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The Price Discrimination Provisions of the Robinson-Patman Act: A Forthcoming Clarification of the Jurisdictional Requirements?

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The Price Discrimination Provisions of the Robinson-Patman Act: A Forthcoming Clarification of the Jurisdictional Requirements?

The first federal anti-price discrimination legislation was embodied in section 2 of the Clayton Act. Section 2 was intended to prohibit price discrimination causing injury to competitors of the discriminating seller, and it applied to discriminatory practices which satisfied two interstate commerce requirements:

\[
\text{[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to discriminate in price. . . .}
\]

Section 2(a) of the Robinson-Patman Act substantively changed the coverage of the original section 2 of the Clayton Act by the insertion of a clause explicitly prohibiting price discrimination causing economic injury to competing sellers, as well as discrimination causing injury to disfavored buyers of the seller. In addition, it altered the jurisdictional interstate commerce language of the Clayton Act to include a further jurisdictional requirement:

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\[
\text{That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities, . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce. . . .}
\]

2. See text accompanying note 19 infra, for further explanation of the types of discrimination covered.

3. See note 1 supra.


\[
\text{That it shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .}
\]

[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, where either or any of the purchases involved in such discrimination are in commerce. . . .

Courts have held that this third jurisdictional requirement necessitates a showing that at least one of the sales involved in the discrimination crosses state lines. But confusion has arisen from various interpretations of the "purchases involved" in a particular price discrimination. In situations where the discriminating seller does make some interstate sales the question for the courts is whether the interstate sales are "involved" in the discrimination so as to satisfy the jurisdictional requirement of section 2(a). Some courts, in determining whether "either or any of the purchases involved in such discrimination" are in commerce, have considered all the discriminator's sales "involved," to competitors and noncompetitors alike. Others have interpreted the "purchases involved" language as meaning that only the discriminator's sales to competing buyers are involved. Three recent cases have added to this lack of clarity concerning the jurisdictional scope of section 2(a) of the Act. In one of these cases, Copp Paving Co. Inc. v. Gulf Oil Co., the Ninth Circuit held that local sales of a commodity having a nexus with an instrumentality of interstate commerce are sales in interstate commerce. There, the court applied section 2(a)'s prohibition to a case in which neither the plaintiff nor the defendants engaged in interstate commerce or made any sales crossing state lines. This holding appears to dispense entirely with the jurisdictional requirement of section 2(a) that at least one of the discriminatory purchases must cross state lines.

This note will examine these recent cases which have added to the confusion in determining the jurisdictional scope of section 2(a).

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6. E.g., Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 208 (5th Cir. 1969); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785, 787 (10th Cir. 1967); Belliston v. Texaco, Inc., 455 F.2d 175, 177 (10th Cir.), cert. denied, 408 U.S. 928 (1972).
8. Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964), and cases cited at note 39 infra.
10. 487 F.2d 202 (9th Cir. 1973).
11. Id. at 205.
12. This Note deals only with the interstate commerce requirements of section 2(a) of the Robinson-Patman Act. For the jurisdictional requirements of sections 2(c)-(f) of the Act, 15 U.S.C. § 13(c)-(f), see Kintner and Mayne, Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act, 58 Geo. L.J. 1117.
A brief outline of the legislative history of the Robinson-Patman and Clayton Acts will precede this examination in order to identify the types of price discrimination which section 2(a) was designed to protect. This Note also will examine the underwriting principle as a possible tool in solving section 2(a) jurisdictional problems.

**LEGISLATIVE HISTORY OF SECTION 2(a)**

In enacting the original price discrimination provisions of section 2 of the Clayton Act, Congress responded to the predatory tactic of national trusts—notably the Standard Oil Company—of territorial price slashing for the purpose of eliminating competitors. Dissatisfaction with the price discrimination law increased after passage of the original Clayton Act with the burgeoning growth of the chain stores. Because of their large purchasing power chain stores demanded and received price concessions from manufacturers, enabling them to cut their prices and destroy their competitors, independent local retailers. This kind of competitive injury occurring on the buyer's level rather than on the seller's level was not explicitly prohibited by the original Clayton Act. Congress, motivated by a mortality rate among independent retailers as high as ten per cent a year, amended the language of the original Clayton Act to apply equally to price discrimination causing injury to primary-line and secondary-line competition.

