12-1993

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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 discrimi-

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 economi-
cally 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 necessari-
ly 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.