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## JURISDICTIONAL REACH UNDER § 2(a) OF THE ROBINSON-PATMAN ACT: LITTLEJOHN SAYS MOORE, OTHERS SAY LESS

During the early part of this century large manufacturer-suppliers drove their smaller competitors out of business by reducing prices in regions where both firms operated. The Clayton Act,<sup>1</sup> passed in 1914, was designed to eliminate these primary-line problems of predatory price-cutting.<sup>2</sup>

During the next twenty years, manufacturer-suppliers took advantage of the rapid growth of large chainstores to engage in secondary-line discrimination.<sup>3</sup> In the late 20's and early 30's, chainstores in the United States nearly tripled their share of total sales,<sup>4</sup> and the mortality rate among independent retailers was perhaps as high as ten per cent a year.<sup>5</sup> This movement was facilitated by the manufacturer-suppliers who, attracted by the large wholesale purchasing powers of chainstores, sold goods to these purchasers on terms more favorable than those given to smaller retailers.<sup>6</sup> Thus, chainstores were able to cut their prices within the smaller retailers' market areas and force many competing firms out of business.

Section 2(a) of the Robinson-Patman Price Discrimination Act<sup>7</sup> was passed to expand the Clayton Act's jurisdiction to include secondary-line discrimination.<sup>8</sup>

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1. 15 U.S.C. §§ 12, 14-27, 44 (1970).

2. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543 (1960); C. AUSTIN, *PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBINSON-PATMAN ACT* 11 (2d rev. ed. 1959) [hereinafter cited as AUSTIN]. See also D. BAUM, *THE ROBINSON-PATMAN ACT* 12 (1964).

3. Essentially, primary-level competition is that between manufacturer-suppliers, and secondary-level competition is that between common purchasers of a manufacturer-supplier. For an excellent explanation of the distinction between primary- and secondary-line competition and discrimination, see E. KINTNER, *A ROBINSON-PATMAN PRIMER* 93-96 (1970) [hereinafter cited as KINTNER].

4. J. PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* 7 (1955).

5. *Id.* at 12-13. It should be noted that this statistic does not reflect an absolute decline in numbers, but rather a high "turnover" of independent retailers. Although ten per cent of the independent retailers may have gone out of business in a given year, they were replaced, to a certain extent, by others who would in turn fall victim to the chain store phenomenon.

6. See AUSTIN, *supra* note 2, at 11; T. BECKMAN & H. NOLEN, *THE CHAINSTORE PROBLEM* 43-44 (1938); 79 CONG. REC. 9078 (1935) (remarks of Congressman Patman).

7. 15 U.S.C. §§ 13, 13a, 13b (1970) [hereinafter referred to as the Robinson-Patman Act or the Act]. The Robinson-Patman Act is technically an amendment to § 2 of the Clayton Act as originally enacted, Clayton Act of 1914, ch. 323, 38 Stat. 730. For this reason one must look to the Clayton Act for the definition of such terms as "person" and "commerce."

8. See AUSTIN, *supra* note 2, at 11; F. ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* 6 (1962) [hereinafter cited as ROWE].

[I]t 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 . . . , where either or any of the purchases involved in such discrimination are in commerce. . . .<sup>9</sup>

This language includes the Clayton Act's two original jurisdictional requirements—the seller must be “engaged in commerce” and the price discrimination must occur “in the course of such commerce”<sup>10</sup>—as well as a further requirement that the purchases involved must be “in commerce.”

Courts have consistently held that this third jurisdictional requirement does, in fact, necessitate a showing that at least one of the discriminatory sales must occur in interstate commerce (i.e., cross a state line).<sup>11</sup> However, the recent Fifth Circuit decision in *Littlejohn v. Shell Oil Co.*<sup>12</sup> dispensed with this requirement. Relying on *Moore v. Mead's Fine Bread Co.*,<sup>13</sup> the *Littlejohn* court held that a complaint based on § 2(a) need not charge that an alleged discriminatory sale crossed a state line.<sup>14</sup> This decision will promote Robinson-Patman's legislative goals by imposing civil liability on powerful national concerns which, until now, have evaded § 2(a) by limiting their local manufacturing plants to intrastate sales.<sup>15</sup>

#### THE MEANING OF MOORE

The plaintiff in *Moore v. Mead's Fine Bread Co.*, the Supreme Court's most recent decision on § 2(a)'s jurisdictional requirements, was an intrastate wholesale bakery supplier located near Clovis, New Mexico. Defendant Mead's was also a bakery goods supplier, having a large intrastate business in New Mexico, along with one interstate truck route into Farwell, Texas. Mead's was part of a large family of corpora-

9. 15 U.S.C. § 13(a) (1970).

