Antitrust Law -- A Rocky Road for Price Discrimination In North Carolina

T. Carlton Younger Jr.
NOTES

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In *Rose v. Vulcan Materials Co.* the North Carolina Supreme Court was given its first opportunity to apply North Carolina antitrust law to price discrimination. The relationship of the parties involved, however, partially obscured the problems of price discrimination. Normally, price discrimination pits the government or the victim of the discrimination against the discriminating seller. In *Rose* the favored buyer demanded damages from the seller because of the seller's failure to perform the contract which created the discrimination.

T. W. Rose and J. E. Dooley, owners of the only rock quarries in a three county area, executed two agreements in January 1959 for the sale of crushed stone. Under the first agreement Dooley received a ten-year lease on the Rose quarry. He was not required to operate that quarry, and in fact, he never mined any stone. Besides a two-cents per ton royalty on all stone taken from the leased quarry, Rose was to receive a price advantage on two types of gravel extracted from the leased mine: twenty-five cents per ton on crusherrun stone and twenty cents per ton on clean concrete stone. The second agreement gave Rose similar ten-year price advantages and these differentials were to be applied to Rose's purchases from the quarry owned by Dooley.

1. *282 N.C. 643, 194 S.E.2d 521 (1973).*
3. The agreement relative to the Rose quarry specified:
   Should the tenant decide to operate the above mentioned quarry he agrees
to sell stone to [plaintiff] F.O.B. this quarry for the following prices:
   Crushed run stone at $1.45 per ton
   Clean Concrete stone at $1.80 per ton
   #11 stone at $2.20 per ton
   The tenant further agrees that he will not sell any stone produced at this
quarry to anyone other than the Highway Commission for a price less than
the following:
   Crushed Run stone at $1.70 per ton
   #11 stone at $2.20 per ton
   Clean Concrete stone at $2.00 per ton
4. Another agreement gave similar terms on price for operation of the Dooley
quarry:
   Witnesseth, that the seller agrees to furnish the buyer stone F.O.B. the
quarry site at Cycle, North Carolina at the following prices:
Vulcan Materials Company assumed the contracts with Rose after it had purchased the Dooley firm. In May 1961 Vulcan informed Rose that it was equalizing prices to all customers because of buyer discontent and the company's fear of liability. Rose protested but paid the higher price, claiming there was no alternative source of supply. When the agreements expired, Rose brought suit for the difference between the higher price demanded by Vulcan and the contract price.

The North Carolina Court of Appeals, reversing a superior court ruling for Rose, found that the contracts violated both federal and state antitrust laws and, thus, could not be enforced. The North Carolina Supreme Court, however, held that the court of appeals had incorrectly interpreted the applicable laws and therefore reversed in favor of Rose.

In analyzing the alleged statutory violations, the supreme court first held that the price discrimination portion of the Robinson-Patman Act did not apply because the defendant had failed to show that any sale had occurred in interstate commerce. Turning to state law, the

Crusher run stone at $1.25 per ton
Clean Concrete stone at 1.60 per ton
No. 11 stone at 2.00 per ton...

J. E. Dooley & Son, Inc., agree that they will not sell any stone to anyone other than the State Highway Commission for prices less than the following from the Cycle Quarry:

Crusher run stone $1.50 per ton
Clean Concrete stone 1.80 per ton
No. 11 stone at 2.00 per ton

The above restrictions shall apply only to an area of an eight mile radius of Elkin, North Carolina and shall apply for a period of ten years from the date of this contract.

Id. at 648, 194 S.E.2d at 525.

6. Id. at 53.
9. The Robinson-Patman Act, 15 U.S.C. § 13 (1970), has two jurisdictional prerequisites: (1) the seller must be engaged in interstate commerce; and (2) a discrimination in price must result from the conduct of such interstate commerce. Interpretation of the second requirement has been uncertain since the Supreme Court decision of Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). Moore implied that resources acquired in interstate commerce that are used to finance intrastate discriminations would satisfy the "course of commerce" requirement. Like the North Carolina Supreme Court in Rose, however, most of the federal courts of appeals have consistently required proof of a discriminatory interstate sale. See, e.g., Kitner & Mayne, Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act, 58 Geo. L.J. 1117 (1970). See also Note, The Commerce Requirement of the Robinson-Patman Act, 22 Hastings L.J. 1245 (1971).

