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An Interpretation of the "... Sold for Use, Consumption, or Resale Within the United States. . ." Requirement of Section 2(A) of the Robinson-Patnam Act

David R. Sonnenberg

AN INTERPRETATION OF THE ". . . SOLD FOR USE, CONSUMPTION, OR RESALE WITHIN THE UNITED STATES . . ." REQUIREMENT OF SECTION 2(A) OF THE ROBINSON-PATMAN ACT

A series of recent cases involving price discrimination under the Robinson-Patman Act[1] have examined the application of the Act to foreign trade. Although the courts discussed its application, they failed to delineate a test which could be readily administered to a fact pattern to determine if the transaction is within the Act's parameters. This note will trace the history of the Act and will examine the cases in an attempt to devise such a test.

The impetus for the passage of the Robinson-Patman Act, which, *inter alia*,[2] forbids a seller from discriminating in price between his buyers under certain circumstances,[3] can be found in the growth of the large chainstores,

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1. 15 U.S.C. §§ 13, 13(a), 13(b), 2(a) (1976). The Robinson-Patman Act, enacted in 1936, amended the price discrimination provisions of Section 2 of the Clayton Act. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914). The Act also established in Section 3 a separate substantive law provision directed toward predatory pricing for which criminal sanctions were provided.

2. The Act also prohibits a seller from paying brokerage or commission, or any discount in lieu of brokerage or commission, to a buyer or to anyone acting for a buyer. It also prohibits a buyer from receiving the forbidden payment. 15 U.S.C. § 13(c) (1976). A seller is prohibited from making any payment to a customer as compensation for services or facilities provided by the buyer in connection with the processing, handling, resale, or offering for resale of the goods purchased unless such payment is available on proportionately equal terms to all other competing customers. 15 U.S.C. § 13(d) (1976). The furnishing of services or facilities by a seller to a customer is prohibited unless it is accorded to competing customers on proportionately equal terms. Section 2(e) of the Robinson-Patman Act, 15 U.S.C. § 13(e) (1976). Liability is imposed on a buyer who knowingly induces or receives a prohibited price discrimination. 15 U.S.C. § 13(f) (1976). Criminal sanctions are provided for a knowing discrimination in a discount or allowance not available to purchasers' competitors for sales of like grade, quality and quantity. Also forbidden is geographical price-discrimination for the purpose of destroying competition or eliminating a competitor. Finally, sales at "unreasonably low prices" for the same predatory purposes are banned. 15 U.S.C. § 13(a) (1976). Protection is granted to cooperative associations in paying dividends to their members, 15 U.S.C. § 13(b) (1976), and they are exempted from the Act with regard to purchases of supplies for their own use by nonprofit hospitals, religious, educational, and charitable institutions. 15 U.S.C. § 13(c) (1976).

3. Section 2(a) of the Robinson-Patman Act, 15 U.S.C. § 15(a) (1976), provides in pertinent 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 of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commod-

most notably the Great Atlantic and Pacific Tea Co. during the 1920s.[4] The traditional method of marketing goods had been from producer or manufacturer to wholesaler and then to the retailer. The chainstores altered this procedure, bypassing the wholesalers and dealing directly with the producer or manufacturer. Their ability to buy in large quantities and the elimination of middlemen reduced costs for the producer; these cost efficiencies were passed on to the chains in the form of lower prices.[5] Both the cost savings due to economies of scale and the price discounts received from the producer-sellers, enabled the large chains to provide a wide range of products and services more efficiently and at lower prices than those of the independent merchant.[6]

The wholesalers and independent merchants alleged that the ability of the chains to offer lower prices was based partly upon price discounts the chains received from sellers wholly apart from the cost savings they generated. More specifically, it was alleged that the buyers coerced sellers into granting them lower prices. The price preferences were often disguised as advertising, special allowances for sales promotion, and brokerage payments.[7]

The clamor from wholesalers and independent retailers prompted Congress to take action. In 1928, Congress requested that the FTC investigate the practices of the large chains.[8] In 1934, the FTC reported its

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ities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. . . .

4. For an excellant discussion of the economic and political environment surrounding the passage of the Act, *see* EDWARDS, THE PRICE DISCRIMINATION LAW 5–12 (1959) and ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 3–23 (1962).

5. Evidence of the success of the chain stores can be seen in their rapid growth. The chains nearly tripled their share of total retail sales from 9 to 25 per cent during the late twenties and early thirties. PALAMOUNTAIN, THE POLITICS OF DISTRIBUTION 7 (1955). Many retailers attempted to emulate the purchasing advantages of the chains by pooling their purchasing, by bypassing the wholesaler, and by negotiating directly with the producer. ROWE, *supra* note 4, at 5.

6. The chain buyer was often able to secure not only the "wholesaler" discount from many suppliers, "but frequently augmented this monetary recognition of his performance of the typical 'wholesale' function with special promotional payments for advertising the supplier's product in his retail stores." ROWE, *supra* note 4, at 4.