In a primary-line case, section 2(a) restricts the seller from cutting prices in one area of the territory of a competitor while maintaining higher prices elsewhere. In a secondary-line case, section 2(a) prohibits a supplier from selling his goods to a buyer at a lower price than to the buyer's competitors. In both cases section 2(a) specifically requires that at least one of the "purchases involved in the dis-

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Robinson-Patman Act

crimination," either the higher or the lower priced sale, must cross state lines.19

The legislative history of section 2(a) of the Act evidences little unanimity of congressional intent as to its jurisdictional coverage. The House Judiciary Committee rejected two proposed bills containing broad jurisdictional language20 and reported Representative Patman's bill containing the "either or any" clause and a second clause covering discriminations "whether in commerce or not."21 In explaining its choice of the narrower jurisdictional language, the House Report stated only that the two clauses covered price discriminations "wherever it is of such a character as tends directly to burden or affect interstate commerce."22 The Senate-House Conference Committee subsequently deleted the second clause of the House bill, with only this brief comment:

This [second clause] was omitted, as the preceding ["either or any"] language already covers all discriminations both interstate and intrastate, that lie within the limits of Federal authority.23

Because of the rejection of the broader jurisdictional phrases, the courts24 and commentators25 have concluded that Congress did not intend to exercise its full commerce power when enacting section 2(a) of the Act. In adherence to the literal statutory language, they have interpreted the "either or any" clause strictly, requiring at least one discriminatory sale to cross state lines.26 This is in contrast to the Sherman Act,27 which has been interpreted to reach not only acts involving interstate transactions, but also intrastate conduct "substantially affecting" interstate commerce.28 Against this confusing and contradictory

20. H.R. 4995, 74th Cong., 1st Sess. (1935): "It shall be unlawful for any person engaged in commerce in any transaction in or affecting commerce . . . ."
25. Austin, supra note 14, at 15; Rowe, supra note 16, at 78; Recent Cases, 86 Harv. L. Rev. 771 (1973).
26. See note 6 supra.
legislative history, reliance upon a few isolated statements, suggesting a possible congressional intent to exercise its full commerce power, seems misplaced in light of the rejection of the broader jurisdictional language.20

DEVELOPMENT OF THE UNDERWRITING PRINCIPLE IN PRIMARY-LINE CASES

The leading Supreme Court decision discussing the jurisdictional requirements of section 2(a) is Moore v. Mead’s Fine Bread Co.89 In that case, the defendant baking company, part of an interstate corporation,31 cut prices on sales from its Clovis, New Mexico, plant to the plaintiff’s local market in Santa Rosa, New Mexico, but maintained higher prices on sales from its other New Mexico and Texas plants outside Moore’s marketing area.32 Moore alleged that the defendant’s price discrimination caused primary-line competitive injury. The bread involved in the discriminatory sales was baked and sold almost entirely in New Mexico, but a de minimis amount was sold in Texas to non-competitors of the plaintiff.33 The court of appeals held, consistent with prior decisions, that in considering a violation of section 2(a) causing primary level injury, at least one of the alleged discriminatory sales which undercut the plaintiff must cross state lines.34 The court refused to consider the interstate sales of the other bakery plants owned by the Mead corporation. On appeal, the Supreme Court reversed the court of appeals, holding that the sales of all the Mead corporation’s other plants were involved in the discrimination.35 The Court reasoned that an interstate seller, such as Mead, could afford to operate without a profit in one part of his sales area only if he made a profit elsewhere. The interstate corporation used profits derived from sales in other areas to underwrite the losses in one locality.


31. Id. at 116. The respondent was part of a group of corporations with interlocking ownership and management, operating throughout Texas and New Mexico.

32. Id.

33. Id. The volume of these sales was insignificant. The Court did not consider them since they were considered de minimis and properly disregarded. Rowe, supra note 16, at 78, states that the "commerce" text of the statute is qualified by an implicit exemption for transactions of a de minimis dimension.” Accord, Skinner v. United States Steel Corp., 233 F.2d 762, 764 (5th Cir. 1956).

