The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2€ of the Robinson-Patman Act

Michigan Law Review

Follow this and additional works at: https://repository.law.umich.edu/mlr

Part of the Antitrust and Trade Regulation Commons, Consumer Protection Law Commons, and the Legislation Commons

Recommended Citation
Michigan Law Review, The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2€ of the Robinson-Patman Act, 83 Mich. L. Rev. 1584 (1985).
Available at: https://repository.law.umich.edu/mlr/vol83/iss6/11

This Note is brought to you for free and open access by the Michigan Law Review at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in Michigan Law Review by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
The Distinction Between the Scope of Section 2(a) and Sections 2(d) and 2(e) of the Robinson-Patman Act

Price discrimination, under section 2(a) of the Robinson-Patman Act, is lawful if it can be justified under one of several exculpatory provisions or if it has no adverse effect on competition. In contrast,

1. At law, price discrimination is a mere difference in price. FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). However, the economic definition is different from the legal definition. To an economist, price discrimination occurs when “two (or more) sales [are made] at prices that are not in the same proportion to the marginal cost of each sale.” R. Posner, The Robinson-Patman Act, Federal Regulation of Price Differences 3 (1976) (quoting G. Stigler, The Theory of Price 209 (3d ed. 1966)). The difference in the two definitions is not of major practical significance, see note 42 infra, and the legal definition is a workable rule of thumb for measuring price — “provided the economic indicia of discrimination . . . are not ignored in the application of the other criteria of the statute.” F. Rowe, Price Discrimination Under the Robinson-Patman Act 97 (1962) (emphasis added).

As § 2(a) recognizes, see note 3 infra, price discrimination can be either direct or indirect. Direct price discrimination occurs when the seller charges different prices to different purchasers for the same goods or offers one buyer discounts and allowances not available to another buyer. Indirect price discrimination occurs when the buyer receives something of value not offered to other buyers, through collateral contract terms or a separate and independent business arrangement that has no nexus with the price quotation. See, e.g., National Dairy Prods. Corp. v. FTC, 412 F.2d 605 (7th Cir. 1969); Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4, 8 (E.D. Pa. 1977); F. Rowe, supra, at 103-05; Indirect Price Discrimination Under the Robinson-Patman Act, 49 NW. U. L. Rev. 225 (1954) [hereinafter cited as Robinson-Patman Symposium]. The economic objections to price discrimination include:

[F]irst . . . a price difference not justified by a difference in cost may distort competitive relationships and impair efficiency at the customer level. . . . The second economic objection to price discrimination is that it is a symptom of — and, more important, a condition fostering — monopoly or cartel pricing at the seller level.

R. Posner, supra, at 3-4.


3. Section 2(a) states 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 of commodities . . . where such commodities are sold for use, consumption, or resale . . . 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: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery . . . And provided further, That nothing herein contained shall prevent price changes from time to time . . . in response to changing conditions affecting the market. . . .


The “changing conditions” proviso permits a seller to respond to changes in market conditions that are beyond his control by engaging in temporary and limited price discrimination.

The Attorney General’s National Committee to Study the Antitrust Laws 178 (1955). For example, if a firm sells a product in two areas and there is an unexpected increase in demand for its product in one area, the firm will raise its price in that area as a means of rationing its supply, which has suddenly become short in relation to the newly increased demand. This price increase could create the illusion of price discrimination, because the firm will be selling the same good at different prices in different areas. However, as the seller increases output in the market in which demand has suddenly risen, prices will fall. This process of adjustment would
discrimination related to services and facilities, covered under sections 2(d) and 2(e), is prohibited irrespective of competitive impact. A problem arises when a seller's discriminatory conduct conceivably falls within the scope of both section 2(a) and sections 2(d) or 2(e) of the Act. If a plaintiff has the choice of suing under either or both sec-

be "inhibited rather than facilitated by forbidding the temporary 'discrimination.'" R. POSNER, supra note 1, at 13. This temporary discrimination is distinct from the systematic, persistent discrimination engaged in by cartels and monopolies. See id. at 13-15. It is unclear whether or not the judiciary can distinguish between sporadic and systematic discrimination. To avoid unintentional "inhibition" of market price adjustment by the judiciary, the seller should be allowed to utilize the defenses available under § 2(g). R. BORK, THE ANTITRUST PARADOX 391 (1978).

Section 2(a) also has provisions allowing a seller to select his own customers, thereby refusing to deal with a potential customer, and allowing the seller to pass on to a purchaser savings associated with sale of a product in a specific quantity or by a particular method. For discussion of the consumer selection defense, see FTC v. Simplicity Pattern Co., 360 U.S. 55, 64 (1959); 3 E. KINTNER & J. BAUER, FEDERAL ANTITRUST LAW 448-54 (1983) [hereinafter cited as 3 KINTNER & BAUER]; Barber, Refusals to Deal, 1957, at 21-23. For discussion of the cost-justification defense, see 3 KINTNER & BAUER, supra, at 323-72; F. ROWE, supra note 1, at 265-321; Kuenzel & Schiffres, Making Sense of Robinson-Patman: The Need to Revitalize Its Affirmative Defenses, 62 VA. L. Rev. 1211, 1218-33 (1976); see also Standard Oil Co. v. FTC, 340 U.S. 231, 240-41 (1951).

The seller also has a complete defense to a § 2(a) action if his discrimination was "made in good faith to meet an equally low price of a competitor . . . ." 15 U.S.C. § 13(b) (1982). Likewise, the seller has a tactical advantage because the majority of courts have held that the buyer (plaintiff) must prove an adverse effect on competition. See 3 KINTNER & BAUER, supra, at 251-54; see generally Brooks, Injury to Competition Under the Robinson-Patman Act, 109 U. PA. L. Rev. 777 (1961); cf. Automatic Canteen Co. v. FTC, 346 U.S. 61, 79 (1953) (burden of proof on plaintiff in a § 2(f) action). But see Samuel H. Moss, Inc. v. FTC, 148 F.2d 378 (2d Cir.) (burden of proof on defendant), cert. denied, 326 U.S. 734 (1945).

4. Section 2(d) reads:

It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

15 U.S.C. § 13(d) (1982). Section 2(e) states that:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

15 U.S.C. § 13(e) (1982). In contrast to a § 2(a) action, the buyer in a § 2(d) or § 2(e) action does not have to prove competitive injury. FTC v. Simplicity Pattern Co., 360 U.S. 55, 65, 71 n.18 (1959); Kirby v. F.R. Mallory & Co., 489 F.2d 904 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974). Because §§ 2(d) and 2(e) operate independently of § 2(a), the cost justification defense of § 2(a) does not apply. See FTC v. Simplicity Pattern Co., 360 U.S. 55 (1959). However, the "meeting competition" defense, discussed in note 3 supra, is available in a § 2(d) or § 2(e) charge. Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499 (D.C. Cir. 1961), cert. denied, 369 U.S. 888 (1962).

Although §§ 2(d) and 2(e) have some semantic differences, courts have construed them to impose identical duties on the seller. "[S]ection 2(e) has long been viewed as coterminous with § 2(d), and courts have consistently resolved the two sections into an harmonious whole." Kirby v. P.R. Mallory & Co., 489 F.2d 904, 909 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); see 3 KINTNER & BAUER, supra note 3, at 354 n.4; see also F. ROWE, supra note 1, at 372; Annot., 24 A.L.R. Fed. 9, 33-34 (1975).

5. See THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST
tions, the distinctions between the provisions collapse, and the choice of section may determine the success of the plaintiff's suit.