7. KINTNER, A ROBINSON-PATMAN PRIMER 8–9 (1970).

8. S. Res. 224 Congressional Record, 70 Cong., 1st Sess., 69 CONG. REC. 7857 (1928).

findings[9]; they confirmed that the lower prices offered by the chains could be traced in part to the coercive, clandestine activities alleged by the wholesalers and merchants.[10] The FTC also noted that the then existing price discrimination law, Section 2 of the Clayton Act,[11] passed in 1914, had major flaws which prevented it from effectively coping with these practices.[12] It

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9. F.T.C. *Ann. Rep.* 32–40 (1935) [hereinafter *Annual Report*]. The investigation yielded a total of 33 reports culminating in the final report entitled F.T.C., FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. DOC. NO. 4, 74th Cong., 1st Sess. (1935) [hereinafter CHAIN STORE].

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> The Commission found in the chains many advantages "flowing from the integration of production and of wholesale and retail distribution, from the savings involved in avoiding credit and delivery service, and from the ability of chains to realize the benefits of large-scale advertising," all of which, in the opinion of the Commission, were plainly lawful and could not be eliminated without "radical interference with the rights of private ownership and initiative, virtual abandonment of the competitive principle, and destruction of the public advantage represented by lower prices and a lower cost of living." However, the Commission also found that the chains enjoyed buying advantages derived from price discrimination by suppliers, which accounted for "a most substantial part of the chains' ability to undersell independents," and that the chains engaged in local price discrimination in reselling. It thought that the selling practices of the chains were intrastate and hence unreachable by federal authority, but that the discriminatory buying advantages should be subjected to federal attack.

EDWARDS, *supra* note 4, at 10–11; CHAIN STORE, *supra* note 9, at 60.

Interestingly, the Commission saw no threat of monopoly because it believed that vigorous competition among the various chains as well as independent rivals would forestall such a result. The Commission recommended that section 2 of the Clayton Act be amended so as to declare it illegal "to discriminate unfairly or unjustly in price between different purchasers." CHAIN STORE, *supra* note 9, at 90–92, 96–97.

11. 38 Stat. 730 (1914).

12. The Commission saw as a flaw in the existing law the exemption of discriminations based on quantity and discriminations made in good faith to meet competition. *Annual Report, supra* note 9, at 32–33. ROWE, *supra* note 4, at 6–7 discussed the inadequacies of the Clayton Act as follows:

> Section 2 was addressed to an entirely different pricing problem of an earlier era: the predatory tactic of national trusts to slash prices in certain localities for the purpose of eliminating smaller competing sellers. According to the legislative committee reports, Section 2 was intended to strike at a "common practice of great and powerful combinations engaged in commerce — notably the Standard Oil Co., and the American Tobacco Co., and others to less notoriety, but of great influence — to lower prices of their commodities, oftentimes below cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors, and with the ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made." (Footnote omitted)
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> Courts soon sterilized the power of this law to curb discriminatory concessions in favor of chain buyers. Two decisions in the early 1920s, notwithstanding the

recommended that the Act be amended to bar unjust price discrimination by ensuring that price differentials between buyers be linked to the cost differences incurred by a seller in selling to them.[13]

The call for legislation was intensified when, in 1935, the Supreme Court struck down the National Recovery Act codes.[14] These codes,[15] at least one scholar has argued, attempted to enable the independant retailer and wholesaler to more effectively compete with the chains. This attempt was facilitated by forcing the chains, to some extent, to operate through the traditional manufacturer-wholesaler-retailer framework by penalizing them if they failed to do so.[16] Ultimately, the lobbying efforts of the wholesalers

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Section 2 ban on price discriminations threatening "to substantially lessen competition or tend toward monopoly in any line of commerce," interpreted the law to bar relief against discriminatory pricing practices prejudicial to competition only on the *buyer* level. The specific purpose of checking monopolistic abuses whereby sellers destroyed other sellers was thus construed to prevent relief for competitive dislocations among the seller's customers. (Footnotes omitted).

As a result, the Clayton Act was ineffectual to redress even extreme discriminations in favor of chain stores which might create unwarranted purchasing advantages that could jeopardize the survival of independent grocers.

Those interpretations, to be sure, were later repudiated by the Supreme Court. . . .

But Section 2 of the Clayton Act contained yet another disabling flaw. The statute unconditionally exempted price differentials made "on account of differences in the grade, quantity or quality of the commodity sold." As confirmed by the later *Goodyear* case, the statute thereby authorized unlimited price differentials in the form of *quantity discounts,* so that even a minor difference in quantity could support a vast difference in price. . . . (Footnotes omitted).

13. *Annual Report, supra* note 9, at 32–33.

14. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935). The Supreme Court invalidated the National Industrial Recovery Act as an unconstitutional delegation of legislative powers.

15. The Codes of Fair Competition were authorized by the National Industrial Recovery Act of 1933. National Industrial Recovery Act of 1933, Pub. L. No. 67 § 90 (1933), 48 Stat. 195 (1933).

