Washington and Lee Law Review

Volume 32 | Issue 4 Article 6

Fall 9-1-1975

Antitrust-The Jurisdictional Requirements Of Robinson-Patman Act § 2(A) Clarified: Gulf Oil Corp. V. Copp Paving Co., Inc.

ANTITRUST—THE JURISDICTIONAL REQUIREMENTS OF ROBINSON-PATMAN ACT § 2(a) CLARIFIED: *GULF OIL CORP. V. COPP PAVING CO., INC.*

In *Gulf Oil Corp. v. Copp Paving Co., Inc.*,[1] the United States Supreme Court considered the interstate commerce jurisdictional requirements of § 2(a) of the Clayton Act as amended by the Robinson-Patman Act[2] for the first time in over twenty years.[3] During this period, the lower federal courts frequently construed the subject matter jurisdiction requirements of § 2(a)[4] with inconsistent results.

---

[1] 95 S. Ct. 392 (1974).

[2] Clayton Act § 2(a), 15 U.S.C. § 13(a) (1970), *formerly* Ch. 323, § 2, 38 Stat. 730 (1914). The Clayton Act was amended in 1936 by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970), *formerly* Ch. 592, § 1, 49 Stat. 1526 (1936).

[3] The last time the Supreme Court considered the jurisdictional reach of the Robinson-Patman § 2(a) "in commerce" provision was in Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954). See notes 50-60 and accompanying text *infra*.

[4] The following circuit and district court cases have construed the "in commerce" provision of § 2(a) of the Clayton Act since the Supreme Court last considered the issue: Scranton Constr. Co., Inc. v. Litton Indus. Leasing Corp., 494 F.2d 778 (5th Cir. 1974), U.S. App. pending, 43 U.S.L.W. 3095 (1974); Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); Lehrman v. Gulf Oil Corp., 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd en banc*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir.), *cert. denied*, 393 U.S. 831 (1968); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Foremost Dairies, Inc. v. FTC, 348 F.2d 674 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); Fort Lauderdale v. East Coast Asphalt Corp., 329 F.2d 871 (5th Cir.), *cert. denied*, 379 U.S. 900 (1964); United States v. South Fla. Asphalt Co., 329 F.2d 860 (5th Cir.) *cert. denied*, 379 U.S. 880 (1964); Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963) *cert. denied*, 375 U.S. 971 (1964); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J., dissenting); Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 257 F.2d 417 (7th Cir. 1968); Miles v. Coca-Cola Bottling Co., 360 F. Supp. 869 (E.D. Wis. 1973); *In re* Western Liquid Asphalt Cases, 350 F. Supp. 1369 (N.D. Cal. 1972), *rev'd*, 487 F.2d 191 (9th Cir. 1973), *cert. denied*, 415 U.S. 919 (1974); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972), *aff'd*, 493 F.2d 1204 (9th Cir. 1974), *cert. denied*, 95 S. Ct. 138 (1974); Webster v. Sinclair Ref. Co., 338 F. Supp. 248 (S.D. Ala. 1971); Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 330 F. Supp. 549 (E.D. La. 1971), *aff'd*, 469 F.2d 416 (5th Cir. 1972); Flotken's West, Inc. v. National Food Stores, Inc., 312 F. Supp. 136 (E.D. Mo. 1970); Liquilux Gas Servs. v. Tropical Gas Co., 303 F. Supp. 414 (D.P.R. 1969); Clausen & Sons, Inc. v. Theo.

This lack of harmony among the lower courts may be attributed, at least in part, to the equivocal nature[5] of *Moore v. Mead's Fine Bread Co.*,[6] the Court's last ruling on the jurisdictional scope of § 2(a). The question which the federal courts faced for so long without Supreme Court guidance was whether or not Congress, by enacting § 2(a), intended to exercise its plenary power under the Constitution to regulate commerce.[7]

The problem of determining Congress's intent in enacting § 2(a) springs from the vague and complicated language used in that statute to establish federal jurisdiction in cases of price discrimination.[8] Specifically, to fall within the Act's purview one must, first, be "engaged in commerce;" second, one must discriminate in price between different purchasers of commodities "in the course of such commerce;" and, third, at least one of the purchases involved in such discrimination must be "in commerce."[9] Although the term "commerce" is defined by § 1 of the Clayton Act,[10] courts have never adopted a

---

Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967), *rev'd*, 395 F.2d 388 (8th Cir. 1968); Baldwin Hills Bldg. Materials Co. v. Fibreboard Paper Prods. Corp., 283 F. Supp. 202 (C.D. Cal. 1968); LaPointe v. Schweigert Meat Co., 282 F. Supp. 974 (D. Minn. 1966); Industrial Bldg. Materials, Inc. v. Interchemical Corp., 278 F. Supp. 938 (C.D. Cal. 1967); Ingram v. Phillips Petroleum Co., 259 F. Supp. 176 (D.N.M. 1966); Becker v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965); Cream Crest-Blanding Dairies, Inc. v. National Dairy Prods. Corp., 243 F. Supp. 331 (W.D. Mich. 1965), *aff'd per curiam*, 370 F.2d 332 (6th Cir.), *cert. denied*, 387 U.S. 930 (1967); Gaylord Shops, Inc. v. Pittsburgh Miracle Mile Town & Country Shopping Center, Inc., 219 F. Supp. 400 (W.D. Pa. 1963); Davidson v. Kansas City Star Co., 202 F. Supp. 613 (W.D. Mo. 1962), *rev'd*, 336 F.2d 439 (8th Cir. 1964); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957).