This Note argues that sections 2(d) and 2(e) were meant to cover only disguised discriminations not within the scope of section 2(a). If the seller's conduct falls within the scope of section 2(a), that section must be applied regardless of whether or not the conduct also falls within the language of section 2(d) or 2(e). Only when section 2(a) does not apply is recourse available under sections 2(d) and 2(e). Part I of this Note looks at general antitrust policy, the limitations of the Clayton Act that led to the enactment of the Robinson-Patman Act, and the legislative history of the Robinson-Patman Act to show that the Act's purpose is to maximize consumer welfare by protecting com-

The classification of an action as price discrimination or services and facilities discrimination has practical importance. First, in a § 2(a) action, but not in a § 2(d) or § 2(e) action, plaintiff must prove an adverse competitive effect and defendant may raise the defense of cost justification. See note 3 supra. Second, under §§ 2(d) and 2(e), discrimination is not directed to price but to other elements of the transaction. See note 4 supra. Third, discrimination in these two sections is couched as a substantive offense, while in § 2(a) it is couched as a jurisdictional prerequisite. See notes 3-4 supra; 3 KINTNER & BAUER, supra note 3, at 538.

6. In Kirby v. P.R. Mallory & Co., 489 F.2d 904 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974), the court noted that indirect price discrimination under § 2(a) must be distinguished from disproportionate payments or services under §§ 2(d) and 2(e). Otherwise the distinction in schemes and standards would collapse, and the two sections would be mere surplusage. 489 F.2d at 910. For a discussion of the different standards of legality under each section, see notes 3-5 supra.

7. See, e.g., Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83 (N.D. Ill.), aff'd per curiam, 371 F.2d 428 (7th Cir. 1966). The court ruled that § 2(a) explicitly covered delivery costs and therefore §§ 2(d) and 2(e) could not be applied. To allow a freight allowance under § 2(d) would "make nugatory the defenses specifically outlined for this offense." 254 F. Supp. at 84. This would be "in contradiction to the apparent goal of all anti-trust legislation, by stifling price competition." 254 F. Supp. at 84. See notes 40-58 infra and accompanying text for discussion of the antitrust goal of promoting competition and its relation to the Robinson-Patman Act.

8. This Note addresses only the issue of which section — § 2(a) or §§ 2(d) and 2(e) — should apply to the actions of a particular seller. After determining which section governs the seller's actions, one must consider the various legal criteria contained in that clause to determine the action's legality. See notes 3-4 supra.
petition. Part II argues that to accomplish this goal, courts should not allow plaintiffs to choose between section 2(a) and section 2(d) or 2(e). Instead, courts should determine if section 2(a) applies, and if it does, should apply section 2(a) to the exclusion of sections 2(d) and 2(e). This result is consistent with the legislative history of the sections and with Supreme Court interpretations of this history. Part III develops an analytical framework for determining whether discriminatory conduct is within the scope of section 2(a) and, if not, whether it is within the scope of sections 2(d) and 2(e).

I. THE PURPOSE OF THE ROBINSON-PATMAN ACT

This Part examines the purpose behind the Robinson-Patman Act and concludes that it is primarily to protect competition. Factors relevant to this inquiry include the general antitrust scheme of which the Act is a part; the Clayton Act, which it amends; the circumstances surrounding its enactment; and the legislative history of the Act.

A. The Antitrust Laws

The Robinson-Patman Act, passed in 1936 as an extension of earlier antitrust laws, must be reconciled "with the broader antitrust policies that have been laid down by Congress." Federal antitrust law promotes competition by regulating activities that "might restrain or monopolize commercial intercourse among the states." "Competition" is a term of art, defined in economics as "any state of affairs in which consumer welfare cannot be increased by moving to an alternative state of affairs through judicial decree." Consumer welfare is maximized through economic efficiency. An activity that restrains


10. See Standard Oil Co. v. United States, 340 U.S. 231, 248-49 (1951) ("The heart of our national economic policy long has been faith in the value of competition. In the Sherman and Clayton Acts, as well as in the Robinson-Patman Act, 'Congress was dealing with competition, which it sought to protect, and monopoly, which it sought to prevent.'") (citation omitted); see also R. BORK, supra note 3, at 58 ("The polar models of the Clayton Act and its various amendments . . . are 'competition' and 'monopoly.' ").


12. Judge Bork argues that competition is an economic concept and therefore only economic definitions should be used. He believes much of the confusion in antitrust law is due to the judiciary's infusion of social and political considerations into the definition of competition. R. BORK, supra note 3, at 58-61.

13. Id. at 61 (emphasis added).

14. This approach assumes that the consumer is rational, has perfect information and therefore maximizes his utility given the constraints of his resources. The most efficient firm will be favored by consumers because it offers the lowest price for goods of a particular quality. An inefficient firm will be forced to match its competitor's price (which it can do in the long run only by becoming efficient) or its customers will switch to a competitor. However, when a business gains a monopoly it can restrict output and therefore raise prices because consumer demand now
output is economically inefficient and harms consumer welfare, and therefore is within the scope of antitrust regulation.

The antitrust laws as a whole are economically oriented and the individual statutes should be read in light of this orientation. In its Sylvania opinion, the Supreme Court recognized that "[c]ompetitive economies have social and political as well as economic advantages, but an antitrust policy divorced from market considerations would lack any objective benchmarks." This emphasis on economic criteria is important when other goals that have been attributed to the antitrust laws, such as protection of small businesses, conflict with consumer welfare maximization.

Other goals should be viewed as subordinate to protecting the consumer from restricted output. As one commentator has observed, the Sylvania opinion "represents a movement away from earlier cases that reflected the view that the antitrust laws could and should satisfy more than one goal, and toward a recognition that consumer wealth maximization should be the sole policy underlying antitrust enforcement." Thus, any interpretation of the Robinson-Patman Act must be consistent with the broader goal of consumer welfare maximization, which is obtained through promoting economic efficiency.


15. Output is restricted whenever the market fails to deliver the best product at the lowest price. Thus output can be restricted by decreasing supply, as well as by less obvious means, such as reducing the product's quality while maintaining the same price. See Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (pt. 1), 74 Yale L.J. 775 (1965).

16. See notes 9-12 supra; see also D.E. Rogers Assocs. v. Gardner-Denver Co., 718 F.2d 1431, 1440 (6th Cir. 1983) (court refused to apply Robinson-Patman Act to conduct that was "well within the competitive boundaries the antitrust laws were enacted to protect"), cert. denied, 104 S. Ct. 3513 (1984).

18. 433 U.S. at 53 n.21 (emphasis added) (citation omitted).
19. For a discussion of the other goals, see, e.g., 3 KINSTNER & BAUER, supra note 3, at 690-92 (claiming that preservation of small businesses is a principal goal); Elzinga, supra note 14, at 1200-02 (arguing that promotion of the liberty of the entrepreneur is a legitimate antitrust goal); Liebeler, Let's Repeal It, 45 Antitrust L.J. 18, 19-20 (1976) (suggesting that the Robinson-Patman Act was motivated by interests other than preserving competition, such as the protection of small businesses); Sullivan, Economics and More Humanistic Disciplines: What Are the Sources of Wisdom for Antitrust?, 125 U. Pa. L. Rev. 1214 (1977) (arguing that antitrust has multiple goals); see also note 39 infra.
B. Inadequacies of the Original Clayton Act in Handling New Forms of Discrimination

The price discrimination clauses of the original Clayton Act were ineffective in curbing excessive concessions secured from sellers by the large chain store buyers. The Clayton Act attempted to curb price discriminations related to local or territorial price cutting, whereby national trusts slashes prices in certain localities to eliminate smaller competing sellers. The lower courts interpreted this congressional emphasis on protection of competition at the primary seller level as barring relief at the secondary buyer level. Although the Supreme Court overruled these interpretations to allow an action for price discrimination at the buyer level, a buyer’s action was still foiled by the unconditional exemption the statute gave to price differences “on account of the differences in the grade, quantity, or quality of the commodity sold.”