The unsettled nature of this issue was demonstrated in Littlejohn v. Shell Oil Co., 456 F.2d 223 (5th Cir. 1972). The three-judge panel ruled that an interstate sale was
supreme court ruled that section 75-5(b)(5) of the North Carolina General Statutes, which had been applied by the court of appeals, did not cover the conduct of the parties.\textsuperscript{10} Since this provision prohibits geographic discriminations that injure competitors of the seller and since the proven injuries were only to competitors of the buyer, the court held that the statute was inapplicable.

The supreme court also rejected the argument that the agreements were "restraints of trade" under section 75-1 of the North Carolina General Statutes.\textsuperscript{11} After tracing the history of competitive restraints, the court concluded that all restrictions not condemned at common law were to be tested for their unreasonableness. The supreme court further held that, if particular offenses were not analyzed by the common law courts, the burden of proving unreasonableness rests on the party asserting illegality. Since price discrimination had not been subjected to common-law review, Vulcan was found to have the burden of proof. However, the court found that Vulcan had failed to satisfy this requirement. The not required. This decision received mixed "reviews" from commentators. Compare Note, Robinson-Patman Act: "In Commerce" Jurisdictional Requirement Broadened, 57 MINN. L. REV. 1035 (1973), with 86 HARV. L. REV. 765 (1973). The Fifth Circuit, sitting \textit{en banc}, reversed the initial decision. Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir. 1973). The Tenth Circuit also has rejected this principle. Continental Baking Co. v. Old Homestead Bread Co., 476 F.2d 109 (10th Cir. 1973). Although the rule is not absolute, the requirement of an interstate sale will probably remain in force until specifically changed by the United States Supreme Court.

\textsuperscript{10} 282 N.C. at 653-55, 194 S.E.2d at 529. Interpretation of section 75-5(b)(5) demands a careful reading of the statute.

(b) In addition to the other acts declared unlawful by this chapter, it is unlawful for any person directly or indirectly to do, or to have any contract express or knowingly implied to do, any of the following acts:

\begin{itemize}
  \item [5] While engaged in dealing in goods within this State, at a place where there is competition, to sell such goods at a price lower than is charged by such person for the same thing at another place, when there is not good and sufficient reason on account of transportation or the expense of doing business for charging less at one place than at the other, or to give away such goods, with a view to injuring the business of another.
\end{itemize}

N.C. GEN. STAT. § 75-5(b)(5) (1965). The most important limitation on this provision is a result of legislative drafting: the General Assembly described all of the prohibited activities with reference only to the verb "to sell." The statute therefore applies only to sellers. The same construction is encountered in the Robinson-Patman Act, and the limitation to sellers has been held constitutional. United States v. National Dairy Prods. Corp., 372 U.S. 29 (1963) (constitutional attacks on vagueness and due process dismissed).

Further wording limits the general usefulness of section 75-5(b)(5) even for sellers. Price discrimination traditionally has required two sales; however, this provision requires two sales in two different regions. Therefore the statute is directed more at locality discriminations than at general forms of price discrimination. See CAL. BUS. \& PROF. CODE § 17031 (West 1964), \textit{applied in} Harris v. Capital Records Distrib. Corp., 64 Cal. 2d 454, 413 P.2d 139, 50 Cal. Rptr. 539 (1966).

\textsuperscript{11} 282 N.C. at 657-58, 194 S.E.2d at 531.
court added that even if the pricing agreements were in violation of sections 75-1 and 75-5(b)(7), the decision would not have been changed because the illegal price to other customers could have been severed from the legal price to Rose. The contract was therefore enforceable and the trial court's judgment for damages was reinstated.

**PRICE DISCRIMINATION**

A prerequisite for evaluating the Rose decision is an understanding of price discrimination, the most complicated trade restraint. Only a simplistic explanation is possible here. The condemned activities involve transactions by a seller which "discriminate in price between different purchasers of commodities of like grade and quality" and which economically injure another buyer or seller. Price discrimination, however, does not depend solely on a price differential. If the difference in prices charged to various customers reflects decreased marketing and production costs or competition, the discrimination is lawful. This special price, however, must be available to all customers practically as well as theoretically. The price differential is illegal when it is the extension of favoritism, a result of competitive power or resources.

The economic nature of the pricing agreements, therefore, is ex-

12. *See* note 44 *infra.*
13. 282 N.C. at 658, 194 S.E.2d at 531.
17. The need for methods of evaluating pricing structure is demonstrated in *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948). Morton had a special pricing system that provided for discounts based on two criteria: single car-load orders and accumulated purchases. The structure seemed to give preferential treatment to a few large buyers. The Court concluded that the effects of a pricing system are crucial elements that must be examined. The discounts must be practically available to everyone, not simply theoretically available. *See also United States v. Borden Co.*, 370 U.S. 460 (1962).
tremely important. The original vertical integration of the Rose company—a quarry and a cement plant—should have given that firm a competitive advantage. However, if Rose had used his quarry to supply only his needs for stone, he would have lost valuable economies of scale in his operations. The cost of internally supplied stone would have been greater than externally purchased stone. By maintaining regular production, Rose could satisfy his cement requirements and sell the excess. This excess stone competed directly with gravel from the Dooley quarry. Thus in order to justify regular operation, Rose merely had to cover his incremental costs of production. This type of competition was disastrous for Dooley.