[5] *E.g.*, Littlejohn v. Shell Oil, 456 F.2d 225 (5th Cir. 1972), *rev'd en banc*, 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973), and cases cited therein.

[6] 348 U.S. 115 (1954).

[7] Both positions have been advocated strongly. *Compare* E. KINTNER, A. ROBINSON-PATMAN PRIMER 80 (1970) *with* Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245 (1971).

[8] Courts have not infrequently bemoaned the "infelicitous language," Automatic Canteen Co. v. FTC, 346 U.S. 61, 78 (1953), and "vague and general" wording, FTC v. Ruberoid Co., 343 U.S. 470, 481 (1952) (Jackson, J., dissenting), of the Robinson-Patman Act.

[9] The relevant portion of the statute reads:

> 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 . . . .

15 U.S.C. § 13(a) (1970).

[10] 15 U.S.C. § 12 (1970).

uniform interpretation of the "in commerce" language of § 2(a). Rather, there have been two rival interpretations of the "in commerce" standard for jurisdiction under § 2(a) of the Clayton Act.

Some courts have ruled that Congress exercised its full power to regulate commerce in § 2(a) and therefore intended that the "affecting commerce" doctrine apply to cases arising under that section.[11] Under this theory, commercial activities which are purely intrastate

[11] The "affecting commerce" doctrine has been most extensively defined in Katzenbach v. McClung, 379 U.S. 294 (1964); Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241 (1964); United States v. Women's Sportswear Mfg. Ass'n., 336 U.S. 460 (1949); and Wickard v. Filburn, 317 U.S. 111 (1942). The following cases have applied the "affecting commerce" doctrine to § 2(a); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 178 F.2d 150 (2d Cir. 1949); Ford Wholesale Co. v. Fibreboard Paper Prods. Corp., 344 F. Supp. 1323 (N.D. Cal. 1972); General Shale Products v. Struck Constr. Co., 37 F. Supp. 598 (W.D. Ky. 1941), *aff'd*, 132 F.2d 425 (6th Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); Abouaf v. Spreckels Co., 26 F. Supp. 830 (N.D. Calif. 1939). *Cf.* United States v. South Fla. Asphalt Co., 329 F.2d 860 (5th Cir. 1964); Central Ice Cream Co. v. Golden Rod Ice Cream Co., 257 F.2d 417 (7th Cir. 1958); White Bear Theatre Corp. v. State Theatre Corp., 129 F.2d 600 (8th Cir. 1942); Sorrentino v. Glen-Gery Shale Brick Corp., 46 F. Supp. 709 (E.D. Pa. 1942); Alabama Independent Serv. Station Ass'n., Inc. v. Shell Petroleum Corp., 28 F. Supp. 386 (N.D. Ala. 1939). *See also* C. AUSTIN, PRICE DISCRIMINATION, 15-17 (2d ed. 1959); W. PATMAN, THE ROBINSON-PATMAN ACT: WHAT YOU CAN AND CANNOT DO UNDER THIS LAW 225-26 (1938). *But see* W. PATMAN, COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT 46-47 (1963); 2 H. TOULMIN, A TREATISE ON THE ANTI-TRUST LAWS OF THE UNITED STATES § 7.5 (1949); Blackford, *A Survey of Section 2(a) of the Robinson-Patman Act*, 41 NOTRE DAME L. 285, 291 (1966); Dixon, *Practice and Procedure Before the Federal Trade Commission*, 9 N.Y.L.F. 31, 34-35 (1963); Eiger, *The Commerce Element in Federal Antitrust Legislation*, 25 FED. B.J. 282, 299 (1965); Haslett, *Price Discriminations and Their Justifications Under the Robinson-Patman Act of 1936*, 46 MICH. L. REV. 450, 452-53 (1948); Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245, 1255 (1971); Comment, *Robinson-Patman Act—Section 2(a)—Primary Line Competition—Discriminatory Sales Need Not Cross State Lines*, 9 N.Y.L.F. 93, 97 (1963).

A number of cases decided under §§ 2(c) and (e) of the Clayton Act lend support to the proposition that the "affecting commerce" doctrine is incorporated into § 2(a). Skinner v. U.S. Steel Corp., 233 F.2d 762 (5th Cir. 1956); Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947); Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331 (3d Cir. 1939); Liquilux Gas Servs. v. Tropical Gas Co., 303 F. Supp. 414 (D.P.R. 1969); Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp., 81 F. Supp. 547 (S.D. N.Y. 1948). *But see* E. KINTNER, A ROBINSON-PATMAN PRIMER 84 (1970). The following cases decided under §§ 2(c) and (e) indicate that Robinson-Patman jurisdiction may be based on the "affecting commerce" doctrine: Corn Prods. Ref. Co. v. FTC, 324 U.S. 726 (1945); Rangen, Inc. v. Sterling Nelson & Sons, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966); Fitch v. Kentucky-Tennessee Light & Power Co., 136 F.2d 12 (6th Cir. 1943); Quality Bakers v. FTC, 114 F.2d 393 (1st Cir. 1940); Body-Steffner Co. v. Flotill Prods., Inc., 63 Cal. App. 2d 555, 147 P.2d 84 (1944).

are nevertheless within Congress's regulatory power if they hinder or otherwise affect interstate commerce.[12] Other courts, however, have adopted a narrower reading of § 2(a), requiring that before the statute applies there must be a showing that at least one of the commodities for which a discriminatory price is charged has crossed a state line.[13] This is the so-called "state line" test.