24. In United States v. Standard Oil Co., 173 F. 177 (C.C.E.D. Mo. 1909), the circuit court failed to discuss whether or not area price discrimination or receipt of railroad rebates was illegal under the Sherman Act. The Clayton Act was passed in response to dissatisfaction with this opinion. R. POSNER, supra note 1, at 22-23; see H.R. REP. No. 627, 63d Cong., 2d Sess. 8 (1914):

Section 2 of the Bill . . . is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations . . . have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular community where their rivals are engaged in business than at other places throughout the country.

25. The Clayton Act was consistent with the general antitrust policy of promoting competition. Under § 2, price discrimination was considered unlawful if its effect was “substantially to lessen competition” or to “tend to create a monopoly in any line of commerce.” 15 U.S.C. § 13(a) (1982). For a discussion of seller-level discrimination, see C. AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT 7 (1952); Rowe, The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective, 57 COLUM. L. REV. 1059, 1063 (1957).

26. The lower courts held that price discrimination that affected competition at the buyer level among competing customers of the seller was outside the scope of § 2 of the Clayton Act. See, e.g., National Biscuit Co. v. FTC, 299 F. 733 (2d Cir.), cert. denied, 266 U.S. 613 (1924); Mennen Co. v. FTC, 288 F. 774 (2d Cir.), cert. denied, 262 U.S. 759 (1923). See 3 KINTNER & BAUER, supra note 3, at 46; see generally Rowe, supra note 25, at 1063-64.


28. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914). This provision would allow unlimited price differentials to qualify as quantity discounts. Even a minor quantity difference could support a major price difference. F. ROWE, supra note 1, at 7; see also Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620 (6th Cir.) (allowing unlimited quantity discounts under the original § 2), cert. denied, 308 U.S. 557 (1939); TO AMEND THE CLAYTON ACT: HEARING ON H.R. 8442, H.R. 4995, H.R. 5062 BEFORE THE HOUSE COMMITTEE ON THE JUDICIARY, 74th Cong., 1st Sess. 214, 248, 257-58 (1935) (concerning the broadening of the scope of § 2 of the Clayton Act).
grant "quantity discounts" that exceeded any real cost savings in selling to the quantity buyer.29

The 1914 legislature that enacted the original Clayton Act focused primarily on seller competition, failing to foresee the growth of buyer chain stores. During the 1920s and 1930s, grocery chains and other mass marketers began to grow rapidly, nearly tripling their share of total retail sales to the detriment of the independent retailer.30 These stores were able to use their concentrated buying power to compel preferential concessions from sellers, concessions that were outside the scope of section 2 of the Clayton Act.31 These concessions endangered the competitive position of independent local merchants who lacked sufficient economic power to compel similar concessions for themselves and for whom the antitrust laws provided no remedy.32 As a result, organizations of small businessmen lobbied for a strong law to curb the power of these chain buyers.33

At the direction of Congress, the Federal Trade Commission (FTC) undertook an exhaustive investigation of these chain stores.34 The Commission's report showed that the chain stores' ability to undersell their independent competitors was based only partially on efficiency.35 The chain stores' competitive advantage derived from the quantity and functional discounts that they were receiving, based on volume of sales, or from performance of certain marketing functions for which the independent competitor could not qualify.36 In addition, the chain stores gained a competitive advantage through preferential treatment — including receipt of brokerage payments and promotional allowances — that was often granted secretly, often outside the knowledge of their competitors.37 The report concluded that some of the concessions granted to large chain store buyers were not based on efficiency.38

The report prompted congressional action. The Robinson-Patman Act was proposed in response to the inadequacies of the Clayton Act.

---

29. See Automatic Canteen Co. v. FTC, 346 U.S. 61, 64-65 (1953).
30. See F. Rowe, supra note 1, at 5; Rowe, supra note 25, at 1062. See generally C. Austin, supra note 25, at 4-10; Bernard, Handling Modern Buyers: A New Look at Payments for Services Under the Robinson-Patman Act, 44 ALB. L. REV. 89 (1979).
31. 3 Kintner & Bauer, supra note 3, at 45-46. See notes 26-28 supra and accompanying text.
32. See 3 Kintner & Bauer, supra note 3, at 48.
33. C. Austin, supra note 25, at 8.
35. 3 Kintner & Bauer, supra note 3, at 48; Final Report, supra note 34, at 57-63.
36. Final Report, supra note 34, at 64-65, 90; 3 Kintner & Bauer, supra note 3, at 46; Bernard, supra note 30, at 91; see also note 28 supra.
37. C. Austin, supra note 25, at 8; Final Report, supra note 34, at 57-63, 85.
38. See Final Report, supra note 34, at 85-86.
in dealing with these buyer-level price discriminations. The Act's
sponsors claimed that it would "close many dangerous loopholes that
were found in the Clayton Act, but would leave the fields of competi-
tion free and open to the most efficient and, in fact, would protect them
the more securely against the aggressions of those having greater
purchasing power." 39

C. Legislative History of the Robinson-Patman Act

The legislative history supports the conclusion that the purpose of
the Robinson-Patman Act is to maximize consumer welfare by
strengthening competition, not to protect the independent retailer
from the competition of chain stores. 40 Congress believed many price
differences were predatory exercises of monopoly power that were not
economically justified. 41 The Robinson-Patman Act was designed to

39. 80 CONG. REC. 3113 (1936) (statement of Senator Logan) (emphasis added). This
statement implies that the purpose of the bill was consistent with the purpose of antitrust law — to
protect competition. However, in the same statement, he reversed his position: "The more im-
portant concern is in injury to the competitor who has suffered by the discrimination." Id. at
3113 (emphasis added). This statement implies that the purpose of the Act was to protect the
retailer, rather than to protect competition. Much of the confusion surrounding the Robinson-
Patman Act results directly from the confusion surrounding its purposes — protection of compe-
tition versus protection of the independent retailer.

As Part I.A. shows, see notes 9-21 supra and accompanying text, consumer welfare max-
imization — protection of competition to promote economic efficiency — should be the predomi-
nant goal of antitrust policy. If protection of the independent retailer would conflict with
economic efficiency, the economically efficient choice should prevail.

40. The House Judiciary Committee Report explicitly states:
The purpose of this proposed legislation is to restore, so far as possible, equality of opportu-
nity in business by strengthening antitrust laws and by protecting trade and commerce
against unfair trade practices and unlawful price discrimination, and also against restraint
and monopoly for the better protection of consumers, workers, and independent producers,
manufacturers, merchants, and other businessmen.

H.R. REP. No. 2287, 74th Cong., 2d Sess. 3 (1936) (emphasis added). Senator Logan, floor
manager of the bill, explained the committee's concern with chain stores:

[I]f the tendencies [of discriminatory allowances to chain stores] are continued for a few
years, there will be a complete monopoly of many of the necessities of life. When that time
comes the consumer will be at the mercy of such monopoly, and the sensible thing to do is to
prevent the coming of that day by attacking the problem in time . . . . [O]ne of the chief
aims of government is to protect the people against aggressions that naturally follow the
creation of a monopoly.