Legal analysis of the economic effects in Rose demands initial recognition of one principle: while the contested pricing agreements allowed Dooley to eliminate Rose as a competitor, such a result is not a violation of North Carolina antitrust laws. The special contract price given to Rose as consideration for the lease of his quarry appears lawful. Nevertheless, the inclusion of minimum prices that Dooley

19. See Texas Gulf Sulphur v. J.R. Simplot Co., 418 F.2d 793 (9th Cir. 1969). The plaintiff cited this case, which found no price discrimination, because of its factual similarity to Rose and the nature of the protection bargained for by Simplot, protection from upward swings in price. Brief for Plaintiff-Appellee, vol. 15, at 11, Rose v. Vulcan Materials Co., 15 N.C. App. 695, 190 S.E.2d 719 (1972). The creation of the contract in Simplot was a natural and sound business decision for a purchaser who depends primarily on one input. However, the contract was not unbalanced: the agreements gave Texas Gulf a relatively stable demand against which to schedule production, allowing the company to increase efficiency and reduce cost. In addition, if the market price decreased, Texas Gulf would be protected within a narrow range.

Rose attempted to secure the same advantage which Simplot acquired in its agreement. However, Rose went further and acquired protection from downward swings in price. The agreements did not require that Rose purchase stone from Dooley. Rose had to continue his purchases only so long as he could not secure stone from another quarry at a price (including the costs of transportation) that was less than the price charged by Dooley. Meanwhile, the restrictive agreements prevented Dooley from lowering his price to retain customers or to attract new purchasers. If prices declined greatly, Dooley would have no buyers other than Rose. This threat of a shift in orders gave Rose a bargaining advantage with which he could have obtained new agreements from Dooley with lower purchase prices for the stone.

The Rose decision can thus be distinguished from Simplot by combining contract theory and practical economics. First, in Simplot mutual advantages were obtained by each party in the agreements. In Rose all of the contract provisions benefited Rose. Dooley obtained his advantages from the economic setting, the creation of a local monopoly. Secondly, benefits and losses in Simplot affected only the parties involved. In Rose, Dooley was greatly restricted in his pricing decisions during periods of market decline. However, Rose probably would never lose anything. The real "losers" were Rose's competitors and the eventual consumers. Other purchasers were required to pay an artificially high price for stone. This excess could either be absorbed or transferred to the public. In either case the actual burden of the agreements was carried by other parties.
could charge other buyers was a basis for claiming unlawful price discrimination.\(^20\)

The dynamic nature of the pricing agreements should be the basis for legal analysis. If the market price for crushed stone had fallen, other cement companies in competition with Rose would have been forced to absorb transportation costs from distant quarries to compete with Rose in the Elkin market since the Dooley quarry could not lower its price because of the agreements. All of the purchasers would have been on an equal footing only when Rose's competitors could have purchased gravel at distant quarries for prices substantially less than those which Dooley charged Rose.\(^21\) Rose thus secured a cheap supply of stone and a preferred position for cement manufacture through the price differential.\(^22\) It is this differential which is important, not the prices themselves.

Indeed, North Carolina precedent exists to support a finding of illegal discrimination. In *Shute v. Shute\(^23\)* the supreme court consid-

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20. Inclusion of the restriction on prices to other customers provides the basis for distinguishing *Rose* from a factually similar case in Utah. The Utah Supreme Court held that a contract authorizing lower prices to one customer than to all other customers did not violate the Unfair Practices Act of Utah, *UTAH CODE § 16A-4-3(a) (1943)* (now *UTAH CODE § 13-5-3(a) (1953)*), a statute containing provisions similar to the Robinson-Patman Act, 15 U.S.C. § 13 (1970). *Burt v. Woolsulate, Inc.*, 106 Utah 156, 146 P.2d 203 (1944).

