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Trade Regulation -- Robinson-Patman Act -- Unjustified Price Discrimination -- Additional Requirements Necessary to Constitute Violation of Section 2(a)

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requires evidence of the same type as the courts require, except that due to its specialized nature, it is better equipped to probe more deeply into the same complex relevant economic facts that the courts consider in order to determine whether competition has been or probably will be substantially lessened.³¹

From the foregoing it is apparent that the mere doing of a substantial amount of business by an alleged violator is not sufficient to satisfy the requirements of the qualifying clause of Section 3. The major factor in the substantiality test is the amount of business foreclosed by the exclusive dealing arrangements. However, the courts do broaden an inquiry to include such factors as the rank in the industry, practice in the industry, number and per cent of outlets foreclosed, rigidity of enforcement of the restrictive practices, alleged violator's share of the market, length of the contracts, intent of the parties, availability of alternative ways of obtaining an assured market, and the economic power and capacity of the alleged violator to enforce restrictive provisions.

The fact that it is necessary to make an inquiry into the question of substantiality makes it clear that exclusive dealing contracts or arrangements are not legal per se. On the other hand, the fact that such inquiry is made does not mean that the rule of reason is employed. The technique adopted to determine the question of substantiality is similar to that in the rule of reason. But the analogy goes no further. Once substantiality is found to exist, these arrangements may be said to be illegal per se because there is no further inquiry into the reasonableness or beneficial effects that may, in fact, flow from such arrangements in a particular case. But it must be emphasized that the necessity of finding substantiality precludes such contracts from being per se illegal. Thus, it appears that the courts and the Federal Trade Commission have carried out the congressional intent in regard to exclusive dealing arrangements by applying a test of legality that falls between the rule of reason and illegality per se tests.

JAMES R. STRICKLAND.

Trade Regulation—Robinson-Patman Act—Unjustified Price Discrimination—Additional Requirements Necessary to Constitute Violation of Section 2(a).

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act,¹ prohibits an interstate seller from making certain price discriminations. The section in part states:

³¹ Cf. Revlon Products Corporation, 3 CCH TRADE REG. REP. (10th ed.) ¶ 25,184, *motion to reopen denied*, ¶ 25,249 (F. T. C. 1954); Beltone Hearing Aid Co., 3 CCH TRADE REG. REP. (10th ed.) ¶ 25,397 (F. T. C. 1955) (Here the order is not a final Commission order, but a hearing examiner's ruling.)

¹ 38 STAT. 730 (1914), 15 U. S. C. § 13 (1946), as amended, 49 STAT. 1526 (1938), 15 U. S. C. § 13 (Supp. 1952).

"That 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 or commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, . . . 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. . . ."

In addition to an unjustified price discrimination² this statute seems to require that (1) the defendant be engaged in interstate commerce, (2) the discrimination occur in the course of such interstate commerce, and (3) the discrimination be of such a nature that the effect may be substantially to lessen competition, or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. This note assumes the existence of a price discrimination³ and will deal only with these additional requirements of Section 2(a).

With the exception of the "flow of commerce"⁴ and "bulk storage"⁵ doctrines, courts find little trouble in determining whether the alleged price discriminator was engaged in interstate commerce.⁶ Since the "affection doctrine"⁷ of the Sherman Act has been found inapplicable to Section 2(a) of the Clayton Act,⁸ a defendant solely engaged in intrastate commerce is not within the coverage of this section regardless of any effect his discrimination may have on interstate commerce.⁹

² Certain defenses are available to the alleged discriminator in justification of his price differences. They are contained in Subsections (a) and (b) of Section 2 of the Clayton Act. For a recent discussion see Fortas, *Affirmative Legal Defenses*, HOW TO COMPLY WITH THE ANTITRUST LAWS 187 (Chicago Commerce Clearing House, 1954).

³ For a discussion of this problem see Correa, *Discrimination in Prices*, HOW TO COMPLY WITH THE ANTITRUST LAWS 152 (Chicago: Commerce Clearing House, 1954).

⁴ This applies to products which after being produced or refined in one state are transported across state lines and sold from storage facilities in another state. *Standard Oil Co. v. Federal Trade Commission*, 340 U. S. 231 (1951); *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N. D. Ill. 1941).