10. Section 2 of the original Clayton Act provided in part:

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 . . . , where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Clayton Act of 1914, ch. 323, § 2, 38 Stat. 730.

11. *See, 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); *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co.*, 284 F. Supp. 148, 157-58 (D. Minn. 1967).

12. 456 F.2d 225 (5th Cir. 1972), *rehearing granted*, 5 TRADE REG. REP. (New Court Decisions) ¶ 74,316, at 93,470 (5th Cir., Jan. 2, 1973).

13. 348 U.S. 115 (1954).

14. 456 F.2d at 226.

15. *See* KINTNER, *supra* note 3, at 86-87; *cf.* AUSTIN, *supra* note 2, at 17; ROWE, *supra* note 8, at 81.

tions with interlocking ownership and management, operating throughout Texas and New Mexico.<sup>16</sup> The defendant cut prices on intrastate sales in the Clovis area,<sup>17</sup> but maintained higher prices on interstate sales into Texas.

The lower court in *Moore* held that to show a violation of § 2(a) a plaintiff must prove not only that the defendant made interstate sales, but also that the alleged discriminatory sale which undercut the plaintiff crossed state lines.

Here, although Mead was engaged in [interstate] commerce, the sales made in the course of such commerce were not the means for the elimination of the local competitor. The means for the achievement of the local purpose did not extend beyond state lines.<sup>18</sup>

On appeal the Supreme Court struck down the lower court's interpretation of § 2(a)'s jurisdictional requirements.

[T]he practices in the present case are also included within the scope of the antitrust laws. We have here an interstate industry increasing its domain through outlawed competitive practices. 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 other Mead companies, are kept high while the local prices are lowered. . . . The profits made in interstate activities would underwrite the losses of local price-cutting campaigns.<sup>19</sup>

This language leaves the scope of § 2(a) unclear. The Court seems to suggest that the existence of an interstate combine capable of underwriting local discriminatory price cuts satisfies § 2(a)'s jurisdictional prerequisites even without discriminatory interstate sales. However, the defendant in *Moore* did operate an interstate truck route. While the interstate sales from this route constituted only a small fraction of the

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16. Petitioner's Reply Brief at 20-24, *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954) [hereinafter cited as Petitioner's Reply Brief].

17. The order to cut prices in the Clovis area was given by E. E. Corcoran, a Vice-President of all four Mead corporations. Petitioner's Reply Brief, *supra* note 16, at 22.

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

19. 348 U.S. at 119.

defendant's total sales,<sup>20</sup> they were technically sufficient to bring the defendant's selling activity within the jurisdictional requirements of § 2(a).<sup>21</sup> Therefore, perhaps the Supreme Court merely held that although a defendant's undercutting sale need not have been interstate, at least one interstate sale, whether it be the higher or lower-priced sale, must be shown.<sup>22</sup> This conclusion would be consistent with other language in *Moore*:

[T]hose sections [ §§ 2(a) and (3) ] on their face seem to cover the instant case. Respondent is engaged in commerce, selling bread both locally and interstate.<sup>23</sup>

On the other hand, if the defendant's few interstate sales were alone sufficient to establish jurisdiction, the Court's strong emphasis on the existence of a large, interstate combine is superfluous.<sup>24</sup>

Since *Moore*, circuit courts, interpreting *Moore's* concern for Mead's interstate nature as dicta,<sup>25</sup> have repeatedly concluded that a § 2(a) violation requires a showing that at least one of the sales complained of has crossed state lines. On at least eight separate occasions the Supreme Court has denied certiorari on decisions interpreting § 2(a) in this manner.<sup>26</sup>

20. Testimony in the trial court revealed that interstate sales into Farwell, Texas, represented only 1.7 per cent of the Clovis company's total sales for the period in question. Record at 423-24, *Moore, d/b/a Moore's Bakery v. Mead's Fine Bread Co.*, Civil No. 1457 (D.N.M., filed Dec. 8, 1952).