34. Mead’s Fine Bread Co. v. Moore, 208 F.2d 777, 780 (10th Cir. 1953).

35. 348 U.S. at 119.
To understand the Court's reasoning in treating all of the sales of the Mead plants as involved in the discrimination, it is essential to note that section 2(a) only prohibits price discrimination which causes competitive injury as defined by the Act. A price discrimination has been interpreted as a difference between the prices charged to two or more buyers. But since only those discriminations which cause injury are prohibited, a competitive nexus must exist between the buyers charged the higher prices and those charged lower prices. Without such a connection no competitive injury can occur. In a case of primary-line injury a nexus does exist between all the sales of the discriminating seller and the injury caused to the seller's competitor, including sales outside the market of the local competitor.

Commentators have considered the underwriting principle of Moore to be dictum. They point to the fact that the defendant, Mead, sold a de minimis quantity of goods from its Clovis plant in interstate commerce. Subsequent court decisions have similarly rejected the Moore holding as dicta, with a few exceptions. Such a rejection, however, renders as surplusage the explicit basis of the decision, the combined sales of all Mead plants.

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36. Section 2(a) prohibits price discriminations which "lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition. . . ." 15 U.S.C. § 13(a) (1970). See Rowe, supra note 16, at 139.


38. It is essentially the relationship between cost and price that determines whether a particular price discrimination is legal. If shipping to a particular point costs the seller more, then he can charge a higher price. Cost, however, is not usually so simply determined. See Edwards, supra note 19, at 2-3; Rowe, supra note 16, at 113-39.


40. Practitioners also refer to the underwriting principle as the "deep-pocket" principle.

41. Kintner, supra note 18, at 81; Rowe, supra note 16, at 79-80.

42. See note 33 supra.

43. Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1965); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967).

44. See cases cited at note 39 supra. See also Jones v. Metzger Dairies, Inc., 334 F.2d 919, 923 (5th Cir. 1964), cert. denied, 379 U.S. 965 (1965); Rangen, Inc. v. Sterling Nelson and Sons, Inc., 351 F.2d 851 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966); Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963), cert. denied, 375 U.S. 971 (1964).

45. The victim, to be sure, is only a local merchant; and no interstate transactions are used to destroy him. But the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate, as well as local, sources which include not only respondent but also a group of interlocked companies engaged in the same line of business; and the prices on the interstate sales, both by respondent and by the other Mead companies, are kept high while the local prices are lowered. . . . The profits made in inter-
However, a recent Fifth Circuit Panel decision, *Littlejohn v. Shell Oil Co.*, 46 accepted the Moore interpretation of the "purchases involved" language of section 2(a) and received generally enthusiastic support from the commentators. 47 In that case, involving indirect primary-line discrimination, Littlejohn alleged that Shell and American Oil Company made intrastate sales of gasoline produced at their Houston refineries to retail franchise operators in the plaintiff's Dallas market area at discriminatory prices. 48 The panel opinion relied on Moore, holding that Littlejohn's complaint under section 2(a)

need not allege that one of the sales involved was interstate in character as long as it charges that interstate sales were used to underwrite allegedly discriminatory intrastate price tactics. 49

On rehearing the Fifth Circuit sitting en banc vacated the earlier panel decision, dismissing the plaintiff's complaint for failure to allege any interstate sales. 50 Although the court granted the plaintiff leave to amend his complaint, it insisted that the new complaint allege interstate sales by the defendants to the plaintiff's market area. 51 The court considered immaterial the defendants' interstate sales from their refineries in Houston to noncompetitors of the plaintiff. Only by rejecting the Moore underwriting principle as dicta could the Littlejohn court arrive at this holding. Like the defendants in Moore, Shell and American made interstate sales from the same plant which sold gasoline to Littlejohn's competitors. In a primary-line case it is precisely because the discriminator does business over a large area that he is able to cut prices in a small geographic area so as to drive out local, independent competitors such as Littlejohn. Any interstate sales from the defendant's Houston refineries are therefore "involved in the discrimination" and should be sufficient to satisfy the jurisdictional requirements of section 2(a).