16.

The Codes of Fair Competition authorized by the National Industrial Recovery Act of 1933 in many cases expressed the objectives of the numerically dominant independent merchants who sought to freeze the orthodox pattern of distribution into law. In some codes, producers were barred from distributing outside the conventional wholesaler-retailer channel. Other codes ensured that chain distributors and mail-order houses, notwithstanding their performance of typical "wholesaling" functions such as bulk storage and delivery, were classified as retailers entitled to receive only the prevailing retailer's functional discount. Food industry codes limited the quantity discounts chain buyers could secure, and many prohibited "brokerage" commissions to buyers whose direct purchasing techniques saved the seller fees otherwise paid to independent brokers. Most grocery

and retailers gained momentum and led to the passage of corrective price discrimination legislation. These efforts were aided by the fall of the codes, the F.T.C. report, supplemented in part by House Committee hearings[17] and the generally depressed state of the economy. This legislation took the form of an amendment to section 2 of the Clayton Act and was entitled the Robinson-Patman Act, after the Senator and Congressman who respectively introduced what became the final legislation.[18]

The legislative history of the Act is marked by long debate, last minute compromise and change. In the words of one scholar,[19] "The final compromise text of the Act, rather than reflecting any clear-cut Congressional objectives, was a masterpiece of obscurity." In the words of another writer,

> As a result of the haphazard way in which the bill was developed, there are unusual difficulties in ascertaining the intent of Congress from a study of the legislative history. In regard to some matters, no explanation was offered for the version finally adopted by the Congress. As to others, conflicting expressions of opinion were reconciled in ways susceptible to varying interpretation.[20]

In the words of Rep. Cellar,[21] an arch critic of the Act, the Act emerged as a "hodge podge" with so many inconsistencies that "courts will have the devil's own job to unravel the tangle . . ."[22]

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codes required that detailed terms and conditions be openly specified in the granting of all advertising allowances, so as to help ensure that these were actually expended for the intended purpose and could not serve as disguised price concessions.

Rowe, supra note 4, at 10–11.

17. *Investigation of the Lobbying Activities of the American Retail Federation, Hearings* on H.R. 523 *the House Special Committee to Investigate American Retail Federation,* 74th Cong., 1st sess. (1935). For the resolution to investigate and a portion of the committee's conclusions, *see* H.R. 8105, 74th Cong., 2d Sess., 80 CONG. REC. 8105 (1936).

18. The Patman Bill (H.R. 8442, 74th, Cong., 1st Sess. (1935)) was introduced in the House on June 11, 1935, and the companion, identical Robinson Bill (S. 3154, 74th Cong., 1st Sess. (1935)) was introduced in the Senate on June 26, 1935. On March 4, 1936, the Borah-Van Nuys Bill (S. 4171, 74th Cong., 2d Sess. (1936)) was introduced. it subsequently became what is now Section 3 of the Act.

19. ROWE, *supra* note 4, at 19.

20. EDWARDS, *supra* note 4, at 28.

21. Congressman Celler wrote an acrimonious report which accompanied the House Judiciary Committee's report. E. CELLER, VIEWS OF THE MINORITY, H.R. REP. NO. 2287, 74th Cong., 2d Sess. 5 (1936).

22. 81 CONG. REC. 9419 (1936).

The two major writers do agree,[23] however, that the best insight into the legislative purpose or objectives of the Act can be gained by viewing the reports of the judiciary committees of the two houses, the statements of the sponsors of the bill during debate and expressions of opinion from the floor. The House Committee reported that

> The object of the bill briefly stated is to amend section 2 of the Clayton Act so as to suppress more effectively discriminations between customers of the same seller not supported by sound economic differences in their economic positions or in the cost of serving them . . .[24]

The Senate Committee Report was similar:

> The bill proposes to amend section 2 of the Clayton Act so as to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them . . .[25]

The House Debates echo this sentiment as well:

> The bill merely strikes out the proviso in the Clayton Act which renders ineffective as to quantity discounts the provisions of that Act prohibiting price discriminations and at the same time makes the Clayton Act effective as a prohibition against improper discounts or rebates under the guise of advertising discounts or brokerage discounts.[26]

Of the legislative history of the Act, Rowe concluded, "[It] shows how an anti-chain store bill, conceived and pushed by the organized grocery wholesalers and their allies, was engrafted onto the Clayton Antitrust Act governing pricing in all of American industry."[27]

In his book, *The Price Discrimination Law,* Corwin Edwards gave his views concerning the aims of the Act:

> . . . The political impulse underlying the law was an impulse to control changes in the channels of distribution, to curb the power of the

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23. EDWARD, supra note 4, at 28; ROWE, *supra* note 4, at 20.
24. H.R. REP. NO. 2287, 74th Cong., 2d Sess. 3 (1936).
25. S. REP. NO. 1502, 74th Cong., 2d Sess. 3 (1936).
26. 80 CONG. REC. 8348 (1936).
27. ROWE, *supra* note 4, at 22.

stronger distributors, and to enhance the opportunities of the weaker ones.