21. In attempting to ascertain the holding in *Moore*, it is significant to note that the "'commerce' test of the statute [Robinson-Patman Act] is qualified by an implicit exemption for interstate transactions of a de minimus dimension." *Rowe, supra* note 8, at 78. Therefore, the position that *Moore* was based upon Mead's interstate sales is certainly questionable.

22. This interpretation of *Moore* is suggested in *KINTNER, supra* note 3, at 81; *Rowe, supra* note 8, at 79.

23. 348 U.S. at 118.

24. The conclusion that the Court's decision was based on the existence of an interstate combine capable of underwriting local discriminatory price cuts, and not the negligible number of interstate sales by one member of the combine, is supported by the following language:

We have here an interstate industry . . . ; the beneficiary is an interstate business; the treasury used to finance the warfare is drawn from interstate . . . sources which include not only respondent but a group of interlocked companies. . . . The profits made in interstate activities would underwrite the losses of local price-cutting campaigns.

348 U.S. at 119.

25. See *KINTNER, supra* note 3, at 82. The *Littlejohn* majority even admits that the language of *Moore* upon which it relies has been considered dicta by several courts. *Littlejohn v. Shell Oil Co.*, 456 F.2d 225, 228 (5th Cir. 1972).

26. *Walker Oil Co. v. Hudson Oil Co.*, 396 U.S. 1042 (1970), *denying cert. to* 414 F.2d 588 (5th Cir. 1969); *Hiram Walker, Inc. v. A & S Tropical, Inc.*, 396 U.S. 901 (1969), *denying cert. to* 407 F.2d 4 (5th Cir. 1969); *Abramson v. Colonial Oil Co.*, 393 U.S. 831, *denying cert. to* 390 F.2d 873 (5th Cir. 1968); *Cream Crest-Blanding Dairies, Inc. v. National Dairy Products Corp.*, 387 U.S. 930, *denying cert. to* 370 F.2d 332 (6th Cir. 1967); *Foremost Dairies, Inc. v. FTC*, 382 U.S. 959, *denying cert. to* 348 F.2d 674

*Littlejohn v. Shell Oil Co.*<sup>27</sup> has challenged these precedents.

### LITTLEJOHN V. SHELL OIL

The plaintiff in *Littlejohn* owned and operated an independent gasoline service station in Dallas County, Texas. Shell Oil's<sup>28</sup> Houston refinery allegedly sold gasoline to one of its retail stations which was in direct competition with Littlejohn (the station was in the same block as the plaintiff's) at lower prices than it charged other Shell stations in the Dallas area. The favored station, in turn, sold to the public at lower prices than those charged by other Shell stations. Littlejohn alleged that these sales violated § 2(a).<sup>29</sup>

Since Littlejohn had failed to allege that the defendant's Houston refinery made interstate sales, the district court granted the defendant summary judgment.<sup>30</sup> Littlejohn had been unable to discover any interstate

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(5th Cir. 1965); *Jones v. Metzger Dairies, Inc.*, 379 U.S. 965 (1965), *denying cert. to* 334 F.2d 919 (5th Cir. 1964); *Willard Dairy Corp. v. National Dairy Products Corp.*, 373 U.S. 934 (1963), *denying cert. to* 309 F.2d 943 (6th Cir. 1962); *Central Ice Cream Co. v. Golden Rod Ice Cream Co.*, 368 U.S. 829, *denying cert. to* 287 F.2d 265 (7th Cir. 1961).  
27. 456 F.2d 225 (5th Cir. 1972).

28. Although American and Sooner Oil Companies were also defendants in *Littlejohn*, it is sufficient to relate only Shell's activities for purposes of analyzing the court's opinion.

29. Brief for Appellant at 23, *Littlejohn v. Shell Oil Co.*, 456 F.2d 225 (5th Cir. 1972) [hereinafter cited as Brief for Appellant]. Thus, Littlejohn was not only complaining of the wholesale sales to his Shell retail competitor, but also of the competitor's retail sales to the public which undercut the price at which Littlejohn was selling.