348 U.S. at 119.
46. 456 F.2d 225 (5th Cir. 1972).
48. Section 2(a) does protect competitors of the supplier's customer. Such plaintiffs may allege that the supplier's price discriminations vis-à-vis his customers places these favored customers in a position to injure their competitors. Thus, the supplier indirectly injures primary-line competition. See, *e.g.*, Bolick-Gillman Co. v. Continental Baking Co., 278 F.2d 649 (9th Cir. 1959). *Cf.* Klein v. Lionel Corp., 237 F.2d 13 (3d Cir. 1956); ROWE, *supra* note 16, at 57-59.
49. 456 F.2d at 226.
51. 483 F.2d at 1146.
APPLICABILITY OF THE UNDERWRITING PRINCIPLE IN SECONDARY-LINE CASES

In a primary-line case, the underwriting effect of the sales outside the plaintiff's competitive area is readily ascertainable, as previously explained.62 Thus, such sales are "purchases involved in the discrimination," and may be compared to determine the existence of interstate sales. Unlike the situation in a primary-line case the nexus between the discriminator's extraterritorial sales and his local sales in a secondary-line case is not so readily perceived.53

It is argued that sales outside the disfavored buyer's area of competition are not "purchases involved" for jurisdictional purposes in a secondary-line injury case. Only those purchases among competitors may be considered.54

The Seventh Circuit decision in Borden Co. v. FTC,55 a leading case on this issue, explains the "purchases involved" in a case of secondary-line injury. Defendant Borden Company operated plants in many states, including several in Ohio. But none of its Ohio plants made any interstate sales. The Commission staff presented evidence showing that Borden sold milk from its Portsmouth, Ohio, plant to a grocery chain operating stores in Portsmouth and New Boston, Ohio, at lower prices than it sold to the chain's independent competitors in those two towns.56 The hearing examiner found that all the discriminatory sales from the Portsmouth plant were intrastate and dismissed the case for lack of jurisdiction under section 2(a).57

On review the Commission determined that a sufficient nexus existed between Borden's Portsmouth sales and its interstate sales from other plants, so as to consider them "purchases involved" in the discrimination for jurisdictional purposes. However, in finding the nexus, the Commissioners did not rely on the Moore underwriting principle.

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52. See text accompanying notes 38 and 39 supra.
53. Rowe, supra note 16, at 173:
   Some competitive nexus between the customers receiving the higher and lower prices is a basic predicate of any conclusion of adverse effects at the customer level attributable to a seller's price differentials. . . . In practice, this requirement ordinarily averts any conclusion of adverse effects arising from sales to purchasers who do not encounter each other in resale markets, either functionally or geographically.
56. 339 F.2d at 953.
Rather, they found that Borden’s operations constituted an “interstate complex” and that its practices and policies had an “interstate homogeneity.”\(^{58}\) On this rationale the Commission held that the allegations satisfied the jurisdictional requirements of section 2(a).

On appeal the Seventh Circuit reversed, stating that in a secondary-line case,

unless the third commerce requirement of Section 2(a) [requiring either or any of the purchases involved to be in commerce] is to be given no effect whatever, the Commission’s burden of establishing jurisdiction cannot be discharged merely by showing that respondent is an interstate concern or that it makes interstate sales not involved in the challenged discrimination.\(^{59}\)

The court thus rejected the “interstate homogeneity” theory of the Commissioners. The proof offered by the Commission of Borden’s interstate characteristics only satisfied section 2(a)’s “engaged in commerce” requirement. As the court noted it is not sufficient that the defendant was merely engaged in interstate commerce. If the Commission staff had presented evidence that Borden used its interstate profits from its other plants to underwrite discriminatory intrastate sales from its Portsmouth plant, the court’s result may have been different. As the facts were presented, the court did not consider Borden’s interstate sales outside the plaintiffs’ competitive area as “purchases involved.”

