

Guaranteeing High Prices by Guaranteeing the Lowest Price

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Many businesses in a wide variety of fields have instituted low price guarantees as a competitive tactic. A low price guarantee is a promise by a business to match the prices of its competitors. This Note explores the competitive effect of low price guarantees and determines that their effect is ambiguous. The author then argues that even if the low price guarantees are anti-competitive, the antitrust laws do not prohibit their use. Finally, it discusses possible legislative solutions to the potential problems caused by low price guarantees.

I. INTRODUCTION

Most Americans are familiar with low price guarantees.¹ Contrary to conventional wisdom,² however, low price guarantees actually may result in

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¹ Circuit City, an electronics retailer, makes the following guarantee: "If you've seen a lower advertised price from a local store with the same item in stock, we want to know about it. Bring it to our attention, and we'll gladly beat their price by 10% of the difference." *Price Match Guarantee*, at http://www.circuitcity.com/cs_contentdisplay.jsp?c=1&b=g&incat=52608#match (last visited Sept. 16, 2003). Circuit City further guarantees "[e]ven after your Circuit City purchase, if you see a lower advertised price (including our own sale prices) within 30 days, we'll refund 110 % of the difference." *Id.*; see also *Low Price Guarantee*, at http://www.thegoodguys.com/price_pop.asp (last visited Sept. 16, 2003). The Good Guys, another electronics retailer, guarantees: "If you find a lower verifiable delivered price from *bestbuy.com*, *circuitcity.com*, or *crutchfield.com*, on an available product of the same brand and model, we'll gladly match that price." *Id.* The Good Guys also guarantee their low prices for up to thirty days after a purchase. *Id.*

² Consumers often equate low price guarantees with competition and low prices. See Morten Hviid & Greg Shaffer, *Hassle Costs: The Achilles' Heel of Price-Matching Guarantees*, 8 J. ECON. & MGMT. STRATEGY 489, 490 (1999); Maria Arbatskaya et al., *Promises to Match or Beat the Competition: Evidence From Retail Tire Prices*, in 8 ADVANCES IN APPLIED MICROECONOMICS 123, 124 (Michael R. Baye ed., 1999); Kenneth S. Corts, *On the Competitive Effects of Price-Matching Policies*, 15 INT'L J. INDUS. ORG. 283, 284 (1997); James D. Hess & Eitan Gerstner, *Price-Matching Policies: An Empirical Case*, 12 MANAGERIAL & DECISION ECON. 305, 305 (1991). "On its face, a price-matching policy seems the epitome of cutthroat competition: what could be more competitive than sellers' guaranteeing their low prices by promising to match the prices of any competitor?" Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?*, 111 HARV. L. REV. 528, 531 (1997).

higher prices and welfare losses.³ Low price guarantees have become prevalent and are used in a wide variety of industries.⁴ In response to their widespread use, some have argued that resort to the antitrust laws is the appropriate method to curtail the use of low price guarantees.⁵ However, in this Note it will be argued that resort to the antitrust laws is inappropriate for two reasons: first, the effects of low price guarantees are not clearly anti-competitive and the courts are not the appropriate place to make that determination; and second, even if low price guarantees are anti-competitive, they do not in all cases violate the antitrust laws.

Part II of this Note will discuss the social harms caused by a monopoly. In Part III, the arguments suggesting that low price guarantees are anti-competitive, the arguments suggesting that low price guarantees are not anti-competitive, and those arguments suggesting that low price guarantees will actually have a positive

³ See Zhiqi Chen, *How Low is a Guaranteed-Lowest-Price?*, 28 CAN. J. ECON. 683 (1995); Edlin, *supra* note 2; Aaron S. Edlin & Eric R. Emch, *The Welfare Losses from Price-Matching Policies*, 47 J. INDUS. ECON. 145 (1999); Hess & Gerstner, *supra* note 2. Welfare losses are a measure of the loss of value to society as a whole. See MARK SEIDENFELD, MICROECONOMIC PREDICATES TO LAW AND ECONOMICS 40–41 (1996). Market transactions create economic surplus. For example, imagine a person selling a car. If that person values the car at \$5,000 and a buyer values the car at \$7,000, a sale will create \$2,000 in surplus. This surplus exists regardless of how it is distributed to each person. If the car is sold for \$5,000, the buyer is \$2,000 richer and the seller stays the same. On the other hand, if the car is sold for \$7,000, the seller is \$2,000 richer and the buyer is indifferent. If the car is not sold at all, that \$2,000 of surplus is lost. This \$2,000 loss is a welfare loss.

It may be easier to see the loss if the aggregate positions of the people before the transaction are compared to their aggregate positions after the transaction. Assume for simplicity's sake, that the seller only has a car and the buyer only has \$7,000. Because the seller values the car at \$5,000, the total value society has is \$12,000 (\$7,000 [cash buyer has] + \$5,000 [value of car to seller]). If the car is sold for \$6,000, then the total value society has is \$14,000 (\$6,000 [cash seller has] + \$1,000 [cash buyer has] + \$7,000 [value of car to buyer]). Therefore, if the car is not sold the society loses \$2,000 (\$14,000 [value of society if car is sold] – \$12,000 [value of society if car is not sold]).

It is important to note that the loss of money itself is not the welfare loss. Money only serves as a metric for utility (utility is a measure of the overall “happiness” in society), and it is the loss of utility which is the welfare loss. See DAVID W. BARNES & LYNN A. STOUT, CASES AND MATERIALS ON LAW AND ECONOMICS 6 (1992).

⁴ Corts, *supra* note 2, at 283 (noting use in many retailers, consumer electronics, office supplies, and automobile tires); Hess & Gerstner, *supra* note 2, at 305 (noting use in appliance stores, hardware stores, and supermarkets); Hviid & Shaffer, *supra* note 2, at 489–90 (noting use in “sporting goods, books, housewares, cellular phones, office products, consumer electronics, luggage and travel accessories, furniture, tires, toys, petrol, eyewear, and prescription drugs”).

⁵ Edlin, *supra* note 2, at 532; Mark T.L. Sargent, Comment, *Economics Upside-Down: Low-Price Guarantees as Mechanisms for Facilitating Tacit Collusion*, 141 U. PA. L. REV. 2055, 2118 (1993); cf. Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of “Most-Favored-Customer” Clauses*, 64 ANTITRUST L.J. 517, 534 (1996).

effect on competition will be discussed. In Part IV, the antitrust laws will be reviewed and it will be argued that even if low-price guarantees are anti-competitive, the antitrust laws do not forbid their use in all instances. Part V will explore possible legislative solutions to low price guarantees, if they are in fact anti-competitive. Finally, Part VI concludes this note.