80 CONG. REC. 3117 (1936); see also 80 CONG. REC. 8115-16 (1936) (statement of Senator Pat-
man, coauthor of the bill, regarding monopoly potential of chain stores); 80 CONG. REC. 8125-27
(1936) (remarks of Rep. Crawford, member of the House Committee and Subcommittee that
considered the bill). Senator Logan further explained that the Robinson-Patman Act would not
"interfere in any way with legal competition" but rather would avoid "destroying competition"
and the resulting monopoly. 80 CONG. REC. 3117 (1936) (emphasis added); see also FTC v.

41. See note 40 supra. Representative Patman, co-sponsor of the bill, explained the congres-
sional concern regarding monopolistic predatory practices not based on economic efficiency:

"[The chain stores] may meet competition . . . . but they cannot cut down the price below cost for
the purpose of destroying the local man." 80 CONG. REC. 8235 (1936).

Judge Posner points out that "the existence of price discrimination is evidence that the seller
or sellers engaged in the discrimination have — and are exercising — monopoly power." R.
POSNER, supra note 1, at 5. Not only does this power distort competitive relations at the buyer
level, but it also creates inefficiencies in the seller's market. These expenditures represent a
strengthen section 2 of the Clayton Act by suppressing "discriminations between customers of the same seller not supported by sound economic differences in their business positions or in the cost of serving them." Consistent with consumer welfare maximization, cost-justified price concessions were still allowed. This was accomplished by amending and strengthening the Clayton Act to prohibit discriminations in price between purchasers "where such discriminations cannot be shown to be justified by differences in the cost."

The statutory defenses for price discrimination show Congress's concern with protecting competition at the buyer level as a means of promoting consumer welfare. If the Act's sole purpose was to protect the independent retailer, the economic justifications would be irrele-

“deadweight social cost” and hence conflict with the goal of consumer welfare maximization. See id. at 4-12; see also note 39 supra and accompanying text (importance of economics to the Act).

42. H.R. REP. NO. 2287, supra note 40, at 7 (emphasis added). Although the legal and economic definitions of price discrimination differ, see note 1 supra, the difference is not of major significance because price discrimination is only a jurisdictional element and not a substantive element of a § 2(a) violation. See note 5 supra. Also, the availability of the cost-justification defense under § 2(a), see note 3 supra, theoretically should bring these two definitions into harmony. See R. Posner, supra note 1, at 40. Posner notes that making cost-justification a defense rather than part of the prima facie case, as the economic definition would do, is not a critical factor in deciding most cases. "The main objection to the cost-justification provision in section 2(a) is not that the burden of proof is on the defendant but that the commission has been so niggardly in the scope it has allowed to the cost-justification defense." Id. at 40.

43. See notes 9-21 supra and accompanying text for a discussion of consumer welfare maximization. As Judge Bork states:

"[T]he obvious congressional intention [is] to let lower costs be reflected in lower prices even when a rival was thereby injured . . . . This willingness to let efficiency have its way in the marketplace is not only proconsumer in itself but throws new light on the rest of the statute. Congress obviously thought that many of the price differentials in existence did not reflect real economies, but rather the predatory exercise of power. Both points indicate a basic consumer welfare rationale.

R. Bork, supra note 3, at 68-69.

44. See note 3 supra for a discussion of the cost-justification proviso of § 2(a). In explaining the cost-justification defense, Rep. Utterback, Chairman of the House Conferences, stated:

"It is through [the cost-justification] clause that the bill assures to the mass distributor, as to everyone else, full protection in the use and rewards of efficient methods in production and distribution in return for depriving him of the right to crush his efficient smaller competitors with the power and resources of mere size. There is no limit to the phases of production, sale, and distribution in which such improvements may be devised and the economies of superior efficiency achieved, nor from which those economies, when demonstrated, may be expressed in price differentials in favor of the particular customers whose distinctive methods . . . make them possible.

80 Cong. Rec. 9417 (1936); see also 80 Cong. Rec. 8111 (1936) (Rep. Patman noting that "the bill expressly provides that the manufacturer may have a difference in price where there is a difference in cost of manufacture.")."

45. H.R. REP. NO. 2287, supra note 40, at 3; see also 80 Cong. Rec. 8111 (1936) (Sen. Patman explains that the purpose of the bill was to prevent coerced concessions, but "recognizes the right of the manufacturer to have a different price for a different quantity where there is a difference in the cost of manufacture.").

46. See note 3 supra.

47. In Jefferson County Pharmaceuticals Assn. v. Abbott Labs., 460 U.S. 150 (1983), the Supreme Court faced the issue of whether or not a government entity was excluded from the coverage of the Robinson-Patman Act. The plurality argued that the Act should be applied "to
Congress saw the potential for a monopoly in restraint of trade in the chain stores and wanted to stop this anticompetitive threat in its infancy; although the independent retailer benefited from such law, his benefit was only incidental to the protection of competition.

Advertising allowances that were not used for advertising were a particular abuse uncovered by the FTC chain store investigation. The legislative history of sections 2(d) and 2(e) shows that Congress intended the Act to end this abuse in order to aid advertising in performing its economic function of increasing consumption. Congress believed these sections would prevent the diversion of funds intended for advertising and would prevent a buyer from circumventing section 2(a)’s prohibition of price discrimination.

All combinations . . . organized to suppress commercial competition.” 460 U.S. at 170 (quoting United States v. South-Eastern Underwriters Assn., 332 U.S. 533, 553 (1944)). Yet, in deciding that the Robinson-Patman Act applied to government entities, the court reasoned that “[t]here is no reason . . . to deny small businesses . . . protection from the competition of the strongest competitor of them all.” 460 U.S. at 171. This choice of wording seemingly implies that the purpose of the Robinson-Patman Act was to protect the independent retailer from competition. However, in light of the strong emphasis in the rest of the opinion on the evil of anticompetitive behavior of certain organizations, this “protection from competition” should be read narrowly as “protection from unfair competition.”

These economic justifications limit the scope of the Robinson-Patman Act to systematic price discrimination rather than sporadic discrimination. See note 3 supra. If the primary purpose of the Act was to protect the independent retailer, Congress would have wanted to protect him from any price differences, including those of a sporadic nature, and Congress would have banned all price differences between customers. Cf. AAA Liquors, Inc. v. Joseph E. Seagram & Sons, 705 F.2d 1203, 1207 n.5 (10th Cir. 1982) (“The Robinson-Patman Act also permits the defenses of meeting competition, 15 U.S.C. § 13(b), cost-differential, and changing market, 15 U.S.C. § 13(a). The existence of these defenses shows that Congress considered price discrimination to be reasonable in at least these circumstances.”), cert. denied, 461 U.S. 919 (1983).

As Judge Bork points out: “[T]he legislative history shows predominant concern for consumers, with protection of small competitors intended only when that was a means of protecting consumers from monopoly not based on efficiency.” R. Bork, supra note 3, at 64. See also Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 548 (9th Cir. 1983) (“Neither section 2(a) nor any other provision of the antitrust laws was intended to protect competitors as opposed to competition.”) (citations omitted), cert. denied, 104 S. Ct. 1315 (1984).

Patman noted that §§ 2(d) and 2(e) were passed in response to the FTC chain store investigation. W. Patman, Complete Guide to the Robinson-Patman Act 129 (1963).

See note 4 supra for text of §§ 2(d) and 2(e).