These, in essence, were the conflicting theories offered by the parties in *Copp Paving*. In deciding *Copp Paving*, the Supreme Court eliminated much of the uncertainty that has surrounded the "in commerce" jurisdictional requirements of § 2(a) by rejecting the "affecting commerce" interpretation, and adopting the more restrictive "state line" test. Insofar as it clarifies obscure statutory language, *Copp Paving* is of sweeping importance for both the private § 2(a) plaintiff and the Federal Trade Commission.[14]

---

[12] For the furthest development and clearest articulation of the doctrine, see cases cited in note 11 *supra*.

[13] Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763 (7th Cir. 1973); Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd en banc* 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir. 1968); Food Basket, Inc. v. Albertson's, Inc., 383 F.2d 785 (10th Cir. 1967); Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J., dissenting); Miles v. Coca-Cola Bottling Co., 360 F. Supp. 869 (E.D. Wis. 1973); Webster v. Sinclair Ref. Co., 338 F. Supp. 248 (S.D. Ala. 1971); Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co., 330 F. Supp. 549 (E.D. La. 1971); Flotken's West, Inc. v. National Food Stores, Inc., 312 F. Supp. 136 (E.D. Mo. 1970); Liquilux Gas Servs. v. Tropical Gas Co., 303 F. Supp. 414 (D.P.R. 1969); Baldwin Hills Bldg. Materials Co. v. Fibreboard Paper Prods. Corp., 283 F. Supp. 202 (C.D. Cal. 1968); LaPointe v. Schweigert Meat Co., 282 F. Supp. 974 (D. Minn. 1966); Ingram v. Phillips Petroleum Co., 259 F. Supp. 176 (D.N.M. 1966); Becker v. Safelite Glass Corp., 244 F. Supp. 625 (D. Kan. 1965); Cream Crest-Blanding Dairies, Inc. v. National Dairy Prods. Corp., 243 F. Supp. 331 (W.D. Mich. 1965); Shlomchik v. Hygrade Bakery Co., 1953 Trade Cas. ¶ 67,632 (E.D. Pa. 1953); Myers v. Shell Oil Co., 96 F. Supp. 670 (S.D. Cal. 1951); Spencer v. Sun Oil Co., 94 F. Supp. 408 (D. Conn. 1950); Lewis v. Shell Oil Co., 50 F. Supp. 547 (N.D. Ill. 1943); Pittsburgh Plate Glass Co. v. Jarrett, 42 F. Supp. 723 (M.D. Ga. 1942). *See also* E. KINTNER, A. ROBINSON-PATMAN PRIMER 80-81 (1970); 16c [J. von Kalinowski, Business Organizations: Antitrust Laws and Trade Regulation § 26.02 (1971); Kemker, *Price Discrimination Under the Robinson-Patman Act*, 14 U. FLA. L. REV. 155, 158-59 (1961); Kintner and Mayne, *Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act*, 58 GEO. L. REV. 1117 (1970); Rowe, *Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1168 (1958).

[14] Although the Justice Department and FTC share responsibility for enforcing the Robinson-Patman Act, in practice most of this responsibility devolves upon the FTC. E. KINTNER, A ROBINSON-PATMAN PRIMER 286 (1970).

The respondent, Copp Paving Company, Inc., originally brought suit against Union Oil Co. and its wholly-owned subsidiary Industrial Asphalt, and Edgington Oil Company. Copp Paving alleged infractions of §§ 1 and 2 of the Sherman Act,[15] §§ 3 and 7 of the Clayton Act,[16] and § 2(a) of the Clayton Act as amended by the Robinson-Patman Act. All parties to the suit were engaged in the asphaltic concrete, or "black top," industry.[17] Petitioners Gulf Oil, Union Oil and Edgington Oil were producers of liquid asphalt. Gulf sold all of its liquid asphalt to its subsidiary Industrial Asphalt which operated fifty-five "hot plants" in California, Arizona, and Nevada.[18] Although both Gulf and Industrial Asphalt were engaged in interstate commerce, Copp was unable to point to any particular sale from an individual hot plant which had crossed a state boundary.[19] Union Oil sold liquid asphalt to its subsidiary Sully-Miller which operated eleven hot plants in Los Angeles and Orange Counties, California. Edgington Oil Company sold liquid asphalt to Sully-Miller, Industrial Asphalt and Copp Paving Company. The respondent, Copp Paving, operated only one hot plant and was in direct competition with the Los Angeles area hot plants owned by Sully-Miller and Industrial Asphalt. Significantly, Sully-Miller, Industrial Asphalt and Copp sold a large proportion of their asphaltic concrete to contractors engaged in the building and repair of California's interstate highways.[20]

---

[15] 15 U.S.C. §§ 1 & 2 (1970).

[16] 15 U.S.C. §§ 14 & 18 (1970).

[17] Asphaltic concrete has two main ingredients. *In re* Western Liquid Asphalt Cases Relating to Copp Paving Co. v. Gulf Oil Corp., 1972 Trade Cas. ¶74,013, at 92,206 (N.D. Cal. 1972). Liquid asphalt, a petroleum derivative, comprises about 5% of asphaltic concrete, and the remainder is made up of various fillers such as sand and gravel. The liquid asphalt and fillers are combined at temperatures of approximately 375°F in what is termed a "hot plant." The asphaltic concrete is then delivered to road construction sites where it is placed at a temperature of about 275°F. The necessity of maintaining the product's heat, its great weight, and the low cost and ready availability of its main component make it uneconomical to deliver beyond a limited radius. A radius of thirty-five miles seems to have been the area of potential delivery for the hot plants in *Copp Paving*. Because the actual construction of the entire interstate highway system is performed by the states, it seems most unlikely that a contract for road paving would ever involve a particular hot plant in deliveries of its product across a state line. Thus, the singular characteristics of asphaltic concrete manufacture and sale combine to make it an almost exclusively intrastate enterprise. This fact made it highly unlikely that interstate commerce played any role in the production and sale of asphaltic concrete as far as the situation in *Copp Paving* was concerned.