II. THE SOCIAL HARMS CAUSED BY A MONOPOLY

Monopolistic outcome serves as a measuring stick to determine whether a particular practice is anti-competitive. This is true of many of the arguments that low price guarantees are anti-competitive.⁶

Firms in competitive markets are price takers because their output decisions do not affect market price.⁷ Therefore, each additional unit of output allows a firm to obtain additional revenue equal to price.⁸ A firm will maximize profits by choosing to produce enough units so that price equals marginal cost.⁹ In contrast, a monopoly produces all of the products sold in a market.¹⁰ Therefore, a monopolist's output decision will affect the price it receives for the goods.¹¹ Furthermore, the additional revenue received from an additional unit sold will be affected by the change in price.¹² A monopolist will maximize profit by choosing to produce the number of units where marginal revenue equals marginal cost.¹³ This is represented graphically in the following diagram.

⁶ See Edlin, *supra* note 2; Baker, *supra* note 5; Sargent, *supra* note 5.

⁷ SEIDENFELD, *supra* note 3, at 35. A perfectly competitive market is a theoretical model and never exists in the real world. However, it can be a predictor of how firms behave in the real world. *Id.*

⁸ *Id.*

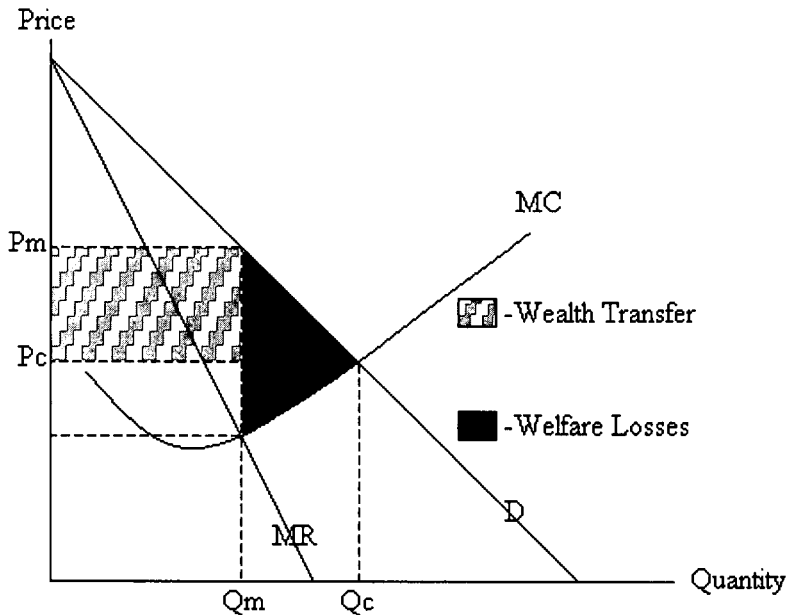
⁹ *Id.* at 35–36. “Marginal cost is the increase in cost necessary to produce one additional unit of output.” *Id.* at 24. The reason a firm will maximize profit by setting price equal to marginal cost is because if it is producing where marginal cost is less than price, it can increase profits by producing one additional unit of product by price minus marginal cost. After marginal cost is equal to price, if a firm produces one more unit of a product, it will sustain a loss of marginal cost minus price. *Id.* at 36.

¹⁰ *Id.* at 39.

¹¹ *Id.*

¹² *Id.*

¹³ SEIDENFELD, *supra* note 3, at 40. Marginal revenue is the increase in revenue derived from producing one additional unit of output. *Id.* at 29. Marginal revenue is derived from market demand. Generally, marginal revenue decreases more rapidly than the market demand. *Id.* at 39–40. A monopolist maximizes profits by setting marginal cost equal to marginal revenue because if it is producing where marginal cost is less than marginal revenue, it can increase its profit by marginal revenue minus marginal cost. After marginal cost is equal to marginal revenue, if a monopolist produces one more unit of product, it will sustain a loss of marginal cost minus marginal revenue. *See id.* at 40.



D represents the demand curve, MC represents marginal costs, and MR represents marginal revenue. P_m and Q_m are the monopolist's optimal price and quantity, respectively. P_c and Q_c are the competitive optimal price and quantity, respectively.

Monopolists cause two negative impacts on society: a dead weight loss¹⁴ and a wealth transfer from consumers to the monopolist. The dead weight loss is created because there are products that could be sold to consumers who value them more than the cost to produce them. Therefore, some wealth creating transfers do not occur, and this results in a welfare loss.¹⁵ This loss is represented on the graph above by the dark solid shaded area. The second problem created by monopolies is a wealth transfer from those consumers, who would buy the

¹⁴ Dead weight loss is a measure of the economic surplus lost to society as a whole because of the loss of sales. *See id.* at 41; *see also supra* note 3. If a monopolist could perfectly price discriminate between consumers, no dead weight loss to society would be created. Imagine a monopolist in a market with three consumers—A, B, and C. Assume A values a widget at \$10,000, B values a widget at \$9,000, and C values a widget at \$8,000, and that all are above marginal cost. If the monopolist could charge A \$10,000, B \$9,000, and C \$8,000, all socially beneficial transfers would occur and there would be no dead weight loss. The monopolist, however, would capture all of the consumer surplus. For a discussion of price discriminating monopolies, see SEIDENFELD, *supra* note 3, at 42–44.

¹⁵ *See* SEIDENFELD, *supra* note 3, at 41.

product at either price, to the monopolists.¹⁶ This problem is the result of increased price, and it is represented by the light gray shaded area on the graph above.

In sum, monopolies are bad because they raise the price of their goods, which results in a dead weight loss to society and a wealth transfer from consumers to monopolists.¹⁷ Many of the arguments that low price guarantees are anti-competitive contend that low price guarantees push the market from the competitive outcome toward the monopolistic outcome.

III. THE IMPACT OF LOW PRICE GUARANTEES ON COMPETITION

In the field of economics there has been a large amount of literature condemning low price guarantees as anti-competitive, because low price guarantees prevent prices from falling to competitive levels creating a dead weight loss to society and wealth transfers from consumers to producers.¹⁸ In addition, low price guarantees can cause over-investment in production, causing a dead weight loss not normally associated with monopolies.¹⁹ However, not everyone agrees that low price guarantees have a negative impact on

¹⁶ *Id.* Consumers buying at the higher price value the product at least as much as the monopolist price. Therefore, if these consumers were to buy the product at competitive prices they would be receiving a benefit of at least the difference between the monopolist price and the competitive price. For example, if the monopolist price is \$10 and the competitive price is \$8, the consumers who buy at both prices at least value the product at \$10. By buying the product at \$8, the consumers receive a surplus of at least \$2. In raising the price to \$10, the monopolist captures this \$2 of surplus.