A recent Seventh Circuit case, *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*,\(^{60}\) places an additional gloss on the “purchases involved” language in secondary-line cases. Unlike the defendant in the *Borden* case, whose Portsmouth plant made no interstate sales, in *Mayer* the defendant’s subsidiary, Material Service Corporation, sold crushed rock to paving contractors in Illinois and Indiana from its Illinois quarries.\(^{61}\) The plaintiff, who operated a paving company doing business in Illinois, alleged that Material Service charged higher prices to Mayer than to its competitors in Illinois and its non-competitors in Indiana, causing competitive injury.\(^{62}\) Because Mayer

\(^{58}\) *Id.* at 21,716-17.


\(^{60}\) 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 94 S. Ct. 899 (1974).

\(^{61}\) The defendant operated five quarries in Illinois, including one at Thornton, a few miles from the Indiana border. Its Indiana office sold nearly five million dollars worth of crushed rock to Indiana paving contractors during the 1958-1968 period. Brief for Appellant at 7-8, 35, *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763 (7th Cir. 1973) [hereinafter cited as Brief for Appellant].

\(^{62}\) The favored Indiana customers paid from 20¢ to 30¢ less per ton and the Illinois competitors paid between 10¢ and 47¢ per ton less than Mayer. Petitioner's
did not compete with the Indiana purchasers, the lower court held that none of the defendant's Indiana sales were "purchases involved" in commerce and granted judgment n.o.v. for failure to satisfy the third jurisdictional requirement. On appeal, the plaintiff, relying on Moore, argued that the purchases involved in the discrimination did include those sales to Mayer's Indiana noncompetitors:

[T]he higher prices charged Mayer permit Material Service to accumulate a treasury available to underwrite the lower prices charged its Indiana customers as well as plaintiff's local competitors.

In its decision, the Seventh Circuit noted that the Borden case was analogous. Both Borden and General Dynamics were interstate corporations making interstate sales, but their interstate sales were largely to noncompetitors in different market areas. The court restated its earlier holding in Borden that evidence of a discriminating corporation's interstate character does not fulfill the requirement that one of the discriminatory sales must cross state lines. However, the court noted that, unlike Borden, Material Service did make interstate sales from its local plant. Here, the court was presented with a factual situation similar to Moore, where an interstate discriminator making both local and interstate sales from the same plant discriminates against a local buyer.

Over a strong dissent by Justice Clark, sitting by designation, the court held that the Moore principle was inapplicable since the Mayer case did not involve a primary-line injury case where there existed a pattern for growth of monopoly. Admittedly, Material Service did
not gain a monopoly over sales of crushed rock in the Chicago area by means of its price discrimination. However, section 2(a)'s prohibitions extend not only to price discriminations creating monopolies but also to those tending to injure competition.\(^7\) The lack of monopoly characteristics of the discriminating seller should not preclude application of the underwriting principle.

The court also cited *FTC v. Anheuser Busch, Inc.*\(^{71}\) for support that the underwriting principle does not apply to secondary-line competition. However, the relevant language in that decision tends to support the plaintiff's contention of applicability of the *Moore* principle. There the Supreme Court stated that *Moore* was applied “without reliance upon the presence or absence of competition among purchasers as a relevant factor.”\(^7\)\(^2\)

As previously explained, only those sales among buyers with some competitive nexus are “involved” for the purpose of determining whether any discriminatory sale occurred in interstate commerce. For this reason, sales to noncompetitors of the injured buyer are usually not compared by the courts for jurisdictional purposes.\(^7\)\(^3\) However, Representative Utterbach, House manager of the Robinson-Patman Act, envisioned a situation where the particular facts might create a relation between noncompeting buyers:

Where the price to one is so low, as to involve a sacrifice of some part of the seller's necessary costs and profit, it leaves that deficit inevitably to be made up in higher prices to his other customers. . . . [t]here, too, a relationship may exist upon which to base the charge of discrimination.\(^7\)\(^4\)

*Mayer* provides an illustration of the kind of relationship between noncompetitors suggested by Representative Utterbach. Here, the lower prices charged to Mayer's competitors and those interstate noncompetitors may have forced Material Service to make up the deficit in higher prices to Mayer and the other disfavored intrastate customers. The fact that the Indiana paving companies bought from the same quarries as did the plaintiff enhances the possibility of interstate underwriting in this particular case.