21. The competitive positions of all purchasers will be exactly equal when the market price for stone plus transportation costs equals the contract price between Dooley and Rose. However, the spread resulting from transportation costs may be substantial. Goods that are heavy or bulky have relatively high transportation costs. At some point it becomes more profitable to build a new plant than to ship these products. As a result, regional monopolies or oligopolies are created. This trend towards monopolization is accelerated when the industry depends on a resource that is available only in certain areas. Therefore, the supply of crushed stone and the transportation costs of cement have been the prime factors in the creation of a cement industry which is an accumulation of regional oligopolies.

22. If the purpose of the arrangement had only been to assure the Plaintiff a favorable price, it would have been sufficient to set out the price at which Plaintiff could buy stone and there would have been no need to provide in the agreement that Dooley would not sell to other customers at prices less than those provided for. However, by providing for price discrimination between the Plaintiff and other customers, the agreements became an unreasonable restraint upon trade and contrary to public policy. Brief for Defendant-Appellant, vol. 15, at 10, *Rose v. Vulcan Materials Co.*, 15 N.C. App. 695, 190 S.E.2d 719 (1972).

23. 176 N.C. 462, 97 S.E. 392 (1918). Other jurisdictions have cases legally similar to *Shute*. For example, in *Clark v. Needham*, 125 Mich. 84, 83 N.W. 1027 (1900), the Michigan Supreme Court considered the practical consequences of a lease of manufacturing machinery and voided the contract. The lessor did not intend to use the machinery. Rather, the lease was an indirect method for creating a monopoly. In addition, when the contract was voided, no unjust enrichment resulted because the machinery was returned to the lessee. These factors make the case factually similar to *Rose*.\)
erred actual economic effects and motives in describing the sale of a cotton gin as an illegal division of marketing territories. However, in *Rose* the supreme court refused to follow *Shute*. By strictly construing the jurisdictional requirements of the Robinson-Patman Act and of section 75-5(b)(5) of the North Carolina General Statutes,24 the court precluded the application of either statute.25

**PRICE DISCRIMINATION AS A “RESTRAINT OF TRADE”**

The supreme court also considered the broader question of whether price discrimination was a “restraint of trade” under North Carolina General Statute section 75-1,26 a copy of section 1 of the Sherman Act.27 Although section 75-1 has a federal parentage, the scope of the statute is not necessarily defined by federal precedent. The court outlined its own procedure for analysis because of legislative failure to define “restraint of trade.”28

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24. See notes 8-10 and accompanying text supra.
25. The defendant contended that State v. Atlantic Ice & Coal Co., 210 N.C. 742, 188 S.E. 412 (1936) supported the application of section 75-5(b)(5). Brief for Defendant-Appellant, vol. 15, at 12, *Rose v. Vulcan Materials Co.*, 15 N.C. App. 695, 190 S.E. 2d 719 (1972). While a territorial division was in issue in *Atlantic Ice*, the court's decision in that case was based on section 75-5(b)(3), not on section 75-5(b)(5).
26. N.C. GEN. STAT. § 75-1 (1965) provides: “Combinations in restraint of trade illegal.—Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in the State of North Carolina is hereby declared to be illegal...”
28. The method of analysis chosen by the court appears to be logical on its face. Factual and legal evaluations of trade restraints are to be analyzed relative to a spectrum of judicial applications which runs from common-law definitions to federal interpretations of the Sherman Act. The court implied that an integral part of the *Rose* decision would be to determine the position of North Carolina antitrust law on this continuum. However, the court used this outline only in form, not in substance.

The court maintained that the defendant had attempted to define price discrimination as a per se offense, a contention that exceeded the judicially defined scope of the Sherman Act. Nevertheless, an attempt to balance the interests of the parties was precluded by the court's specifications of the burden of proof. See notes 40-43 infra. Thus, the North Carolina Supreme Court was not forced to determine the scope of restraint of trade under the “rule of reason.”

In determining that no violation existed, the court took the narrowest view possible of its own procedure for analysis. The court refused to consider the effect of the special standards established in the Robinson-Patman Act on Sherman Act coverage. See 1 R. CAllmann, THE LAW OF UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES 335 (3d ed. 1967). Application of the Sherman Act was thus considered only in a situational context (relative to offenses previously attacked by judicial application) rather than in a policy context (relative to the logic for applying rules of analysis). Consequently, the court violated a policy established by the United States Supreme Court for interpreting the Sherman Act: “That statute is aimed at substance rather than form.” United States v. Yellow Cab Co., 332 U.S. 218, 227 (1947). In addition, this difference cannot
G.S. 75-2 says that “[a]ny . . . contract . . . in restraint of trade or commerce which violates the principles of the common law is hereby declared to be a violation of § 75-1.” Thus, the common law on restraint of trade is determinative of at least the minimum scope of G.S. 75-1. And, the body of law applying the Sherman Act, although not binding upon this court in applying G.S. 75-1, is nonetheless instructive in determining the full reach of that statute.29