See also H.R. Rep. No. 2287, supra note 40, at 15-16 (“Such an [advertising] allowance becomes unjust when the service is not rendered as agreed and paid for, or when, if rendered, the payment is grossly in excess of its value.”); id. at 16; 80 Cong. Rec. 6282 (1936) (Sen. Logan notes that “[i]t is provided in the Robinson Bill that money allowed for advertising purposes must be used to advertise the goods of the seller.”).

Sen. Logan explained the per se standards of these sections:
One practice which has been indulged in to evade the provisions of the Clayton Act is for the seller to make certain service allowances to the purchaser. They may be called advertising allowances. When the purchaser had great purchasing power he could demand that great concessions be made to him; but here was the Clayton Act, which said “You cannot make discriminations in prices.” So there was devised a second scheme under which the
The legislative history, viewed in combination with the antitrust laws' goal of protecting consumer welfare and with congressional concern over the monopoly potential of large retail chains, requires the conclusion that the purpose of the Robinson-Patman Act is to maximize consumer welfare by protecting competition, even at the expense of the independent retailer.

II. EXCLUSIVE APPLICATION OF SECTION 2(a) IN ALL CASES OF PRICE DISCRIMINATION

Although characterization of conduct as "indirect" price discrimination under section 2(a) or as a service or facility under sections 2(d) or 2(e) is extremely significant, the courts have been unable to develop a coherent general rule. Some courts have held that these sections are not mutually exclusive; therefore conduct may fall within the prohibition of both sections. Other courts have rejected this approach.

seller said, "We will make you an advertising allowance or a service allowance which will bring about a discrimination in prices."

80 Cong. Rec. 6282 (1936); see also FTC v. Simplicity Pattern Co., 360 U.S. 55, 65, 68 (1959) (arguing that the purpose of the per se standards of §§ 2(d) and 2(e) was to create a legal motive to "confine their discriminatory practices to price differentials, where they could be more readily detected and where it would be much easier to make accurate comparisons with any alleged cost savings") (footnote omitted); 80 Cong. Rec. 3114 (1936) (Sen. Logan discusses use of advertising allowances to evade the law); 80 Cong. Rec. 9418 (1936) (Rep. Utterback, Chairman of the Senate-House Conferences, explains that §§ 2(d) and 2(e) were designed to prevent sellers from granting disguised discriminations related to cost as service or promotional allowances). See generally F. Rowe, supra note 1, at 365-72.

56. See notes 9-21 supra and accompanying text.

57. See notes 40-41 supra and accompanying text.

58. See notes 46-50 supra and accompanying text. The courts also have recognized that the primary purpose of the Act is to protect the competitive process, not the individual competitors. See Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 680 (10th Cir.), cert. denied, 105 S. Ct. 178 (1984); Foremost Pro Color, Inc. v. Eastman Kodak Co., 703 F.2d 534, 547-48 (9th Cir. 1983), cert. denied, 104 S. Ct. 1315 (1984); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950, 954 (10th Cir. 1959), cert. denied, 363 U.S. 843 (1960). But see Eximco, Inc. v. Trane Co., 737 F.2d 505, 514 (5th Cir. 1984) ("We must examine § 2(a) in the light of sound economic theory, and attempt to effectuate as much as possible the somewhat paradoxical intent behind the Robinson-Patman Act, which is to promote competition by protecting competitors.") (footnote omitted).

59. See note 5 supra for discussion of the differing burdens of proof in § 2(a) and § 2(d) or § 2(e). See also 3 Kintner & Bauer, supra note 3, at 184 n.156, 190 (noting that the "inquiry as to the applicable statutory provision is not an idle one . . . because different standards of legality, and different defenses, apply to each of these provisions"); F. Rowe, supra note 1, at 106, 372 (noting the advantages to a defendant of a § 2(a) action and the advantages to a plaintiff of a § 2(d) or § 2(e) action); Hansen, supra note 23, at 1165 (arguing that determination of whether or not the seller violated § 2(a) or §§ 2(d) and 2(e) is "crucial" because §§ 2(d) and 2(e) have more limited defenses).

60. For example, some courts have allowed an action under § 2(a) when discriminatory deliveries result in indirect price discrimination but have split on whether or not § 2(e) is also applicable. See Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682 n.4 (10th Cir.) (noting the circuit split but avoiding the issue because § 2(e) was not argued on appeal), cert. denied, 105 S. Ct. 178 (1984).

61. See C. Austin, supra note 25, at 126; see also Viviano Macaroni Co. v. FTC, 411 F.2d 255, 258 (3d Cir. 1969) (prepayment of advertising allowances may violate both §§ 2(a) and
promote, holding that a section 2(d) or 2(e) action can only be brought after determining that section 2(a) does not apply.62 These courts claim that "the theory that sections 2(d) and 2(e) proscribe acts which are themselves prohibited by section 2(a) is not supported by either the legislative history or the scheme of the Act."63 Still other courts have applied sections 2(d) and 2(e) to the exclusion of section 2(a).64 Under these differing approaches, behavior such as making advertising allowances,65 granting sales return privileges,66 or providing warehousing67 or delivery services68 have been held violative of both sections 2(a) and 2(d) or 2(e). The economic cost of such confusion is substantial.69 Moreover, price competition is stifled70 by the chilling effect on sellers who might not take actions that would be allowable under section 2(a), for fear of violating sections 2(d) or 2(e).71

A section 2(d) or 2(e) action should only be allowed after a deter-

---

62. See, e.g., Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83, 84-85 (N.D. Ill.) ("We submit that the better view is to limit actions on price differentials . . . to Section 2(a), and to consider Section 2(d) and 2(e) applicable only to unlawful promotional arrangements connected with resale, i.e. services unrelated to price") (emphasis in original), affd. per curiam, 371 F.2d 428 (7th Cir. 1966); F. Rowe, supra note 1, at 377 & n.57.


64. See, e.g., American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.), cert. denied, 371 U.S. 824 (1962); Lang's Bowlarama, Inc. v. AMF, Inc., 377 F. Supp. 405, 409-10 (D.R.I. 1974); In re Joseph A. Kaplan, Inc., 63 F.T.C. 1308, 1329, 1346 n.2 (1963), modified and affd., 347 F.2d 785 (D.C. Cir. 1965) (all applying § 2(d) and/or § 2(e) to payments that resemble reductions in price); see 3 KINTNER & BAUER, supra note 3, at 556.

65. See, e.g., Fred Meyer, Inc. v. FTC, 359 F.2d 351, 361-62 (9th Cir. 1966) (court allowed § 2(a) action without deciding whether or not §§ 2(a) and 2(d) are mutually exclusive), revd. on other grounds, 390 U.S. 341 (1968); R.H. Macy & Co. v. FTC, 326 F.2d 445, 449-50 (2d Cir. 1964) (applying § 2(a) but not § 2(d)); American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.) (applying § 2(d) but not § 2(e)), cert. denied, 371 U.S. 824 (1962).

66. See, e.g., In re Agricultural Labs. Inc., 26 F.T.C. 296, 300 (1938) (challenged under § 2(a)).

67. See, e.g., In re Champion Spark Plug Co., 50 F.T.C. 30, 50 (1953) (challenged under § 2(a)); In re Life Savers Corp., 34 F.T.C. 472, 475 (1941) (challenged under § 2(d)).

68. See, e.g., L. & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116-19 (5th Cir. 1982) (§ 2(e) does not apply to delivery services); Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585, 587-88 (7th Cir. 1971) (delivery services covered by § 2(e)), cert. denied, 405 U.S. 921 (1972); Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83, 84-85 (N.D. Ill.) (freight allowances covered only by § 2(a)), affd. per curiam, 371 F.2d 428 (7th Cir. 1966).