[18] 95 S.Ct. at 395.

[19] *Id.* at 396 n.2.

[20] *Id.* at 395-96.

The basis of Copp's treble-damage claim under § 2(a) of the Robinson-Patman Act was twofold. First, Copp alleged that Sully-Miller and Industrial Asphalt were selling their asphaltic concrete for higher prices in those areas where they did not compete with Copp than in the Los Angeles area where they did so compete, thereby causing primary injury at the seller's level.[21] Second, Copp alleged that Union, Gulf, and Edgington sold liquid asphalt to Sully-Miller and Industrial for lower prices than they charged Copp, thereby causing secondary injury at the buyer's level.[22] The district court severed Copp's claim pertaining to the sale of asphaltic concrete from its claim concerning liquid asphalt and dismissed the asphaltic concrete claim for failure to show subject matter jurisdiction, stating that the commercial activities of which Copp compained neither crossed a state line, nor affected interstate commerce.[23] On interlocutory appeal from this dismissal,[24] the Ninth Circuit reversed the district court.[25]

The Ninth Circuit concluded that through their production of asphalt for use in interstate highways, the parties in *Copp Paving* sufficiently affected interstate commerce to be "in commerce" for the purposes of § 2(a). The Ninth Circuit reached this conclusion in two

---

[21] "Primary-line injury at the seller's level" describes the situation in which two sellers are competing for one geographical market, but only one of them has a position in some other geographical market. If the seller with access to two markets cuts his price in the area where he competes with the other seller and keeps his prices high in that area where he has no competition, then a "primary line" injury is said to have occurred. E. KINTNER, A ROBINSON-PATMAN PRIMER 93 (1970). The Robinson-Patman Act was primarily designed to combat "secondary-line" injury, see note 22 *infra*, but because the original § 2 of the Clayton Act addressed primary-line price discrimination, the Court has held that primary line injury is still forbidden. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 544 (1960).

[22] "Secondary-line injury at the buyer's level" refers to the situation where two buyers have a common supplier and also compete for the same customers. If the seller gives a lower price to one buyer than to the other, this saving can be passed on to the consumer and the favored buyer has a stronger position in the market than the one paying the higher price. When this happens, "secondary-line injury at the buyer's level" is said to have occurred. E. KINTNER, A ROBINSON-PATMAN PRIMER 93-96 (1970). The Robinson-Patman Amendment to the Clayton Act was designed specifically to redress the grievance of grocery wholesalers and retailers against the emerging power of the food chains. The large food chains used their great buying power to compel producers to sell to them at a very low price, and passed this lower price on to the consumer. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, Ch. 1 (1962). Thus, elimination of secondary-line injury at the buyer's level is the primary goal of § 2(a).

[23] 1972 Trade Cas. ¶74,013, at 92,208 (N.D. Cal. 1972).

[24] 28 U.S.C. § 1292(b) (1970).

[25] *In re* Western Liquid Asphalt Cases, 287 F.2d 202 (9th Cir. 1973).

steps. First, the court determined that the "affecting commerce" doctrine could validly be applied to the "in commerce" language of § 2(a). Second, the court decided that the allegedly discriminatory sales in *Copp Paving* actually affected interstate commerce since the goods sold were for use in the construction and repair of interstate highways.

In ruling that the "in commerce" jurisdictional test of § 2(a) could be satisfied by sales which merely "affect" interstate commerce, the Ninth Circuit relied on two independent propositions. First, the court posited that the phrase "in commerce" should have the same meaning whenever it is used in federal statutes. Pursuant to this premise, the Ninth Circuit accepted cases decided under the "in commerce" jurisdictional provision of the Fair Labor Standards Act (FLSA)[26] as relevant precedent for interpreting the same phrase in the Robinson-Patman Act.[27] In two of these cases the Supreme Court has used the "affecting commerce" doctrine to rule that those who either operate and maintain or manufacture materials for repairing interstate roads are "engaged in commerce"[28] within the meaning of the FLSA. Relying on these precedents, the Ninth Circuit concluded that the "affecting commerce" doctrine could also be applied to the "in commerce" language of § 2(a).

The second proposition upon which the Ninth Circuit relied in ruling that the "affecting commerce" doctrine satisfied § 2(a) jurisdictional requirements was that because the Robinson-Patman Act was passed to augment the purposes of the Sherman Antitrust Act, the jurisdictional scope of the two laws should be similarly con-

[26] 29 U.S.C. §§ 201 *et seq.* (1970).

[27] 487 F.2d at 205.

[28] Alstate Constr. Co. v. Durkin, 345 U.S. 13 (1953); Overstreet v. North Shore Corp., 318 U.S. 125 (1943).

[29] 487 F.2d at 206. The circuit court's conclusion that the Robinson-Patman Act complements the purposes of the Sherman Antitrust Act is questionable at best. While the Supreme Court has ruled that the Sherman Act encourages a situation where individual businesses have the freedom to determine their own pricing policies, Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951), United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940), the Robinson-Patman Act arguably denies this freedom and thus dictates a form of price fixing. This basic policy conflict has been recognized by the Supreme Court. Automatic Canteen Co. v. FTC, 340 U.S. 231 (1951). This policy difference is partially explicable in terms of the extreme circumstances which produced the Robinson-Patman Act.