The federal courts have not analyzed price discrimination as a restraint of trade under the Sherman Act because such cases have been decided under the more specialized provisions of the Robinson-Patman Act.30 Thus, in the absence of federal authority, the supreme court turned its attention to common-law precedent on “restraints of trade.”31

Although every restraint of trade was illegal under the original, common-law rule, this rule has been modified. If the restraint is introduced to protect the consideration exchanged by the parties and its scope is reasonably restricted in time and place, it may be upheld. These restrictions are auxiliary elements in the creation of the agreement; their use is “ancillary” to the primary purpose of the agreement.32 A “rule of reason” was used to evaluate these restrictions.33

be classified merely as structural analysis. See Mueller, The New Antitrust: A "Structural" Approach, 12 VILL. L. REV. 764 (1967). Nevertheless, even if Rose had accepted the policy arguments, the refusal of the court to acknowledge an obvious discrimination as sufficient proof was a gap that could not be bridged by any logical statement.

This judicial maneuvering precluded consideration of the Sherman Act. Under its own common-law powers, the North Carolina Supreme Court in effect dictated that the common law on restraints of trade would become the standard of application for section 75-1. This section thus adds nothing to the prohibitions in section 75-2.

29. 282 N.C. at 655, 194 S.E.2d at 530.
30. Theoretically, the Sherman Act could have been used to attack price discrimination. Dixon, Price Discrimination and the Sherman Act, 27 ABA ANTITRUST SECTION 13 (1965). However, Congress created a special standard under the Robinson-Patman Act. Section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1970), as amended by the Robinson-Patman Act, reads:

That it shall be unlawful for any person engaged in commerce . . . to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved 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. (emphasis added). The “substantial effect” standard of the Act seems to place this test between the standards of the “rule of reason” and the per se rule. Rudolf Callmann gives a more precise explanation.

While the Sherman Act condemns certain acts as illegal by virtue of their intended purpose, a Clayton Act violation ex hypothesi requires proof that the challenged act will have, or is likely to have, the prohibited effect. Thus, the measure of legality under the Clayton Act is whether the defendant’s conduct is likely to diminish competition substantially.

1 R. CALLMANN, supra note 28, at 330. For application of this standard see United Biscuit Co. of America v. FTC, 350 F.2d 615 (7th Cir. 1965), cert. denied, 383 U.S. 926 (1966); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir. 1965).
31. See note 28 supra.
32. The distinction between ancillary and non-ancillary restraints is not solely
According to the North Carolina Supreme Court, non-ancillary trade restrictions do not protect the exchange of consideration, but establish special economic advantages. These restraints will not be analyzed for their reasonableness. Rather, they will be considered per se illegal.\textsuperscript{34}

The supreme court in \textit{Rose} applied the "rule of reason" to the alleged price discrimination even though this restraint was not recognized at common law. The court's use of this rule was probably based on its intuition of the probability that the activity would restrain trade. Per se offenses generally have high probabilities of restricting competition, while only a moderate possibility for such restriction exists with ancillary restraints. The court simply assumed that only a moderate probability of illegality exists with price discrimination.

The court's application of the "rule of reason" is supported by pragmatic economic policy. Price changes normally can be applied as a dynamic force to increase competition. However, this power, when combined with substantial financial strength, can be used to create based on the purposes for which the restrictions are created. The effects of ancillary restraints, often used in employment contracts and in contracts for the sale of goodwill, are felt primarily by the parties directly involved in the transaction. On the other hand, non-ancillary restraints have significant effects on third parties in the market. \textit{See} note 19 \textit{supra}. Interestingly, price discrimination generally has been attacked under statutory schemes which have invalidated non-ancillary restraints. For a general discussion of ancillary and non-ancillary restraints in North Carolina see Aycock, \textit{Antitrust and Unfair Trade Practices in North Carolina—Federal Law Compared}, 50 N.C.L. Rev. 199 (1972).


33. The "rule of reason" was formulated by the Supreme Court in Chicago Bd. of Trade v. United States, 246 U.S. 231 (1918). In applying this standard, the Court was attempting to balance potential benefits and harms of the challenged activities. For a thorough analysis of this method of evaluation see Loevinger, \textit{The Rule of Reason in Antitrust Law}, 50 Va. L. Rev. 23 (1964).

monopolies and to restrain trade.\textsuperscript{35} The legality of price discrimination thus depends on the particular factual situation.

