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### Recommended Citation

*Gasoline Marketing Practices and "Meeting Competition" Under the Robinson-Patman Act: Maryland's Response to Direct Retail Marketing by Oil Companies*, 37 Md. L. Rev. 323 (1977)

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## Comments

### GASOLINE MARKETING PRACTICES AND "MEETING COMPETITION" UNDER THE ROBINSON-PATMAN ACT: MARYLAND'S RESPONSE TO DIRECT RETAIL MARKETING BY OIL COMPANIES

#### INTRODUCTION

The energy shortage of 1973 focused public attention on the petroleum industry. Foreseeing the possibility that shortages would continue to occur, the Maryland General Assembly enacted a statute in 1974, amended in 1975,<sup>1</sup> designed to equalize the impact of decreased gasoline supplies among gasoline retail dealers. Major national oil companies promptly challenged the statute on constitutional and federal preemption grounds. In *Governor of Maryland v. Exxon Corporation*,<sup>2</sup> the Court of Appeals of Maryland held that the statute was constitutional and was not preempted by either the Federal Emergency Petroleum Allocation Act of 1973<sup>3</sup> or the Robinson-Patman Act.<sup>4</sup> This Note will outline the *Exxon* decision, focusing primarily on the holding that, as a matter of law, the Maryland statute was not preempted by the Robinson-Patman Act. After evaluating the apparent conflict among the Supreme Court, lower federal courts, and the Federal Trade Commission regarding the construction of the "meeting competition" defense in the federal anti-price discrimination statute, the position adopted by the Court of Appeals will be analyzed. The discussion will conclude that the Maryland interpretation is accurate and solidly based on national antitrust policy.

At Governor Mandel's request, the Comptroller of the Treasury conducted a study during the summer of 1973 on the effects of the oil shortage on local gasoline markets. The study focused on the effects of increased direct retailing by the large, vertically integrated oil companies on other major types of marketing in Maryland.<sup>5</sup> In past years, the twenty largest oil companies typically have operated at the crude oil production, transportation, refining, and wholesale marketing levels of the petroleum industry.<sup>6</sup> This involvement at the successive stages from production through wholesaling is characterized as vertical integration.<sup>7</sup> However, in recent years, both major and semi-major oil companies<sup>8</sup> have exerted

1. MD. ANN. CODE art. 56, § 157E (Cum. Supp. 1976).

2. 279 Md. 410, 370 A.2d 1102 (1977), *prob. juris. noted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

3. 15 U.S.C. § 753 (Supp. III 1973).

4. 15 U.S.C. § 13 (1970).

5. See 279 Md. at 420-21, 370 A.2d at 1108-09.

6. THE STRUCTURE OF AMERICAN INDUSTRY 120 (4th ed. W. Adams 1971).

7. See, e.g., J. PATTERSON & F. ALLVINE, COMPETITION LTD.: THE MARKETING OF GASOLINE 5 (1972) [hereinafter cited as COMPETITION LTD.].

8. For detailed discussions of the structure and practices of large, vertically integrated oil companies, see J. BLAIR, THE CONTROL OF OIL (1976) [hereinafter cited

increased control over the retail marketing of their products.<sup>9</sup> The most significant manifestation of this forward integration into retail marketing is the trend toward converting company owned retail outlets ordinarily leased to independent dealers into company owned and operated retail stations.<sup>10</sup> The ramifications of forward integration into marketing are important because the existence of employee operated stations effectively precludes application of antitrust laws regulating sales from distributors to dealers,<sup>11</sup> increases the unwillingness of large oil companies to supply gasoline to

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as THE CONTROL OF OIL]; COMPETITION LTD., *supra* note 7; J. PATTERSON & F. ALLVINE, *HIGHWAY ROBBERY: AN ANALYSIS OF THE GASOLINE CRISIS* (1974) [hereinafter cited as *HIGHWAY ROBBERY*]; Note, *Gasoline Marketing Divestiture Statutes: A Preliminary Constitutional and Economic Assessment*, 28 VAND. L. REV. 1277 (1975) [hereinafter cited as *Gasoline Marketing Divestiture Statutes*].

9. In domestic marketing, integrated oil companies employ various methods to control individual dealers: short-term lease contracts, supervision by company representatives, price discipline through strategically located company stations, commission dealerships, price protection programs, rent manipulation, and pressure to conform to advertised "specials." See, e.g., COMPETITION LTD., *supra* note 7, at 46-48. For a description of such practices in operation, see *Hearings Pursuant to S. Res. 45 on a National Fuels and Energy Policy Study Before the Comm. on Interior and Insular Affairs*, 93d Cong., 1st Sess., pt. 1, at 7 (1973) (statement of Richard Tubbs).

10. See, e.g., *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1290. This trend was motivated largely by the need to increase profits at the marketing level and by the desire to avoid new franchise laws that protected independent gasoline dealers from oil company leasing terms that many consider oppressive. *Id.* at 1287-90. The major oil companies suffered a drastic decline in domestic retail profits in the late 1960's and early 1970's, attributable in large part to successful competition by independent marketers. THE CONTROL OF OIL, *supra* note 8, at 241-42. In addition, the international companies, strongly dependent upon profits at the crude oil level of operation, were seriously threatened by foreign expropriations and by the Arab embargo. See, e.g., THE CONTROL OF OIL, *supra* note 8, at 220-30; N.Y. Times, May 27, 1973, § 3, at 1, col. 1. Between August 31, 1970 and January 1, 1974, Arabian light crude oil prices rose from \$1.80 per barrel to \$11.651 per barrel. *HIGHWAY ROBBERY*, *supra* note 8, Table 4-1 at 53.

At the marketing level of the industry, oil companies began to lose some of their power over their dealers. For example, the Maryland legislature enacted the Gasoline Products Marketing Act, MD. COM. LAW CODE ANN. §§ 11-301 to 308 (1975), to prevent unfair control of independent gasoline dealers. Among other provisions, the Act requires a distributor to disclose past gallonage to a prospective franchisee, allows a dealer to cancel a marketing agreement within seven days of signing, prohibits a distributor from setting a dealer's hours of business unless otherwise provided in the franchise agreement, and forbids a distributor from exerting pressure on a dealer to participate in promotion schemes. One particularly important provision requires that a party give 90 days notice of intent not to renew a franchise. MD. COM. LAW CODE ANN. § 11-304 (1975). See *Becker v. Crown Central Petroleum Corp.*, 26 Md. App. 596, 614, 340 A.2d 324, 335, *cert. denied*, 276 Md. 738 (1975).

11. Antitrust laws regulating sales do not apply to intracompany transfers. See, e.g., Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (1970) (unlawful to discriminate in price between "purchasers"); *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1320-25.

retail competitors,<sup>12</sup> and focuses the power of vertically integrated companies against the small, independent private-brand marketers.<sup>13</sup>

The Comptroller's study showed that every type of independent outlet had suffered greater shortages in 1973 than had company owned and operated retail outlets. Four categories of gasoline stations were surveyed: stations owned by major oil companies and leased to dealers,<sup>14</sup> independently owned stations that sold major brand supplies, unbranded stations,<sup>15</sup> and oil company owned and operated stations. Results showed that only company owned and operated stations experienced no shortage; stations not retailing brand names received decreased supplies, as did independents and major brand stations that were leased to dealers.<sup>16</sup>

Responding to this study and following extensive public hearings, the Maryland General Assembly added several provisions to the Motor Fuel Inspection Law to prohibit forward integration into gasoline retailing and to prevent suppliers from discriminating among gasoline dealers.<sup>17</sup> The statute also attempts to equalize the impact of decreased gasoline supplies by requiring that supplies be uniformly and equitably allocated to all Maryland

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12. See, e.g., *COMPETITION LTD.*, *supra* note 7, at 237-38; *HIGHWAY ROBBERY*, *supra* note 8, at 17, 150; *THE CONTROL OF OIL*, *supra* note 8, at 249; *Hearings Pursuant to S. Res. 344, Before the Subcomm. on Antitrust and Monopoly of the Comm. on the Judiciary*, 91st Cong., 2d Sess., pt. 1, at 97 (1970) [hereinafter cited as *1970 Hearings*]; *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1291. See generally, Note, *The Gasoline Marketing Structure and Refusals to Deal With Independent Dealers: A Sherman Act Approach*, 16 ARIZ. L. REV. 465 (1974).

13. Private brand marketers are generally small, non-integrated, price-conscious retailers. These gasoline dealers obtain supplies from the best available source, do not advertise, and avoid expensive locations. See, e.g., *COMPETITION LTD.*, *supra* note 7, at 237-38. This method of gasoline marketing is efficient and competitive; by the late 1960's and early 1970's the major oil companies had lost a substantial amount of sales to the private marketers despite price wars and the tactic of introducing "secondary" or "fighting" brands of gasoline into the market. *THE CONTROL OF OIL*, *supra* note 8, at 237-42; *HIGHWAY ROBBERY*, *supra* note 8, at 42-46, 74. When gasoline supplies became scarce in 1973, the oil companies focused the effects of the shortage on private marketers; denial of supplies and the resulting price increases forced many private brand retailers out of the market. *COMPETITION LTD.*, *supra* note 7, at 176-77; *THE CONTROL OF OIL*, *supra* note 8, at 246-60.

14. Traditionally, this form of retailing has been the most prevalent. *COMPETITION LTD.*, *supra* note 7, at 44.

15. This method of marketing gasoline is considered to represent a strong competitive force. See *COMPETITION LTD.*, *supra* note 7, at 74-102; note 13 *supra*. For a discussion of the growth of private brand marketers, see *THE CONTROL OF OIL*, *supra* note 8, at 237-40.

16. *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 421, 370 A.2d 1102, 1109, *prob. juris. noted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

17. MD. ANN. CODE art. 56, § 157E(b)-(h) (Cum. Supp. 1976):

(b) After July 1, 1974, no producer or refiner of petroleum products shall open a major brand, secondary brand or unbranded retail service station in the State of Maryland, and operate it with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the

retailers during times of shortage.<sup>18</sup> In order to preserve competition and to prevent independents from being forced out of business by discounts offered by oil companies to their own outlets,<sup>19</sup> the statute makes price discrimination among dealers in the form of voluntary allowances unlawful.<sup>20</sup> The absolute prohibitions of the statute are tempered by provisions authorizing the Comptroller to exercise discretion in the administration and enforcement of the law.<sup>21</sup>

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producer or refiner. The station must be operated by a retail service station dealer.

(c) After July 1, 1975, no producer or refiner of petroleum products shall operate a major brand, secondary brand, or unbranded retail service station in the State of Maryland, with company personnel, a subsidiary company, commissioned agent, or under a contract with any person, firm, or corporation, managing a service station on a fee arrangement with the producer or refiner. The station must be operated by a retail service station dealer.