¹⁷ Economists generally are not concerned with wealth transfers, and therefore think the only harm caused by a monopolist is the dead weight loss. *See id.* at 1–2, 43. However, as a matter of social policy, the wealth transfer and requisite increased price may be undesirable without regard to economic principles. Notions of fairness and justice suggest that the resulting distribution of surplus caused by a monopoly may not be desirable.

¹⁸ *See, e.g.,* Edlin & Emch, *supra* note 3; Edlin, *supra* note 2; *cf.* Chen, *supra* note 3; Hess & Gerstner, *supra* note 2.

¹⁹ *See* Edlin & Emch, *supra* note 3; Edlin, *supra* note 2, at 547–49; *see also infra* notes 45–49 and accompanying text. The dead weight loss to society from over-investment in production can be demonstrated by the following example. Suppose two people will buy a widget in a competitive market each year. If a firm wants to produce a widget, it must build a widget factory that costs \$100,000. A widget factory costs \$10,000 to operate per year regardless of how many widgets it produces. It costs \$10 to produce each widget above the previously mentioned operating costs. Each widget factory is able to produce 10 widgets. Therefore if one factory produces two widgets, it will cost \$100,000 (the factory) plus \$10,020 per year (cost to operate factory plus cost to produce a widget). However, if two firms build factories and each produces one widget, it will cost \$200,000 (two factories) plus \$20,020 per year (\$10,000 per factory plus \$20 for widgets). This results in the use of \$100,000 (the factory) plus \$10,000 per year (factory operating costs) that is lost because it creates no benefit to society as a whole.

competition.²⁰ Furthermore, some people believe that low price guarantees have a positive impact on society by allowing firms to compete more vigorously and by serving as a valuable signal to consumers that the firm has low prices.²¹

This Part will explore the competing arguments about low price guarantees. Part A will discuss the arguments that suggest low price guarantees have a negative impact on competition. Some arguments have been made in response to the arguments in Part A suggesting that low price guarantees are not anti-competitive; Part B will discuss these arguments. In Part C, the arguments that suggest low price guarantees have a positive impact on competition will be discussed. Finally, Part D will discuss the difficulties in determining the true effects of low price guarantees.

A. *The Negative Effects of Low Price Guarantees*

To effectively examine impacts of low price guarantees, it is important to understand the normal course of events in a market charging supra-competitive prices.²² Imagine a market for widgets and that the competitive price is \$19, but the market price is \$25. Normally there are two forces that will drive the price down to \$20—price-cutting by firms and market entry by new firms.²³

A reduction in price by one firm results in a great increase in demand for that firm, assuming the decrease in price will not create a substantial increase in cost.²⁴ Not only is the total number of available customers increased by the lower price, but the firm cutting its price also will attract other firms' current

²⁰ See generally Corts, *supra* note 2; Kenneth S. Corts, *On the Robustness of the Argument that Price-Matching is Anti-Competitive*, 47 ECON. LETTERS 417 (1995); Sridhar Moorthy & Ralph A. Winter, *Are Price Matching Guarantees Anti-Competitive?* (August 2002) (working paper, Simon Fraser University Department of Economics), available at <http://www.sfu.ca/economics/sem papers/winter.pdf>. Cf. Hviid & Shaffer, *supra* note 2, at 491 (arguing that the hassle cost of invoking a low price guarantee mitigates the anti-competitive effects of low price guarantees).

²¹ Moorthy & Winter, *supra* note 20, at 3; see also *infra* notes 62–65 and accompanying text.

²² A supra-competitive price is a price that is greater than marginal cost. A firm will usually not charge a price below marginal cost because the additional revenue gained from increased sales will be more than offset by the increased cost of production. For a discussion of a firm's optimal price choice, see generally SEIDENFELD, *supra* note 3, at 21–34.

²³ Edlin, *supra* note 2, at 540.

²⁴ Generally speaking, the cost per unit decreases at low levels of output and then begins to increase with sufficient amount of output. At some point, a firm's production output will be maximized and it will only be efficient to increase output by increasing the scale of the operation.

customers.²⁵ This increased revenue from increased customers more than offsets the decrease in per unit revenue. For illustration, imagine that the market contains ten firms, with each selling ten widgets apiece at a price of \$25. Imagine that the cost per widget remains constant regardless of output at \$19.²⁶ Therefore, each firm is currently making a profit of \$60 dollars.²⁷ If one firm cuts its price to \$24, it will increase its profit to at least \$500.²⁸

However, it does not always make sense for firms in the market to cut prices. The additional output required to meet market demand may require the price-cutting firm to make additional capital investments. For example, suppose each widget factory can produce only 10 widgets and that a widget factory costs \$500 to build. If one firm lowers the price from \$25 to \$24, it will have to build factories to satisfy the market demand for its widgets. Therefore, it will have to build at least one new factory and incur additional costs of at least \$500. In this case, its price cut would lead to profits of \$100 as opposed to \$60.²⁹ The competing firms will eventually cut their prices to recapture the customers lost to the initial price-cutting firm.

Now assume that after the other firms cut their prices, they regain all of their old customers and the lower price causes one new customer to enter the market.

²⁵ See Edlin, *supra* note 2, at 540. A price-cutting firm will attract other firms' customers because those customers can get the same product for a lower price. The number of consumers willing to buy the product in the overall market will increase as well, because some customers unwilling to pay \$25 for a widget would be willing to pay \$24 for a widget. This is not necessarily related to customers' ability to afford the product. Some people like to ski more than others and, therefore, a lift ticket is worth more to them. A person who really enjoys skiing may be willing to pay \$50 for a lift ticket, but another person who only gets moderate enjoyment out of skiing may only be willing to pay \$25 for a lift ticket.

²⁶ Normally, the number of widgets affects the cost to produce a widget. Imagine an assembly line at a factory. As you add workers to the line, they will be able to work faster and produce more widgets cheaper. Eventually, if too many workers are added, they will get in each other's way, slowing down production and causing each widget to be more expensive.

²⁷ Profit is the difference between revenue and cost. The revenue is the number of widgets sold times the price received for each widget ($10 \times \$25$) and is equal to \$250. The cost is the number of widgets sold times the cost to produce each widget ($10 \times \$19$) and is equal to \$190. The difference between revenue and cost ($\$250 - \190) is \$60, which is the profit.

²⁸ The profit again is revenue minus cost, which is $((\$24 \times 100) - (\$19 \times 100))$ or \$500. This assumes that the reduction in price will be revealed to all customers in the market and that the widgets from all firms are perfect substitutes. All customers would prefer to buy the same widget for \$24 rather than \$25. The profit is at least \$500 because there are most likely some people who would be unwilling to buy a widget for \$25, but willing to buy it for \$24. However, this increased profit will only be realized for a short period because all firms will eventually follow the initial price-cutter and market share will be reduced.