30. *Littlejohn v. Shell Oil Co.*, 326 F. Supp. 45, 48 (N.D. Tex. 1971). While the district court's primary concern was the interstate sales issue (and the lack of such sales was the only ground for summary judgment dealt with on appeal), the district court felt that Littlejohn was without a cause of action for at least two other reasons. First, Littlejohn had failed to show that the defendants controlled retail prices. *Id.* at 47. Second, and most significant, the court doubted that Littlejohn had standing to sue under § 2(a) of the Robinson-Patman Act; the court reasoned that he was not harmed by secondary-line discrimination as that term is traditionally defined because he did not purchase from the same supplier as the competitor of whose undercutting activity he was complaining. *Id.* at 47-48. *See also* *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588 (5th Cir. 1969), *cert. denied*, 396 U.S. 1042 (1970). Thus, the Fifth Circuit's reversal of the district court arguably implies that such secondary-line discrimination (and primary-line discrimination as well, since Littlejohn did not compete with Shell at the supplier level) need not be alleged in order for the plaintiff to have standing under the Robinson-Patman Act.

Although courts may be willing to accept the position set forth in this note (i.e., that the interstate sale requirement should be dispensed with when there is a predatory price-cutting scheme underwritten by a national concern engaged in interstate commerce), it is unlikely that they will also extend the Robinson-Patman Act's coverage to plaintiffs who are injured by neither type of discrimination which § 2(a) has been traditionally thought to prohibit. Nevertheless, a strong argument for such an extension in the *Littlejohn* context can be made because Littlejohn is the type of plaintiff which the Act was designed to protect. That is to say, Robinson-Patman was concerned with small retailers who could not compete with their large competitors because the small retailers were forced to pay more than their competitors for goods purchased from a common supplier. *See* note 6 *supra* & text accompanying. While Littlejohn did not

sales within the time permitted by the district court and thus his appeal to the Fifth Circuit was based on a plea for additional time.<sup>31</sup> The Fifth Circuit reversed the district court, holding that more time for discovery should be permitted. However, the court went on to say that the plaintiff's discovery need not be directed at uncovering a discriminatory interstate sale. According to the court, Littlejohn's

complaint under the Robinson-Patman Act 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-cutting tactics.<sup>32</sup>

This holding was based on that language in *Moore* which emphasized the jurisdictional importance of large, interstate combines which finance and underwrite intrastate price cutting through interstate sales.<sup>33</sup>

purchase from the same supplier as his Shell competitor, he was driven from business because he could not obtain price cuts from his supplier which were comparable to those being "temporarily" afforded his Shell competitor. If the common supplier criterion is strictly adhered to, it will mean, in most instances, that the only party capable of complaining of activities such as those in *Littlejohn* would be a retailer who did not get the same price cut as his retailing competitor. The prospect of a retailer bringing a price discrimination suit against a major supplier who has given him a dealership or franchise is, at best, fanciful.

Extension of § 2(a) coverage to a plaintiff in Littlejohn's situation may also be justified on the ground that such an extension would indirectly protect primary-line competition, which remains a concern of the Robinson-Patman Act. *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 543-44 (1960). The scheme employed by Shell in *Littlejohn*, if repeated throughout the nation, could seriously affect competition at the primary level. Not only was Littlejohn driven from his business by this scheme, but his supplier lost a customer. Thus, while Shell is prohibited from discriminating on the primary level through means of predatory price-cutting to drive a competing supplier out of business in a given area of the country, it may accomplish the same result by driving the competitor's customers out of business one by one through the scheme employed in *Littlejohn*.

31. Brief for Appellant, *supra* note 29, at 13-14. Counsel for Littlejohn did not argue for the holding adopted by the Fifth Circuit. He only sought more time in which to discover whether or not any interstate sales had been made from Shell's Houston refinery, and his brief indicates agreement with the traditional § 2(a) jurisdictional requirement that at least one of the sales complained of must be "in interstate commerce." *See, e.g., id.* at 26.

32. 456 F.2d 225, 226 (5th Cir. 1972). After making this statement, the court continued:

We simply hold that the district court acted prematurely in foreclosing the plaintiff from further discovery regarding the interstate aspects of the defendants' operations. . . .

*Littlejohn v. Shell Oil Co.*, 456 F.2d 225, 229 (1972) (emphasis added). This language makes it apparent that the discovery referred to was that required to show "interstate underwriting" and not interstate sales.