(d) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall extend all voluntary allowances uniformly to all retail service station dealers supplied.

(e) Every producer, refiner, or wholesaler of petroleum products supplying gasoline and special fuels to retail service station dealers shall apply all equipment rentals uniformly to all retail service station dealers supplied.

(f) Every producer, refiner, or wholesaler of petroleum products shall apportion uniformly all gasoline and special fuels to all retail service station dealers during periods of shortages on an equitable basis, and shall not discriminate among the dealers in their allotments.

(g) The Comptroller may adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station.

(h) The Comptroller may permit reasonable exceptions to the divestiture dates specified by this section after considering all of the relevant facts and reaching reasonable conclusions based upon those facts.

18. *Id.* § 157E(f) (Cum. Supp. 1976).

19. At the legislative hearings, evidence was presented by the Executive Branch showing the existence of forward integration in Maryland as well as inequalities in supply allocations and price allowances. Supporters of the act argued that the effect of these developments would be to force the independent marketers out of the area. See 39 CONSUMER REPORTS 346-47 (April 1974). They warned that when this was accomplished major oil companies would control the market, resulting in higher consumer prices. Although such a situation is usually attractive to new competition willing to offer the public lower prices, see P. SAMUELSON, *ECONOMICS* 492 (8th ed. 1970), it was argued that since the major oil companies control nearly 80% of the petroleum supplies, new entries would be precluded by lack of access to products. See *COMPETITION LTD.*, *supra* note 7, at 10. The oil companies countered that the true effect of the proposed statute would be to force discount marketers out of business because they would be unable to compete without price allowances. In enacting the bill, the legislature was persuaded that the Maryland gasoline market faced harmful anticompetitive practices through forward integration and discriminatory pricing.

20. MD. ANN. CODE art. 56, § 157E(d) (Cum. Supp. 1976).

21. *Id.* §§ 157E(g) & (h) (Cum. Supp. 1976).

Major national oil companies involved in direct retailing in Maryland<sup>22</sup> immediately challenged the statute on constitutional and federal preemption grounds. The plaintiffs filed suit in the Circuit Court for Anne Arundel County seeking both a declaratory judgment that the statute was unconstitutional and injunctive relief prohibiting its enforcement. Focusing on the divestment provisions, the plaintiffs argued that the statute was a denial of substantive due process.<sup>23</sup> The plaintiff oil companies also objected to the requirements that prices and supplies be calculated on a nondiscriminatory basis, alleging that these provisions of the statute were in conflict with the Federal Emergency Petroleum Allocation Act of 1973<sup>24</sup> and the Robinson-Patman Price Discrimination Act.<sup>25</sup> Agreeing with the plaintiffs, the trial court held that the statute unconstitutionally deprived the oil companies of their property without due process<sup>26</sup> and that it was preempted by federal energy and antitrust laws.<sup>27</sup> On appeal, the Court of Appeals of Maryland reversed, holding that the statute was a valid exercise of the state's police power<sup>28</sup> and that it did not conflict with federal laws.<sup>29</sup>

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22. In a consolidated action, the plaintiffs were Exxon Corporation, Shell Oil Company, Gulf Oil Corporation, Phillips Petroleum Company, Ashland Oil, Inc., Continental Oil Company and its subsidiary Kayo Oil Company, and Commonwealth Oil Refining Company, Inc. and its subsidiary Petroleum Marketing Corporation. *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 370 A.2d 1102, *prob. juris. noted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977).

23. *Id.* at 423, 370 A.2d at 1110. In a similar case, a Florida statute requiring divestment of service stations owned and operated by producers or refiners in excess of three percent of the total number of all service stations that sold their branded products was held unconstitutional as, *inter alia*, an improper exercise of the police power. *Exxon Corp. v. Conner*, No. 74-1449 (Leon County Cir. Ct. Fla. Jan. 23, 1975). The decision was not appealed. *See also* DEL. CODE tit. 6, §§ 2905-2906 (Cum. Supp. 1976).

24. 15 U.S.C. § 753 (Supp. III 1973).

25. 15 U.S.C. § 13 (1970).

California recently attempted to prohibit price discrimination by gasoline suppliers among their dealers. A California statute provided that a defense would be available to a price-discriminating supplier who could show "that his lower price to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor and was also offered to any other of his purchasers in competition with the purchaser or purchasers receiving such lower price." CAL. BUS. & PROF. CODE § 21200 (West Supp. 1977). In *Shell Oil Co. v. Younger*, [1976-1] TRADE CASES (CCH) ¶60,960, this statute was struck down by a federal district court on the ground that it was in conflict with the federal Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13 (1970).

26. *Exxon Corp. v. Mandel*, No. 22,066, slip op. at 90 (Anne Arundel County Cir. Ct. filed Jan. 27, 1976).

27. The trial court granted summary judgment on this issue. *Exxon Corp. v. Mandel*, No. 22,066 (Anne Arundel County Cir. Ct. Oct. 14, 1975) (mem.).

28. 279 Md. at 435, 370 A.2d at 1116.

29. *Id.* at 452, 370 A.2d at 1125.

## CONSTITUTIONAL CHALLENGES TO THE DIVESTITURE PROVISIONS

The divestiture provisions of the Motor Fuel Inspection Law<sup>30</sup> were attacked as violations of substantive due process. The plaintiffs contended that the statute constituted an invalid exercise of the state's police power in violation of the due process clause of the fourteenth amendment to the United States Constitution and article 23 of the Maryland Declaration of Rights.<sup>31</sup> The oil companies argued that forced divestiture was beyond the police power of the state because it constituted an unjustified interference with a lawful business and its effect would be anticompetitive and thus contrary to the purpose of the statute.<sup>32</sup>

In light of the contradictory testimony presented at the legislative hearings<sup>33</sup> before the statute's enactment, and again at the trial stage of the litigation,<sup>34</sup> the availability of the due process argument as a ground for invalidating the statute depended upon whether the court would apply the traditional standard for review of economic legislation, which permits evaluation of legislative determinations, rather than the modern approach, which upholds a statute if there could be any rational basis for its enactment. The Court of Appeals of Maryland generally has adhered to the traditional test, which requires that the court determine for itself whether the challenged statute bears a "substantial relationship between its object and the means employed to attain that object."<sup>35</sup> Recently, however, the court has indicated that it may be prepared to supplant<sup>36</sup> the "real and substantial" means to end test with the rational basis standard currently applied by the Supreme Court.<sup>37</sup> Without expressly considering its past

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30. MD. ANN. CODE art. 56, § 157E(b) & (c) (Cum. Supp. 1976).

31. The Court of Appeals of Maryland has long equated article 23 of the Maryland Declaration of Rights with the due process clause of the fourteenth amendment. 279 Md. at 423 n.3, 370 A.2d at 1110 n.3 (1977).

32. See note 19 *supra*.

33. *Id.*

34. Exxon Corp. v. Mandel, No. 22,066, slip op. at 69-70 (Anne Arundel County Cir. Ct. filed Jan. 27, 1976).

35. Salisbury Beauty Schools v. State Bd. of Cosmetologists, 268 Md. 32, 48-49, 300 A.2d 367, 383 (1973). See also Maryland Bd. of Pharmacy v. Sav-A-Lot, Inc., 270 Md. 103, 311 A.2d 242 (1973); Maryland Coal & Realty Co. v. Bureau of Mines, 193 Md. 627, 69 A.2d 471 (1949); Schneider v. Duer, 170 Md. 326, 18 A.2d 914 (1936).

36. See Bowie Inn, Inc. v. City of Bowie, 274 Md. 230, 335 A.2d 679 (1975). In *Bowie Inn*, the court, purporting to apply the real and substantial relationship test, upheld a city ordinance requiring return deposits on soft drink containers on the finding that the city "could rationally conclude that the deposit law should motivate consumers to return containers." *Id.* at 237, 335 A.2d at 684. In *Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 276 Md. 448, 348 A.2d 856 (1975), the court noted that in view of recent Supreme Court decisions, "an even less stringent standard than the 'real and substantial relation test,' with even greater deference to the legislative judgment than required by that test, is the proper standard to be applied in reviewing, under the due process clauses of the federal constitution, economic regulatory legislation." *Id.* at 456 n.4, 348 A.2d at 860-61 n.4.

37. See, e.g., *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 165 (1973); *Ferguson v. Skrupa*, 372 U.S. 726, 729 (1963); *American Fed'n of Labor v. American Sash & Door Co.*, 335 U.S. 538 (1949).

practice, the court in *Exxon* clearly opted for a rational relationship analysis and, consequently, had little difficulty in upholding the statute.<sup>38</sup>

Before responding to the plaintiffs' argument that divestiture would be contrary to the purpose of the statute, the court observed that where economic regulatory legislation is challenged on constitutional grounds, the judicial function is very limited: "[T]he wisdom or expediency of a law adopted in the exercise of the police power of a state is not subject to judicial review, and such a statute will not be held void if there are any considerations relating to the public welfare by which it can be supported."<sup>39</sup> The court stated that the test to be applied in evaluating economic legislation is, first, whether there was "'an evil at hand for correction'" and, second, whether "'it might be thought that the particular legislative measure was a rational way to correct it.'"<sup>40</sup> Noting that judicial deference to the legislature is particularly warranted where novel or experimental methods are implemented to solve a difficult problem,<sup>41</sup> the court held that the Maryland legislature could "reasonably conclude" from the evidence presented to it that forward integration by major oil companies into Maryland markets endangered competition and that divestiture was "conceivably . . . a reasonable means of preserving competition."<sup>42</sup> The court therefore concluded that the provisions were not contrary to the purpose of the statute.<sup>43</sup> Further, because divestment had long been recognized as an appropriate means of exercising the state's police power<sup>44</sup>

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38. 279 Md. at 429, 370 A.2d at 1113.

39. 279 Md. at 424, 370 A.2d at 1111 (quoting *Westchester West No. 2 Ltd. Partnership v. Montgomery County*, 276 Md. 448, 455, 348 A.2d 856, 860 (1975)).

40. 279 Md. at 426, 370 A.2d at 1111 (quoting *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955)).

41. 279 Md. at 428, 370 A.2d at 1112-13. See *Bowie Inn v. City of Bowie*, 274 Md. 230, 237-38, 335 A.2d 679, 684 (1975).

42. 279 Md. at 427, 370 A.2d at 1112.

43. *Id.* at 429, 370 A.2d at 1113.