²⁹ The price-cutting firm could sell only twenty widgets because that is all it could produce. Therefore, its revenue is 20 times \$24, which is equal to \$480, and its cost is 20 times \$19, which is equal to \$380. Profit is the difference between revenue and cost, which is \$100.

Therefore, after the other firms lower their prices and regain their customers, the initial price-cutting firm has eleven customers and its profits are \$55.³⁰ If the firms were able to perfectly predict this result, they would be unwilling to build new factories and cut prices.³¹ However, people on the outside would want to build a factory to capture some of those profits.³²

These two market forces will act in combination to drive the market price to the competitive level of \$19.³³ Therefore, when a market is charging supra-competitive prices, the normal result will be the competitive one.

The basic thrust of the argument that low price guarantees have a negative impact on competition is that they destroy competitors' incentives to undercut rivals' prices.³⁴ This can be illustrated by using the previously discussed model of the market for widgets. Assume now that all firms have instituted a low price guarantee.³⁵ If one firm decides to cut its price to \$24 in the face of low price guarantees, the price-cutting firm's market share will not increase. Therefore, the firm's profit is decreased from \$60 to \$50.³⁶ Entry will not be deterred.³⁷

³⁰ There are now 101 customers in the market. This is just an assumption, but in any given market the actual number could be higher or lower.

³¹ This is assuming that the discounted value of the loss of \$5 in future profits plus the \$40 gain in profit is greater than the loss of \$40 in the present.

³² It is likely that when a new firm enters the market, it would likely permanently steal some of the other firms' customers. Unlike the example discussed above with a current firm building a new factory, even if the entering firm could capture only people who enter the market because of a lower price, the new firm would be willing to cut the price even lower than \$24 to gain more customers. If a price of \$23 would cause nine more customers to enter the market (remember that a price of \$24 caused one more customer to enter the market), the new firm would be able to sell ten widgets at \$23 and make a profit of \$40 (10 x \$23 - 10 x \$19). \$40 compared to \$0 is a good reason to enter the market.

³³ Edlin, *supra* note 2, at 540-41.

³⁴ *Id.* at 536; Moorthy & Winter, *supra* note 20, at 1; cf. George A. Hay, *Oligopoly, Shared Monopoly, and Antitrust Law*, 67 CORNELL L. REV. 439, 455-56 (1982) (arguing that most-favored-customer clauses penalize price-cutting firms, and thereby reduce the incentive to cut prices); Steven C. Salop, *Practices that (Credibly) Facilitate Oligopoly Co-ordination*, in NEW DEVELOPMENTS IN THE ANALYSIS OF MARKET STRUCTURE 265, 265-66 (Joseph E. Stiglitz & G. Frank Mathewson eds. 1986).

³⁵ All firms post a price of \$25 and guarantee that if any firm charges a lower price, they will meet that price.

³⁶ A price-cutting firm will not increase its market share because all rivals will instantly match the price cut. Therefore, the price-cutting firm will be unable to steal any of the other firms' customers because those customers will be able to buy the product at the same price from the other firms. Again, the market size may be increased and the price-cutting firm may be able to capture some of the new customers. However, as long as the current price in the market is lower than or equal to the optimal monopoly price, the increased size of the market will not offset the revenue lost on individual sales. Therefore, the actual profit will be somewhere greater than \$50 but less than \$60 dollars.

However, it will handicap the ability of entering firms to gain market share by offering a lower price.³⁸ Furthermore, the disincentive to raise prices is eroded by a low price guarantee.³⁹ A firm can raise its prices without fear of losing customers because the actual price consumers will face is the lowest market price at any firm. Therefore, the firm's price will not be higher than any competitor's. Because all firms will have an incentive to obtain a higher overall price, all firms will price high and therefore, the market price will be supra-competitive.

The model discussed above assumed that all consumers were homogenous and had perfect information about all competitors' prices. However, in the real world this is not the case. Some consumers will be informed and others will be uninformed about competitors' prices.⁴⁰ This is true because there is a cost associated with becoming informed, and not all customers will choose to incur that cost.⁴¹ A low price guarantee policy allows firms to price discriminate between uninformed and informed consumers.⁴² This increases a firm's incentive

³⁷ See Maria Arbatskaya, *Can Low-Price Guarantees Deter Entry?*, 19 INT'L. J. IND. ORG. 1387, 1389 (2001). However, price-beating guarantees can effectively deter entry. *Id.* at 1390. Maria Arbatskaya argues that firms will not always maximize profits by deterring entry and often choose to price match and enjoy one-half monopoly profits with the entrant. *Id.*

³⁸ An entering firm will be unable to attract existing firms' customers by offering a lower price, because the existing firms automatically meet the new firm's price through their low price guarantees. There are other ways for an entering firm to attract customers. Novelty may attract some customers to at least visit the new firm, and if they like it better, they may stay. Location is another way for new firms to attract customers. If there are two firms in a large town at opposite ends, locating the firm in the center of town may attract some of the other firms' customers.

³⁹ Edlin, *supra* note 2, at 536–37.

⁴⁰ *Id.*; I.P.L. Png & D. Hirshleifer, *Price Discrimination Through Offers to Match Price*, 60 J. BUS. 365, 366 (1987); Terrence M. Belton, *A Model of Duopoly and Meeting or Beating Competition*, 5 INT'L J. IND. ORG. 399, 401 (1987); Steven Salop & Joseph Stiglitz, *Bargains and Ripoffs: A Model of Monopolistically Competitive Price Dispersion*, 44 REV. ECON. STUD. 493, 493 (1977).

⁴¹ See Edlin, *supra* note 2, at 541; Png & Hirshleifer, *supra* note 40, at 366 (noting that the cost of obtaining information about price may be large in comparison to the relative value of the product).