33. Until the Supreme Court explicitly repudiates the above-quoted language [the interstate underwriting language] from Mr. Justice Douglas' opinion in *Moore*, we believe that a Robinson-Patman Act plaintiff should be entitled to proceed upon a theory that the interstate operations of the defendant or de-

## THE ARGUMENT FOR LITTLEJOHN

In searching for Congressional intent with respect to the *Littlejohn* situation it must be observed that Congress possessed the power to enact legislation with the broad jurisdictional requirements found by the court in *Littlejohn*.<sup>34</sup> Whether or not Congress did so is uncertain. While *Littlejohn's* interpretation of § 2(a) is unsupported by any post-*Moore* decisions,<sup>35</sup> recourse to the Act's legislative history and to § 2's other subsections arguably supports the *Littlejohn* opinion.

Perhaps the strongest argument in support of *Littlejohn* is simply that it effects the basic purpose of Robinson-Patman. In light of the draftsmen's stated concern for the plight of the small retailer,<sup>36</sup> it seems unlikely that Congress did not desire to protect someone like Littlejohn. Congress was concerned with small retailers being driven out of business by large nationwide or regional retailers,<sup>37</sup> precisely what happened to Littlejohn. Robinson-Patman was designed to cover the more subtle methods of price discrimination, such as rebates and commissions, which had been developed to evade the Clayton Act.<sup>38</sup> Therefore, the Robinson-Patman Act's expanded coverage should call for jurisdictional power at least equal to that of the Clayton Act, which has been interpreted by the Supreme Court not to require an interstate sale to establish jurisdiction.<sup>39</sup>

defendants were used to 'underwrite' local discriminatory pricing practices. 456 F.2d at 229.

34. See AUSTIN, *supra* note 2, at 15-16; *Royal Farms, Inc. v. Piels Bros., Inc.*, 1971 Trade Cas. 89,877 (E.D.N.Y. 1971).

35. See note 26 *supra* & text accompanying. See also *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203 (5th Cir. 1969); *Food Basket, Inc. v. Albertson's, Inc.*, 383 F.2d 785 (10th Cir. 1967).

36. "[T]he day of the independent merchant is gone unless something is done and done quickly." *Hearings Before the House Comm. on the Judiciary on Bills to Amend the Clayton Act*, 74th Cong., 1st Sess. 5 (1945) (statement by Congressman Patman).

The backbone of . . . local enterprise is the local independent businessman. . . . It is a mistake to assume that he is less efficient just because he is small. . . . Yet his nonresident competitor . . . with the ability to absorb losses, is able to . . . crush his [the small businessman's] superior efficiency with no other weapons than those of greater size and the power of outside resources.

80 CONG. REC. 9416 (1936) (remarks of Congressman Utterback).

37. For a general discussion of the objectives of the Robinson-Patman Act, see C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 29-30 (1959) [hereinafter cited as EDWARDS]. Particularly significant is his comment: "It [the Act] expressed not a concern to preserve free markets, but rather a concern to assure the survival of small business." *Id.* at 12.

38. See H.R. REP. NO. 2287, 74th Cong., 2d Sess. 7 (1936); S. REP. NO. 1502, 74th Cong., 2d Sess. 3 (1936); ROWE, *supra* note 8, at 365. Cf. AUSTIN, *supra* note 2, at 8-9; KINTNER, *supra* note 3, at 30, 227.

39. Cf. *Standard Oil Co. v. United States*, 337 U.S. 293, 314-315 (1949). For the differences between the jurisdictional requirements of the Robinson-Patman Act and the Clayton Act, see notes 9 & 10 *supra* & text accompanying.

It is uncertain whether Robinson-Patman's legislative history indicates an intent to make an interstate sale a jurisdictional requirement of § 2(a) when there is underwriting by a large, multi-state business. Courts which have read § 2(a) to require at least one interstate sale would disagree with this proposition, arguing that the jurisdictional language of Robinson-Patman is far narrower in scope than the effect on commerce test applicable under the Sherman Antitrust Act.<sup>40</sup> In support of this position, some commentators<sup>41</sup> cite the fact that the Senate-House Conference Committee struck a clause<sup>42</sup> in the original House bill which would have adopted the "effect on commerce" criterion for Robinson-Patman jurisdiction:

[I]t shall be unlawful for any person, whether in commerce or not, either directly or indirectly, to discriminate in price. . . where . . . such discrimination may substantially lessen competition in commerce. . . .<sup>43</sup>