69. See R. BORK, supra note 3, at 384-85; see also note 71 infra.

70. Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83, 84 (N.D. Ill.) (noting that price competition was stifled because "buyers and sellers were no longer free to haggle over basic price elements") (emphasis in original), affd. per curiam, 371 F.2d 428 (7th Cir. 1966).

71. "[E]very antitrust practitioner knows, that tens of thousands, probably hundreds of thousands, of pricing decisions every year are altered through fear of Robinson-Patman." R. BORK, supra note 3, at 384. This results in "deformation of market processes" and loss of national wealth. Id. at 384.
mination that section 2(a) does not apply. This is consistent with the goal of consumer welfare maximization, as it gives the seller the security that an economically efficient decision will be protected under the provisions of section 2(a).

The exclusive application of section 2(a) to conduct that could also constitute a violation of sections 2(d) or 2(e) is consistent with the legislative history of the Act. Because the legislative history supports protection of the competitive process, the competition-related de-

72. A plaintiff should not be allowed to choose between § 2(a) and § 2(d) or § 2(e). The plaintiff would prefer a § 2(d) or § 2(e) action, because he would be able to bypass the more difficult burden of proof of § 2(a). See Chicago Spring Prods. Co. v. U.S. Steel Corp., 254 F. Supp. 83, 85 (N.D. Ill.) ("When plaintiff herein dropped its charges of Section 2(a) violations . . . it did so to avoid the necessity of proving competitive injury, and to escape from meeting a cost justification defense. In the opinion of this Court, plaintiff did not have the opportunity to make such a choice.")., affd. per curiam, 371 F.2d 428 (7th Cir. 1966).

Several courts have used a method of analysis that allows a § 2(d) or § 2(e) action only after the court has determined that § 2(a) is inapplicable to the fact situation. In Chicago Spring, 254 F. Supp. at 85, the district court determined that an action for discrimination in freight allowances could only be brought under § 2(a), and that §§ 2(d) and 2(e) were therefore inapplicable. The Seventh Circuit reasoned that any discrimination that would come within the confines of § 2(a) must be brought under that section, and that §§ 2(d) and 2(e) would only apply to services unrelated to price. 371 F.2d at 429.

The Eighth Circuit has concluded that when a case (here a discrimination in freight allowances) appears to fit under the language of both sections, § 2(a) must be applied. American Can Co. v. Russellville Canning Co., 191 F.2d 38, 56 (8th Cir. 1951). The court did not detail its reasoning, possibly because it felt that this result was required but could not determine a proper rationale. However, promotion of the goal of consumer welfare maximization mandates such a result. See notes 20-21 supra and accompanying text.

In Kirby v. P.R. Mallory & Co., 489 F.2d 904, 910 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974), the Seventh Circuit allowed the plaintiff's § 2(d) action only after determining that § 2(a) did not apply to the case. A district court in Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350, 354 (E.D. Wis. 1979), determined that § 2(a) applied to the conduct and that therefore § 2(d) was inapplicable.

The Supreme Court has not accepted a case requiring it to determine whether to apply § 2(a) or § 2(d) or § 2(e). However, in FTC v. Henry Broch & Co., 363 U.S. 166 (1960), the Court considered an action that was within the scope of §§ 2(a) and 2(e). It held that §§ 2(a) and 2(e) were independent sections and "the fact that a transaction may not violate one section of the Act does not answer the question whether another section has been violated." 363 U.S. at 170. However, as Justice Whittaker pointed out in his scathing dissent:

"Every case presenting this type of situation is actionable only under § 2(a), for it seems clear that § 2(a), which is expressly concerned with discrimination between purchasers, with effects on competition, and with the possible existence of true cost savings, was designed by Congress to cover this type of case. . . . The court's adroit footwork . . . serves quite effectively to illustrate the reasons why I think the case before us is one which Congress intended should be actionable under § 2(a), rather than § 2(e) . . . .

363 U.S. at 189 (Whittaker, J., dissenting) (emphasis in original). By failing to see the relationship between application of § 2(a) and the goal of consumer welfare maximization, the majority failed to analyze this case properly.

73. See Grauer, supra note 14, at 8 ("The businessman who operates efficiently will aid society in its quest to attain the consumer welfare goal of providing the most goods at the lowest possible price."). Bork agrees that economically sound decisions should be protected by the law. "[The businessman] can know what the law is when the goal of the law is consumer welfare, because the major distinctions of such a system run along the same lines in which the businessman thinks, making lawful his attempts to be more efficient . . . ." R. BORK, supra note 3, at 81.

74. See notes 40-58 supra and accompanying text.
fenses of section 2(a) should be available whenever possible to promote economically efficient forms of competition. The legislative history shows that sections 2(d) and 2(e), with their per se standard of illegality, were to apply only to sellers who had evaded the price discrimination prohibition of section 2(a) by discriminating in respects other than price. Congress had hoped that by applying a stricter standard in sections 2(d) and 2(e), sellers would be prompted to limit their differentials to price, thus making evaluation of cost justifications for the differentials easier.

III. DISTINGUISHING INDIRECT PRICE DISCRIMINATION FROM SERVICE OR FACILITY DISCRIMINATION

This Note argues that any action for discrimination related to price must be brought under section 2(a). Sections 2(d) and 2(e) are applied.

75. See notes 3-5 supra (discussion of the defenses); notes 44-45 supra (discussion of the legislative history of these defenses).

76. See note 73 supra; cf. Indian Coffee Co. v. Procter & Gamble Co., 482 F. Supp. 1104, 1110 (W.D. Pa. 1980) ("The Robinson-Patman Act does not simply prohibit an undesirable end result (the substantial lessening of competition), but rather prohibits certain conduct where the effect thereof may be to bring about that undesirable end result.") (emphasis in original).

77. See note 55 supra (discussion of legislative history); see also Kirby v. P.R. Mallory & Co., 489 F.2d 904, 910 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); H.R. Rep. No. 2287, supra note 40, at 7 (The aims of the Robinson-Patman Act were "to suppress more effectively discriminations between customers of the same seller . . . sometimes effected directly in prices . . . and sometimes by separate allowances to favored customers . . . "). (emphasis added).

Rowe argues that the legislative history implicitly restricts §§ 2(d) and 2(e) "to advertising and promotional arrangements, to the exclusion of other incidents or terms of sale" which are covered by § 2(a). F. Rowe, supra note 1, at 377 n.57. For example, the Senate-House Conference Report explicitly stated "the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price" under § 2(a). Id.

Some confusion has surrounded Representative Utterback's statement of the purposes of §§ 2(d) and 2(e):

The existing evil at which this part of the bill is aimed is . . . the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored. . . . The prohibitions of the bill, however, are made intentionally broader than this one sphere in order to prevent evasion in resort to others by which the same purpose might be accomplished, and it prohibits payment for such services or facilities whether furnished "in connection with the processing, handling, sale, or offering for sale" of the products concerned.

80 CONG. REC. 9418 (1936) (emphasis added). As Rowe points out, the "intentionally broader" language did not mean the sections encompassed other forms of conduct besides advertising or promotional allowances, but rather that the statute prohibited both direct provision of advertising allowances and promotional allowances in connection with the "processing, handling" or sale of the product. F. Rowe, supra note 1, at 377 n.57. The correct interpretation should read, "and it therefore prohibits payments for such services . . . furnished" in connection with the processing, handling, sale or offering for sale "of the products concerned." Cf. Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 744 (1945) (the court appeared to be relying on the above interpretation of Utterback's quote in concluding that §§ 2(d) and 2(e) reached an advertising service connected with "sale or offering for sale").