⁵ This doctrine refers to intrastate sales where the goods involved were stored in bulk warehouses or storage tanks but had moved in interstate commerce prior to the storage. *Walling v. Jacksonville Paper Co.*, 317 U. S. 564 (1943); *Alabama Independent Service Station Ass'n v. Shell Petroleum Corp.*, 28 F. Supp. 386 (N. D. Ala. 1939).

⁶ Austin, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 14* (Philadelphia: American Law Institute, 1953).

⁷ *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U. S. 219 (1948).

⁸ *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S. D. Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950.)

⁹ *But see Bowamn Dairy Co v. Hedlin Dairy Co.*, C. C. H. TRADE REG. REP. (10th ed.) ¶ 67,959 (N. D. Ill. 1954). The defendant was an intrastate dealer and

The requirement that the discrimination must have occurred *in the course* of defendant's interstate commerce has caused difficulty. It has been established that if defendant's goods are moving to him across state lines, as in the "flow of commerce" cases, then any discriminatory prices in his later sales will meet this requirement. This may be illustrated by a case in which the defendant refines gasoline in Indiana, ships it to storage tanks in Illinois, and competes with plaintiff, an intrastate dealer who buys gasoline from an Illinois corporation and sells it in Illinois. Defendant's discriminatory sales to customers of plaintiff would be in the course of his interstate commerce.¹⁰ Section 2(a) may also be held applicable even if only one of the discriminatory sales was made in interstate commerce.¹¹ On the other hand, most courts have taken the view that a discriminatory act in intrastate commerce resulting in an injury to an intrastate merchant is not deprived of its local character merely because the same seller is conducting other transactions in interstate commerce. For example, in *Shlomchik v. Hygrade Bakery Company*¹² the defendant manufactured bakery products and sold them in interstate commerce. The plaintiff, an intrastate operator, sold similar products. The defendant was charged with following plaintiff's salesmen and underselling them while at the same time defendant was maintaining higher prices elsewhere. In regard to the jurisdictional requirement that the discrimination must occur in the course of defendant's interstate commerce, the court said:

"In order for the sales here involved to come under the Clayton Act as amended by the Robinson-Patman Act, they must have been made in interstate commerce. The fact that the defendant conducts other business across state lines is not enough, nor is the additional fact that the effect of the discrimination may be to lessen competition with the person [the defendant in this case] who grants the benefit of such discrimination."¹³

The court further said that Congress plainly did not intend to regulate

the plaintiff was engaged in interstate commerce. The plaintiff alleged that the defendant had by means of discriminatory prices taken customers away from the plaintiff. The defendant moved for summary judgment on the ground that none of the alleged practices had occurred in interstate commerce. The court in denying defendant's motion relied on *Moore's Bakery v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954). The parties in the *Mead* case represented the converse of this situation with the defendant there being the party engaged in interstate commerce. However, the court said that since the plaintiff would be amenable to suit by the defendant under the *Mead* decision, then the plaintiff must be accorded a corresponding right.

¹⁰ *Midland Oil Co. v. Sinclair Refining Co.*, 41 F. Supp. 436 (N. D. Ill. 1941).

¹¹ The present language of Section 2(a) of the Clayton Act is that it covers situations "where either of any of the purchases involved in such discrimination are in commerce."

¹² *C. C. H. TRADE REG. REP.* (1953 Trade Cas.) ¶ 67,632 (E. D. Pa. 1953).

¹³ *Id.* at 68,992.

every transaction of every business engaged in interstate commerce and that the phrase "in the course of such commerce" indicates an intent to limit the operation of the Act to interstate transactions and not to attempt to regulate those which are wholly intrastate even though part of the seller's business may be interstate. This action was dismissed for lack of jurisdiction.¹⁴

Subsequently, the United States Supreme Court in *Moore's Bakery v. Mead's Fine Bread Company*¹⁵ reached a different result, deciding that such a discrimination had occurred in the course of defendant's commerce and was therefore within the scope of Section 2(a) of the Clayton Act.¹⁶ Mead's the defendant, manufactured bread in New Mexico and in one town in Texas. The plaintiff, Moore, was a local baker making and selling his bread only in Santa Rosa, New Mexico. Plaintiff and defendant were competitors in Santa Rosa. The defendant, on learning of an agreement by the local merchants to buy exclusively from the plaintiff, cut the price of his bread below cost and kept it low until the plaintiff was forced out of business. During this time de-