⁴² Edlin, *supra* note 2, at 536 n.37, 542; Png & Hirshleifer, *supra* note 40, at 366. An overt price-matching policy is not necessary to price discriminate between informed and uninformed customers. *Amazon.com* has "post[ed] different prices to different consumers, depending upon the 'cookies' on their machine." Cary A. Deck & Bart J. Wilson, *The Effectiveness of Low Price Matching in Mitigating the Competitive Pressure of Low Friction Electronic Markets*, 2 ELEC. COM. RES. 385, 386 (2002). Cookies are files placed on a computer by a website that allows the website to personalize the website to the user while using a static language. *Amazon.com* was able to tell if its customers had checked competitors' websites and how recently they had checked them. The price quoted would be competitive with the prices observed by the customer. However, *Amazon.com* did not inform consumers about its practice. When this policy was discovered, customers were so outraged that *Amazon.com* offered to

to raise prices because even if the informed customers can obtain the lowest market price, the firm will still be able to charge the uninformed customers the high price, thereby increasing overall profits.⁴³ The likelihood that high prices will prevail in the market is greater when there are a larger number of firms.⁴⁴

To this point, the discussion of the negative impacts of low price guarantees has been limited to their affect on market price.⁴⁵ However, there is another negative effect associated with low price guarantees.⁴⁶ Price-matching policies do not deter entry, they deter only the entrants' incentives to charge lower prices to gain market share.⁴⁷ The supra-competitive prices and the inability of entrants to reduce prices will encourage over-entry.⁴⁸ The over-entry into the market will result in individual firms producing under capacity, and this leads to welfare

rebate the difference between the price paid and the lowest price available at the time of purchase. *See id.*

⁴³ Edlin, *supra* note 2, at 536–37. Edlin argues:

The seller can retain some of the business of those customers that have the time and inclination to search for the lowest available price, because, even if the seller posts a high price, these customers can buy from the seller at the lowest available price by invoking the matching offer. At the same time, uninformed customers that do not search for the lowest price end up paying the new, higher price and thereby give additional revenue to the price matcher. The price matcher can thus profitably price-discriminate between “informed” and “uninformed” customers.

Id. (Footnote omitted). Edlin further argues that without assuming that there is a heterogeneous consumer population, there is only a “weak” incentive for firms to price match, *i.e.*, the hope that all firms will price high and ultimately the price-matching firm will receive a higher price. *Id.* at 541 n.43. A resulting high price is less likely because there is a risk that firms will ultimately charge a price that is sub-optimal, and this risk is increased if some firms have lower costs than the price-matching firm. *Id.* Therefore, because price discrimination allows for greater rewards, price-matching policies coupled with higher prices is more likely in a heterogeneous market. *Id.* at 541 n.42; *see also* Png & Hirshleifer, *supra* note 40, at 366.

⁴⁴ Png & Hirshleifer, *supra* note 40, at 372–73. Png and Hirshleifer argue that:

The intuitive explanation of this result is that setting a low price is a public good to all the other firms; once one firm sets a low price, the others are free to set list price at r to maximize earnings from discrimination. The larger the number of firms, the smaller is the pressure on any firm to set a low price.

Id.

⁴⁵ *See supra* Part II for a discussion about the impact supra-competitive prices have in monopoly markets. The same harms result from the inflated price due to low price guarantees.

⁴⁶ *See* Edlin & Emch, *supra* note 3, at 146; Edlin, *supra* note 2, at 538–39.

⁴⁷ Arbatskaya, *supra* note 37, at 1389.

⁴⁸ Edlin & Emch, *supra* note 3, at 146.

losses because there is over-expenditure of fixed costs.⁴⁹ This excess expenditure of fixed costs benefits no one and is lost.

Low price guarantees could have great negative consequences. They remove the incentive for existing firms to cut prices and for entering firms to offer lower prices to attract customers. In addition, the inflated prices cause too many firms to enter the market. All of these things contribute to a dead weight loss to society and a wealth transfer from consumers to producers.

B. Arguments that Suggest Low Price Guarantees Do Not Have a Negative Impact on Competition

The use of a low price guarantee by a consumer is not free. A consumer will incur a hassle cost when using a low price guarantee.⁵⁰ Hassle costs include the opportunity cost of time (salesman must confirm the lower price, decide whether to grant the discount, and then rebate the difference), other costs (such as bringing the advertisement in), and disutility of confronting a salesperson.⁵¹ The particular hassle costs associated with utilizing a low price guarantee will depend on the specific characteristics of the low price guarantee. A firm that initially quotes a lower price has an effective price that is lower than a firm offering a low price guarantee. Therefore, some argue, a consumer will always prefer to shop at firms quoting a lower price.⁵² However, this conclusion is not necessarily true because it assumes that a consumer faces no cost in switching firms.⁵³ Furthermore, firms often attempt to reduce hassle costs.⁵⁴ Because firms attempt to reduce hassle costs and there is usually a positive cost to switch firms, firms with low price

⁴⁹ *Id.* at 146–47; *see also supra* note 19. Assume that 100 widgets are sold in the market each year. If there are twenty firms in the market and each produces five widgets, then there are twice as many factories as necessary to supply that market at the current price. Therefore, half of the factories' costs and overhead costs are a dead weight loss to society.

⁵⁰ Hviid & Shaffer, *supra* note 2, at 490. Hviid and Shaffer argue that “[a] firm’s promise to match the lowest price in the market is not the same as actually having the lowest price. In reality, consumers incur hassle costs when securing a matching lower price from an initially higher-priced firm.” *Id.*; *see also* Edlin, *supra* note 2, at 536–37; Corts, *supra* note 2, at 285.

⁵¹ Hviid & Shaffer, *supra* note 2, at 490.

⁵² *Id.* at 491.

⁵³ Edlin, *supra* note 2, at 545–46 (arguing that when switching costs exceed hassle costs consumers will prefer to invoke the offer). Even Hviid and Shaffer recognized the potential of other costs to erode the force of their argument. Hviid & Shaffer, *supra* note 2, at 491 (noting that locational preference of where to shop among other costs will erode the effects of hassle costs).

⁵⁴ Edlin, *supra* note 2, at 545 & n.59; *see also* Deck & Wilson, *supra* note 42, at 1. *Amazon.com*’s practice of automatically matching prices based on the cookies found on an individual customer’s computer completely eliminates the hassle costs of matching offers.

guarantees may not have the lowest effective price. A consumer will choose only to switch firms when hassle costs exceed switching costs.

Another argument that erodes the assertion that low price guarantees are anti-competitive is that when firms are also allowed to institute price-beating policies, the incentive to charge the lowest price is restored.⁵⁵ Firms will have an incentive to quote the lowest price because it will be higher than beating the lowest price by a percentage or certain amount. Take, for example, a pledge to beat any lower price by 10%. If a firm is charging \$10 for a widget, but the lowest prevailing market price is \$9 a widget, the firm will get only \$8.10 per widget when it beats the lowest price.⁵⁶ Therefore, the firm will be better off charging \$9 per widget because it is greater than \$8.10. This also erodes a firm's incentive to increase price because the matched price they will be able to receive is lower than the price before increase.⁵⁷ However, if firms are able to match effective prices, it is possible that the anti-competitive effects of price-matching will be restored.⁵⁸

Low price guarantees may or may not have a negative impact on competition. Hassle costs associated with utilizing a low price guarantee may prevent customers from invoking the guarantee. However, if the cost of switching firms exceeds the hassle cost, customers will choose to use a low price guarantee. In addition, the use of a price-beating policy will restore a firm's incentive to quote the lowest price, and prevent low price guarantees from negatively impacting competition. But if firms are able to match another firm's lowest effective price, the incentive to price low is eroded.