78. See Century Hardware Corp. v. Acme United Corp., 467 F. Supp. 350, 354 (E.D. Wis. 1979); see also notes 72 & 77 supra.


80. See notes 59-79 supra and accompanying text.
cable only to advertising and promotional arrangements unrelated to price.\textsuperscript{81} Therefore one must determine as a threshold issue when a payment for a service or facility can be considered an indirect price discrimination that triggers a section 2(a) analysis.

Section 2(a) explicitly outlaws both direct and indirect price discriminations.\textsuperscript{82} While not defined in the statute, price for Robinson-Patman purposes has been defined as "the amount actually paid by the purchaser . . . the quoted invoice price less any discounts, offsets or allowances . . . not otherwise reflected in the invoice price."\textsuperscript{83} Direct price discrimination is merely a price difference.\textsuperscript{84} "Indirect price discrimination . . . arises when one buyer receives something of value not offered to other buyers."\textsuperscript{85}

Courts have tried to develop specific criteria to help in applying this general formula.\textsuperscript{86} The FTC argues that section 2(a) applies to payments that help the original sale, while sections 2(d) and 2(e) apply to payments that facilitate the resale.\textsuperscript{87} Many courts have adopted the FTC original sale/resale dichotomy as a general rule.\textsuperscript{88} However, this formulation has been subject to inconsistent interpretation\textsuperscript{89} and con-

\textsuperscript{81} See Chicago Spring Prods. Co. v. United States Steel Corp., 254 F. Supp. 83, 84-85 (N.D. Ill.) ("We submit that the better view is to limit actions on price differentials . . . to Section 2(a), and to consider Section 2(d) and 2(e) applicable only to unlawful promotional arrangements connected with resale, i.e. services unrelated to price.") (emphasis in original), affd. per curiam, 371 F.2d 428 (7th Cir. 1966). See notes 77-79 supra and accompanying text for legislative support of the Chicago Spring position.

82. "It shall be unlawful for any person . . . either directly or indirectly, to discriminate in price between different purchasers of commodities . . . ." 15 U.S.C. § 13(a) (1982).


86. See Indian Coffee Corp. v. Procter & Gamble Co., 482 F. Supp. 1104, 1107 (W.D. Pa. 1980) ("Certain more specific criteria have been devised to aid in applying this general formula; namely, whether the 'payment' is directly related to the quantity of goods purchased, or facilitates the original sale of the product to the retailer.") (citations omitted).

87. See New England Confectionery Co., 46 F.T.C. 1041 (1949) (FTC holds that §2(a) applies when the discrimination is related to the original sale by the seller to the purchaser, while §§2(d) and 2(e) cover the subsequent resale by the purchaser).

88. See, e.g., Foremost Pro Color v. Eastman Kodak Co., 703 F.2d 534, 546 (9th Cir. 1983), cert. denied, 104 S. Ct. 1315 (1984); L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1111, 1119-21 (5th Cir. 1982); Kirby v. P.R. Mallory & Co., 489 F.2d 904, 909-10 (7th Cir. 1973), cert. denied, 417 U.S. 911 (1974); Skinner v. United States Steel Corp., 233 F.2d 762, 765 (5th Cir. 1956); see also C. AUSTIN, supra note 25, at 122; 3 KINTNER & BAUER, supra note 3, at 191; F. ROWE, supra note 1, at 107.

89. Compare L & L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113, 1116-19 (5th Cir. 1982) (late delivery not connected with resale so as to trigger §2(d) application), with Centex-Winston Corp. v. Edward Hines Lumber Co., 447 F.2d 585, 587-88 (7th Cir. 1971) (late delivery sufficiently connected with resale to trigger §2(d) application), cert. denied, 405 U.S. 921 (1972). See also Chicago Spring Prods. Co. v. U.S. Steel Corp., 254 F. Supp. 83, 85 (N.D. Ill.) (court avoids the question by defining resale as "unrelated to price"), affd. per curiam, 371 F.2d 428 (7th Cir. 1966).
The best approach is to look at the particular action\(^{91}\) to determine whether or not its net effect is a reduction in price.\(^{92}\) The legislative history indicates that the scope of indirect price discriminations is broad, encompassing both terms of sale and collateral contract terms that affect a seller's nominal price.\(^{93}\) Courts taking this broad view have correctly held that advertising allowances actually intended to reduce the purchase price fall within the scope of section 2(a).\(^{94}\) Other forms of payments for services and facilities have also been found to affect the net price and, therefore, to fall within the scope of section 2(a).\(^{95}\) Delivery\(^{96}\) and credit allowances\(^{97}\) have also been found ac-

---

90. See, e.g., American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir.) ("[e]ven if these payments [of promotional allowances] were all no more than disguised price adjustments, ... they would nevertheless violate § 2(d)."), cert. denied, 371 U.S. 824 (1962).

91. A multipart transaction may be separated into its component parts to determine whether or not each section violates the Robinson-Patman Act. Each part of the transaction would be considered separate conduct. See Fred Meyer, Inc. v. FTC, 359 F.2d 351, 362 (9th Cir. 1966), rev'd. on other grounds, 390 U.S. 341 (1968).

92. See Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682 (10th Cir.) (arguing that if the net effect is not a reduction in price the Act is inapplicable), cert. denied, 105 S. Ct. 178 (1984).

93. In the original version of the Act, § 2(a) reached direct or indirect discrimination "in price or terms of sale." However, the bill as passed by the House deleted the reference to terms of sale. The Senate-House Conference Committee accepted the House version, noting that "the bill should be inapplicable to terms of sale except as they amount in effect to indirect discriminations in price within the remainder of subsection (a)." H.R. REP. No. 2951, 74th Cong., 2d Sess. 5 (1936). In Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945), the Supreme Court used the above language in the Conference Committee Report to hold that § 2(a) does reach terms of sale, and held that the term of sale resulted in an indirect price discrimination. 324 U.S. at 740. Accord Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682 (10th Cir.), cert. denied, 105 S. Ct. 178 (1984). See generally F. Rowe, supra note 1, at 103-07; Robinson-Patman Symposium, supra note 1, at 225.

An interesting approach to defining such terms as "sales" and "terms of sale" was suggested by the court in Students Book Co. v. Washington Law Book Co., 232 F.2d 49, 52-53 (D.C. Cir. 1955), cert. denied, 350 U.S. 988 (1956). The court used the definition of sale in the Uniform Sales Act, the forerunner of the Uniform Commercial Code (UCC), to determine whether the conduct in question resulted in a sale or an agency. Because the UCC covers almost all aspects of a sale, including terms of sale, similar use of the UCC could be helpful in determining if a transaction constituted a term of sale.

94. See, e.g., Fred Meyer, Inc. v. FTC, 359 F.2d 351, 362 (9th Cir. 1966) ("[W]e think the Commission correctly decided that these excesses were 'outright price concessions'... cognizable under section 2(a)."), rev'd. on other grounds, 390 U.S. 341 (1968); American Coop. Serum Assn. v. Anchor Serum Co., 153 F.2d 907, 913 (7th Cir.) (agreeing with the lower court that when the advertising and promotional allowances "were so greatly in excess... such rebates were merely for the purpose of reducing the purchase price"), cert. denied, 329 U.S. 721 (1946). The Robinson-Patman Act is limited to concessions from the seller to his buyer. It does not reach concessions directly from the seller to the consumer, the buyer's buyer. See Indian Coffee Corp. v. Procter & Gamble Co., 482 F. Supp. 1104, 1109 (W.D. Pa. 1980).