44. It is clear that divestment is not a totally novel means of regulation. Federal statutes requiring divestment include: the Commodities Clause of the Hepburn Act, 49 U.S.C. § 1(8) (1970) (prohibiting railroads from transporting commodities they had manufactured, mined or produced); the "Death Sentence" provision of the Public Utility Holding Company Act of 1935, 15 U.S.C. § 79 (1970) (authorizing the Securities and Exchange Commission to restructure and simplify holding companies); the Federal Alcohol Administration Act, 27 U.S.C. § 205(b) (1970) (prohibiting distillers and producers of alcoholic beverages from maintaining "tied houses"); the National Bank Act, 12 U.S.C. § 24 (1974) (prohibiting national banks from underwriting securities); 49 U.S.C. § 1378 (1970) (prohibiting airlines from engaging in allied transportation businesses). Congress has considered restructure of the petroleum industry, see, e.g., S. 2082, 93d Cong., 1st Sess. (1973) and S. 2310, Amendment, 94th Cong., 1st Sess. (1975). See generally *TIME*, Nov. 3, 1975, at 78.

State statutes requiring divestment also exist and have been upheld in a number of instances: *Asbury Hospital v. Cass County*, 326 U.S. 207 (1945) (North Dakota prohibited any corporation from owning agricultural land in the state); *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129 (1921) (prohibited any corporation that manufactured cotton seed oil from owning or operating cotton gins); *Paramount Pictures, Inc. v. Langer*, 23 F. Supp. 890 (D.N.D. 1938), *remanded with*



to regulate private property,<sup>45</sup> the plaintiff oil companies did not convince the court that the regulation at issue was an unjustified interference with their business.<sup>46</sup>

Adopting similar reasoning, the Court of Appeals rejected the additional contention of the oil companies that the statute unconstitutionally discriminated between retail operations of integrated oil companies and, for example, those of mass merchandisers and food retailers who are allowed to own and operate retail outlets.<sup>47</sup> When economic legislation is challenged on equal protection grounds, it must appear "only that the classification . . . be rationally related to a legitimate state interest."<sup>48</sup> The court acknowledged the state interest in preserving competition among retail service stations and suggested that oil company discrimination against retail service station dealers and in favor of company operated stations may be an evil properly remedied by excluding petroleum producers and refiners from the retail market.<sup>49</sup> Concluding that the statute therefore was not arbitrary, the court held that it was rationally related to the pro-competitive purpose of the legislation and that the equal protection challenge was without merit.<sup>50</sup>

The statute's divestiture provisions were also challenged as an uncompensated taking of private property.<sup>51</sup> Rejecting the plaintiffs' argument, the *Exxon* court held that a state regulation constitutes a taking, in the constitutional sense, only if it "essentially deprives the owner of all beneficial uses of his property."<sup>52</sup> The Court of Appeals concluded that no

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*directions to dismiss on grounds of mootness*, 306 U.S. 619 (1939) (North Dakota prohibited operation and ownership of any theatre by producers or distributors who made or had an interest in motion picture films).

45. See, e.g., *Munn v. Illinois*, 94 U.S. 113, 125 (1876); *Goldman v. Crowther*, 147 Md. 282, 287, 128 A. 50, 51-52 (1925). The Supreme Court has upheld state regulation of businesses in a number of cases. See, e.g., *North Dakota State Bd. of Pharmacy v. Snyder's Drug Stores, Inc.*, 414 U.S. 156, 167 (1973) (upholding a state statute requiring that the majority of the company's stock be held by registered pharmacists for a corporation to qualify for a permit to operate a pharmacy); *Ferguson v. Skrupa*, 372 U.S. 726, 731 (1963) (upholding a state statute prohibiting any person, except an attorney, from engaging in the practice of debt adjusting); *Williamson v. Lee Optical, Inc.*, 348 U.S. 483, 488 (1955) (upholding a state law allowing only licensed optometrists or ophthalmologists to fit lenses without a prescription).

46. See 279 Md. at 427-29, 370 A.2d at 1112-13.

47. *Id.* at 438-40, 370 A.2d at 1118-19. This claim was raised under the equal protection clause of the fourteenth amendment to the Federal Constitution and under the due process clause of article 23 of the Maryland Declaration of Rights. Although the Maryland Constitution does not explicitly refer to "equal protection," the court assumed that the state due process clause includes the "concept of equal protection." *Id.* at 438 n.8, 370 A.2d at 1118 n.8.

48. *Id.* at 439, 370 A.2d at 1118 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303-04 (1976)).

49. *Id.* at 440, 370 A.2d at 1118-19.

50. *Id.*, 370 A.2d at 1119.

51. *Id.* at 436, 370 A.2d at 1117. This challenge was based on the fifth amendment to the Federal Constitution and article III, § 40 of the Maryland Constitution.

52. *Id.* at 437, 370 A.2d at 1117. See also *Goldblatt v. Town of Hempstead*, 369 U.S. 590 (1962) (ordinance prohibiting excavation below the water table held not a

taking had occurred in this case because the divestiture sections prohibit only the combination of ownership and operation. Since no oil company is denied ownership of a service station as long as it is leased to an independent dealer, the statute did not deprive the oil companies involved in direct retailing of all beneficial use of their outlets.<sup>53</sup>

The *Exxon* plaintiffs also maintained that paragraphs (g) and (h) of the statute constituted an unlawful delegation of legislative authority.<sup>54</sup> These two provisions authorize the Comptroller to "adopt rules or regulations defining the circumstances in which a producer or refiner temporarily may operate a previously dealer-operated station" and to "permit reasonable exceptions to . . . divestiture dates."<sup>55</sup> Although acknowledging that a delegation of legislative authority must ordinarily be accompanied by guidelines for administrative action, the court recognized that specific guidelines often cannot be devised to handle the complicated economic problems confronting legislatures today.<sup>56</sup> In this case, where the delegation involved the particularly complex gasoline marketing industry, the court observed that it would be virtually impossible for the General Assembly to anticipate and provide for each justified exemption from the divestment dates.<sup>57</sup> Hence, it was necessary and practical for the legislature to grant

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taking of appellant excavator's property); *Bureau of Mines v. George's Creek Coal and Land Co.*, 272 Md. 143, 321 A.2d 748 (1974) (prohibition against mining state-acquired land in which the plaintiff owned mineral rights held not a taking); *Allied Am. Mut. Fire Ins. Co. v. Comm'r of Motor Vehicles*, 219 Md. 607, 150 A.2d 421 (1959) (requirement that insurance companies contribute to the state uninsured motorist fund held not a taking).

53. 279 Md. at 437-38, 370 A.2d at 1117. The court also indicated that the statutory provision for reasonable delays and exceptions to the divestiture dates, MD. ANN. CODE art. 56, § 157E(g) & (h) (Cum. Supp. 1976), would lessen the impact of the divestiture provisions on producers and refiners. 279 Md. at 438, 370 A.2d at 1117. Presumably, the delays and exceptions allowed will assure that no company affected by the act would be forced to accept low bids for property it decided to sell rather than to convert to a dealership. Cf. Hand, *The Commodities Clause and the Fifth Amendment*, 22 HARV. L. REV. 250, 263 (1909) ("[I]t is important to remember that some of the decrease in value may be the measure of that very advantage of discrimination and of ultimate monopoly which it is the purpose of the act to destroy.").

54. 279 Md. at 440, 370 A.2d at 1119. This attack was raised under article 8 of the Maryland Declaration of Rights.

55. MD. ANN. CODE art. 56, § 157E(g) & (h) (Cum. Supp. 1976). See also MD. ANN. CODE art. 56, § 157B(a) (1972) (Comptroller authorized to issue rules and regulations in the administration of the Motor Fuel Inspection Law).

56. 279 Md. at 440-41, 370 A.2d at 1119. See also *Montgomery County v. Walsh*, 274 Md. 502, 523-24, 336 A.2d 97, 110-11 (1975), *appeal dismissed*, 424 U.S. 901 (1976); *Pressman v. Barnes*, 209 Md. 544, 555, 121 A.2d 816, 822 (1956); Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 3-8 (1964); Jaffe, *An Essay on Delegation of Legislative Power: II*, 47 COLUM. L. REV. 561, 592 (1947). Cf. Tomlinson, *Constitutional Limits on the Decisional Powers of Courts and Administrative Agencies in Maryland*, 35 MD. L. REV. 414 (1976) (discussing judicial review of administrative agency decisions).

57. 279 Md. at 441, 370 A.2d at 1119.

fairly broad discretion to the agency administering the statute.<sup>58</sup> Without expressly considering, therefore, whether the absence of statutory guidelines could, as a matter of law, constitute an unlawful delegation of legislative authority,<sup>59</sup> the *Exxon* court found no merit in this challenge.

Specific language in the Maryland statute — “producer or refiner,” “voluntary allowances,” “uniformly,”<sup>60</sup> “equipment rentals,”<sup>61</sup> “periods of shortage,” “uniformly . . . on an equitable basis”<sup>62</sup> — was also alleged to be void for vagueness.<sup>63</sup> In general, criminal statutes must be sufficiently definite to provide “a person of ordinary intelligence” with notice that certain conduct is prohibited.<sup>64</sup> Where the statute regulates commercial conduct, however, “ordinary intelligence” has been construed to mean “ordinary commercial knowledge.”<sup>65</sup> To determine the common commercial meaning of these terms the Court of Appeals referred to their industry usage, as found in affidavits and prior congressional testimony.<sup>66</sup> The court decided that the provisions were sufficiently definite in the context of industry practice so as not to constitute a denial of due process of law and, accordingly, it rejected the vagueness argument.<sup>67</sup>

The final challenge to the validity of the divestiture provisions was based on the commerce clause of the Federal Constitution.<sup>68</sup> The plaintiff oil companies argued that the divestment act was enacted “to protect local retail service station dealers from competition by those engaged in interstate commerce” and that this purpose was accomplished by denying “out-of-state competitors access to local retail gasoline markets.”<sup>69</sup> In support of their

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58. *Id.*

59. For a discussion of cases where the Court of Appeals of Maryland has struck down statutes for lack of articulated standards for agency enforcement, see Cohen, *Some Aspects of Maryland Administrative Law*, 24 MD. L. REV. 1, 3-8 (1964).

60. MD. ANN. CODE art. 56, § 157E(d) and (e) (Cum. Supp. 1976). See note 110 and accompanying text *infra*.

61. MD. ANN. CODE art. 56, § 157E(e) (Cum. Supp. 1976).

62. MD. ANN. CODE art. 56, § 157E(f) (Cum. Supp. 1976). See notes 89 to 104 and accompanying text *infra*.

63. 279 Md. at 453, 370 A.2d at 1125. This challenge was raised under the due process clauses of the fourteenth amendment to the Federal Constitution and article 23 of the Maryland Declaration of Rights. Criminal penalties may be imposed for a violation of the Motor Fuel Inspection Law. MD. ANN. CODE art. 56, § 157K (1972).