No precise mechanism exists to determine when the "rule of reason" or the per se rule should be applied. However, where the benefits of discrimination are recognized and occur frequently, the flexibility afforded by the "rule of reason" allows the beneficial aspects of that conduct to be utilized more fully.\textsuperscript{36} For that reason the balancing test of the "rule of reason" is preferable to the absolute standard of the per se rule for cases of price discrimination.

Before the "rule of reason" can be applied, however, the burdens of proof must be allocated. When a party attempts to enforce an agreement containing an ancillary restraint, he must demonstrate the reasonableness of the restraint as part of his prima facie case.\textsuperscript{87} However, \textit{Rose} decided that in price discrimination cases the party alleging the illegality must prove the unreasonableness of the restraint.\textsuperscript{88} Thus, price discrimination is held analogous to ancillary restraints for purposes of applying the "rule of reason" apparently because of the court's assumption that under the probability test both concepts offer an equal probability of causing harm. However, the court did not consider them analogous for purposes of allocating the burden of proof.\textsuperscript{39}

\textsuperscript{35} Congress apparently recognized the potentiality of both benefit and harm when it enacted Robinson-Patman in which price discrimination was not made a per se offense. Whitaker Cable Corp. v. FTC, 239 F.2d 253, 256 (7th Cir. 1956). \textit{But see} Wood, \textit{Antitrust Policy: a View from Corporate Counsel}, in \textit{Perspectives on Antitrust Policy} 368, 387 (A. Phillips ed. 1965) (claiming the "substantially lessen" standard of Robinson-Patman is really closely analogous to the per se rule in its operation). One criticism of the Robinson-Patman Act has been the element of rigidity which it has introduced into the market. Austern, \textit{Problems and Prospects in Antitrust Policy—I}, in \textit{Perspectives on Antitrust Policy} 3, 26 (A. Phillips ed. 1965).

\textsuperscript{36} Many states have statutory or constitutional provisions which make restrictive agreements and contracts automatically void. \textit{North Carolina does not have such a provision. J. Flynn, Federalism and State Antitrust Regulation 75 (1964) (citing relevant state statutes and criticizing these automatic provisions).}

\textsuperscript{37} Kadis v. Britt, 224 N.C. 154, 29 S.E.2d 543 (1944). However, this is not an excessive burden. The court in such cases has been concerned primarily with the time and the area of the restriction which is often shown on the face of the agreement. That showing was seemingly made in \textit{Rose}.

\textsuperscript{38} 282 N.C. at 657, 194 S.E.2d at 531.

\textsuperscript{39} In addition, the probability test unfortunately omits one important element from its analysis, the comparative frequency or severity of these two concepts. If ancillary restraints are more frequent and more severe than price discriminations, the court arguably distributed the burden of proof properly. The court is simply favoring the parties opposing the more serious restriction. However, the court gave no indication that it considered this question. It only stated a conclusion. Of course, the supreme court's allocation of the burden may simply be a method used to avoid consideration of price discrimination.
Viewed from another perspective, the Rose decision can be treated as another example of the problems and confusion that accompany defensive pleadings in antitrust cases. Although the same prima facie standards should apply to both offensive and defensive uses of the statutes, courts have been unreceptive to defensive attempts to complicate simple litigation. Nevertheless, because an offensive user of the statutes must only prove a discrimination and injury, it seems inequitable to require a defensive user to prove an unreasonable discrimination and injury. Unfortunately, this prejudice is not unique to the North Carolina Supreme Court. This affliction has surfaced even in the highest federal court.

40. The complex problems of proof encountered when antitrust violations are pleaded as a defense may be traced to congressional failure to specify the defensive scope of the Sherman Act. The importance of the conflicting policies—the need to discourage antitrust violations with a uniform method of interpretation versus the equity of avoiding unjust enrichment—has prevented even the United States Supreme Court from outlining clear rules of interpretation. Sobel, Antitrust Defenses to Contract Actions: A Question of Policy Priorities, 16 Antitrust Bull. 455 (1971).


41. Under the guise of "unreasonableness," the North Carolina Supreme Court seems to have applied a "substantial effect" standard, a derivative of the Robinson-Patman Act. If this was done, however, the same prima facie requirements should have been transferred to plaintiffs. F. Rowe, supra note 14, at 109 (distribution of the burden of proof under Robinson-Patman). However, the court did not account for the specialized wording of the Robinson-Patman Act. Although the analogy between the "substantial effect" standard and the "rule of reason" may be viable, the court's ruling on the burden of proof encounters serious obstacles when N.C. Gen. Stat. § 75-5(b)(7) (1965) is applied since the possibility for applying a per se rule exists under that section. See Aycock, supra note 32, at 216-17.