Of course, in many secondary-line cases, the *Moore* underwriting theory would clearly not be applicable, such as where the seller's local

\(^7\)\(^0\) See text of section 2(a), note 4 supra.

\(^7\)\(^1\) 363 U.S. 536 (1960).

\(^7\)\(^2\) *Id.* at 545-46.

\(^7\)\(^3\) See text accompanying notes 52, 53, and 54 supra.

\(^7\)\(^4\) 80 Cong. Rec. 9416 (1936) (remarks of Representative Utterbach).
plant made no interstate sales.\textsuperscript{75} But the \textit{Mayer} case is one of those few secondary-line cases where the underwriting principle appears applicable.

**THE Copp CASE: INTERSTATE SALES NO LONGER REQUIRED**

The preceding cases show disagreement as to which sales of the discriminating seller should be considered in deciding the jurisdictional question in a section 2(a) action. However, the courts are in complete agreement as to the requirement that at least one of the discriminator's sales must cross state lines. Where the seller is a local enterprise making no interstate sales whatsoever, the section 2(a) prohibitions do not apply.

A recent opinion from the Ninth Circuit Court of Appeals has unsettled this substantial judicial precedent. That court, in \textit{Copp Paving Co. v. Gulf Oil Co.},\textsuperscript{76} eliminated the requirement that “either or any of the purchases involved” must be in commerce. The plaintiff and defendant competitors operated “hot plants” in the Los Angeles area producing asphaltic concrete,\textsuperscript{77} which they used for paving intrastate portions of the federally-funded interstate highway system.\textsuperscript{78} Neither the plaintiff nor the defendants sold asphaltic concrete in interstate commerce.\textsuperscript{79} Copp alleged that Gulf's subsidiary, Industrial Asphalt, Inc., and Sully-Miller Contracting Co. discriminated against the plaintiff in the sale of asphaltic concrete by reason of price and credit concessions to some local customers, causing primary-line injury.\textsuperscript{80}

The most notable feature of Copp's complaint was its attempt to establish a jurisdictional basis for the section 2(a) allegations. Copp

\textsuperscript{75} E.g., Miles v. Coca-Cola Bottling Co., 360 F. Supp. 869, 871 (E.D. Wis. 1973); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 287 F.2d 265 (7th Cir. 1961); Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964).

\textsuperscript{76} 487 F.2d 202 (9th Cir. 1973), cert. granted, 94 S. Ct. 1586 (1974).

\textsuperscript{77} Id. at 203. All the aggregates and liquid asphalt used by these plants were produced locally. Brief for Appellee at 3, Copp Paving Co. v. Gulf Oil Co., 487 F.2d 202 (9th Cir. 1973) [hereinafter cited as Brief for Appellee].

\textsuperscript{78} Brief for Appellant at 11, Copp Paving Co. v. Gulf Oil Co., 487 F.2d 202 (9th Cir. 1973) [hereinafter cited as Brief for Appellant].

\textsuperscript{79} The traffic in asphaltic concrete is essentially local. The requirement that it be delivered hot plus the high costs of transportation as compared to the value of the product require that a hot plant serve a relatively restricted area. In this case plaintiff's business was confined to an area near Los Angeles with a radius of 30 to 35 miles. None of the plants in competition with the plaintiffs delivered out of California.

\textsuperscript{80} Brief for Appellant, supra note 78, at 6. In addition, the plaintiff charged price fixing, monopolization, and attempted monopolization by the defendants, Gulf Oil Company, Union Oil Company, and Edgington Oil Company, in the sale and marketing of liquid asphalt, in violation of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1970).
did not allege any interstate sales of asphaltic concrete, nor did it rely on the underwriting principle by alleging that the defendants subsidized the discriminatory intrastate prices with profits derived from interstate sales. Rather, Copp contended that the defendants' local sales were in interstate commerce for purposes of section 2(a) because the activities of the defendants' employees in paving interstate highways were "in commerce" and those employees were "engaged in commerce" for purposes of the Fair Labor Standards Act. The district court found this argument unpersuasive. Since the defendants made no interstate sales of asphaltic concrete whatsoever, it ordered the dismissal of all the section 2(a) claims regarding asphaltic concrete.