However, when rejecting this language, the conferees did not expressly state an intention to make interstate sales a minimum jurisdictional requirement of § 2(a).<sup>44</sup> Moreover, the discarded language represents an extreme approach under which purely local transactions involving purely local parties could have been reached by the Act. Rejection of such an extreme does not imply acceptance of the opposite, i.e., requiring at least one interstate sale. An equally plausible explanation of the conferees' disapproval is that they merely desired more stringent jurisdictional requirements than those of the Sherman Act. It can be argued that the court in *Littlejohn* similarly recognized that Robinson-Patman and Sherman Act jurisdictional requirements are not the same, thus admitting the jurisdictional necessity of relating an alleged discriminatory price-cut in some way to interstate commerce. Its extensive reliance on *Moore* would indicate that it shares the Supreme Court's position on the necessity of showing, in the absence of an "in commerce" sale, that the defendant was heavily engaged in interstate activity.

Internal inconsistencies in § 2 may also justify *Littlejohn*. Section 2(c)<sup>45</sup> (prohibiting large chain buyers from exacting fictitious brokerage

40. See *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 676 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *Willard Dairy Corp. v. National Dairy Prods. Corp.*, 309 F.2d 943, 946 (6th Cir. 1962), *cert. denied*, 373 U.S. 934, *rehearing denied*, 375 U.S. 871 (1963); *Lewis v. Shell Oil Co.*, 50 F. Supp. 547, 549 (N.D. Ill. 1943).

41. AUSTIN, *supra* note 2, at 15; ROWE, *supra* note 8, at 78.

42. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

43. H.R. 8442, 740th Cong., 2d Sess. § 2(a) (1936).

44. H.R. REP. No. 2951, 74th Cong., 2d Sess. 6 (1936).

45. 15 U.S.C. § 13(c) (1970), which provides in part:

fees) and § 2(d)<sup>46</sup> (prohibiting large purchasers from receiving promotion allowances and services) were enacted to reach more subtle methods of § 2(a) price discrimination.<sup>47</sup> Neither of these sections has an interstate sale requirement.<sup>48</sup> This omission has been viewed as an argument for reading § 2(a)'s "purchase . . . in commerce" clause as an additional jurisdictional requirement for that section.<sup>49</sup> However, under this interpretation, a seller could structure his operation to achieve the same discriminatory result through direct price-cutting that would be outlawed by §§ 2(c) and (d) if attempted through more subtle methods.<sup>50</sup>

Section 2(f)<sup>51</sup> is another example of the Act's aberrant drafting. This section imposes liability upon buyers accepting discriminatory prices for which their sellers would be liable under § 2(a).<sup>52</sup> Yet § 2(f)'s

It shall be unlawful for any person *engaged in commerce, in the course of such commerce*, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods. . . .

*Id.* (emphasis added).

46. 15 U.S.C. § 13(d) (1970), which provides:

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.

*Id.* (emphasis added).

47. See 80 CONG. REC. 6281, 6282 (1936) (remarks of Senator Logan).

48. With respect to § 2(c), see *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966). With respect to § 2(d), see *Shreveport Macaroni Mfg. Co. v. FTC*, 321 F.2d 404 (5th Cir. 1963), *cert. denied*, 375 U.S. 971 (1964).

49. See KINTNER, *supra* note 3, at 80.

50. To illustrate, it will be assumed that a manufacturer-supplier has plants in Indiana, Illinois, and Ohio, and that he does not sell outside of this three-state region. If his plants in these three states sell only within the state in which they are located, the manufacturer-supplier will not be liable for discriminatory price-cutting unless he discriminates by means of fictitious brokerage fees (§ 2(c)), or unfair promotional allowances (§ 2(d)). The absurdity of this situation is apparent. Sections 2(c) and 2(d), which were enacted to prevent evasion of § 2(a) by the use of subtle methods of price discrimination, are ineffective in this situation because, although they would be applicable without a showing of an interstate sale, the manufacturer could escape liability by using direct methods of price discrimination.

51. 15 U.S.C. § 13(f) (1970).

52. [I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

15 U.S.C. § 13(f) (1970). Section 2(f) is the only subsection directed at the large purchasers with whom the Robinson-Patman Act was primarily concerned. The other subsections are directed at sellers rather than buyers. It has been suggested that this approach was motivated by constitutional considerations. Rowe, *supra* note 8, at 23.

language does not contain § 2(a)'s interstate sale requirement. It is probable that courts will attempt to remedy this inconsistency by reading the § 2(a) interstate sale requirement into § 2(f).<sup>53</sup> Although not explicitly addressed to this inconsistency, *Littlejohn* resolves it in an equally plausible manner: The court merely interpreted § 2(a) as not requiring an interstate sale.