¹⁴ *Accord*, *Myers v. Shell Oil Co.*, 93 F. Supp. 670 (D. C. Cal. 1951). The defendant was engaged in interstate commerce but the discriminatory acts complained of by the plaintiff were made wholly in California. The plaintiff was engaged in intrastate commerce only. The court said the question here was whether the discrimination was committed in the course of defendant's interstate commerce. In denying relief under the Clayton Act the court said that Congress had not exercised all of its power over interstate commerce but had dealt only with persons who were not merely engaged in interstate commerce but who also practiced restraints in the course of the interstate commerce. See also *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E. D. N. Y. 1953); *Lewis v. Shell Oil Co.*, 50 F Supp. 547 (N. D. Ill. 1943).

¹⁵ 348 U. S. 115 (1954). This case was begun March 10, 1949, in the United States District Court for the District of New Mexico. It was dismissed at the close of plaintiff's case on the ground that the plaintiff was "in pari delicto" with the defendant. This was affirmed in *Moore v. Mead Service Co.*, 184 F. 2d 338 (10th Cir. 1950). The Supreme Court, in *Moore v. Mead Service Co.*, 340 U. S. 944 (1951), granted certiorari, vacated the judgment, and remanded the case for consideration in the light of *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U. S. 211 (1951). The district court in a new trial again dismissed the plaintiff's complaint and rendered judgment for the defendant on the ground that the price discrimination was justified under the fourth proviso in Section 2(a) of the Clayton Act, allowing discriminatory prices to meet changed market conditions. This was reversed and remanded for new trial in *Moore v. Mead Service Co.*, 190 F. 2d 540 (10th Cir. 1951), *cert. denied*, 342 U. S. 902 (1952). The district court in a new trial gave judgment for the plaintiff for \$57,000 (\$19,000 trebled) under Section 4 of the Clayton Act. This was reversed in *Mead's Fine Bread Co. v. Moore*, 208 F. 2d 777 (10th Cir. 1953), *cert. granted*, 347 U. S. 1012, *rev'd sub nom.* *Moore's Bakery v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954).

¹⁶ A violation of Section 3 of the Robinson-Patman Act, 49 STAT. 1528 (1936), 15 U. S. C. § 13a (1946), was also found. This section, also known as the Borah-Van Nuys Act, prevents, *inter alia*, a person engaged in interstate commerce from selling 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 a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor." This section was once thought to be criminal only, but now it is conceded that it provides for treble damage actions also. Note, 31 N. C. L. Rev. 454 (1953).

defendant's bread prices in the other towns—including the one town in Texas—remained unchanged. Regarding the jurisdictional requirement of interstate commerce, the Supreme Court said:

"Respondent [Mead] is 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. . . . The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him."¹⁷

Nevertheless, the Supreme Court found an interstate connection on the ground that the defendant, an interstate merchant, was the beneficiary of the discrimination. He was financed from his interstate operations and also from other interstate companies in the Mead organization.¹⁸ These sources enabled him to survive while his low prices forced the local competitor out of business.

In this decision the Supreme Court seems to have made a reality of Cyrus Austin's warning that:

"It is unsafe for a seller engaged in interstate commerce to assume that his intrastate pricing policies are without the scope of the [Clayton] Act, even where only intrastate competition appears to be involved. There is always the possibility that the lowering of his intrastate prices will be held to be supported by the higher prices charged interstate purchasers; and this would undoubtedly be the case if such a seller should lower his price throughout an intrastate area to meet (or beat) local competition."¹⁹

The qualifying clause of Section 2(a) which requires a showing that the effect of such discrimination may be substantially (1) to lessen competition or (2) tend to create a monopoly in any line of commerce, or (3) to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination also has presented difficulty in interpretation. The first two of these "effects" were part of the original Clayton Act,²⁰ and the third was added by the Robinson-Patman Act. Protection to individual competitors was

¹⁷ Moore's Bakery v. Mead's Fine Bread Co., 348 U. S. 115, 118 (1954).