Although a choice between these divergent views was an essential part of the Ninth Circuit's disposition of *Copp Paving*, the Supreme Court did not reach the issue explicitly but rather seemed to adopt the position that the two acts have different purposes by implication. 95 S.Ct. at 398.

strued.[29] Thus, because the prohibitions of the Sherman Act have been interpreted as coextensive with the full scope of Congress's constitutional power to regulate commerce,[30] the Ninth Circuit in *Copp Paving* ruled that § 2(a) should also reach discriminatory pricing arrangements which affect interstate commerce.[31]

Having concluded that the "in commerce" jurisdictional test of § 2(a) *could* be satisfied by sales which merely affect commerce, the Ninth Circuit had to determine whether the allegedly discriminatory sales in *Copp Paving actually* affected interstate commerce. Because the plaintiff Copp had been unable to show that the defendants' pricing activities had in fact affected interstate commerce,[32] the Ninth Circuit ruled that the requisite effect was shown as a matter of law. The court reasoned that because highways are instrumentalities of interstate commerce, and because there is a close connection between highways and the asphalt needed to build them the sales of asphalt were "in commerce" purely because of this "nexus with an instrumentality of interstate commerce. . . ."[33]

Although the Ninth Circuit ruled that Copp had established subject matter jurisdiction under the Sherman, Clayton and Robinson-Patman Acts, the Supreme Court limited its grant of certiorari to the Clayton and Robinson-Patman Act claims, recognizing that an apparent conflict among the circuits had arisen concerning the criteria necessary to establish jurisdiction under the two acts.[34] Ultimately, however, the Court found it unnecessary to reach the Clayton Act question,[35] and limited its decision solely to the issue of the requirements for § 2(a) jurisdiction. On this issue, the Supreme Court reversed the decision of the Ninth Circuit and adopted the "state line" test.

In overruling the Ninth Circuit's decision in *Copp Paving*, the Supreme Court rejected the circuit court's analogies with the FLSA and the Sherman Act. Rather, the Supreme Court ruled that § 2(a) must be read as literally as possible and that any ambiguities should be resolved by reference to Congress's intention in enacting the

---

[30] Burke v. Ford, 389 U.S. 320 (1967); Mandeville Island Farm, Inc. v. American Crystal Sugar Co., 334 U.S. 219 (1948).

[31] 487 F.2d at 204.

[32] 1972 Trade Cas. ¶74,013, at 92,207 (N.D. Cal. 1972).

[33] 487 F.2d at 206.

[34] 95 S.Ct. at 397.

[35] The Court declined to rule on the issue of whether the "affecting commerce" doctrine may be the basis for jurisdiction under §§ 3 and 7 of the Clayton Act on the ground that Copp did not allege that the defendant's pricing policies affected interstate commerce. 95 S.Ct. at 402.

Robinson-Patman Act itself.[36] The Court rejected the Ninth Circuit's analogy between the Sherman Act and Robinson-Patman Act for two reasons. The first ground of rejection was the different wording of the two statutes. The Court ruled that the language of the Sherman Act, which forbids certain activities when they are "in restraint of trade or commerce among the several states," is more harmonious with the "affecting commerce" doctrine than is the "in commerce" language of § 2(a),[37] and that analogies between the two statutes are therefore invalid.

The *Copp Paving* Court's second reason for rejecting the Ninth Circuit's analogy between the Sherman and Robinson-Patman Acts was the Court's conclusion that while Congress intended to exercise its commerce clause power as fully as possible in the Sherman Act,[38] it intended a more restricted jurisdictional scope for the Robinson-Patman Act. Looking at the legislative history of the Robinson-Patman Act, the Court found affirmative indications that Congress did not intend that the "affecting commerce" doctrine apply to § 2(a). Particularly, the Court noted that when the Patman Bill passed in the House of Representatives, it contained the phrase "whether in commerce or not."[39] However, the Conference Committee deleted this

---

[36] 95 S.Ct. at 399.

[37] From the wording of the statute itself, the Court concluded that the Sherman Act protects the flow of interstate commerce from the effect of certain proscribed behavior. United States v. Women's Sportswear Mfg. Ass'n., 336 U.S. 460, 464 (1949). The Court's interpretation of the "in restraint of commerce" language in the Sherman Act was made possible by the Court's earlier ruling that in passing the Sherman Act Congress "wanted to go to the utmost extent of its constitutional power in restraining trust and monopoly agreements." United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 558 (1944). Therefore, both the wording of the Sherman Act and the Court's interpretation of Congress's intent in enacting it permit the regulation of even local activities which have the effect of restraining commerce among the states.

[38] United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533, 558 (1944). It is important to note that the Sherman Act's jurisdictional breadth has fluctuated with whatever a particular Court thought to be the outer limit of the congressional commerce clause power. *Compare* United States v. E. C. Knight Co., 156 U.S. 1, 13 (1895) (process of manufacturing not in interstate commerce) *with* Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 228-29 (1948) ("affecting commerce" doctrine of Wickard v. Filburn, 317 U.S. 111 (1942) conclusively incorporated into the Sherman Act). The point is that once the Court has determined that Congress intended to exercise its constitutional commerce power to its fullest extent in a particular statute, the jurisdictional scope of that statute expands with the Court's current view of the commerce power. The problem with the Robinson-Patman Act has been to determine how far Congress intended its jurisdiction to reach. C. AUSTIN, PRICE DISCRIMINATION 14-18 (2d ed. 1959).