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The broad plan of the Robinson-Patman Act was to cope with price discrimination that had significant effects on business opportunities . . . Attention was to be given to the opportunities of both sellers and buyers, but with primary concern for the latter.[28]

Section 2(a) of the Robinson-Patman Act[29] contains several jurisdictional requirements that a plaintiff must establish before the substantive provisions of the Act can be invoked. They are as follows:

(1) The seller charged with a violation must have been engaged in commerce;
(2) The transactions involved must have been made in the course of such commerce;
(3) The transactions must have been consummated and contemporaneous and made by the same seller;
(4) The transactions must have involved commodities;
(5) Of like grade and quality;
(6) At least one of the purchases involved must have been in commerce, and
(7) The commodities must have been sold for use, consumption or resale within the United States . . .

Each of the requirements has been extensively considered and given dimension by courts[30] and scholars[31] alike with one major exception; the requirement that the commodities involved have been "sold for use, consumption, or resale within the United States . . ." has been largely ignored. This "sold for use, consumption or resale" exception was part of the original 1914 Clayton Act and was left intact when the Act was amended in 1936. The phrase received scant attention from the courts until 1975, when *Zenith Radio Corp. v. Matshushita Elec. Indus. Co.*[32] was decided. In

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28. EDWARDS, *supra* note 4, at 12–13.

29. 15 U.S.C. § 13(a).

30. For a collection of cases from the various circuits, *see* VON KALINOWSKI, BUSINESS ORGANIZATIONS, §§ 24.02–24.05, 26.02[1]–[3] (Vols. 16B, 16C); [hereinafter VON KALINOWSKI]; and SHNIDERMAN, PRICE DISCRIMINATION IN PERSPECTIVE 7–43 (1977).

31. *See, e.g.*: ROWE, *supra* note 4, at 45–85; KINTNER, A ROBINSON-PATMAN PRIMER 35–95 (1970); BAUM, THE ROBINSON-PATMAN ACT — SUMMARY AND COMMENT 6–14 (1964).

32. 402 F. Supp. 244 (E.D. 1975).

Zenith, for the first time, a case's outcome hinged on an interpretation of the phrase. Prior to 1975, all the commentators who considered the phrase viewed it as unambiguously excluding export goods.[33] The court in *Zenith* seemed to embrace that view when it held that "[The] clause makes it . . . clear that the commodities involved must eventually reach the United States."[34] Two years later, in *Fimex v. Barmatic Products,*[35] the Court acknowledged that the clause contained ambiguities. However, on the peculiar facts of that case, the court did not have to resolve the uncertainties.

The present state of the law in the wake of *Zenith* and *Fimex* is one of general confusion. Several approaches to the clause have been suggested by the courts but none has been conclusively adopted. As indicated above, this note will suggest a framework which can be applied to transactions in order to ascertain if the Act applies.

The reason for insertion of the clause in the Act is not clear. The phrase first appeared in the original Clayton Act and was carried over *in toto* into the 1936 amendment without explanation.

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33. The language which effectively exempts export transactions from Robinson-Patman appears in Section 29(a). This key ban on price discrimination is confined to commodities "sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States . . ." Hence, American goods sold abroad are exempt from civil price discrimination charges, and American firms may maintain price differentials among their foreign customers without concern over the Act. ROWE, *supra* note 4, at 81–82; *See also Antitrust Recent Developments,* Prepared by the Section of Antitrust Law of the American Bar Assn. (1975) at 110: "Section 2(a) does not apply to export sales"; VON KALINOWSKI, *supra* note 30, at 626.03[1]: "[T]he language of Section 2(a) specifically exempts export transactions."

80 CONG. REC. 6333 (1936) is often cited to support the conclusion that the act does not apply to dumping:

MR. LOGAN . . . The purpose of the bill is to compel the treatment of all customers exactly alike when the same situation applies to all of them.
MR. VANDENBERG . . . Would that apply equally to a customer in the United States and a customer out of the United States?
MR. LOGAN . . . I do not think it applies to a customer out of the United States.
MR. VANDENBERG . . . I do not. As I recall, the provisions of the bill are confined specifically to the United States and possessions of the United States.

Since this conversation was specifically directed toward dumping activities, it is improper to interpret the colloquy as also indicating an exclusion from coverage of all export transactions. *But see* ROWE, *supra* note 4, at 82.

34. 402 F. Supp. at 248.

35. 429 F. Supp. 978 (E.D.N.Y.), *aff'd mem.,* 573 F.2d 1289 (2d Cir. 1977).