⁵⁵ Corts, *supra* note 2, at 291–92; Corts, *supra* note 20, at 420. A price-beating policy is a guarantee to charge a price lower than a lower available price.

⁵⁶ 10% of \$9 is \$0.90, therefore, the price-beating pledge would result in a price of \$8.10 (\$9 – \$0.90).

⁵⁷ The problem becomes much more complex when one considers that there are uninformed and informed customers. A firm will only choose to reduce its price if the revenue gained from informed customers exceeds the revenue lost from uninformed customers. In the example discussed above, if 50% of the customers are informed and 50% are not, the company would not choose to lower its price. The company would lose \$1 from sales to uninformed customers and gain only \$0.90 in sales from informed customers. Ultimately, the firm would lose \$0.10 per every two sales because the number of informed customers and uninformed customers is equal. Furthermore, a price-beating policy will likely raise the overall number of informed consumers, because if uninformed consumers will gain greater benefit from incurring costs, more people would be willing to incur those costs.

⁵⁸ Todd R. Kaplan, *Effective Price-Matching: A Comment*, 18 INT'L J. INDUS. ORG. 1291, 1293 (2000). An effective price match is a match to a firm's final quoted price including the institution of all price-matching and price-beating policies. However, price-matching an effective price might raise the level of hassle costs, and force the effective price-matching policy into disuse. *Id.*

C. Arguments that Suggest Price-Matching Has a Positive Effect on Competition

Low price guarantees could have a positive effect on competition because they can be a very aggressive form of competition. Low price guarantees are a way for firms to ensure that the lowest, most competitive price is the prevailing market price.⁵⁹ In fact, price-matching policies generally create this impression.⁶⁰ Firms will use the low price guarantees to ensure that they remain competitive, and help drive down supra-competitive prices to competitive ones.⁶¹

Another argument depends on the fact that all firms do not face the same costs.⁶² Some firms will have high costs and other firms will have lower costs. A firm's optimal price depends on its cost, so high cost firms will necessarily have a higher optimal price. Therefore, high price firms will not want to price match low price firms because the price, which they match, will likely be sub-optimal.⁶³ Furthermore, obtaining price information is costly for consumers.⁶⁴ Therefore, in many cases it is difficult for consumers to ascertain which firm actually has the lowest prices. A low price guarantee serves as a signal to consumers that the firm charges low prices because firms with high costs and high prices will be unwilling to price match. Low price guarantees thus reduce the transaction costs of determining which stores price low and informed consumers will ensure that only low price firms institute price-matching policies.⁶⁵

⁵⁹ See Hess & Gerstner, *supra* note 2, at 305.

⁶⁰ Moorthy & Winter, *supra* note 20, at 2–3; Hviid & Shaffer, *supra* note 2, at 490; Hess & Gerstner, *supra* note 2, at 305; see Arbatskaya et al., *supra* note 2, at 124 (noting price guarantees give consumers a false sense of security); Belton, *supra* note 40, at 401 (noting consumers will often view price guarantees as the same thing as the lowest price).

⁶¹ For a discussion about how price cutting will drive down prices to the competitive level, see *supra* Part III.A.

⁶² Moorthy & Winter, *supra* note 20, at 3; cf. Belton, *supra* note 40, at 414.

⁶³ Moorthy & Winter, *supra* note 20, at 3.

⁶⁴ *Id.* Moorthy and Winter maintain that “These costs, which vary across consumers, are interpreted very generally as the costs of obtaining, organizing and memorizing information on the prices of hundreds of products offered at different retailers.” *Id.*

⁶⁵ *Id.* at 3 (“The signal is credible because of the vigilance of the low time-cost consumers, the consumers who are directly informed about prices.”).

D. Empirical Evidence of the Effects of Low Price Guarantees

There have been very few empirical studies done on the competitive impact of low price guarantees.⁶⁶ Most of the work done to determine whether low price guarantees have a negative impact on competition has been theoretical.⁶⁷ Those studies that have been done have yielded mixed results.⁶⁸ At least one laboratory experiment has concluded that price-matching policies have a negative impact on competition.⁶⁹

A price-matching policy will probably have varying effects depending on the individual characteristics of an industry and individual markets. Some characteristics that might affect the ability for price-matching guarantees to be anti-competitive are the stratification of individual firms' costs,⁷⁰ the hassle costs,⁷¹ the switching costs,⁷² the potential savings from obtaining the lowest price,⁷³ and the cost of becoming informed.⁷⁴

⁶⁶ Enrique Fatás & Juan A. Mañez, *Are Low-Price Compromises Collusion Guarantees? An Experimental Test of Price Matching Policies 3* (2002) (working paper, Laboratory for Research in Experimental Economics), available at <http://www.uv.es/lineex/pdf/3602.pdf>.

⁶⁷ *Id.*

⁶⁸ *Id.* For an empirical study finding that low price guarantees resulted in supra-competitive prices, see Hess & Gerstner, *supra* note 2. Hess and Gerstner evaluated the effect a price-matching guarantee given by a single supermarket had on prices. They concluded that the price-matching guarantee was effective in avoiding the downward pressure of price and found no evidence of a price war. *Id.* at 312. For a study finding that low price guarantees do not have an effect on prices, see Arbatskaya et al., *supra* note 2, at 134 (concluding that price-matching guarantees in the tire market did not have a significant effect on price).

There are at least two possible explanations for the lack of empirical evidence of the effect price-matching has on competition. First, because sellers are probably aware of any positive effect of these policies, they will attempt to hide this fact from buyers and antitrust authorities. Second, the effects of price-matching will be difficult to examine and prove. It is hard to determine what the price would be without price-matching, especially since price-matching policies can lead to stable prices. See Fatás & Mañez, *supra* note 66, at 4.

⁶⁹ See Fatás & Mañez, *supra* note 66, at 4. Fatás and Mañez set up three games for participants to play. Treatment I was a control game to compare to the results in the other two, and price-matching was not considered. In Treatment II price-matching was a given; players were asked to quote prices each turn and automatically had a price-matching policy instituted. In Treatment III participants had the choice of whether or not to institute a price-matching guarantee. Fatás and Mañez found that the prices resulting from Treatments II & III converged toward the collusive equilibrium price, even though it occurred more quickly in Treatment II. *Id.* at 5.

