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ARTICLE DIGEST

Donald L. Bell, Esq., *Price Discrimination: Territorial Pricing for Cable Television Services and the “Meeting Competition” Defense Under the Cable Television Consumer Protection and Competition Act of 1992*, 19 J. LEGIS. 63 (1993).

One of the many changes that the Cable Television Consumer Protection and Competition Act of 1992 is designed to bring about is the end of price discrimination among cable providers. Section 623(d) of the Act forbids cable operators from charging consumers in the same cable system different prices for the same service. In his article, Donald Bell argues that this provision should be interpreted with caution so as not to restrict legitimate competitive pricing.

Bell explains how price discrimination developed in the mid-1980s, after the passage of the Cable Communications Policy Act of 1984. The 1984 Act forbids rate regulation of cable operators, but municipalities feared that without any direction or competition, a single cable operator in a community could charge exorbitant rates for service. Some municipalities decided to encourage a competing cable operator to enter the market, hoping direct competition would lead to lower rates. This typically was not the result, however. A competing cable operator would provide service to a small area within an existing cable system and charge lower rates than the established cable provider. The established cable operator would lower rates in that area in response to the competition, but would raise rates elsewhere to compensate. This created a two-tier pricing system, where some consumers were paying more for the same cable service than other consumers in the same system. Competing cable providers thus complained that the

established provider was engaging in anticompetitive discrimination.

Section 623(d) was Congress's response to these complaints about territorial pricing and price discrimination. It was modeled after some state ordinances on the same subject and the 1936 Clayton Act. The Clayton Act made it unlawful for anyone engaged in selling commodities to charge a lower price for a product similar in nature to another seller's product, where the effect of that lower price was to reduce competition or create a monopoly. The Clayton Act itself does not apply to cable television because cable television is a service, not a commodity. But according to Bell, the Clayton Act will likely prove to be very influential in deciding cases brought under Section 623(d).

Bell cautions, however, that Section 623(d) should not be used to prevent cable operators from charging prices that meet the demands of the market. He makes a distinction between economic price discrimination and price discrimination as a legal concept. Price discrimination as a legal concept simply means a company charges different customers different prices for the same product or service. In the economic context, however, price discrimination is centered on the belief that different consumers are willing to pay different prices for the same product or service based on how much they value that product or service. Therefore, an economically efficient company will try to maximize profits by selling its product or service to different consumers at different prices.

According to Bell, a cable operator who lowers rates for some customers, and raises them for others, in response to a competitor is only trying to maximize profits and is not necessarily engaging in anticompetitive behavior. Section 623(d), however, like the Clayton Act, simply interprets price discrimination as meaning a difference in price, without regard to economic considerations. Bell suggests that the Clayton Act provides a possible solution to this problem in its "meeting competition" defense. This defense provides that if a seller can prove he lowered prices for his product based on a good faith effort to match the prices of his competitors, he will avoid a finding of price discrimination.

Bell believes that the “meeting competition” defense would work well in the cable industry because it would permit an incumbent cable provider to lower its rates in areas where it faces direct competition. Section 623(d), however, does not explicitly incorporate a “meeting competition” defense. In his conclusion, Bell argues that courts faced with the Section 623(d) claim should read a “meeting competition” defense into the statute to avoid prohibiting legitimate competitive conduct.

B.R.