In explaining the language in 1914, the House and Senate Committee reports both stated:

> This section expressly forbids discrimination in price between different dealers of commodities that are sold for use, consumption, or resale within the United States or any place within its jurisdiction . . . It will be observed that the language used makes this section applicable only to domestic commerce, or, in other words, its application is restricted to commerce carried on in the United States, or in places under the jurisdiction thereof, and has no reference to commodities sold either in this country or abroad which are intended solely for our export trade.[36]

The language of the Reports is unclear. The Reports state that the words of the statute indicate that the Act has no application to commerce other than commerce carried on in the United States. They then state that the phrase has no application to commodities sold either in this country or abroad when the commodities are intended solely for export trade. The Reports and the scholars never considered that it may be possible for the Act to apply to foreign commerce and yet be consistent with the limitation that it be enforced only when the goods are "sold for use, consumption, or resale within the United States . . ." Almost without exception,[37] the scholars have considered Section 2(a) to be inapplicable to foreign commerce.

In order to understand the present state of the law, an examination must be made of the several decisions which have considered the phrase. In *Zenith Radio Corp. v. Matshushita Elec. Indus. Co.*,[38] Zenith Radio Corp. brought suit under Section 2(a) of the Robinson-Patman Act against a Japanese based concern for allegedly selling televisions at one price in Japan and at another

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36. H.R. REP. No. 627, 63d Cong., 2d Sess. 8 (1914); S. REP. No. 698, 63d Cong., 2d Sess. 3 (1914).

37. In SAWYER, BUSINESS ASPECTS OF PRICING UNDER THE ROBINSON-PATMAN ACT 10 (1963), the author interprets the phrase as referring to where the transactions occur and not where the goods are destined.

> "The two or more transactions giving rise to the alleged discrimination must be (a) within the United States . . . *Id.*

The fallacy of this approach is that it interprets the phrase as if it read "where such commodities are sold *within the United States* . . ." Although not developed in his book, Sawyer's interpretation leaves open the possibility that goods could be sold for export and/or exported and the Act would apply as long as the sales occurred in the United States. For an amplification of this "location theory" vis-a-vis a "destination theory" *see* 4 INT'L TRADE L.J. 427 (1979). It should be noted that the location approach was expressly rejected by Wright Patman in his book PATMAN, W., THE ROBINSON-PATMAN ACT 208 (1938) [hereinafter PATMAN].

38. 402 F. Supp. 244 (E.D. 1975).

price in the United States. The court noted that the issue, i.e. whether the Act was applicable to a dumping arrangement, was one of first impression.[39] In holding the Act inapplicable, the court made the following statement concerning the phrase:

> The 'use, consumption, or resale' clause makes it equally clear that the commodities involved must eventually reach the United States. Hence, no cause of action arises under the Act unless both commodities involved in the alleged price discrimination are sold for use, consumption, or resale within the United States. That, of course, is not the case here, for one 'leg' of the price discrimination alleged by plaintiffs involved commodities that are 'sold for use, consumption, or resale', not within the United States, but within a foreign country, Japan. I conclude therefore that on its face the statute does not reach the transactions alleged here.[40]

In addition to the statutory requirement that the commodities involved have been "sold for use, consumption or resale within the United States . . .", Judge Higgenbotham asserted the requirement that the commodities involved must actually be used, consumed, or resold within the United States. Although under the facts of *Zenith* the difference between "sold for" and "must actually reach" was unimportant,[41] the failure to distinguish between the two and to determine which is required by the Act can lead to deleterious consequences.

It is submitted that the clause requires, on its face, that the trier of fact determine if the goods were sold *for* use, consumption or resale; in other words, it requires that a determination be made of the purpose or intention behind the sale. This interpretation is supported by Webster's Third New International Dictionary of the English Language (Unabridged (1966)), wherein the crucial word "for" is defined, in the category of usage most applicable to its use in the phrase, as follows: "with the purpose or object of" and "intending to go to or toward." Thus, by a literal reading, the Act focuses upon the purpose behind the sale or the intended destination rather than upon the actual one, as Judge Higgenbotham so concluded.

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39. 402 F. Supp. at 247. Specifically, the case involved an alleged violation regarding an import transaction in the United States as one "leg" of the discrimination, and a transaction that occurred wholly within a foreign country as the other.

40. *Id.* at 248.

41. The goods were both sold with the intention of reselling them within the United States and they were in fact resold within the United States. It is only when one of these conditions is not met that the issues raised by this note are brought into question.

Two years later, in *Fimex v. Barmatic Products,*[42] the difficulties involved in ascertaining the meaning of the phrase became further compounded. A domestic distributor brought an action under Section 2(a) of the Robinson-Patman Act against a domestic manufacturer alleging price discrimination with respect to parts sold by the defendant to the plaintiff. The parts were exported by the plaintiff following the sale. The court began by raising the question of whether the Act covers goods sold for export.[43] The plaintiffs proffered the argument that the Act prohibited discrimination between persons within the United States "even if those persons purchased for export."[44] In rejecting this theory, the court quoted from Wright Patman's book, *The Robinson-Patman Act,* published two years after the passage of the Act.