⁷⁰ See *supra* Part III.C. The more likely it is that firms will have marked differences in their cost of production, the less likely it is that price-matching policies will have a negative impact on competition; Edlin, *supra* note 2, at 544-45; Moorthy & Winter, *supra* note 20, at 3.

⁷¹ See *supra* Part III.B. Firms can attempt to lower hassle costs, or hassle costs may be reduced by the nature of the industry. For example, the electronics marketplace reduces the hassle costs consumers face in searching and redeeming a matching offer.

Because the anti-competitive effects of low price guarantees are hard to detect and will vary depending on the nature of the market and industry, recourse to existing law is inappropriate. The courts are even less adequate at assessing the anti-competitive effects than economists. Therefore, the decision of whether to restrict the use of price-matching policies should be left to the legislature.

IV. THE APPLICATION OF ANTITRUST LAWS TO LOW PRICE GUARANTEES

Antitrust laws are the traditional tools used to curtail practices that result in a noncompetitive outcome.⁷⁵ Several scholars have argued that resorting to these laws is appropriate to put an end to the use of low price guarantees.⁷⁶ This Part will argue that resorting to the antitrust laws is inappropriate because the guarantees do not fall within the proscriptions of the relevant acts. In this Part it will be assumed that low price guarantees have an anti-competitive outcome, which is not necessarily the case.⁷⁷ Part IV.A will discuss the application of section one of the Sherman Act⁷⁸ to low price guarantees, and Part IV.B will cover the application of section 2(a) of the Robinson-Patman Act⁷⁹ to low price guarantees.⁸⁰

⁷² See *supra* Part III.B. Switching costs are more likely to be affected by the nature of the market in industry than by actions of individual firms. The retail market is likely to have low switching costs especially when it is concentrated around a shopping area and firms are close together. In contrast, other industries such as financial advising will have relatively large switching costs because of the relationship that develops between customers and their advisor.

⁷³ Small items such as compact disks will likely not create large savings per purchase, however, when shopping for a car, the difference in price could be greater than \$1000. The difference in savings is a positive incentive for a consumer that will make it more likely he or she will incur search costs.

⁷⁴ See *supra* Part III.B–C.

⁷⁵ See *Gordon v. N.Y. Stock Exch., Inc.*, 422 U.S. 659, 689 (1975) (“[T]he sole aim of antitrust legislation is to protect competition”); Edlin, *supra* note 2, at 532 (“Antitrust is the traditional bulwark against such noncompetitive outcomes.”).

⁷⁶ E.g., Edlin, *supra* note 2; Baker, *supra* note 5; Sargent, *supra* note 5.

⁷⁷ See discussion *supra* Part III.

⁷⁸ 15 U.S.C. § 1 (2000).

⁷⁹ 15 U.S.C. § 13(a) (2000).

⁸⁰ The discussion of these two sections of antitrust law should not be interpreted as excluding the possibility of the applicability of other antitrust laws to low price guarantees. For example, section 5 of the Federal Trade Commission Act declares that “[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are . . . unlawful.” 15 U.S.C. § 45(a)(1) (2000). Subsection (a)(2) empowers the Federal Trade Commission to enforce this provision. 15 U.S.C. § 45 (a)(2) (2000). These two

A. *Application of the Sherman Act to Low Price Guarantees*

This Part will discuss the possibility of curtailing the use of low price guarantees through section one of the Sherman Act. First, this Part will discuss the requirements for establishing a violation of section 1 of the Sherman Act. It will then be argued that in most cases low price guarantees do not violate the Sherman Act.

1. *Requirements to Establish Liability Under the Sherman Act*

Section one of the Sherman Act makes all combinations in restraint of competition illegal.⁸¹ Because it is assumed that low price guarantees are anti-competitive and in restraint of trade, this Part will focus on the requirement of a combination or conspiracy to establish liability under the Sherman Act. This Part will explore the requirement of an agreement, the possibility of using a firm's policy as circumstantial evidence of an agreement, and the use of facilitating practices.

Price-fixing under the Sherman Act is per se illegal.⁸² To establish a violation under section one of the Sherman Act there must be an agreement.⁸³ There is no requirement of a formal agreement between two firms, but there must be some agreement for a section one violation of the Sherman Act to occur.⁸⁴

Direct proof of an agreement is not required to establish liability under the Sherman Act.⁸⁵ The plaintiff can show that a conspiracy existed by proving there

antitrust sections were chosen because they seemed the most readily applicable to low price guarantees.

⁸¹ 15 U.S.C. § 1 (2000) ("Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is hereby declared to be illegal.").

⁸² See, e.g., *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) (holding horizontal price-fixing is per se illegal); *Dr. Miles Med. Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 408 (1911) (holding vertical price-fixing per se illegal).

⁸³ HERBERT HOVENKAMP, *FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE* § 4.4 (2d ed. 1999) ("Many Sherman § 1 decisions hold that the statute requires an explicit agreement . . .").

⁸⁴ *Am. Tobacco Co. v. United States*, 328 U.S. 781, 809–10 (1946) ("The essential combination or conspiracy in violation of the Sherman Act may be found in a course of dealing or other circumstances as well as in an exchange of words."); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 226 (1939) ("It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it."); see also HOVENKAMP, *supra* note 83, § 4.6a ("[T]he agreement need not be 'formal,' in the sense of involving discrete, identifiable acts of offer and acceptance.").

⁸⁵ *First Nat'l Bank of Ariz. v. Cities Serv. Co.*, 391 U.S. 253 (1968); *Theatre Enters., Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537 (1954); see also HOVENKAMP, *supra* note 83, §§ 4.4–4.5.

was opportunity to collude and that the defendant's actions were rational only if the other parties to the alleged conspiracy would follow suit.⁸⁶ Liability can also be established by proving that an agreement between firms that constitutes a facilitating practice.⁸⁷

2. *Low Price Guarantees Do Not Violate the Sherman Act*

If a low price guarantee was instituted as part of an agreement for price fixing, it would violate section one of the Sherman Act.⁸⁸ Furthermore, if there was an agreement between firms to institute low price guarantees absent an agreement to fix prices, it would also violate section one of the Sherman Act.⁸⁹ However, this likely would not sufficiently deter to the use of low price guarantees because firms have considerable incentive to institute these policies unilaterally.

The use of a low price guarantee by a firm would not be circumstantial evidence of agreement. For a policy to be circumstantial evidence of a conspiracy, it must only make sense to use it if other firms use it as well.⁹⁰ Low price guarantees make sense regardless of whether firms institute the same policy, because they allow firms to discriminate between informed and uninformed customers.⁹¹ The ability to discriminate between informed and uninformed customers will allow the firm to charge competitive prices to one class of customers and supra-competitive prices to another class of customers, enabling them to capture some monopolist profit.⁹² Therefore, the use of a low price guarantee would not serve as circumstantial evidence of a conspiracy. Moreover, it is likely firms will not make agreements to fix prices or institute low price guarantees. The same result would likely be achieved by acting unilaterally, and antitrust liability could be avoided altogether. Therefore, low price guarantees do not violate section one of the Sherman Act.

