermingled with them. Commerce among the several states cannot stop at the external boundary line of each state, but may be introduced into the interior." *See also* Swift & Co. v. United States, 196 U.S. 375, 398, 25 S. Ct. 276, 280, 49 L. Ed. 518, 525 (1904):

> [C]ommerce among the States is not a technical legal conception, but a practical one, drawn from the course of business. When cattle are sent for sale from a place in one state, with the expectation that they will end their transit, after purchase, in another, and when in effect they do so, with only the interruption necessary to find a purchaser at the stock yards, and when this is a typical, constantly recurring course, the current thus existing is a current of commerce among the states, and the purchase of the cattle is a part and incident of such commerce.

20 Standard Oil Co. v. FTC, 340 U.S. 231, 237 n.5, 71 S. Ct. 240, 243 n.5, 95 L. Ed. 239, 244 n.5 (1951). *See also* Willard Dairy Corp. v. National Dairy Prod. Corp., 309 F.2d 943, 945-46 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed.2d 691 (1963).

21 Willard Dairy Corp. v. National Dairy Prod. Corp., 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed.2d 691 (1963).

22 Moore v. Mead's Fine Bread Co., 348 U.S. 115, 119, 75 S. Ct. 148, 150, 99 L. Ed. 145, 149 (1954).

plaintiff in *Moore v. Mead's Fine Bread Co.*,[23] to the effect that the defendant was able to supplant the losses sustained by discriminatory price-cutting in intrastate sales through profits obtained in interstate non-discriminatory sales, was identical to the plaintiff's contention in the *Littlejohn* decision.

The decision reached in *Littlejohn* was entirely congruent with that in the *Mead* decision. The Court of Appeals for the Fifth Circuit, relying on *Mead*, reasoned that a monopolistic pattern would be inevitable if the coffers of an interstate business would be maintained through legitimate interstate transactions while at the same time financing an *intrastate* price war.[24] Local competition would be stifled by the interstate combine not by reason of the skill of the interstate competitor, but solely "because of [its] strength and ability to wage price wars."[25] A dissenting opinion was grounded on the belief that prior Fifth Circuit decisions were to the contrary, and that part of the discriminatory sales in the *Mead* case were interstate in character thereby deeming as dicta the language of the Supreme Court supporting jurisdiction of the Robinson-Patman Act through an allegation of "loss underwriting."[26]

Due to its bearing on *Littlejohn*, emphasis must be placed upon the authoritative rationale espoused in *Mead*. In the *Mead* case, the petitioner was in the bakery business at Santa Rosa, New Mexico. None of his activities were interstate in character.[27] The respondent was also in the bakery business and was located at Clovis, New Mexico. The respondent made sales of bread in Farwell, Texas, a town which it served with a bread truck operating out of Clovis. By the foregoing, it may be reasoned that the goods handled by the respondent were considered as being in interstate commerce.[28] For some time the petitioner and respondent were in competition in Santa Rosa. There was evidence that the respondent eventually cut the prices of bread in the

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23 *Id.*

24 Littlejohn v. Shell Oil Co., 456 F.2d 225, 226 (5th Cir. 1972).

25 *Id.* at 228.

26 *Id.* at 228.

27 *Id.* at 230. Dissenting, Judge Coleman noted three prior decisions by the Court of Appeals for the Fifth Circuit dealing with the applicability of the Robinson-Patman Act: Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Walker Oil Co. v. Hudson Oil Co., 414 F.2d 588 (5th Cir. 1969); and Hiram Walker, Inc. v. A. & S. Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901, 90 S. Ct. 212, 24 L. Ed.2d 177 (1969). According to Judge Coleman, the decisions amounted to a rule which holds that at least one of the transactions which generate a discrimination must cross a state line. The three above cases were discussed by the majority but deemed not to be controlling. In *Cliff*, the sales were not *in commerce* within the meaning of the Act. In the *Hiram Walker* case, the Act did not apply because the manufacturer was held not to be a seller within the meaning of the Act. And the decision in *Hudson Oil* was found to be distinguishable on the same basis as *Cliff Food Stores*.

28 Moore v. Mead's Fine Bread Co., 348 U.S. 115, 116, 75 S. Ct. 148, 149, 99 L. Ed. 145, 148 (1954).

Santa Rosa area while allowing prices of bread to remain constant in all the other cities which he serviced.[29] The resultant price war in Santa Rosa forced the petitioner to close his business. In determining the applicability of the Robinson-Patman Act, the Supreme Court recognized that the victim was only a local merchant, and *no interstate transactions were used to destroy him.*[30] The court noted further that through the Clayton Act and the Robinson-Patman Act, Congress intended that the use of interstate commerce to destroy local business be barred.[31] Recognizing that this type of price-cutting was held to be foreign to any legitimate commercial competition even prior to the Robinson-Patman Act, subject matter jurisdiction was granted to prevent discriminatory intrastate price-cutting by an interstate concern.[32]