> Therefore, in applying the Act to export sales, it is evident that no limit or regulation of price discrimination in such sales is intended, unless goods involved in such transactions are resold for use, consumption, or resale in any place under the jurisdiction of the United States. It is likewise apparent that the parties to any sales transaction, regardless of where the parties are located, are not subject to the price-discrimination provisions of the Act, unless such goods are sold for resale in, or are to be used or consumed in, any place under the jurisdiction of the United States.[45]

The court concluded from the above quote that "the focus of the Act is on where the goods are going, not on where the parties are located."[46] The court made no attempt to clarify whether the original intention or the ultimate destination of the goods would be controlling.

The *Fimex* court then stated that the *Zenith* decision was in accord with Wright Patman's interpretation. However, unlike the *Zenith* court which held that the goods must eventually reach the United States, Patman believed only that the goods need be sold for resale domestically, or "are to be used within the United States."[47] Such a belief does not indicate that the goods must *actually* be resold, used, or consumed in the United States.

The *Fimex* court did recognize, however, that the phrase was ambiguous on its face and open to at least three possible interpretations.

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42. *See* 429 F. Supp. 978 (E.D.N.Y.), *aff'd mem.,* 573 F.2d 1289 (2d Cir. 1977).
43. 429 F. Supp. at 979.
44. *Id.*
45. PATMAN, *supra* note 37, at 208.
46. 429 F. Supp at 979
47. PATMAN, *supra* note 37, at 208.

> First, that section could mean that the seller's intent is controlling. In other words, did the seller intend the goods for resale within the United States? Second, the focus of the Act could be on the buyer's intent, and third, the focus of the Act could be the objective standard of where the goods were in fact resold.[48]

The court did not evaluate the merits of a seller's intent test. However, the court did state that even if such a standard were utilized, the plaintiff buyer would be unable to prevail; the nature of the transactions between the seller and buyer in this case led the seller to reasonably assume that the sales were for export.[49]

The court considered and rejected the buyer's intent test on the specific facts of the case because

> If a buyer's intent test, particularly an undisclosed one, were to be read into the Act, it would be an easy matter for every buyer which (as has been the case with the plaintiff) traditionally purchased for export to place a seller in jeopardy of a suit such as this by submitting on occasion orders to a seller for items which the buyer subsequently claims were for the domestic market. In short, this would make the Act a real trap for the unwary and subject sellers to liability which might only be said to be clearly undeserved.[50]

The court did not explain why it concluded that a buyer's test which included subjective intent is the only buyer's test that could be applied. The court further stated that even if the buyer's intent test were the proper one, the plaintiff had failed to produce sufficient evidence to indicate that there was a genuine issue of material fact.[51] In considering the result of an application of the "objective" test, the court concluded that, again, the plaintiff could not prevail because none of the goods were actually resold domestically.[52] Finally, the court suggested the "the correct test may be that the seller can rely on where the buyer customarily resells his goods, absent some express notice given to the contrary with respect to particular

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48. *Id.* at 980.
49. *Id.* at 980–81.
50. *Id.* at 981.
51. *Id.*
52. *Id.*

purchases." The court recognized that this test would also result in a judgment for the defendant.[53]

The *Fimex* opinion is a model of judicial conservatism. The court discussed three or perhaps four approaches to the "sold for use, consumption, or resale within the United States" clause but refused to endorse any of them. The court was not required to resolve the issue because all the tests delineated yielded identical results on the particular facts of the case. This decision leaves the law regarding the meaning to be given to the phrase in a state of flux.[54] Although *Zenith* held that the destination of the goods is all controlling, the more recent *Fimex* case casts doubt upon the conclusiveness of the *Zenith* decision by suggesting numerous approaches to what it viewed as an ambiguous phrase.

Courts are therefore lacking a coherent, systematic approach in ascertaining and applying the requirements of the phrase. The remainder of this note will be devoted to supplying such an approach. In so doing, it will be necessary to first evaluate the current approaches promulgated by the scholars and the courts.

As stated above, those writers who have examined the phrase concluded that, on its face, the Act did not apply to goods which were exported. Thus, as in the *Zenith* case, they read into the Act the additional requirement that the goods actually be used, consumed, or resold within the United States. Within the bounds of legal reasoning, the clause could so objectively contain the additional requirement, even though a subjective, purposive reading is more natural. It is doubtful that the congressional reports and scholarly comments were even directed at this distinction. The legal question, in other words, is entirely open to rational, policy oriented analysis.

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53. *Id.*

54. Following *Fimex* was the case of Raymond v. Avon Products, Inc., [1978–1 Transfer Binder] TRADE REG. REP. (CCH) ¶ 62,076 (New York Supreme Court 1978). The case involved challenged price differentials for goods which were bought by an "export distributor" and were clearly bought for resale abroad. The court, in holding that the Robinson-Patman Act was inapplicable, cited *Fimex* and *Zenith*. Because the goods were bought for resale abroad, the difficulties inherent in the *Fimex* and *Zenith* decisions did not emerge. A careful reading of *Raymond* may indicate that the court implicitly utilized the approach stated in the article. The plaintiff was forced to go out of business when her competitor received larger price discounts and she could not compete profitably. The court stated that the Act was inapplicable because it applies only to goods sold for use consumption or resale within the United States, and not to goods sold for export or resale outside the United States. The court may have decided the case based on the purpose of the sale. Based on *Fimex* and *Zenith*, arguably, if the plaintiff then sold her goods domestically she could still bring suit under the Act. It is clear that the Act was not meant to provide redress under such circumstances. It is for this reason that courts must adopt a clearer approach to such cases.