[39] 95 S.Ct. at 401.

provision.[40] Since the Court found that the phrase "whether in commerce or not" indicated an intent to incorporate the "affecting commerce" doctrine, it ruled that by deleting it Congress had rejected this jurisdictional theory.[41]

Copp Paving's analogy between the FLSA and the Robinson-Patman Act, which had been accepted by the Ninth Circuit, also failed to convince the Supreme Court which found significant differences between the two statutes. The "in commerce" provisions of the FLSA provide for coverage of employees engaged "in commerce or in the production of goods for commerce. . . ."[42] Thus, to determine whether a claim exists under the FLSA, a court must decide whether the goods produced by the relevant employees were either "in commerce" or intended "for commerce." Because what is produced "for commerce" need not be "in commerce," the Court in *Copp Paving*

---

[40] H.R. REP. No. 2951, 74th Cong. 2d Sess. p. 6 (1936). The Court failed to note that in agreeing to omit the "whether in commerce or not" provision, the conferees stated: "This [the "whether in commerce or not" provision] was omitted, as the preceding language already covers all discrimination, both interstate and intrastate, that lie within the limits of Federal authority." *Id.*

[41] 95 S.Ct. at 401. While the "whether in commerce or not" provision might have facilitated an "affecting commerce" interpretation of § 2(a), the two phrases are not identical. The difference is especially important in considering Congress's motivation in deleting the "whether in commerce or not" provision. It has been argued that Congress deleted the "whether in commerce or not" provision as a reaction to the Supreme Court's declaring the National Industrial Recovery Act, ch. 90, §§ 1-10, 48 Stat. 195 (1933) unconstitutional under the commerce clause in Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). Evans, *Anti-Price Discrimination Act of 1936*, 23 VA. L. REV. 140, 151-52 (1936); Note, *The Commerce Requirement of the Robinson-Patman Act*, 22 HASTINGS L.J. 1245, 1255 (1971). Certainly the *Schechter* case disturbed the manner in which Congress perceived the extent of its authority under the commerce clause. Yet even if *Schechter* had not been decided during Congress's deliberations on the Robinson-Patman Act, the constitutional validity of its power to regulate activities "whether in commerce or not" would have been highly questionable. Since § 1 of the Clayton Act defines "commerce" as "interstate commerce," the deleted portion of the Robinson-Patman Act represented an attempt by Congress to extend its power under the commerce clause of the Constitution whether in interstate commerce or not. Such a law would have been a clear violation of constitutional language. That the provision was dropped is, therefore, perfectly understandable without necessarily implying anything concerning the extent to which Congress sought to regulate price discrimination. That is, the phrase "whether in commerce or not" could have been dropped to save the constitutionality of the Robinson-Patman Act. Attaching more significance to removal of the provision than this would seem to impute more meaning to the congressional action than it warrants. The *Copp Paving* Court's interpretation of this episode in the history of the Robinson-Patman law, however, was based upon weighty authority. C. AUSTIN, PRICE DISCRIMINATION 15 (2d ed. 1959).

[42] 29 U.S.C. §§ 206(a) & 209 (1970).

rejected the argument that statutes utilizing the former as a jurisdictional standard are analogous to those utilizing the latter. Rather, the Court indicated that the phrase "in commerce" does not have a single fixed meaning and must be interpreted in light of the policy goals and legislative history of the particular statute in which it is found.[43]

Thus, the Court concluded that Congress did not intend for the "affecting commerce" doctrine to apply to the "in commerce" language of the Robinson-Patman Act.[44] By rejecting the applicability of the "affecting commerce" doctrine to § 2(a), the Court seemed to imply that the "in commerce" provision of the statute requires application of the "state-line" test. This implication is strengthened by the Court's discussion of *Moore v. Mead's Fine Bread Co.*[45] which until *Copp Paving* was the Court's last word on the scope of § 2(a) jurisdiction.

In *Moore*, the petitioner operated a bakery in Santa Rosa, New Mexico and alleged § 2(a) violations against the respondent, a group of corporations with bakeries in New Mexico as well as Texas, all of which had interlocking directorates, common purchasing practices, and trade name rights. From its bakery in Clovis, New Mexico, the respondent competed with the petitioner for the bread market in Santa Rosa. A price war between the two parties resulted, and Moore, the smaller of the two baking concerns, was put out of business. Moore's judgment against Mead under § 2(a) of the Clayton Act was dismissed by the Tenth Circuit[46] on the ground that the sales of which it complained neither crossed a state line nor affected interstate commerce. Significantly, the "affecting commerce" and "state line" doctrines were considered equally viable interpretations of § 2(a) at that time. Moore appealed to the Supreme Court which reversed the Tenth Circuit.

The *Moore* Court did not specifically mention whether the "affecting commerce" or the "state line" test governed. Instead, the Court simply stated that the *Moore* situation was within the jurisdictional scope of the antitrust laws.[47] The basis for this conclusion was not clear, since there were two possible reasons for finding Mead's

---

[43] 95 S.Ct. at 399.

[44] In addition to rejecting the applicability of the "affecting commerce" doctrine to § 2(a), the Court criticized as overly formalistic the Ninth Circuit's ruling that the "nexus" between asphaltic concrete and interstate highways placed the asphalt producers "in commerce" as a matter of law. 95 S.Ct. at 400.

[45] 348 U.S. 115 (1954). That both the respondent and the petitioner in *Copp Paving* relied upon *Moore* indicates the degree of confusion generated by that case.

[46] 208 F.2d 777 (10th Cir. 1953), *noted in* 54 COLUM. L. REV. 1296 (1954).