42. The morass of conflicts created by judicial explanations has produced suggestions for reform. One writer has proposed that the relative guilt or innocence of the parties involved should be the determining factor in the allocation. Comment, The Defense of Antitrust Illegality in Contract Actions: A Suggested Rationale, 15 U. Kan. L. Rev. 183 (1966). Nevertheless, such a policy merely substitutes one problem of balancing for another and is thus not a substantial improvement. Another suggestion incorporates the policy considerations of equity and antitrust enforcement into procedural requirements. The use of rebuttable presumptions, when combined with the "rule of reason," creates not only a uniform pattern of analysis for all types of restraints, but also distributes the burden of proof more equitably. Note, A Suggested Role for Rebuttable Presumptions in Antitrust Restraint of Trade Litigation, 1972 Duke L.J. 595. The major problem with this method is that it complicates an otherwise simple contract action. However, the pleading of the antitrust violation in its present form is an even greater complication.

43. The reasons for avoiding analysis can be seen clearly in Supreme Court cases attempting to resolve the problem. Kelly v. Kosuga, 358 U.S. 516 (1959); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); A.B. Small Co. v. Lamborn
CONTRACT SEVERANCE TO AVOID STATUTORY ANALYSIS

The problems raised by allocation of proof for defensive pleadings are complicated by the use of the "rule of reason." The pleadings and proof demanded by the court to satisfy the prima facie standard become the minimum interests which the court is allowed to balance. Increases in the prima facie standard of the burden of proof only narrow the range of analysis for which the "rule of reason" would be applicable.

Nevertheless, another statutory solution, section 75-5(b)(7), was available to the North Carolina Supreme Court that would not have presented such problems of interpretation. However, the court disposed of the applicability of this provision in a most unusual manner.

Perhaps the portion of the contract purporting to fix the minimum price at which customers other than plaintiff could buy stone is illegal price fixing under G.S. 75-1 and G.S. 75-5(b)(7) . . . . But we do not decide this question since the invalidity of this portion would not affect the validity of those portions of the contract establishing the price at which plaintiff could buy.

The court seems to have manufactured a mystical basis for severance. By its very nature, price discrimination involves a minimum of two sales and two buyers. No discrimination can occur when all sales are made to one party. The unreasonableness of sales to other purchasers is evaluated not by absolute price but by their relation to prices charged to the favored buyer. The attack is on the differential—the discrimination—and not on the prices themselves. The court's use of severance implies a judicial misunderstanding of the offense. Thus, perhaps, the purpose for using severability was the reluctance of the court to interpret section 75-5(b)(7), which appears applicable to the facts in Rose and is not limited by grammatical construction as is section 75-5(b)(5).


44. N.C. GEN. STAT. § 75-5(b)(7) (1965) states as follows:

Except as may be otherwise provided by article 10 of chapter 66, entitled "Fair Trade," while engaged in buying or selling any goods in this State to make, enter into, execute or carry out any contract, obligation or agreement of any kind by which the parties thereto or any two or more of them bind themselves not to sell or dispose of any goods or any article of trade, use or consumption, below a common standard figure, or fixed value, or establish or settle the price of such goods between them, or between themselves and others, at a fixed or graduated figure, so as directly or indirectly to preclude a free and unrestricted competition among themselves, or any purchasers or consumers in the sale of such goods.

45. 282 N.C. at 658, 194 S.E.2d at 531 (emphasis by the court).

46. See notes 9-10 supra.

47. Section 75-5(b)(7) does not require sales in two different areas and does not
The failure of the supreme court to consider section 75-5(b)(7) removed a major interpretive obstacle; the court was not forced to consider whether the "rule of reason" or the per se rule would be used to interpret section 75-5(b)(7). Strictly construed, the per se rule should be applied. The special federal standard for evaluating price discrimination is demanded by the restrictive wording of the Robinson-Patman Act, but section 75-5(b)(7) has no such restrictive language. In addition, other sections of chapter 75, not influenced by the "restraint of trade" limitation of section 75-1, have been regarded as per se offenses. On the other hand, federal experience with problems of interpretation and enforcement in cases of price discrimination might imply that the "rule of reason" is to be used, apart from the wording of the Robinson-Patman Act. However, to be consistent, the court should use federal precedent under Robinson-Patman. If federal interpretations had been applied, the activities of the parties in *Rose* could have been held illegal.