95. See, e.g., Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682 (10th Cir.) ("Some delivery practices may constitute a violation of § 2(a) because they directly or indirectly affect the price paid for the goods") (citing Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945)), cert. denied, 105 S. Ct. 178 (1984). See generally 3 KINTNER & BAUER, supra note 3, at 555.
tionable under section 2(a). Failure to define indirect price discriminations as broadly as Congress intended results in “an improper incentive . . . for invoking the more ‘absolute’ prohibitions in Sections 2(d) and 2(e) to attack the type of sales accommodation which is the equivalent of a price adjustment subject to the statutory criteria governing the legality of price variations by sellers.”

Sections 2(d) and 2(e) should be applied only to advertising, promotional or merchandising services, or facilities that are beyond the reach of section 2(a). A majority of courts have held that sections 2(d) and 2(e) are limited to advertising, promotional or merchandising services, and facilities. However, if these forms of services and facilities amount to a net price reduction, the legislative history mandates application of section 2(a). This narrow reading would fulfill the legislative purpose for sections 2(d) and 2(e) — catching sellers who had evaded the prohibitions of section 2(a). It is consistent with the overall goal of consumer welfare maximization, because it would forewarn the seller as to what specific types of behavior would be outside the scope of section 2(a)’s cost-justification defense.

The scope of sections 2(d) and 2(e) is further limited by the requirement that the service or facility must be in relation to the same commodity that the buyer bought from the seller. “Commodity,”


97. Although credit may be outside the reach of the Robinson-Patman Act, see 3 KINTNER & BAUER, supra note 3, at 555, when such actions are allowed, § 2(a) is applied. See, e.g., ACS Enter. v. Sylvania Commercial Elec. Corp., 1979-2 Trade Cas. (CCH) ¶ 62,765 at 78,398, at 78,399-400 (E.D. Pa. 1979); Robbins Flooring, Inc. v. Federal Floors, Inc., 445 F. Supp. 4, 8 (E.D. Pa. 1977). But see Standard Oil Co. v. Perkins, 396 F.2d 809, 814 (9th Cir. 1968) (applying the proportionally equal standard of §§ 2(d) and 2(e) to credit), rev’d on other grounds, 395 U.S. 642 (1969).

98. F. Rowe, supra note 1, at 107 (footnote omitted). See note 72 supra and accompanying text for further discussion.

99. See notes 55 & 77 supra and accompanying text.


101. See notes 40-79 supra and accompanying text.

102. See note 55 supra and accompanying text.

103. See notes 71 & 73 supra (discussion of the economic importance to a businessman of knowing the legal consequences of his actions).


Foremost’s failure to allege resale of the photofinishing equipment, the commodities with respect to which the alleged discrimination in delivery and technical services occurred, is a failure as a matter of law to allege a crucial element of a section 2(e) violation. . . . Instead, Foremost argues that its complaint states a section 2(e) claim because it resells other commodities . . . . Even if these specific commodities were purchased for resale . . . . Foremost did not contend that it resells the photofinishing equipment involved in the alleged discrimination.
for purposes of the Robinson-Patman Act, has been defined as a tangible product, not a service provided by the buyer who uses the product.\textsuperscript{105} A problem may arise distinguishing the buyer's resale of a product when he provides some services along with the product he sells, and the buyer's sale of his services when he uses the seller's product to promote his services.\textsuperscript{106} The inquiry should focus on whether or not the buyer's dominant intent, as revealed by the surrounding circumstances, was to resell the product or to sell his services.\textsuperscript{107} One relevant consideration would be the type of business and whether sellers in this line of business are generally considered product or service sellers.\textsuperscript{108} Courts should also consider whether the buyer's advertising emphasized the product or his services.\textsuperscript{109} An additional factor would be the expectations of the customers of the buyer and whether their main purpose in going to the buyer was the services he provides or the product he sells.\textsuperscript{110}

A final argument relates to the institutional competence of the courts to evaluate these factors. Any detailed inquiry will force judges to......

\textsuperscript{105} See Baum v. Investors Diversified Serv., 409 F.2d 872, 875 (7th Cir. 1969); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, 219 F. Supp. 400, 403 (W.D. Pa. 1963); Hansen, \textit{supra} note 23, at 1126 n.80.

\textsuperscript{106} See Clairol, Inc. v. FTC, 410 F.2d 647 (9th Cir. 1969) (holding that because customers came specifically for the advertised Clairol products rather than the hairdresser's general services, the transaction was the sale of a commodity within the meaning of the Robinson-Patman Act); Fleetway, Inc. v. Public Serv. Interstate Transp. Co., 72 F.2d 761, 763 (3d Cir. 1934) (in case arising under \S 2 of the Clayton Act prior to the Robinson-Patman amendments, court held that transportation of customers was predominantly a sale of services, not a commodity), cert. denied, 293 U.S. 626 (1935).

\textsuperscript{107} In Baum v. Investors Diversified Serv., 409 F.2d 872, 875 (7th Cir. 1969), the court had to determine whether the sale of mutual funds constituted the sale of a commodity or of a service. The court looked at the "dominant nature" of a mutual fund share in determining the issue. In an analogous situation, other cases have tried to distinguish the resale of the same product from consumption of the product to resell a new product. \textit{See}, e.g., Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 744 (1945); Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 356 (E.D.N.Y. 1960); \textit{see note 106 supra}.

\textsuperscript{108} See Clairol, Inc. v. FTC, 410 F.2d 647 (9th Cir. 1969); Tri-State Broadcasting Co. v. United Press Intl., 369 F.2d 268, 270-71 (5th Cir. 1966).

\textsuperscript{109} Clairol, Inc. v. FTC, 410 F.2d 647, 648 (9th Cir. 1969) (noting that the purpose of the advertising was not only to persuade the reader to go to the salon for the service, but also to ask for Clairol products).

\textsuperscript{110} See Clairol, Inc. v. FTC, 410 F.2d 647, 648 (9th Cir. 1969) ("The target of the persuasion was the potential customer of the salon and the persuasion, so far as Clairol was concerned, was to consume its products.").
to make detailed investigations of the economic consequences of the actors' behavior, forcing them to apply theory they may not thoroughly understand. The result may be a series of per se rules unrelated to the actual facts of a case and promoting inefficiency in certain circumstances. 111

By limiting the availability of sections 2(d) and 2(e) to actions beyond the scope of the indirect price prohibition of section 2(a), inconsistent application of the Robinson-Patman Act is avoided and the legislative purpose is fulfilled.

CONCLUSION

To serve the goal of consumer welfare maximization, section 2(a) of the Robinson-Patman Act should be read broadly to cover any form of direct or indirect price discrimination, including advertising and service allowances that serve as indirect price discriminations. Sections 2(d) and 2(e) should only be applied after a determination that section 2(a) is inapplicable.

111. R. BORK, supra note 3, at 86-87, argues that the courts will fail to balance the economic issues on a case-by-case basis. Instead they will arrive at rigid rules that are arbitrary and anticonsument. He also questions whether enough information is available to the courts to make this distinction. See id., at 399; see also R. POSNER, supra note 1, at 15 ("T"he problem is to distinguish these practices in the real world, using the inevitably crude methods of . . . judicial factfinding.").