64. 279 Md. at 454, 370 A.2d at 1126 (quoting *United States v. Harris*, 347 U.S. 612, 617 (1954); *Giant of Md., Inc. v. State's Attorney*, 267 Md. 501, 514-15, 298 A.2d 427, 435, *appeal dismissed*, 412 U.S. 915 (1973)).

65. 279 Md. at 454, 370 A.2d at 1126. See, e.g., *McGowan v. Maryland*, 366 U.S. 420, 428 (1961).

66. 279 Md. at 445-47, 455, 370 A.2d at 1121-22, 1126.

67. *Id.* at 455, 370 A.2d at 1126.

68. U.S. CONST. art. I, § 8, cl. 3 (“The Congress shall have Power . . . To regulate Commerce . . . among the several States”).

69. 279 Md. at 429, 370 A.2d at 1113. This argument illustrates the classic conflict between the principle that the “stream” of interstate commerce may not be burdened by state regulation and the retained right of states to regulate internal matters, including economic affairs, that affect the public welfare. See, e.g., *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). As a general proposition, in the absence of a need for uniform regulation, state legislation that affects interstate commerce will not be held

contention, the plaintiffs relied on several cases in which the Supreme Court had struck down state statutes that in purpose and effect protected local business from out-of-state competitors.<sup>70</sup> The *Exxon* court reviewed these cases and found that each involved statutes that "burdened the free flow of commerce between the states by effectively hindering either the import or export of goods,"<sup>71</sup> whereas the Maryland divestiture provisions had no such effect. The statute regulates only wholly intrastate retail marketing of gasoline; the import or export of petroleum is unaffected.<sup>72</sup> Moreover, the statute does not differentiate on the basis of state citizenship as the oil companies contended; all producers and refiners are prohibited from operating retail service stations in Maryland and all out-of-state or Maryland businesses not engaged in producing or refining are permitted to do so.<sup>73</sup> Thus, the court concluded that the Maryland statute does not discriminate, either in purpose or effect, against interstate commerce.<sup>74</sup> Since it is well established that promotion of economic welfare is a legitimate state interest,<sup>75</sup> and that the states have the power to prevent monopolistic behavior and to encourage active competition, the only remaining question was whether commerce was unduly burdened by the Act. The plaintiff oil companies argued that divestment would decrease

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invalid unless it discriminates against or unduly burdens interstate commerce without a justifiable local interest. See, e.g., *Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 530 (1959); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 354 (1951); *H. P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525, 542 (1949); *South Carolina State Highway Dep't v. Barnwell Bros. Inc.*, 303 U.S. 177, 185-86 (1938); *Baldwin v. G. A. F. Seelig, Inc.*, 294 U.S. 511, 523-24 (1935); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469, 1476-77 (1961); *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1301-10. See also Note, *Commerce Clause Limitations upon States Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1133-62 (1974).

70. See 279 Md. at 429-31, 370 A.2d at 1113. See also *Dean Milk Co. v. City of Madison*, 340 U.S. 349 (1951) (municipal ordinance made it unlawful to sell milk in the City of Madison unless processed and bottled within a five-mile radius of the city); *H.P. Hood & Sons, Inc. v. Du Mond*, 336 U.S. 525 (1949) (New York refusal to license out-of-state milk dealer on grounds that market was adequately serviced and that license would not be in public interest); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511 (1935) (New York statute required sale price of milk imported from another state to be no lower than the price paid for milk produced within New York).

71. 279 Md. at 431, 370 A.2d at 1114.

72. *Id.* Legislative history of the enactment indicates that the purpose of the statute was not protective, but rather solely to preserve competition within the retail gasoline marketing industry in Maryland. *Id.* See text accompanying notes 13 to 17 *supra*.

73. 279 Md. at 432, 370 A.2d at 1114-15. The statute's application was restricted to producers and refiners because of the wide belief among experts that private brand marketers constitute the most highly competitive force in the gasoline retail industry. See, e.g., *THE CONTROL OF OIL*, *supra* note 8, at 237; *HIGHWAY ROBBERY*, *supra* note 8, at 206-07; *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1288.

74. 279 Md. at 435, 370 A.2d at 1116.

75. See, e.g., *Crescent Cotton Oil Co. v. Mississippi*, 257 U.S. 129, 137 (1921); *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 107 (1909); *National Cotton Oil Co. v. Texas*, 197 U.S. 115, 129 (1905).

gasoline and services available to interstate travelers.<sup>76</sup> The court, however, viewed this argument as speculative and exaggerated<sup>77</sup> and concluded that any "slight burden" upon commerce was outweighed by Maryland's interest in preserving a competitive gasoline market.<sup>78</sup>

#### FEDERAL PREEMPTION CHALLENGES TO THE EQUITABLE ALLOCATION AND VOLUNTARY ALLOWANCE PROVISIONS

Two additional provisions of the Maryland statute were challenged under the supremacy clause<sup>79</sup> on the ground of federal preemption.<sup>80</sup> Paragraph (f) of the Maryland statute provides that during periods of shortage, producers, refiners, and wholesalers shall "apportion uniformly all gasoline and special fuels" to retail dealers "on an equitable basis, and shall not discriminate among the dealers in their allotments."<sup>81</sup> The oil companies contended that this provision conflicted with and was therefore preempted by the Federal Emergency Petroleum Allocation Act of 1973.<sup>82</sup> Paragraph (d) of the Maryland act requires in addition that producers, refiners, and wholesalers "extend all voluntary allowances uniformly to all retail service station dealers supplied."<sup>83</sup> The plaintiffs argued that this provision was in conflict with the section 2(b) "meeting competition" defense of the Robinson-Patman Price Discrimination Act.<sup>84</sup>

Ordinarily, a state law will not be invalidated on preemption grounds in the absence of a clear, unambiguously expressed congressional intent to preempt the field.<sup>85</sup> Furthermore, in situations where Congress has enacted

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76. 279 Md. at 435, 370 A.2d at 1116.

77. *Id.* Out of the total of 1,573 service stations owned in Maryland as of July 1, 1974 by plaintiffs Exxon Corporation, Gulf Oil Corporation, Phillips Petroleum Company, Shell Oil Company, and Texaco, Inc., only 51 of these stations were company owned and operated. *Id.* at 436 n.6, 370 A.2d at 1116 n.6. Although three of the plaintiffs — Ashland Oil, Inc., Kayo Oil Company, and Petroleum Marketing Corporation — do business in the state solely through an aggregate of 56 company owned and operated service stations, *id.* at 436 n.7, 370 A.2d at 1116 n.7, representatives from at least two of these companies testified at trial that no decision to withdraw from Maryland had been reached and that dealerships were an alternative. *Id.* at 436, 370 A.2d at 1117.

78. *Id.* at 436, 370 A.2d at 1117.

79. U.S. CONST. art. VI, cl. 2 ("This Constitution, and the Laws of the United States . . . shall be the supreme Law of the Land").

80. See generally, Engdahl, *Preemptive Capability of Federal Power*, 45 U. COLO. L. REV. 51 (1973); Hirsch, *Toward a New View of Federal Preemption*, 1972 U. ILL. L.F. 515; Note, *The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court*, 75 COLUM. L. REV. 623 (1975); Note, *The Commerce Clause and State Antitrust Regulation*, 61 COLUM. L. REV. 1469 (1961); Note, *Commerce Clause Limitations upon State Regulation of Tender Offers*, 47 S. CAL. L. REV. 1133, 1163 (1974); *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1311-17.

81. MD. ANN. CODE art. 56, § 157E(f) (Cum. Supp. 1976).

82. 15 U.S.C. §§ 751-760(h) (Supp. V 1975).

83. MD. ANN. CODE art. 56, § 157E(d) (Cum. Supp. 1976).

84. 15 U.S.C. § 13(b) (1970). See note 110 and accompanying text *infra*.

85. See *De Canas v. Bica*, 424 U.S. 351, 357 (1976); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963); *California v. Zook*, 336 U.S. 725, 733

preemptive legislation, a state regulation may nonetheless stand unless there is an actual<sup>86</sup> or potential<sup>87</sup> conflict between the two schemes or between the state law and a purpose or policy of the federal law.<sup>88</sup> Thus, a court presented with allegedly conflicting state and federal laws initially must assess the purpose, operation, and effect of each before proceeding to determine whether a conflict exists. This was the approach followed by the *Exxon* court.

The Court of Appeals first considered the challenge to the equitable allocation provision and concluded that the purposes of paragraph (f) of the Maryland act<sup>89</sup> and the Federal Emergency Petroleum Allocation Act of 1973<sup>90</sup> were fundamentally harmonious.<sup>91</sup> The history of the Maryland statute indicates that the legislature sought to prevent a supplier from inequitably reducing gasoline supplies among dealers.<sup>92</sup> Therefore, when a shortage arises, the statute requires a pro rata reduction to each dealer.<sup>93</sup> Similarly, Congress indicated that the federal allocation act was designed in part to prevent the kind of manipulation of gasoline shortages by suppliers that could result in decreased competition in gasoline retailing.<sup>94</sup> The federal mandatory allocation scheme<sup>95</sup> attempts to accomplish this result by requiring "equitable distribution" among all dealers,<sup>96</sup> where practicable, allocation programs must be designed so that a fuel shortage would result in "a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product."<sup>97</sup> In light of these similarities the court concluded that the purpose and operation of both regulatory statutes are compatible.<sup>98</sup>

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(1949). Congressional intent may be inferred from a necessity for uniform federal regulation, *see, e.g.,* *City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 638-39 (1973) (the "delicate balance between safety and efficiency" persuaded the Court to hold that federal legislation preempted local noise control ordinance), or from an overriding federal interest, *see, e.g.,* *Hines v. Davidowitz*, 312 U.S. 52, 68 (1941) (Pennsylvania alien registration law preempted by similar federal statute; the Court reasoned that "it is of importance that this legislation is in a field which affects international relations").

86. *See, e.g.,* *Perez v. Campbell*, 402 U.S. 637, 649 (1971). The Supreme Court has consistently cautioned that even a conflicting state law should be preempted only to the extent required to preserve the aims of the federal statute. *See* *De Canas v. Bica*, 424 U.S. 351, 357-58 n.5 (1976); *Silver v. New York Stock Exch.*, 373 U.S. 341, 357 (1963).

87. *See, e.g.,* *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941).

88. *See, e.g.,* *Local 24, Int'l Bhd. of Teamsters v. Oliver*, 358 U.S. 283, 296-97 (1959).

89. MD. ANN. CODE art. 56, § 157E(f) (Cum. Supp. 1976).

90. 15 U.S.C. §§ 751-760(h) (Supp. V 1975).