Since the *Mead* case, the critical language concerning the jurisdictional application of the Robinson-Patman Act 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 interstate commerce.*[33] The result of decisions such as this seem totally inconsistent and irreconcilable with the decision in *Mead.*[34] In *Food Basket, Inc. v. Albertson's, Inc.,*[35] the defendant, Albertson, purchased its goods from two wholesalers in Salt Lake City. The wholesalers brought the goods into Utah and held title to them while in storage. Albertson's, in turn, supplied its retail stores in Salt Lake City. Albertson sold 49 nationally advertised items at a lesser price in one of its retail stores than it charged in its other retail stores.[36] Plaintiff, Food Basket was in competition with the store charging the lower prices. In response to the allegation that the defendant succeeded in driving Food Basket out of business by subsidizing its losses with profits earned from other retail stores where Food Basket was not a competitor, the Court

[29] *Id.* at 116-17, 75 S. Ct. at 149, 99 L. Ed. at 148.
[30] *Id.* at 119, 75 S. Ct. at 150, 99 L. Ed. at 149.
[31] *Id.* at 119, 75 S. Ct. at 150, 99 L. Ed. at 149.
[32] *Id.* at 120, 75 S. Ct. at 151, 99 L. Ed. at 150. *See also* Porto Rican Am. Tobacco Co. v. American Tobacco Co., 30 F.2d 234, 237 (2d Cir. 1929) for a parallel fact circumstance upon which the court relied. In this case there was evidence that the American Tobacco Company sent its export manager of its entire business to Puerto Rico to wage a price war against appellee, the Porto Rican American Tobacco Co., allegedly for the purpose of driving the Puerto Rican firm out of business. The conduct of lowering the price of "Lucky Strikes," which, according to the court was a much more expensive brand than appellee's and if sold at a low price would make it practically impossible for a weaker competitor to continue, was in violation of the Clayton Act.
[33] Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 787 (10th Cir. 1967); *accord,* Standard Oil Co. v. FTC, 340 U.S. 231, 237 n.5, 71 S. Ct. 240, 243 n.5, 95 L. Ed. 239, 244 n.5 (1951); Willard Dairy Corp. v. National Dairy Prod. Corp., 309 F.2d 943, 945-46 (6th Cir. 1962), *cert. denied,* 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed.2d 691 (1963).
[34] *See* the dissent filed by Mr. Justice Black to the denial of certiorari to the case of Willard Dairy Corp. v. National Dairy Prod. Corp., 373 U.S. 934, 935, 83 S. Ct. 1534, 1535, 10 L. Ed.2d 691, 691 (1963).
[35] 383 F.2d 785 (10th Cir. 1967).
[36] *Id.* at 786.

of Appeals for the Tenth Circuit ruled in favor of defendant's allegation that "none of the purchases involved in the alleged discriminations were in commerce as required by Section 2(a) . . . of the Robinson-Patman Act."[37]

The court in *Littlejohn,* taking full cognizance of the enigmatic departure of this line of cases from the *Mead* decision explained away the inconsistency by stating:

> Following the *Moore* [*Mead*] decision, several Courts of Appeals have taken the position that the language . . . is merely dicta and that the plaintiff is still required to allege and prove an interstate discriminatory sale in order to state a claim under . . . the Robinson-Patman Act. Frequently, this limited application of the [*Mead*] ruling has been buttressed by reference to the existence of interstate bread sales in that very case.[38]

Notice must be taken[39] that the interstate bread sales referred to in the *Mead* decision were those made by the respondent to the town of Farwell, Texas. The series of transactions established the respondent corporations as being engaged in interstate commerce.[40] While on the other hand, the discriminatory price-cuts were those dealt solely on the *intrastate* sale of bread in Santa Rosa, New Mexico.

The fact that the Supreme Court has denied certiorari to the string of post-*Mead* cases has somehow given credence to the rule requiring one discriminatory interstate sale to be shown before the Robinson-Patman Act may be applied.[41] The case of *Willard Dairy Corp. v. National Dairy Products Corp.*[42] reflected just such a situation. In a fact circumstance similar to that of *Littlejohn,* but involving the sale of dairy products, intrastate prices were cut by the respondent without reducing interstate prices of the same products. The Court of Appeals for the Sixth Circuit held that the respondent's interstate shipments were immaterial to the case, thereby precluding the application of the Robinson-Patman Act.[43] Certiorari was denied.[44]

In view of the evident juxtaposition of holdings by the various courts, the *Littlejohn* decision seemingly segregated the issue of loss

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[37] *Id.* at 788.

[38] Littlejohn v. Shell Oil Co., 456 F.2d 225, 228 (5th Cir. 1972).

[39] Moore v. Mead's Fine Bread Co., 348 U.S. 115, 75 S. Ct. 148, 99 L. Ed. 145 (1954).

[40] *Id.* at 116, 75 S. Ct. at 149, 99 L. Ed. at 148.

[41] Such quasi-affirmance was voiced in the case of Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967) *cited in* Belliston v. Texaco, 455 F.2d 175, 178 (10th Cir. 1972). The court in *Food Basket* stated, "It seems safe to assume that if the post-Meade [sic] Bread case law is contrary to the language used there, the Supreme Court would have corrected the misinterpretation on repeated applications for certiorari." *Id.* at 787.

[42] 309 F.2d 943 (6th Cir. 1962), *cert. denied,* 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed.2d 691 (1963).

[43] *Id.*

[44] Willard Dairy Corp. v. National Dairy Prod. Corp., 373 U.S. 934, 83 S. Ct. 1534, 10 L. Ed.2d 691 (1963).