**Future Application of Rose**

The manner in which the court disposed of *Rose* renders it a highly technical and limited decision on price discrimination. If price discrimination is pleaded as a defense, the party claiming the discrimination must prove the unreasonableness of the discrimination under section 75-1. When the court is subsequently faced with an offensive assertion of a restraint, it will have two available avenues for review consistent with *Rose*. On the one hand, *Rose* can be distinguished as a defensive pleading case, and the court can thus hold that price discrimination is covered by either section 75-1 or section 75-5.

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49. Aycock, *supra* note 32, at 216-17 (contention that section 75-5(b)(7) should use the per se rule for interpretation).
51. The original problem that prevented the supreme court from applying the Robinson-Patman Act was a lack of jurisdiction created by the defendant's failure to offer proof of an interstate sale. The court never reached the issue of whether competition was in fact substantially lessened. This factual question should form the core of a prima facie case under Robinson-Patman; however, as a practical matter, few cases have meticulously analyzed the difference between "substantial" and "inconsequential," especially as a means for dismissing a suit. F. Rowe, *supra* note 14, at 132. The requirement has been weakened by expansive decisions of the federal courts. See, e.g., Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954).
(b)(7). The plaintiff in that situation will merely be required to prove the offense and the injury.

On the other hand, the court might extend the severance theory of *Rose*. Offensive and defensive application of antitrust statutes in North Carolina would be relatively consistent, except for some distinctions in the burden of proof. Effectively, North Carolina would have no price discrimination statute. The legislature would have to express a clear intent to attack price discrimination by enacting another statute.

The preferred course of action would be the application of an existing statute, section 75-5(b)(7). This statute can be interpreted as a broadly worded provision attacking price discrimination.\(^5\) Of course, this choice would mean the abandonment of the severance option used in *Rose*. Distinguishing the *Rose* case as a decision on defensive pleading is not entirely satisfactory; nevertheless, the inequity produced by pleading can be attacked separately in another case. The issues of the *Rose* decision will be confusing enough for later applications without offering numerous distinctions in a single court opinion.

If the court does apply section 75-5(b)(7), it must face the problem avoided by the *Rose* decision—whether to apply the "rule of reason" or the per se rule. Although the statute specifically condemns agreements created "directly or indirectly to preclude a free and unrestricted competition," the court could emphasize legislative use of the verb "preclude." The court could find that the General Assembly intended to create a substantive standard requiring proof of more than a mere discrimination, a test analogous to the "substantial effect" standard of Robinson-Patman.\(^5\) The selection of "preclude" arguably demands proof of some degree of exclusion by the discrimination. Such reasoning, it is true, does distort the wording of the statute,\(^52\)

\(^{52}\) Aycock, *supra* note 32, at 206-07, 215-16.

\(^{53}\) Any encouragement of a "substantial effect" standard must be prefaced by a warning. While the rule delineates possible evaluations, it is still very difficult to apply. Indeed, federal courts have experienced great difficulty in applying the Robinson-Patman Act and have been condemned in many of their attempts. In addition, the reluctance of the court in *Rose* to use existing mechanisms in the antitrust area will be present, no matter what rule is applied.

Nevertheless, the "substantial effect" rule should prove beneficial. The demand for proof of noticeable economic constrictions is generally one-sided, avoiding the flood of information in cases using the "rule of reason." The requirement that the effects of the restriction be demonstrated prevents repetitive pleadings of the statute for minor violations, a potential problem if a per se rule is applied. *But see* Austern, *supra* note 14; Austern, *supra* note 35.
but a per se interpretation may make the provision unpalatable for the court.

Continued reliance on the severance theory demonstrates an additional problem. The General Assembly has established an integrated network of legislation condemning trade restrictions. However, many of these provisions were enacted even though statutes existed which covered the condemned conduct. Like other state courts, those in North Carolina have been reluctant to evaluate specialized economic restraints. In order to avoid analyzing these economic problems, the courts have abdicated their responsibility passing the interpretive burden to the legislatures. In an era when potential restraints of trade are as plentiful as gas pumps, the judiciary must realistically apply antitrust law. North Carolina needs a bolder state policy of antitrust interpretation and enforcement which only the courts can provide.

Rose v. Vulcan Materials Co. was far from the ideal case for an analysis of price discrimination. The complications of defensive pleading as well as the factual complexity of the lease distorted the issue of price discrimination. Although the supreme court held that two antitrust provisions could not be applied, it did not positively restrict the application of 75-5(b) (7). This omission may be the most significant aspect of the case. Until a case comes before the court in which price discrimination is pleaded by an offended party, North Carolina will have only a technical, nondefinitive decision on price discrimination.

T. Carlton Younger, Jr.

54. Aycock, supra note 32, at 215.