91. 279 Md. at 442, 370 A.2d at 1119.

92. *Id.* at 441, 370 A.2d at 1119.

93. *Id.*

94. *See* H.R. REP. NO. 93-531, 93d Cong., 1st Sess. 9-10, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 2582, 2586-87.

95. 15 U.S.C. § 753 (Supp. V 1975).

96. *Id.* § 753(b)(1)(F).

97. *Id.* § 753(c)(1)(A).

98. 279 Md. at 444, 370 A.2d at 1120-21.

The *Exxon* court emphasized that in enacting the Emergency Petroleum Allocation Act of 1973, Congress expressly limited preemption to those state laws that are in actual conflict with regulations promulgated pursuant to the federal statute.<sup>99</sup> Current regulations establish that a supplier must distribute gasoline under a ratio of its available supply over its current obligations applied to a dealer's previous allocations.<sup>100</sup> Allocations in times of short supply must be made on a pro rata basis under both the federal regulations and the state statute.<sup>101</sup> The flexibility inherent in the congressional scheme<sup>102</sup> is also evident in the Maryland provision, which requires that allocations be made uniformly "on an equitable basis."<sup>103</sup> Thus, finding no actual or potential conflict between the federal and state statutes, the Court of Appeals concluded that the allocation provision was not preempted by either the federal legislation or its regulations.<sup>104</sup>

The most difficult issue confronting the Court of Appeals was whether the voluntary allowance provision of the Maryland statute was preempted by the Federal Robinson-Patman Act.<sup>105</sup> Under the Maryland law, any voluntary allowance granted by a supplier of petroleum products to one of its dealers must be extended to all of its other dealers throughout the state.<sup>106</sup> The Robinson-Patman Act likewise forbids discrimination in price by a seller among its buyers.<sup>107</sup> The federal act, however, allows a price-discriminating supplier to raise the "meeting competition" defense<sup>108</sup> in

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99. *Id.* at 442-43, 370 A.2d at 1120. See 15 U.S.C. § 755(b) (Supp. V 1975). Presidential authority to issue regulations under § 753 of the Federal Emergency Petroleum Allocation Act expires on September 30, 1981. 15 U.S.C. § 760(g) (Supp. V 1975).

100. A supplier "shall determine an allocation fraction" which is defined as an amount "equal to its allocable supply . . . divided by its supply obligation." 10 C.F.R. § 211.10(b) (1977). When a shortage arises — indicated by an allocation fraction of less than one — suppliers "shall reduce, on a pro-rata basis, the amounts supplied." 10 C.F.R. § 211.10(f) (1977).

101. 279 Md. at 443, 370 A.2d at 1120.

102. See, e.g., 10 C.F.R. § 211.14(a) (1977) (Federal Energy Administration may order transfer of supplies to compensate for regional imbalances).

103. MD. ANN. CODE art. 56, § 157E(f) (Cum. Supp. 1976). The court construed this language to embrace the exercise of the Comptroller's discretion to permit variations from uniform, pro-rata distributions. 279 Md. at 443, 370 A.2d at 1120. See MD. ANN. CODE art. 56, § 157B(a) (1972) (Comptroller authorized to promulgate rules and regulations necessary to administer the Motor Fuel Inspection Law). Cf. 2 MD. REG. 228 (1975) (Comptroller regulations regarding reasonable delays and procedures under the divestment provisions of § 157E).

104. 279 Md. at 444, 370 A.2d at 1120-21.

105. 15 U.S.C. § 13 (1970).

106. MD. ANN. CODE art. 56, § 157E(d) (Cum. Supp. 1976).

107. It is clear that, by enacting the Robinson-Patman Act, Congress did not intend to preempt all state regulations of price discrimination. See *Schwegmann Bros. Giant Super Mkts. v. Louisiana Milk Comm'n*, 365 F. Supp. 1144, 1158 (M.D. La. 1973), *aff'd*, 416 U.S. 922 (1974); *Morton v. Nat'l Dairy Prods. Corp.*, 287 F. Supp. 753, 764 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (1969), *cert. denied*, 396 U.S. 1006 (1970).

108. This defense may be raised to rebut a showing of unlawful price discrimination and provides in pertinent part:

certain circumstances; no such excuse is allowed under the Maryland statutory scheme. It was this discrepancy between the two schemes that gave rise to the federal preemption challenge.

The nature and scope of the Robinson-Patman "meeting competition" defense is a matter of dispute. The Supreme Court, lower federal courts, and the Federal Trade Commission have each given conflicting constructions of this defense. In holding that the two price regulations were not in actual or potential conflict, the Court of Appeals of Maryland adopted an interpretation of the federal defense sufficiently narrow so that there appears to be no possibility of conflict with the state statute. Preliminary to reaching its interpretation, the *Exxon* court defined the purpose and scope of each provision and determined in what circumstances each statute would apply. The court then decided whether a conflict could arise.

Paragraph (d) of the Maryland statute requires that producers, refiners, and wholesalers supplying gasoline to retail dealers "extend all voluntary allowances uniformly to all retail service station dealers supplied."<sup>109</sup> The Court of Appeals construed "voluntary allowances" to mean "temporary price reductions in the wholesale price to a retail dealer to enable the dealer to meet the lower price of a competing retail dealer."<sup>110</sup> The requirement that voluntary allowances be uniform was included in the act to ensure that all dealers selling the same brand would be treated equally.<sup>111</sup> The court noted that this provision comports with the general policy of the Maryland statute to prevent suppliers from discriminating among retail dealers.<sup>112</sup>

Under the federal scheme, a violation of section 2(a) of the Robinson-Patman Act will be found where "any person . . . discriminate[s] in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen

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[N]othing herein contained shall prevent a seller rebutting the prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

15 U.S.C. § 13(b) (1970).

109. MD. ANN. CODE art. 56, § 157E(d) (Cum. Supp. 1976).

110. 279 Md. at 447, 370 A.2d at 1122. This definition is consistent with industry usage of the term. See Affidavit of Shell, Joint Record Extract at 100; Affidavit of Exxon, Joint Record Extract at 89; Affidavit of Gulf, Joint Record Extract at 108. See also note 111 and accompanying text *infra*.

111. The abuses inherent in the practice of granting voluntary allowances are illustrated by the phenomenon of price wars, which involve a selective lowering of prices to only those dealers facing vigorous price competition. The practice often results in economic injury both to dealers not receiving the discount and to independent marketers, as well as contributing generally to an unstable market. See *Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972); 1970 *Hearings*, *supra* note 12, at 53, 58, 68-90; *COMPETITION, LTD.*, *supra* note 7, at 179-80; *HIGHWAY ROBBERY*, *supra* note 8, at 43, 204; Note, *Competition in Gasoline Retailing: A Price War*, 101 U. PA. L. REV. 644 (1953). See also S. REP. NO. 2810, 84th Cong., 2d Sess. 19 (1956) (price support utilized to contain competition to a local area).

112. 279 Md. at 447, 370 A.2d at 1122.



competition.”<sup>113</sup> Section 2(b), however, permits a seller to rebut a showing of a section 2(a) violation “by showing that his lower price . . . to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor.”<sup>114</sup>

The plaintiffs in *Exxon* argued that paragraph (d) would require oil companies that gave voluntary allowances to violate section 2(a) of the Robinson-Patman Act while precluding them from raising the section 2(b) “meeting competition” defense.<sup>115</sup> The plaintiffs’ position was that section 2(b) would protect a supplier against the charge of a section 2(a) violation where the supplier temporarily reduced wholesale prices of gasoline to a retail dealer to enable that dealer to meet the reduced retail price of a competing dealer.<sup>116</sup> In this situation, paragraph (d) of the Maryland statute would require the supplier to extend the discount to all of its Maryland dealers. Plaintiffs argued that, as a result of the operation of paragraph (d), dealers in border areas surrounding Maryland not receiving the discount could hold the supplier liable for damages under section 2(a).<sup>117</sup> Moreover, the supplier could not avail itself of the section 2(b) defense because the violation would stem from compliance with the Maryland statute rather than from an effort to meet a competitive threat.<sup>118</sup>

In evaluating whether the Maryland statute requires suppliers to violate section 2(a), a threshold question is whether section 2(a) would necessarily be violated where a supplier grants reduced prices to selected retail dealers. For a violation to occur, certain jurisdictional requirements must be met: in addition to a discrimination in price between two purchasers that substantially lessens competition, at least one sale must be in interstate commerce.<sup>119</sup> In the situation described by the plaintiff oil companies the interstate commerce requirement could be met because, under paragraph (d), any discount offered to one Maryland dealer must be extended to all

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113. 15 U.S.C. § 13(a) (1970).

114. *Id.* § 13(b). In general, the purpose of the Robinson-Patman Act was to maximize equal opportunities among small, independent businessmen by preventing price favoritism by suppliers of goods. See *FTC v. Sun Oil Co.*, 371 U.S. 505, 520 (1963); S. REP. NO. 1502, 74th Cong., 2d Sess. (1936); H. REP. NO. 2287, 74th Cong., 2d Sess. 3-17 (1936); 79 CONG. REC. 9078 (1935). The congressional prohibition against price discrimination is a mandate of price uniformity unless justified, for example, by a bona fide competitive threat to the supplier. Thus, as construed by the Court of Appeals of Maryland, both paragraph (d) and the Robinson-Patman Act were designed to promote uniformity in prices offered by suppliers to their dealers.

115. Brief for Appellee at 40, *Governor of Md. v. Exxon*, 279 Md. 410, 370 A.2d 1102 (1977). The plaintiffs observed that their liability under § 2(a) would be the same regardless of whether the party suffering the competitive injury was another supplier or a retail dealer. For the purposes of this discussion, the analysis will be limited to dealer level competition.

116. See 279 Md. at 448, 370 A.2d at 1122.

117. Brief for Appellee at 43-44, *Governor of Md. v. Exxon*, 279 Md. 410, 370 A.2d 1102 (1977).

118. *Id.* at 44.

119. 15 U.S.C. § 13(a) (1970).