¹⁸ Defendant was affiliated with an interlocked chain of bakeries operating in southwest United States. The Court of Appeals for the Tenth Circuit said the fact that the stockholders and officers of the Mead Company in New Mexico were also stockholders and officers of other Mead organizations would not prove that the price war affected interstate commerce in the absence of a showing that the interlocking corporate ownership was related to the price war. Mead's Fine Bread Co. v. Moore, 208 F. 2d 777, 779 (10th Cir. 1953).

¹⁹ Austin, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 17 (Philadelphia: American Law Institute, 1953).

²⁰ 38 STAT. 730 (1914), 15 U. S. C. § 13 (1946).

intended by this language,²¹ but the problem remains whether injury to an intrastate operator will fulfill the requirement.

In cases brought by the Federal Trade Commission public policy is of primary importance, and some probability must exist that interstate commerce will suffer one of the proscribed effects.²² However, private damage actions under the third possible effect involve no general public policy,²³ but the question remains whether the commerce or competition injured must be interstate. The United States Court of Appeals for the Tenth Circuit took the view in *Moore v. Mead* that it was still necessary for the plaintiff to prove an effect on interstate commerce.²⁴ However, the Supreme Court's decision in the *Mead* case²⁵ appears to take the view that an injury caused by price discriminations of one engaged in interstate commerce against an individual merchant competing locally will come under the prohibition of the Clayton Act regardless of the resulting effect on conditions in interstate commerce. The argument that the destroyed competition did not have to be interstate was submitted to the Supreme Court in the *Mead* case²⁶ and was apparently accepted by the following language in the Court's opinion: "The destruction of competition was plainly established as required by Section 2(a) of the Clayton Act." The only competition involved was that between Moore and Mead in Santa Rosa, New Mexico—which seems entirely intrastate. Therefore, it appears that in treble damage actions under Section 2(a) of the Clayton Act,²⁷ so long as the jurisdictional

²¹ The original Clayton Act was "too restrictive, in requiring a showing of general injury to competitive conditions in the line of commerce concerned; whereas the more immediately important concern is an injury to the competitor victimized by the discrimination." SEN. REP. NO. 1502, 74th Cong., 2d Sess. 4 (1936).

²² *Federal Trade Commission v. Morton Salt Co.*, 334 U. S. 37 (1948); *Corn Products Refining Co. v. Federal Trade Commission*, 324 U. S. 726 (1945); *Samuel H. Moss Inc. v. Federal Trade Commission*, 148 F. 2d 378 (2d Cir. 1945); *Minneapolis-Honeywell Regulator Co. v. Federal Trade Commission*, 191 Fed. 2d 786 (7th Cir. 1951), *cert. denied*, 344 U. S. 206 (1952).

²³ *Reid v. Doubleday and Co.*, 109 F. Supp. 354 (D. Ohio 1952); *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S. D. Cal. 1951).

²⁴ *Moore v. Mead Service Co.*, 184 F. 2d 338 (10th Cir. 1950), *rev'd on other grounds*, 340 U. S. 944 (1951).

²⁵ *Moore's Bakery v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954).

²⁶ Brief of Petitioner, *Moore's Bakery v. Mead's Fine Bread Co.*, 348 U. S. 115 (1954).

²⁷ This is also true under Section 3 of the Robinson-Patman Act. See note 14 *supra*. The Supreme Court, in disposing of the added requirement in Section 3—"for the purpose of destroying competition, or eliminating a competitor"—which replaces the qualifying clause of Section 2(a) of the Clayton Act, said there was ample evidence to support a finding that defendant's purpose in the price war was to eliminate a competitor. Again an intrastate competitor appears sufficient. Other cases involving violations of Section 3 are: *Atlantic Co. v. Citizens Ice and Cold Storage Co.*, 178 F. 2d 453 (5th Cir. 1949); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950); *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S. D. Cal. 1950); *Hipps v. Bowman Dairy Co.*, C. C. H. TRADE REG. REP. (1950-51 Trade Cas.) ¶ 62,859 (N. D. Ill. 1951).

requirement is met, any destruction of a competitor—in either intrastate or interstate competition—will per se satisfy the qualifying clause.

The decision of the United States Supreme Court in *Moore v. Mead* extends coverage of Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, beyond any previous interpretation. This is in keeping with the original intentions of the proponents of the Robinson-Patman amendment to provide more protection to small business.²⁸

²⁸ AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 1 (Philadelphia: American Law Institute, 1953); Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140 (1936).