However, the court of appeals reversed the district court's decision, holding that sufficient jurisdictional elements were alleged as a matter of law when the discriminatory sales involved commodities having a nexus with an instrumentality of interstate commerce. The court reasoned that such a nexus with an instrumentality of interstate commerce satisfied the jurisdictional requirements of section 2(a) by analogizing to jurisdictional concepts developed with reference to the Fair Labor Standards Act. Since the activities of the defendants' employees were in commerce for the purposes of the Fair Labor Standards Act they were in commerce for purposes of the Robinson-Patman Act.

In support of the validity of such an analogy, the court relied on holdings that conduct within the reach of congressional power under the Fair Labor Standards Act are entitled to great weight in Sherman

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Every employer shall pay to each of his employees who in any week is engaged in commerce, or in the production of goods for commerce, wages at the following rates . . .


82. Copp Paving Co. v. Gulf Oil Co., 1973-2 TRADE REG. REP. ¶ 74,013, at 94,209 (N.D. Cal. 1972). The court did not render final judgment on the Sherman Act claims relating to liquid asphalt because, unlike asphaltic concrete, some of that commodity moved in interstate commerce. Consequently, some discriminatory sales may have crossed state lines.

83. 487 F.2d at 205.

84. See text of the FLSA cited at note 81 supra. Unlike section 2(a) of the Robinson-Patman Act, section 7(a) of the FLSA does not require that any of the transactions in which the employees are involved must cross state lines. It only requires that the employers be engaged "in commerce" or "in the production of goods for commerce."

85. City of Ft. Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871 (5th Cir. 1964); Hardrives Co. v. East Coast Asphalt Corp., 329 F.2d 868 (5th Cir. 1964). These cases involved only Sherman Act violations. There the courts found the requisite effect on commerce from the fact that the liquid asphalt used in the manufacture of the asphaltic concrete was imported from Venezuela. But cf. note 77 supra, on the dissimilar facts in Copp.
The court then rejected the settled interpretations of the coverage of the Robinson-Patman Act in relation to the Sherman and Clayton Acts, saying that congressional intent “supports a uniform interpretation of the ‘in commerce’ requirement present in all three acts.” However, those cases cited by the court for support of a uniform interpretation of the Sherman and Robinson-Patman Acts merely recognized that the Clayton and Sherman Acts do not embody inconsistent approaches to the national antitrust policy and that the tests of illegality under those statutes are complementary. In none of the cases was the Robinson-Patman Act even involved. By advancing generalities as to the congressional antitrust scheme the court avoided critical differences between the explicit language of the Sherman and Robinson-Patman Acts.

The Fair Labor Standards Act cases which were cited by the court lend questionable support to the holding for two reasons. First, section 2(a) requires that the discriminating person be “engaged in commerce.” *Alstate Construction Co. v. Durkin*, cited by the court, held that persons producing asphaltic concrete for an instrumentality of interstate commerce are engaged not “in commerce,” but in the “production of goods for commerce.” Unlike the Fair Labor Standards Act, section 2(a) does not include such an alternative to fulfilling the “persons engaged in commerce” requirement. Second, the prohibitions of section 2(a) extend only to sales of commodities, not to sales of services. The reliance which the court placed on *Overstreet v. North Shore Corp.* and *Mitchell v. C.W. Vollmer Co.* is misplaced since both involved sales of repair services on interstate highways.

Judicial precedent supporting use of such a technique of analogy to extend the jurisdictional coverage of federal statutes does exist, but only where the statutes being compared contain similar language. Where such an extension of jurisdiction would contradict specific statutory

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86. 487 F.2d at 204.
87. Id. at 206.
89. 345 U.S. 13 (1953).
90. Id. at 15.
92. 318 U.S. 125 (1943).
language, no such precedent exists. The Supreme Court was presented with such a situation in *FTC v. Bunte Bros.* There, the Commission staff sought an extension of the jurisdiction of the Federal Trade Commission Act relying on judicial interpretation of the broad jurisdictional coverage of the Sherman Act. The main factors considered by the Court in rejecting the FTC's contention, the widely disparate language, historical setting, scope and purpose of the statutory schemes, apply equally to the Ninth Circuit's position in *Copp*.