[47] 348 U.S. at 119.

price discrimination within the bounds of § 2(a). First, Mead's bakery in Clovis, New Mexico, in which its bread for the Santa Rosa market was baked, also sold bread in Farwell, Texas, a town which seemed to be but an appendage of Clovis. A solitary delivery truck passed from the Mead bakery in Clovis, over the New Mexico-Texas border, to retail outlets in Farwell.[48] Because the price for which Mead's Clovis bakery sold bread in Farwell was not reduced to the same price as the bread it sold in Santa Rosa, the sale of Mead's bread in Farwell constituted a purchase "in commerce" under the strict "state-line" doctrine.

The second possible basis for the § 2(a) jurisdiction found to exist in *Moore* was that where an interstate company conducts a price war against an intrastate concern using the profits derived from its interstate sales, it is within the "in commerce" jurisdictional formula of § 2(a).[49] Because of these two ways of interpreting *Moore*, therefore, it was not clear whether the solitary delivery truck to Farwell, Texas was a gratuitous supplement to the statement of facts or the key to § 2(a) subject matter jurisdiction. Some cases and commentators found the mention of the bread truck to be an unimportant detail compared with the more general propositions of the case.[50] On the other hand, some courts ruled that the broad statements in *Moore* were mere dicta and that the presence of the delivery truck reconciled the case with a literal reading of § 2(a).[51] Since the Supreme Court consistently denied certiorari in subsequent cases offering conflicting inter-

---

[48] *Id.* at 116.

[49] *Id.* at 119-20.

[50] Littlejohn v. Shell Oil Co., 456 F.2d 225 (5th Cir. 1972), *rev'd en banc* 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973). The Fifth Circuit's first opinion in *Littlejohn* was applauded by commentators: Comment, 57 MINN. L. REV. 1035 (1973); Note, 26 VAND. L. REV. 146 (1973); Note, 19 WAYNE L. REV. 1349 (1973); Note, 48 IND. L.J. 293 (1973); Note, 4 ST. MARY'S L.J. 204 (1972); Note, 41 CIN. L. REV. 689 (1972). *But see* Note, 86 HARV. L. REV. 765 (1973). *See also* Shreveport Macaroni Mfg. Co. v. FTC, 321 F.2d 404 (5th Cir. 1963); Bowman Dairy Co. v. Hedlin Dairy Co., 126 F. Supp. 749 (N.D. Ill. 1954), *criticized in* Note, 69 HARV. L. REV. 769 (1956). For support of a broad reading of *Moore*, see Kintner and Mayne, *Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act*, 58 GEO. L. REV. 1117, 1134 (1970).

[51] Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203 (5th Cir. 1969); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Abramson v. Colonial Oil Co., 390 F.2d 873 (5th Cir. 1968); Borden Co. v. FTC, 339 F.2d 953 (7th Cir. 1964); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J., dissenting).

pretations of the principles in *Moore*,[52] uncertainty arose concerning the elements needed for jurisdiction under § 2(a) of the Clayton Act. The *Copp Paving* case effectively resolved this uncertainty.

Although the Ninth Circuit did not mention *Moore*, the Supreme Court gave a definitive reading of that case.[53] The Court ruled that the comments in *Moore* on the intrastate effect of a large business waging a local price war with the assistance of profits from its interstate operations were dicta pertaining only to the extent of congressional power under the commerce clause. In other words, the Court in *Copp Paving* determined that *Moore* was concerned only with how far Congress *could* have gone in regulating price discrimination, not how far it *actually* had gone in the Robinson-Patman Amendment to the Clayton Act.[54] With respect to jurisdiction under § 2(a), the *Copp Paving* Court impliedly ruled, therefore, that the one delivery truck operating between Clovis, New Mexico and Farwell, Texas was vital,[55] and thereby settled the controversy engendered by *Moore*.

Although the Court in *Copp Paving* couched its decision in terms of reaffirming well-established case precedent,[56] there was more confusion in the cases decided under the Robinson-Patman Act than the Court indicated. Evidence from its legislative history,[57] subsequent statements of its sponsors,[58] and judicial decisions in the first fifteen years of its life[59] arguably indicate a broader applicability for § 2(a) than that recognized by the Supreme Court in *Copp Paving*. Yet, the Court disposed of *Copp Paving* without consideration of these old but troublesome cases and arguments. Rather, the Court apparently re-

---

[52] Littlejohn v. Shell Oil Co., 483 F.2d 1140 (5th Cir.), *cert. denied*, 414 U.S. 1116 (1973); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir.), *cert. denied*, 408 U.S. 928 (1972); Hiram Walker, Inc. v. A & S Tropical, Inc., 407 F.2d 4 (5th Cir.), *cert. denied*, 396 U.S. 901 (1969); Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963) (Black, J., dissenting).

[53] 95 S.Ct. at 401 n.17.

[54] *Id.*

[55] Before *Copp Paving*, the percentage of business actually "in commerce" was subjected to a *de minimis* test in determining whether § 2(a) could be applied. Skinner v. U.S. Steel Corp., 233 F.2d 762 (5th Cir. 1956); Baldwin Hills Bldg. Material Co. v. Fibreboard Paper Prod. Corp., 283 F. Supp. 202 (C.D. Cal. 1968). Although it is not clear what percentage of Mead's business was transacted between Clover and Farwell, the business of one bread truck would hardly have been substantial. As a result of *Copp Paving*, then, the importance of the *de minimis* rule in determining § 2(a) jurisdiction may be doubted.

[56] 95 S.Ct. at 401.