Maryland retailers. Hence, all Maryland dealers may have purchased supplies at a price lower than those charged to neighboring dealers in, for example, the District of Columbia.<sup>120</sup>

Assuming, *arguendo*, that compliance with paragraph (d) could result in price discrimination between Maryland and non-Maryland dealers, section 2(a) still would not be violated unless the discrimination had a debilitating effect on competition.<sup>121</sup> Because the statutory test of competitive injury requires only that "the effect of [a price] discrimination may be substantially to lessen competition,"<sup>122</sup> section 2(a) has been construed to apply whenever the discrimination is shown potentially to threaten normal competition.<sup>123</sup> In the oil industry, such a potential threat could not occur at the supplier level because major oil companies generally do not compete for sales to retail stations.<sup>124</sup> At the retail level, however, regardless of whether the retail outlet passed such a discount on to consumers, an injury to competition would appear to be present if all Maryland dealers were given a discount under paragraph (d) and neighboring dealers were denied a similar allowance.<sup>125</sup> Hence, the *Exxon* plaintiffs correctly pointed out that

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120. See generally *Standard Oil Co. v. FTC*, 340 U.S. 231, 237-38 (1951); *Mayer Paving and Asphalt Co. v. General Dynamics Corp.*, 486 F.2d 763, 769 (7th Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Kintner & Mayne, Interstate Commerce Requirement of the Robinson-Patman Price Discrimination Act*, 58 GEO. L.J. 1117, 1130-33 (1970); *Rowe, Discriminatory Sales of Commodities in Commerce: Jurisdictional Criteria Under the Robinson-Patman Act*, 67 YALE L.J. 1155, 1166-70 (1958); 27 VAND. L. REV. 539 (1974).

121. The language of the statute prohibits a lessening of "competition." 15 U.S.C. § 13(a) (1970). See *Purex Corp., Ltd.*, 51 F.T.C. 100, 112-14 (1954); C. EDWARDS, THE PRICE DISCRIMINATION LAW 32 (1959) [hereinafter cited as C. EDWARDS]; F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT § 6.5 (1962) [hereinafter cited as F. ROWE]. The Supreme Court has stated clearly that the illegality of a price discrimination is conditioned on the showing of an injury to competition. See *FTC v. Sun Oil Co.*, 371 U.S. 505, 527 n.16 (1963); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 550 (1960); Note, *Competitive Injury Under the Robinson-Patman Act*, 74 HARV. L. REV. 1597 (1961).

122. 15 U.S.C. § 13(a) (1970).

123. In both *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948), and *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 742 (1945), the Supreme Court stated that price discriminations are prohibited if there is a "reasonable possibility" that competition may be injured. *Cf. F. ROWE, supra* note 121, at § 6.7 (the controversy over whether the proper test is "reasonable possibility" or "reasonable probability" is academic).

124. One method of securing retail outlets by major oil companies is the use of short-term leases. See *COMPETITION, LTD.*, *supra* note 7, at 44-46; *Gasoline Marketing Divestiture Statutes*, *supra* note 8, at 1285; Note, *Gasoline Marketing and the Robinson-Patman Act*, 82 YALE L.J. 1706, 1707-09 (1973) [hereinafter cited as *Gasoline Marketing*]. In *Enterprise Industries, Inc. v. Texas Co.*, 136 F. Supp. 420, 421 (D. Conn. 1955), the court stated "[i]n view of short term station . . . leases . . . perhaps it is a fiction to speak of price competition at the oil company sale to the station level." *Cf. F. ROWE, supra* note 121, at 142 (a prerequisite to a § 2(a) injury at the retail level is a "competitive relationship" between sellers of a product). See, e.g., *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) ¶10,373, at 18,240.

125. See generally Gifford, *Assessing Secondary-Line Injury Under the Robinson-Patman Act: The Concept of "Competitive Advantage"*, 44 GEO. WASH. L. REV. 48

compliance with paragraph (d) of the Maryland statute could result in a violation of section 2(a) of the Robinson-Patman Act at border areas.

However, no such violation would necessarily result from compliance with the Maryland statute. If voluntary allowances as defined by the *Exxon* court were granted only to some Maryland dealers, the discount would result in a section 2(a) violation within Maryland. Paragraph (d) merely requires that if a supplier desires selectively to lower prices to one Maryland dealer in apparent violation of the Robinson-Patman Act, it may not also discriminate against other Maryland dealers. By requiring uniform allowances, paragraph (d) simply precludes the possibility of competitive injury within Maryland.

Moreover, the Maryland law does not prevent oil companies from employing traditional methods of avoiding a section 2(a) violation. For example, harm to competition at border areas may be prevented by establishing a system of "feathering." Feathering describes a system of price zoning established by oil companies to localize price cuts. In order to minimize the effect of a reduction, prices are progressively stabilized at increasing differentials as the distance from the price discount increases. This practice has been suggested by the Supreme Court as a practical method of avoiding injury to competition,<sup>126</sup> the Federal Trade Commission has sanctioned its use,<sup>127</sup> and it often has been utilized by oil companies.<sup>128</sup> Thus, although it seems clear that price discrimination by a supplier among its branded dealers may result in a violation of section 2(a) of the Robinson-Patman Act, the operation of paragraph (d) of the Maryland act has no effect upon this violation other than to prevent it from occurring within Maryland's borders. If the price-discriminating supplier wishes to avoid liability for the effects of its discrimination on neighboring dealers, it could utilize the industry practice of feathering prices.

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(1975). Gifford suggests that the assumption that a discount to a "favored" dealer works to his competitive advantage is accurate only if the saving is reflected in his resale price. *Id.* at 59-60. Of course, it is also true that there need be only a "reasonable possibility" that the discount will be passed on to consumers. *See, e.g.,* Corn Prods. Ref. Co. v. FTC, 324 U.S. 726, 742 (1945). In the event that a Maryland dealer received an allowance on the wholesale price of gasoline and declined to reflect the discount in resale prices, it is arguable that the dealer has been granted a competitive advantage — whether reflected in a lower supply cost, extra capital, or increased service to consumers. *See, e.g.,* Kroger Co. v. FTC, 438 F.2d 1372, 1379 (6th Cir.), *cert. denied*, 404 U.S. 871 (1971); *Foremost Dairies, Inc. v. FTC*, 348 F.2d 674, 680 (5th Cir.), *cert. denied*, 382 U.S. 959 (1965); *William H. Rorer, Inc., 69 F.T.C. 667, 726-27 (1966), modified and enforced*, 374 F.2d 662 (2d Cir. 1967). *But see* Gifford, *supra* at 70-80 (increased services may also result in increased costs of providing those services above the discount saving).

126. *FTC v. Sun Oil Co.*, 371 U.S. 505, 527-28 n.17 (1963).

127. *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) ¶10,373, at 18,242-43. *But see* notes 165 to 170 and accompanying text *infra*.

128. *See, e.g., Bargain Car Wash, Inc. v. Standard Oil Co.*, 466 F.2d 1163 (7th Cir. 1972).

The plaintiff oil companies contended that even if the statute did not require them to violate section 2(a) whenever they gave voluntary allowances, they would nevertheless violate section 2(a) in situations where feathering was impracticable. Absent paragraph (d), they would be able to invoke the section 2(b) "meeting competition" defense. As a result of the Maryland statute, however, they would be precluded from invoking the section 2(b) defense because the price discrimination between Maryland and non-Maryland dealers would have resulted from compliance with paragraph (d) rather than from the effort to meet the competition that prompted the initial dealer discount. The plaintiffs argued that the defense afforded by section 2(b), therefore, preempted paragraph (d) of the Maryland statute. To evaluate the plaintiffs' position, the *Exxon* court had to determine whether the section 2(b) defense could properly be invoked by a supplier acting in response to dealer level competition.<sup>129</sup>

The original meeting competition defense contained in section 2 of the Clayton Act permitted price discrimination to be justified by a showing that it had been made "to meet competition."<sup>130</sup> This broad language proved unworkable as it tended to extend to nearly every instance of price discrimination.<sup>131</sup> Thus, in 1936, the Clayton Act was amended by the Robinson-Patman Act to permit price discrimination to be justified only when "made in good faith to meet an equally low price of a competitor."<sup>132</sup> As noted by the *Exxon* court, the House Committee considered the amendment a "contraction" of the Clayton Act section 2 defense because it only permits "the seller to meet the price actually previously offered by a local competitor."<sup>133</sup>

Whatever controversy may surround the Robinson-Patman Act section 2(b) defense, it is clear that it protects a seller who grants a price allowance to a dealer to retain his business in the face of a similarly low price offered

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129. It is widely acknowledged that the Robinson-Patman Act was thought necessary to protect small businessmen from their large competitors who forced common suppliers to grant selective discounts only to those large purchasers and to prevent large sellers from subsidizing below cost sales in a competitive market with monopoly profits derived from a controlled market. See, e.g., *FTC v. Sun Oil Co.*, 371 U.S. 505, 518-23 (1963); *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 537, 543-44 (1960); *Littlejohn v. Shell Oil Co.*, 483 F.2d 1140, 1142 n.1 (5th Cir.), cert. denied, 414 U.S. 1116 (1973); C. EDWARDS, *supra* note 121, at 10-12; *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 175 (1963).

130. 38 Stat. 730 (1914). The Federal Trade Commission explained that this defense was designed to permit a seller to lower prices to a buyer in response to a competitor's attempt to woo that buyer away. See *In re Goodyear Tire & Rubber Co.*, 22 F.T.C. 232, 331 (1936), *rev'd on other grounds*, 101 F.2d 620 (6th Cir. 1939). See generally Note, *Meeting Competition Under the Robinson-Patman Act*, 90 HARV. L. REV. 1476, 1484 n.47 (1977).

131. See generally C. EDWARDS, *supra* note 121, at 6, 38-40; W. PATMAN, *COMPLETE GUIDE TO THE ROBINSON-PATMAN ACT* 90-92 (1963); F. ROWE, *supra* note 121, at 208-14.

132. 15 U.S.C. § 13(b) (1970).

133. 279 Md. at 450, 370 A.2d at 1123-24 (quoting H.R. REP. NO. 2287, 74th Cong., 2d Sess. 16 (1936)).

to that dealer by a competing supplier.<sup>134</sup> The oil company plaintiffs argued, however, that section 2(b) would also protect a supplier against section 2(a) liability where that supplier had temporarily reduced the wholesale price of gasoline to a retail dealer to enable that dealer to meet the price of a competing dealer.<sup>135</sup> Under the plaintiffs' interpretation, it followed that the purpose of section 2(b) to allow a seller to respond selectively to dealer-level competition would be defeated by the paragraph (d) requirement that the supplier extend the discount to all of its dealers. The court rejected the plaintiffs' interpretation of section 2(b), holding that the defense was restricted to the situation where a supplier offered a reduced price to a retail dealer in order to meet an equally low price offered to that same dealer by a competing supplier.<sup>136</sup> Under the court's interpretation of voluntary allowance,<sup>137</sup> the uniformity requirement in paragraph (d) could not apply in that situation and, therefore, the section 2(b) defense would be unaffected by the Maryland statute. In order to evaluate the validity of these positions, it is necessary to consider the applicability of the Robinson-Patman Act to suppliers such as the plaintiff oil companies.