The interstate sale requirement is similarly omitted from Robinson-Patman's criminal provisions in § 3:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, . . . to sell, or contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States. . . .<sup>54</sup>

This omission seems to imply the anomalous result that the jurisdictional reach of the Act's criminal provision is broader than that of its civil liability coverage, § 2(a). But the legislative history suggests that the jurisdictional scope of §§ 3 and 2(a) should be the same.<sup>55</sup> Here again, the *Littlejohn* approach of not interpreting § 2(a) to include an interstate sale requirement seems to harmonize the provisions of the Act.

#### CONCLUSION

Section 2(a)'s language "where either or any of the purchases involved . . . are in commerce" is unique to the Robinson-Patman Act. The language alone might imply an additional jurisdictional requirement. However, when read in the context of § 3 and the remainder of § 2, its meaning is uncertain. In the past, uncertainties in the Act have been remedied by judicial interpretation,<sup>56</sup> largely because legislative amendment has been nonexistent.<sup>57</sup> In these circumstances, the prime considera-

53. See KINTNER, *supra* note 3, at 80; *cf.* EDWARDS, *supra* note 37, at 486.

54. 15 U.S.C. § 13a (1970).

55. In discussing the relationship between §§ 2(a)-(f) and § 3, the House Conference Committee observed that:

While they overlap in some respects, they are in no way inconsistent with the provisions of the Clayton Act amendment. . . . Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it.

H.R. REP. No. 2951, 74th Cong., 2d Sess. 8 (1936).

56. For example, the lack of jurisdictional requirements in § 2(e) was remedied by simply reading the requirements of § 2(d) into § 2(e). See *Elizabeth Arden, Inc. v. FTC*, 156 F.2d 132 (2d Cir. 1946); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir. 1945).

57. Admittedly, the Robinson Patman Act is not a model of legislative clarity. However, to paraphrase Mark Twain, reports of its death are exaggerated—

tion should be an interpretation which effectuates the purposes of the Act.<sup>58</sup> Perhaps *Littlejohn* can be best justified on this basis.

The problem *Littlejohn* sought to correct is apparently growing. Since the Supreme Court's denial of certiorari in the post-*Moore* decisions the use of "local plants selling their products solely intrastate is quickly becoming ensconced in the law as a legitimate method by which to avoid the proscriptions of Section 2(a)."<sup>59</sup> The *Littlejohn* court refused to sanction a predatory price-cutting scheme whereby a small independent retailer was driven out of business by local competition underwritten by the economic power of a national corporation. If the basic purpose of Robinson-Patman, the protection of small independent retailers from unfair competitive practices, is to be achieved, the prohibitions of the Act cannot be avoided by organizations capable of structuring their discriminatory transactions so that they take place within, rather than between, individual states.<sup>60</sup>

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*not one word of the statute has been changed in its thirty-four-year span of existence.*

KINTNER, *supra* note 3, at 310 (emphasis added).

58. As Justice Frankfurter observed,

We ought not to find in § 5 [of the FTC Act] radiations beyond the obvious meaning of language unless otherwise the purpose of the Act would be defeated. *FTC v. Bunte Bros., Inc.*, 312 U.S. 349, 351 (1941).

59. KINTNER, *supra* note 3, at 86-87.

60. In his dissent in *Willard Dairy Corp. v. National Dairy Products Corp.*, 373 U.S. 934 (1963), *denying cert.* to 309 F.2d 943 (6th Cir. 1962), Justice Black argued strongly for this position:

[T]he Robinson-Patman Act condemns the monopolistic practice under which profits made in nondiscriminatory interstate transactions are used to offset losses arising from discriminatory price cutting at the local level. . . . Refusing to grant certiorari here means that this Court is allowing the economic resources and staying power of an interstate company to be used with impunity to destroy local competition, precisely the sort of thing the Robinson-Patman Act aimed to prevent. The present case presents an important question of price cutting by interstate business with local plants, each of which services largely a local area but all of which draw on the economic power of the national operation. Judgments like the one . . . here make it difficult indeed for small, independent, local companies to survive against the predatory assaults of their larger and more powerful interest competitors.

373 U.S. at 935-36.