[57] *See, e.g.*, 80 CONG. REC. 9417 (1936) (the statements of Congressman Utterback, the Patman Bill's floor manager).

[58] W. PATMAN, THE ROBINSON-PATMAN ACT 225-33 (1938).

[59] See cases cited in note 9 (supra.

sponded to decisions by the lower federal courts since World War II in which § 2(a) claims were treated with increasing suspicion,[60] and older precedents were ignored. Thus, *Copp Paving* may be seen as the final stamp of approval on these later decisions by the lower federal courts.

In addition to clarifying the language of § 2(a) and the meaning of cases decided under it, *Copp Paving* seemingly has one particularly important consequence for the effectiveness of the statute. By requiring potential Robinson-Patman plaintiffs to show that at least one of the purchases of which they compain has crossed a state line, the independent retailer, or the retailing unit of a large corporation, will find virtual exemption from § 2(a). Because most retail stores do not have a significant[61] amount of sales crossing state lines, *Copp Paving* seems to foreclose application of the Robinson-Patman Act to enjoin or to punish retail price discrimination at the primary level.

Not only will the purely intrastate retailer be relieved of Robinson-Patman liability by the *Copp Paving* decision, but the large, vertically integrated corporation composed of manufacturing, distributing and retailing units will also find Robinson-Patman liability easier to avoid. Before *Copp Paving*, several circuits had denied Robinson-Patman liability in cases where price discrimination was shown because the high and low priced sales came from two separate units of the same corporation.[62] The rationale was usually that in such a situation, independent units of one corporation were simply responding to separate market conditions. Because the issue was decided at the jurisdictional level, however, the question of whether the large defendant corporation was in fact financing intrastate price discrimination with interstate profits, rather than responding to different market circumstances, was not answered.

By adopting a strict reading of the *Moore* opinion, the Supreme Court in *Copp* seems to have affirmed these circuit court decisions by denying the validity of the argument that § 2(a) jurisdiction exists where the discriminatory price was financed with profits obtained

---

[60] The conflicting policies between the anti-trust laws and the Robinson-Patman Act, see note 33 *supra*, seem to have been reflected in the courts' acceptance or denial of jurisdiction under § 2(a). The need to protect businesses decreased as economic prosperity followed the Second World War, and the courts' attitude toward jurisdiction under the Robinson-Patman Act changed accordingly. Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059, 1088 (1957).

[61] For a discussion of the relation of the *de minimis* rule to § 2(a) jurisdiction, see note 55 *supra*.

[62] *See, e.g.*, Willard Dairy Corp. v. National Dairy Prods. Corp., 309 F.2d 943 (6th Cir. 1962), *cert. denied*, 373 U.S. 934 (1963).

from interstate commerce. The impact of this is arguably that a corporation which is engaged in interstate commerce itself will not be liable for a treble-damage Robinson-Patman claim or subject to a Federal Trade Commission injunction unless one of its units makes discriminatory sales across a state line. By eliminating sales crossing state lines from any one sales outlet, *Copp Paving* seems to permit even the largest and most aggressive corporations to circumvent the Robinson-Patman Act.[63] On the other hand, the decision subjects selling units in towns which straddle state boundaries to a much higher chance of primary-line Robinson-Patman liability.[64] Although the economic policies underlying the Robinson-Patman Act have never been clear,[65] it seems unlikely that Congress intended this somewhat bizarre result. However, any frustration of congressional policy by the ruling in *Copp Paving* can hardly be attributed to the Court since it appears to have allowed the literal meaning of statutory language to control its decision. If the literal reading of the Robinson-Patman Act by the *Copp Paving* Court impairs the congressional purpose underlying its enactmant, a legislative reconsideration of that statute's purpose and drafting would seem in order. Following *Copp Paving*, then, the enigma of the Robinson-Patman Act is squarely on Congress's doorstep.

LAWRENCE CALDWELL MELTON

[63] *See* Mayer Paving & Asphalt Co. v. General Dynamics Corp., 486 F.2d 763, 774 (7th Cir. 1973) (Clark, J., dissenting). This point can be illustrated by considering how § 2(a) liability could be avoided in the Moore v. Mead's Fine Bread Co. fact situation under the rule in *Copp Paving*. If Mead had decided to wage a price war against Moore in Santa Rosa, N.M., it could have done so with § 2(a) impunity by shipping bread bearing the discriminatory price to Santa Rosa from its bakery in Roswell, N.M. which was about the same distance from Santa Rosa as Clovis and sufficiently far from the Texas border to make shipments over the state line unlikely. Not a single loaf of bread need cross a state line in this scheme, and yet profits from Mead's widespread organization could still finance its price war. One must wonder if the judicial sanction for this business tactic in *Copp Paving* is consistent with congressional policy.

[64] Clayton Act § 2(a) suits have twice been successful in the Clovis, New Mexico/Farwell, Texas area. Moore v. Mead's Fine Bread Co., 348 U.S. 115 (1954); Ingram v. Phillips Petroleum Co., 259 F. Supp. 176, 178 (D.N.M. 1966). Likewise, a recent Fifth Circuit case mentions the fact that a primary-line § 2(a) suit might meet with success in a place like Texarcana, which straddles the Texas, Arkansas, and Louisiana borders. Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 210 n.4 (5th Cir. 1969). However, the Supreme Court has expressed disapproval of using the commerce clause of the Constitution for regulating purely local businesses which maintain delivery services in cities located on state lines. NLRB v. White Swan Co., 313 U.S. 23, 25 (1941).

[65] See note 33 *supra*.