Support for the plaintiffs' approach was found in *Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana)*,<sup>138</sup> where the United States Court of Appeals for the Seventh Circuit indicated that the section 2(b) defense was available to a supplier who granted a discount to one of its dealers to meet a similar discount received by its dealer's retail competitor from a competing supplier.<sup>139</sup> In that case, Bargain Car Wash's supplier, American Oil Company, had established a system of narrowly drawn "price zones" by which it granted discounts to dealers.<sup>140</sup> During one year American gave discounts to some of its retailers but did not offer the same rebate to Bargain Car Wash, thereby placing Bargain at a severe competitive disadvantage with respect to all its competitors.<sup>141</sup> There was little question that this discriminatory practice resulted in a violation of section 2(a).<sup>142</sup> The oil company defendant, however, attempted to justify the discrimination on the basis of section 2(b) of the Robinson-Patman Act.<sup>143</sup> Noting that the Supreme Court had not decided whether section 2(b) applied to protect suppliers who grant their dealers allowances to permit them to compete with

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134. See, e.g., *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-50 (1951); *Krieger v. Texaco, Inc.*, 373 F. Supp. 108, 112 (W.D.N.Y. 1973).

135. 279 Md. at 448, 370 A.2d at 1122.

136. *Id.* at 451-52, 370 A.2d at 1124.

137. See note 110 and accompanying text *supra*.

138. 466 F.2d 1163 (7th Cir. 1972).

139. *Id.* at 1175.

140. *Id.* at 1167-68. The court indicated that the zones may have been drawn arbitrarily and not in response to actual competitive conditions. *Id.* at 1168. For example, American had carved the 1.5 mile radius around the plaintiff's station into 22 separate price zones. *Id.* at 1169.

141. *Id.* Bargain Car Wash was in competition both with other American dealers and with other major brand dealers. *Id.* at 1168-69 & n.4.

142. *Id.* at 1174-75.

143. 15 U.S.C. § 13(b) (1970).

other dealers receiving discounts from their suppliers, the court stated that it was "inclined to the view" that the defense was available in this situation.<sup>144</sup> Relying upon a position adopted by the Federal Trade Commission,<sup>145</sup> the *Bargain Car Wash* court held that section 2(b) could be asserted as a defense by American.<sup>146</sup> However, the system of zone pricing could not be used as evidence of a competitive threat; the defendant must show that each price reduction was granted in response to a true economic threat.<sup>147</sup> In *Exxon*, the plaintiff oil companies urged the Court of Appeals of Maryland to adopt the *Bargain Car Wash* approach.

In assessing the scope of the section 2(b) defense, the *Exxon* court first identified the two situations in which competition at the retail level would occur: "Either a competing retail dealer would lower its price on its own or a competing retailer would lower its price after receiving a reduction in the wholesale price from its suppliers."<sup>148</sup> The *Exxon* court ruled out the applicability of the section 2(b) defense to the first situation by looking to the *Sun Oil* case. The Supreme Court, in *FTC v. Sun Oil Co.*,<sup>149</sup> clearly established that the section 2(b) defense was not available in the former competitive situation. In *Sun Oil*, a major, vertically integrated oil company granted discounts to one of its branded dealers who had lost business to a competing dealer in a price war.<sup>150</sup> There were several other Sun Oil dealers in the area who did not receive a discount; the losses they suffered clearly established that section 2(a) of the Robinson-Patman Act had been violated.<sup>151</sup> The only issue in the case was whether Sun Oil could assert the section 2(b) "meeting competition" defense.<sup>152</sup> Assuming that the competing dealer was not an outlet for an integrated oil company and that it had not received a discount from its supplier,<sup>153</sup> the Court held that the defense was not available to Sun Oil.<sup>154</sup> Relying on the language of section 2(b), the Court determined that it applied only to a supplier responding to direct competition from another supplier and did not protect a supplier who

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144. 466 F.2d at 1175. This position was criticized in *Gasoline Marketing*, *supra* note 124.

145. See *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) ¶10,373, at 18,242-43; notes 155 to 160 and accompanying text *infra*.

146. 466 F.2d at 1175-76.

147. *Id.* at 1176. The case was remanded for a hearing on the § 2(b) defense. *Id.* at 1176-77. There is no subsequent history of the disposition of this case on remand. Although an argument can be made that the *Bargain Car Wash* court's treatment of the § 2(b) defense was dicta, the Court of Appeals of Maryland in *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 449, 370 A.2d 1102, 1123, *prob. juris. noted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977), accepted the position as a holding and, for the purposes of discussion, it will be treated as such here.

148. 279 Md. at 448, 370 A.2d at 1122-23.

149. 371 U.S. 505 (1963).

150. *Id.* at 506-09.

151. *Id.* at 510-12.

152. *Id.* at 512.

153. *Id.*

154. *Id.* at 529.

attempted to respond to competition between its customer and a competitor of that customer.<sup>155</sup>

The *Sun Oil* Court, however, expressly reserved the question whether section 2(b) was available in the situation where the competing dealer had been granted an allowance by its supplier.<sup>156</sup> This question has not yet been resolved by the Supreme Court and, as noted in *Exxon*,<sup>157</sup> an apparent conflict has developed in the lower federal courts. Rejecting the plaintiffs' reliance on the *Bargain Car Wash* approach, the Maryland court adopted the contrary view of *Enterprise Industries, Inc. v. Texas Co.*,<sup>158</sup> where the United States District Court for the District of Connecticut held that the section 2(b) defense was available only to a supplier who offered a lower price to one of its dealers in order to meet an equally low price offered to that same dealer by a competing supplier.<sup>159</sup>

In its decision disallowing the section 2(b) defense to a major, integrated oil company defendant, the *Enterprise* court looked both to the scope of the statutory language and to the nature of competition in the gasoline retailing industry.<sup>160</sup> The court concluded that the Robinson-Patman Act permits a supplier to meet competition by its competitor,<sup>161</sup> but its protection does not extend to a supplier who wishes to meet the competition of its buyer's competitor.<sup>162</sup> The court observed that the defense would not apply at the supplier level because suppliers are not in competition for sales to service station dealers; the seller-buyer relationship is effectively fixed through station and equipment leases.<sup>163</sup> While it may be true that wholesale buyers of gasoline compete for retail sale to the public, the court held that the Robinson-Patman section 2(b) defense remains limited to the supplier level of competition and "does not go so far as to allow discriminatory price cutting by a supplier to enable a buyer to meet price competition."<sup>164</sup>

In accepting the reasoning of the *Enterprise* court, the *Exxon* court rejected the current position of the Federal Trade Commission. The Federal Trade Commission has not maintained a consistent position on the scope of the Robinson-Patman section 2(b) "meeting competition" defense.<sup>165</sup> In

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155. *Id.* at 512-17.

156. *Id.* at 512 n.7.

157. 279 Md. at 448, 370 A.2d at 1123.

158. 136 F. Supp. 420 (D. Conn. 1955), *rev'd on other grounds*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). This civil case arose out of a gasoline "price war." During one period of price instability the defendant Texas Company had granted allowances to branded dealers other than the plaintiff.

159. *Id.* at 421. *Cf. Bolick-Gillman Co. v. Continental Baking Co.*, 206 F. Supp. 151, 159-60 (D. Nev. 1961) (in deciding that plaintiff and defendant were not competing suppliers in the § 2(a) sense, the court approved a reading of § 2(b) that restricted it to competition at the retail level).

160. 136 F. Supp. at 421.

161. 15 U.S.C. § 13(b) (1970).

162. 136 F. Supp. at 421.

163. *Id.*

164. *Id.* (emphasis in original).

165. See 279 Md. at 449, 370 A.2d at 1123; *Gasoline Marketing*, *supra* note 123, at 1713 n.44 (the commentator explains that before the *Enterprise* case the FTC believed

the 1950's, the FTC adopted the *Enterprise* approach to the section 2(b) defense<sup>166</sup> and, in the *Sun Oil* case,<sup>167</sup> convinced the Supreme Court that the defense did not apply to a supplier who granted a price discount to a dealer threatened by competition. In 1967, however, the FTC reversed its policy and, in response to the question left open in *Sun Oil*,<sup>168</sup> stated that "a price reduction by one supplier to its customer which is reflected in the latter's retail price may be lawfully met by a comparable reduction by another supplier to its customer."<sup>169</sup> The Commission recognized that major oil companies do not compete for sales to retail dealers but argued that suppliers should be able to respond competitively to each other through their retail dealers.<sup>170</sup>

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that suppliers could claim the § 2(b) defense in response to charges of treating dealers unequally without regard to whether the exclusive dealing relationship was threatened).

166. *In re Sun Oil Co.*, 55 F.T.C. 955 (1959), *order set aside*, 294 F.2d 465 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1963). In *Sun Oil*, the Commission specifically relied on the *Enterprise* doctrine and stated that "2(b) has reference to the good faith meeting of competition of the *seller*, and not the competition of the *buyer*, as in this case." *Id.* at 965 (emphasis in original). After *Enterprise* was decided, a senate subcommittee encouraged the Commission to continue to adhere to this position to eliminate unlawful price discrimination. S. REP. No. 2710, 84th Cong., 2d Sess. 28 (1956).

167. 371 U.S. 505, 529 (1963).

168. See text accompanying note 156 *supra*.

169. *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) ¶10,373, at 18,245. Apparently, this policy applies only to contests between integrated oil companies and their dealers. In an earlier part of its report, the Commission indicated that if a major brand supplier interfered with retail competition in order to discipline a private brand marketer, § 5 of the Federal Trade Commission Act, 15 U.S.C. § 41 (1970), might be violated. *Id.* at 18,243.

The Commission further suggested in its report that zone pricing would be an appropriate method of sidestepping a § 2(a) competitive injury while engaging in discriminatory pricing. *Id.* at 18,242. It should be noted, however, that courts have rarely accepted a pricing "scheme" as a justification for price discrimination. See, e.g., *FTC v. National Lead Co.*, 352 U.S. 419, 431 (1957); *FTC v. A. E. Staley Mfg. Co.*, 324 U.S. 746, 753 (1945). See generally F. ROWE, *supra* note 121, at § 9.7; Note, *Pricing Systems and the Meeting Competition Defense*, 49 VA. L. REV. 1325 (1963). One commentator has suggested that the Commission's position creates problems of proof and enforcement, and "may actually be an inarticulate proxy for the *Enterprise* doctrine"; judicial disallowance of the defense in a "system pricing" scheme ultimately rests on the absence of a true competitive threat. *Gasoline Marketing*, *supra* note 123, at 1716-17.

170. *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP. (CCH) ¶10,373, at 18,245. The weaknesses of the "conduit" theory (i.e., wholesalers partaking in retail competition) are discussed at notes 187 to 190 and accompanying text *infra*.