Is there any legitimate reason to read this additional requirement into the Act? Would this additional requirement result in consequences intended by the Act, or would it lead to inequitable consequences which would be at variance with the aims of the legislation?

A paradigm will demonstrate the impropriety of adding this requirement into the phrase. Suppose A, a seller, sells to B, a large buyer, at a lower price than to C, a smaller buyer. Assume that the prohibitions of the Act have been violated. Finally, assume that both B and C bought the commodities intending to resell them within the United States. When C discovers that B is able to undersell him, by virtue of the improper price concession, C decides to bring suit against the seller under Section 2(a) and perhaps against the buyer as well under Section 2(f) for knowingly having induced an illegal price discrimination.

There is a competitive injury requirement in Section 2(a). Price discrimination is banned

> where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.[55]

If C sustains the sufficient competitive injury, it is unrelated to the subsequent disposition of the goods; therefore, he should be able to maintain a cause of action regardless of what he chooses to do with his goods after purchase. C should be permitted to maintain suit if his ability to compete with B is substantially lessened, injured, prevented or even if it may be substantially lessened. The causal connection between the price discrimination and the subsequent disposition of the goods should be irrelevant. If C has purchased for use, consumption or resale within the United States, then he has met the literal requirements of the Act and the competitive injury that he sustains is not linked to the goods' final destination. As indicated above in the material on legislative purpose, the preservation of competition between buyers is at the heart of the Robinson-Patman Act's prohibitions. In the situation described, C was prevented from competing against B because of the improper price concession granted to B and, therefore, if both purchased with the intention of reselling domestically, C should be able to maintain suit.

Under the authorities discussed earlier, a buyer who has been the victim of unfair price discrimination may be foreclosed from maintaining an action

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55. 15 U.S.C. § 13(a) (1976), Section 2(a) of the Robinson-Patman Act.

against the seller if he decides to export the goods subsequent to his purchase. It may prove irrelevant to a court that the buyer exported the goods in order to mitigate damages rather than sell them domestically and sustain an even larger loss. Thus, the present law may lead to such illogical consequences as forcing a buyer, in order to maintain a cause of action, to sustain a larger loss than necessarily need be incurred and thus further hinder his ability to compete in the future with his competitor. This larger loss may not be recoverable because of a failure to mitigate damages. It is difficult to conceive that such deleterious consequences were intended or desired under the Act.

The court in *Fimex* deviated from a strict destination approach to the phrase. In groping for a test, the court stated that rather than using as the test the place where the goods are in fact resold, a court may choose to look to the intent of the two parties to the sale. The court did not evaluate the seller's intent test, and, for the reasons stated above, rejected the buyer's intent test.

The difficulty of ascertaining what parties intended between them is not a novel problem. In the area of contract law, the question has been considered in the form of the objective and subjective intent theories of contract formation.[56] The principles applied in the resolution of that debate can be applied to Robinson-Patman Act cases.[57]

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56. *See* 1 A. CORBIN, CONTRACTS § 106 (1963 ed.).

57. It may be argued that this approach is very similar to the approach utilized in Section 2(f) actions involving buyer's liability. In such cases there is inquiry made into the buyer's knowledge because knowledge is an element of the violation. Reliance may be placed on the buyer's trade experience. *See* Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 79–80 (1953); Mid-South Distribs. v. FTC, 287 F.2d 512, 518 (5th Cir. 1961), *cert. denied,* 368 U.S. 838 (1961). According to SHNIDERMAN, *supra* note 30, at 143–144: "The seller's specific representations, assurances, or even affidavits that the price is legal will not necessarily suffice to clear the buyer, although such statements, if not coerced, will have some bearing on the buyer's state of mind. Similarly, a seller's representation that the price sought would be unlawful will bear on the buyer's knowledge but will not be conclusive, since the seller's motives may be suspect." *See* 346 U.S. at 79–80. "The buyer's deliberate effort to shield himself from facts that would readily demonstrate the SHNIDERMAN illegality of the price he bargained for in all probability will prove of little avail if the buyer's normal trade experience should have alerted him that something was amiss." *Supra* note 30, at 144. Although Section 2(a) does not state that knowledge is an element of a violation, it is submitted that with regard to the phrase under consideration, it is impossible to ascertain the purpose behind a sale without investigating the knowledge of the seller. It is possible to hold a seller liable for a violation of Section 2(a) without knowledge with regard to the other elements of the provision, but such is not possible with regard to the purpose of the sale.
sale.