Putting aside for the moment the validity of the court's technique of analogy from Fair Labor Standards Act cases, the chief difficulty with the *Copp* analysis is that it ignores substantial contrary precedent.

In a primary-line case, such as *Copp*, the underwriting principle allows the court to consider all the discriminator's sales, both within and outside the plaintiff's competitive area, in determining whether any of the discriminatory sales crossed state lines. Using the *Moore* analysis, the *Copp* court would have been correct in considering all of the defendants' sales, not just those sales in the plaintiff's considerably smaller market area. Under such an analysis, however, the court would have found that none of the defendants made any interstate sales of asphaltic concrete. Even under the underwriting principle the court was obligated to dismiss the plaintiff's complaint.

Under the *Copp* holding, local sales of gasoline for use in vehicles crossing state lines are arguably covered because of their nexus with an instrumentality of interstate commerce. Also covered would be local sales of gravel for use in roads which are used by trucks engaged in interstate travel. Previously such conduct has been considered to be outside the jurisdiction of the Robinson-Patman Act. Possibly justice might be served by interpreting the jurisdictional coverage of the Robinson-Patman Act coextensively with that of the Sherman Act, with the effect that any local price discrimination adversely affecting interstate commerce would be prohibited by section 2(a). However, such an interpretation of section 2(a)'s jurisdictional coverage ignores the explicit language of the statute.

95. 312 U.S. 349 (1941).
97. *Id.* "[T]o read 'unfair methods of competition in commerce' as though it meant 'unfair methods of competition in any way affecting interstate commerce,' requires in view of all the relevant considerations, much clearer manifestation of intention than Congress has furnished."
CONCLUSION

The jurisdiction of section 2(a) of the Robinson-Patman Act is explicitly limited to those price discriminations causing injury to competition “where either or any of the purchases involved in such discrimination are in commerce.” In situations where the discriminating seller makes some interstate transactions, the question becomes whether those sales are “involved in the discrimination.” Correct determination of this question requires an analysis of the type of injury caused by the price discrimination. Where the discrimination causes primary-line injury, all of the discriminator’s sales are involved. As explained by the Supreme Court in Moore, the seller uses interstate profits made outside the plaintiff’s competitive area to underwrite the lower intrastate prices. In a secondary-line case, only those sales between competing buyers are generally involved. However, where the lower priced sales to favored buyers inevitably must be made up in higher prices charged to the disfavored buyers, a nexus exists between noncompeting buyers, so that they are “involved” in the discrimination. The circuit courts in Mayer and Littlejohn have continued their rejection of the Moore principle in primary-line and secondary-line cases, where the “underwriting” analysis is clearly applicable. The result of this rejection has been the widespread use by interstate corporations of local plants selling their products solely intrastate “as a legitimate method by which to avoid the proscriptions of section 2(a).”

This Note was intended to challenge the widely held opinion about the limited applicability of the Moore underwriting principle in analyzing the jurisdictional issue in section 2(a) cases. The opinions in the recent cases of Littlejohn and Mayer, where the factual situations were ripe for analysis along the lines of the underwriting principle, failed to take advantage of the opportunity to utilize the Moore principle. Conversely, the Copp opinion contains a startling holding which extends Robinson-Patman jurisdiction into areas of local price discrimination which cannot be justified even under the underwriting principle. The plaintiff’s appeal in Copp presents the Supreme Court with an opportunity to harmonize the conflicting circuit court holdings on the jurisdictional requirements of section 2(a). As an essential component of the antitrust law enforcement scheme, section 2(a) requires clarification consistent with the statutory language and the Moore underwriting principle.

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101. KINTNER, supra note 18, at 87.
102. 94 S. Ct. 1586 (1974), granting cert. to 487 F.2d 202 (9th Cir. 1973).