The Commission, however, does not appear to be adhering to its 1967 policy as evidenced by its response to a recent complaint against a major, integrated oil company for unfair competition. In that case, the FTC's proposal for relief required that gasoline be sold to dealers at uniform prices throughout a competitive area. See *Standard Oil Co. (Ohio)*, [1970-1973 Transfer Binder] TRADE REG. REP. (CCH) ¶20,134, at 22,122.



By adopting the interpretation of the section 2(b) defense reflected in the original FTC position and applied in the *Enterprise* case, the Court of Appeals of Maryland aligned itself with the logic of the Supreme Court's decision in *Sun Oil*. In *Sun Oil*, the Supreme Court refused to extend the section 2(b) defense to a situation where an integrated oil company reduced prices to its dealer to allow the dealer to respond to a competitor's prices; the Court reasoned that the supplier was not in competition with its dealer's competitor and in the absence of this level of competition the defense simply did not apply. It was a logical extension of this reasoning that led the *Exxon* court to conclude that even where the competitor of the supplier's dealer is a major brand outlet, the supplier is nonetheless not "in competition" with that rival dealer within the meaning of the Robinson-Patman Act.<sup>171</sup>

The Supreme Court in *Sun Oil* narrowly construed the section 2(b) phrase "equally low price of a competitor" to refer to "the price of a competitor of the seller who grants, and not of the buyer who receives, the discriminatory price cut."<sup>172</sup> Acknowledging the section 2(a) prohibition of anticompetitive effects arising out of a price discrimination "in any line of commerce,"<sup>173</sup> the Court reasoned that the narrower language in section 2(b) was intended by Congress to limit the defense to the acting parties — the sellers.<sup>174</sup> Further, the Court pointed out that "[l]inguistically and practically" it would be absurd to read the section 2(b) defense to allow a supplier to match his wholesale price to an equally low retail price posted by the competitor of the supplier's dealer.<sup>175</sup> Wholesale prices are generally lower than retail prices. Finally, the Court rejected the suggestion that the defense permitted a supplier to reduce his wholesale price to allow a dealer in turn to meet lower retail price competition, finding no indication that the statute contemplated a two-step transaction.<sup>176</sup>

It appears, moreover, that the fundamental purpose of the Robinson-Patman Act precludes an extension of the defense beyond this limited scope. In allowing the "meeting competition" defense Congress intended to deal with a narrow problem: sellers should be allowed to compete with other sellers for the business of buyers without the legal requirement that a price concession be offered to all customers.<sup>177</sup> In *Exxon*, the Court of Appeals of

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171. See text accompanying notes 160 to 164 *supra*.

172. 371 U.S. 505, 514 (1963).

173. 15 U.S.C. § 13(a) (1970).

174. 371 U.S. at 514-15.

175. *Id.* at 515.

176. *Id.* at 516.

177. See, e.g., *FTC v. Sun Oil Co.*, 371 U.S. 505, 522 (1963); *Standard Oil Co. v. FTC*, 340 U.S. 231, 249-50 (1951); *Governor of Md. v. Exxon Corp.*, 279 Md. 410, 450-51, 370 A.2d 1102, 1124, *prob. juris. noted*, 46 U.S.L.W. 3214 (U.S. Oct. 3, 1977); *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 62, 175 (1963).

It has been noted that restricting the scope of the § 2(b) defense makes economic sense. "[W]here in fact the favored buyer has received a low nondiscriminatory offer from a competing seller, the seller who meets that offer with a discriminatory price cut is injuring the disfavored buyers no more than they would be injured anyway." C. KAYSER & D. TURNER, *ANTITRUST POLICY* 188 (1959).

Maryland stated that to expand the section 2(b) defense beyond this situation would result in anticompetitive conditions contrary to the aim of antitrust legislation.<sup>178</sup> Allowing suppliers to grant selective price discounts results in a lessening of competition, particularly where the reductions are leveled against independent marketers.<sup>179</sup>

Major brand oil companies have argued that they are in competition with each other for sales to consumers through independent retail dealers and that, therefore, competition among dealers is really competition among suppliers that they are entitled to meet under section 2(b). While this argument was rejected in *Sun Oil*,<sup>180</sup> *Enterprise*,<sup>181</sup> and *Exxon*,<sup>182</sup> it was apparently accepted in *Bargain Car Wash*.<sup>183</sup> The Federal Trade Commission rejected the "conduit" theory in *Sun Oil*<sup>184</sup> but currently seems to adhere to a contrary view.<sup>185</sup>

There is a difference of opinion on the question whether integrated oil companies actually are in competition with each other for sales of gasoline to the public.<sup>186</sup> It was conclusively determined by the *Sun Oil* Court's rejection of the "conduit" theory that an independent retailer is not a "competitor" of a major oil company for the purposes of the Robinson-Patman section 2(b) defense.<sup>187</sup> In rejecting the plaintiffs' theory, the Court emphasized the amorphous nature of the "conduit" argument: "In a very real sense . . . every retailer is but a 'conduit' for the goods which it sells. . . . We are sure Congress had no such broad conception of competition in mind."<sup>188</sup> The irrelevance of the conduit argument is demonstrated by the

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178. 279 Md. at 451, 370 A.2d at 1124.

179. *Id.*

180. 371 U.S. 505, 524-25 (1963).

181. See 136 F. Supp. 420, 421 (D. Conn.), *rev'd on other grounds*, 240 F.2d 457 (2d Cir. 1955), *cert. denied*, 353 U.S. 965 (1957).

182. See 279 Md. at 451, 370 A.2d at 1124.

183. See 466 F.2d 1163, 1175-76 (7th Cir. 1972).

184. *In re Sun Oil Co.*, 55 F.T.C. 955, 965 (1959), *order set aside*, 294 F.2d 465 (5th Cir. 1961), *rev'd*, 371 U.S. 505 (1963).

185. See *Commission Policy with Respect to Anti-Competitive Practices in the Marketing of Gasoline*, 3 TRADE REG. REP (CCH) ¶10,373, at 18,245.

186. Indeed, the Fifth Circuit assumed in its *Sun Oil* opinion that the case involved two integrated oil companies and allowed the § 2(b) defense. 294 F.2d 465, 466-67 (5th Cir. 1961). The Supreme Court rejected this assumption and disallowed the defense, reversing the Fifth Circuit. 371 U.S. 505 (1963). When the Fifth Circuit's disposition of *Sun Oil* was announced, commentators approved its conclusion that integrated oil companies are in retail competition. See, e.g., 62 COLUM. L. REV. 171, 174 (1962); 1962 DUKE L.J. 300, 304-05; 75 HARV. L. REV. 429, 430 (1961). But see Note, *Meeting Competition and the Sun Oil Case: Repudiation of the Enterprise Doctrine*, 29 U. CHI. L. REV. 355 (1962). The Supreme Court's decision also received approval. See, e.g., *The Supreme Court, 1962 Term*, 77 HARV. L. REV. 81, 175 (1963). It has been suggested that innumerable joint ventures and the practice of carving the country into separately controlled retail markets has effectively eliminated any competition among major, integrated petroleum companies. See THE CONTROL OF OIL, *supra* note 8, at 136, 150-51. Cf. C. KAYSEN & D. TURNER, ANTITRUST POLICY 136 (1959) ("the joint venture . . . may be viewed as a form of quasi merger").

187. See 371 U.S. 505, 524-25 (1963).

188. *Id.* at 524.

realities of gasoline marketing; most significantly, the overwhelming majority of service station operators are independent businessmen.<sup>189</sup> In order for a court to recognize suppliers as competitors at the retail level they would have to find that there was control over prices — in short, that a violation of the antitrust laws had occurred.<sup>190</sup>

The *Enterprise* doctrine thus appears to be supported by the language and purpose of the Robinson-Patman Act's "meeting competition" defense. By adopting this approach in the *Exxon* case, the Court of Appeals of Maryland properly interpreted section 2(b) and, indeed, its decision comports with the realities of competitive conditions present in the gasoline marketing industry. It is clear that paragraph (d) of the Maryland statute as construed by the court does not conflict with the section 2(b) defense. "Voluntary allowances" means "only those price reductions offered to retail dealers to enable the dealer to meet the lower price of a *competing retail dealer*"<sup>191</sup>; the section 2(b) defense "is available only where the discriminatory price reduction is to meet the equally low price offered to *the same buyer* by a competing seller."<sup>192</sup> Thus, the section 2(b) defense is not available to a supplier who grants a voluntary allowance, and the requirement that allowances be uniform throughout the state does not conflict with the limited Robinson-Patman "meeting competition" defense.

#### CONCLUSION

The *Exxon* decision was significant in several respects. In its opinion, the Court of Appeals clearly reaffirmed the view that economic legislation should be subjected to only the most minimal judicial scrutiny, particularly where a serious problem calls for novel legislation. Moreover, the court recognized that the state has a strong legitimate interest in preserving competition within its borders; states need not always defer to the federal government in antitrust matters. Although the energy shortage of 1973 affected the entire nation, some states, like Maryland, suffered greater economic losses than others. With the possibility that shortages will continue to occur, it is particularly appropriate that the states, rather than the federal government, should formulate laws tailored to deal with those effects of the oil shortage peculiar to their situations. In upholding the Maryland statute, the *Exxon* court clearly considered the state's interest in preserving a competitive gasoline market as justifying the incidental burden the statute placed on interstate commerce. Hence, the Court of Appeals of Maryland validated a significant piece of economic legislation that not only equalizes within Maryland the impact of future shortages, but also serves as

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189. See, e.g., *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (attempt by major oil company to set retail prices through consignment arrangement held to be unlawful vertical price fixing). Cf. MD. COM. LAW CODE ANN. §§ 11-301 to 11-308 (1975) (providing increased statutory protection of independent gasoline retailers).

190. See, e.g., *Bolick-Gillman Co. v. Continental Baking Co.*, 206 F. Supp. 151, 157-59 (D. Nev. 1961).

191. 279 Md. at 452, 370 A.2d at 1125 (emphasis in original).

192. *Id.* at 451-52, 370 A.2d at 1124. (emphasis in original).

an example to other states anxious to control uncertain developments in the presently unstable petroleum industry. Finally, the court's analysis of section 2(b) of the Robinson-Patman Act should dispel much of the confusion that has developed concerning the scope of the Robinson-Patman "meeting competition" defense. The court's analysis is both faithful to antitrust policy and most clearly mandated by the language of the statute. The opinion in *Exxon* also accords completely with the Supreme Court's reasoning in *Sun Oil*. Moreover, by basing the analysis on the realities of the gasoline retailing industry as well as on the scope of the statutory language, the Court of Appeals of Maryland amply demonstrated that a broader construction of the defense would in fact result in the type of anticompetitive conditions that antitrust legislation seeks to avoid.