In a typical contract action in which this question arises, the court will look to the defendant and will determine what a reasonable person, in the defendant's position, would have or should have known. In the case of an alleged Section 2(a) violation, it is here suggested that the court should look at the seller-defendant and make a determination of what a reasonable person in the defendant's position would have or should have thought was the purpose of the sale. The court could take into account communications between the seller and the favored or discriminated–against buyer in determining whether a sale was for use, consumption, or resale abroad or within the United States. The court could take into account the usual pattern of practice between the parties since, in the absence of more direct information regarding a specific transaction, a seller would normally rely upon what the buyer usually did with the goods in forming his impression of the purpose of the sale.

The plaintiff would allege that the sale was for use, consumption or resale within the United States. The plaintiff would be able to rely upon the ultimate destination of the goods, if they were sold domestically, as evidence of the purpose of the sale, since, in the typical case, and in the absence of evidence to the contrary, it would be reasonable to assume that the ultimate destination of the goods was the place where they were intended to go at the time of the sale.

The defendant could assert that based on the information in his possession at the time of the sale, he reasonably believed that the goods were to be exported. The defendant could present such evidence as a statement by the buyer that he was buying for export, or the seller could introduce evidence to indicate that the buyer was an exporter by trade and/or that he always exported commodities sold to him by the seller. Should the defendant seller fail to produce any credible evidence that would support his contention that he reasonably believed that the goods were sold for export, then, if the goods were in fact used domestically, the plaintiff would be entitled to summary judgment. Likewise, if the goods are resold abroad, the defendant should be entitled to summary relief in the absence of contrary evidence offered by the plaintiff.

The advantages of this approach are manifold. It avoids reliance upon the destination theory criticized above, except to the extent that behavior subsequent to the time of sale, i.e., the location to which the goods are eventually shipped, can be relied upon to illuminate the purpose or intent behind the sale. It focuses attention on the activities of the seller — what he knew or should have known. Since, as a defendant, it is his conduct which is brought into question, it is logical to focus attention on him. Under this approach, the fears of the *Fimex* court regarding the use of a buyer's subjective intent component would be eliminated. The seller would not have

to be concerned about a buyer's subjective, unarticulated intentions. The seller would be liable only when, because of the specific knowledge he had received concerning the transaction or because of his past dealings with the buyer, he was or should have been alerted to the fact that the goods were bought for resale domestically.

Such a rule may, in some cases, force a seller to inquire into the motivation of the buyer. For example, suppose a seller is sued for allegedly violating Section 2(a). Assume he sold to a buyer to whom he has either never sold in the past or who sometimes exports and sometimes sells domestically. If he grants a discriminatory price concession to that buyer, and if the buyer resells the goods domestically, the seller will be faced with the obligation of presenting evidence to indicate that he had reason to believe the buyer was planning to export the commodities. If the seller is unable to produce such evidence because he never inquired of the buyer where he intended to resell, summary judgment will be granted to the plaintiff. In order to place the question of the purpose of the sale before a jury, the seller must produce some credible evidence indicating that he reasonably believed the goods would be exported; therefore, this would require that when he deals with a buyer under the circumstances described above, he must take measures to protect himself. This could take the form of a provision in the contract of sale stating that the buyer intends to sell, use, or consume the goods abroad. Such a requirement would be of minor inconvenience since the seller would need such protection only in those cases when he would have no evidence from which to support a contention that he believed the goods were sold for export.

Under this approach, although the burden of persuasion remains with a plaintiff, the burden of production will shift to the defendant in the situation when the goods are not exported. The question may arise as to why the defendant should have the obligation of exculpating himself and why the plaintiff should be able to rely upon the destination of the goods (if sold domestically) rather than having to demonstrate the purpose behind the sale without this aid. The reason is that to do otherwise would be to impose an unfair burden upon the plaintiff. For example, if the plaintiff were limited to what it could find on discovery to prove the purpose of the sale, sellers and buyers would be encouraged to never discuss the purpose of the sale and never reduce to writing anything which could lead a trier of fact to discern the purpose of the sale. If the object of the Act is to promote competition through the prevention of unfair price discrimination, then it would be at odds with the Act to encourage sellers to transact in a state of ignorance or to ignore situations which may foreclose competition, or to become involved in collusive practices with a buyer. The suggested approach would merely require a seller, in a situation in which he is unsure whether or not a sale is

for export, to make an inquiry in order that he may, first, prevent an unfair price discrimination from occurring should he discover that the sale is not for export, and second, that he may better arm himself in the event that a Robinson-Patman Act violation is alleged.

In conclusion, this suggested analysis will provide maximum protection for a plaintiff buyer while at the same time imposing minimal burdens on a seller. Under this approach, the focus of the courts' attention would be on the purpose of the sale and not upon the subsequent disposition of the goods. Such an approach comports with a plain reading of the Act and will lead to consequences in furtherance of the Act's purposes — that in the course of competing with another firm, a buyer is entitled to protection from having to contend with improper price concessions granted to his competitor.

David R. Sonnenberg