⁸⁶ See *Interstate Circuit, Inc.*, 306 U.S. at 222–27; HOVENKAMP, *supra* note 83, § 4.5.

⁸⁷ HOVENKAMP, *supra* note 83, § 4.6b (defining facilitating practices as “certain practices that will make collusion easier); see *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (condemning the elimination of short-term credit, because it made prices easier to monitor); *Sugar Inst., Inc. v. United States*, 297 U.S. 553 (1936) (condemning trade association’s requirement of posting prices before sale and prevented deviation).

⁸⁸ See *supra* notes 82–84 and accompanying text.

⁸⁹ See *supra* notes 82–84 and accompanying text.

⁹⁰ See *supra* note 86 and accompanying text.

⁹¹ See *supra* notes 40–44 and accompanying text.

⁹² See *supra* notes 40–44 and accompanying text.

B. *Application of the Robinson-Patman Act to Low Price Guarantees*

This Part explores the possibility of curtailing the use of low price guarantees through the use of section 2(a) of the Robinson-Patman Act.⁹³ First, the general requirements to establish liability under the Robinson-Patman Act will be discussed. Then this Note will argue that low price guarantees do not violate the Robinson-Patman Act.

1. *Requirements to Establish Liability Under the Robinson-Patman Act*

The Robinson-Patman Act proscribes price discrimination in some circumstances.⁹⁴ Many states have similar statutes forbidding price discrimination,⁹⁵ but those statutes are beyond the scope of this Note. This Part

⁹³ 15 U.S.C. § 13(a) (2000).

⁹⁴ *Id.* It states in pertinent part:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them

Id.

⁹⁵ See, e.g., ARK. CODE ANN. § 4-75-207 (Michie 1987) (forbidding locality discrimination); ARK. CODE ANN. § 4-75-501 (Michie 1987) (forbidding price and locality discrimination for manufactured products, coal, oil, or dressed beef); CAL. BUS. & PROF. CODE § 17040 (West 1997) (forbidding locality discrimination); COLO. REV. STAT. § 6-2-103 (2002) (forbidding locality discrimination); CONN. GEN. STAT. § 35-45 (2003) (forbidding price discrimination); DEL. CODE ANN. tit. 6, § 2504 (2002) (forbidding locality discrimination); FLA. STAT. ch. 540.01 (2002) (forbidding locality discrimination); HAW. REV. STAT. § 481-1 (2003) (forbidding locality discrimination); IDAHO CODE § 48-202 (Michie 2002) (forbidding locality discrimination); IOWA CODE § 551.1 (2002) (forbidding locality discrimination); KAN. STAT. ANN. § 50-149 (2001) (forbidding locality discrimination); KY. REV. STAT. ANN. § 365.020 (Michie 2002) (forbidding locality discrimination); MINN. STAT. § 325D.03 (2002) (forbidding locality discrimination); MISS. CODE ANN. § 75-21-3(d) (2002) (forbidding locality discrimination); MONT. CODE ANN. § 30-14-207 (2002) (forbidding locality discrimination); NEB. REV. STAT. § 59-501 (2002) (forbidding locality discrimination); N.M. STAT. ANN. § 57-14-3 (Michie 2002) (forbidding price and locality discrimination); N.D. CENT. CODE § 51-09-01 (2002) (forbidding locality discrimination); OKLA. CONST. art. IX, § 45 (forbidding locality discrimination); OKLA. STAT. tit. 79, § 204 (2003) (forbidding locality discrimination); OR. REV. STAT. § 646.040 (2001) (forbidding price and locality discrimination); S.D. CODIFIED LAWS § 37-1-4 (Michie 2002) (forbidding locality discrimination); UTAH CODE ANN. § 13-5-3

will discuss the general requirements to establish liability under section 2(a) of the Robinson-Patman Act, and then discuss the statutory defense of “meeting competition.”⁹⁶

In *Texaco, Inc. v. Hasbrouck*⁹⁷ the Supreme Court held that to establish liability under the Robinson-Patman Act, plaintiffs have to prove four facts: first, that the sales were made in interstate commerce; second, that the commodities were of the same grade and quality; third, that price discrimination existed; and fourth, that the discrimination had a prohibited effect on competition.⁹⁸

The Court explained more fully the interstate commerce requirement of the Robinson-Patman Act in *Gulf Oil Corp. v. Copp Paving Co.*⁹⁹ *Copp Paving* involved the asphaltic concrete market in the southern half of Los Angeles County.¹⁰⁰ All of the sales were entirely intrastate.¹⁰¹ The Court held that to satisfy the jurisdictional requirements of the Robinson-Patman Act at least one of the alleged discriminatory sales must have been made in interstate commerce.¹⁰² It was not enough that the asphaltic concrete was used in the construction of interstate highways, because the commerce requirements of the Robinson-Patman Act are narrower than the requirements for the Sherman Act.¹⁰³ *Copp* has been

(2003) (forbidding price discrimination); VA. CODE ANN. § 59.1-9.7 (Michie 2002) (forbidding price discrimination); WIS. STAT. § 133.04 (2002) (forbidding price discrimination); WYO. STAT. ANN. § 40-4-101(a)(ii) (Michie 2002) (forbidding locality discrimination). For a brief discussion of these laws and other unfair trade practice laws, see generally Penelope A. Prevolos, *Unfair Practices & Predatory Pricing*, 1355 PLI/CORP 229 (2003). Laws that forbid locality discrimination forbid firms from charging different prices in different localities within a state, as opposed to general price discrimination laws that forbid charging different prices to different consumers.

⁹⁶ 15 U.S.C. § 13(b) (2000). It states in pertinent part:

Provided, however, That nothing 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.

Id.

⁹⁷ 496 U.S. 543 (1990).

⁹⁸ *Id.* at 556; see Robert M. Klein, *The Robinson-Patman Act: Jurisdictional Aspects and Elements*, 59 ANTITRUST L.J. 777, 777 (1990) (stating that the other requirements to establish liability under the Robinson-Patman Act include a cognizable difference in price and a sale of commodities that occurred reasonably close in time).

⁹⁹ 419 U.S. 186 (1974).

¹⁰⁰ *Id.* at 189.

¹⁰¹ *Id.* at 191–92.

¹⁰² *Id.* at 195.

¹⁰³ *Id.* at 196–200. First, the Court refused to extend the “in commerce” requirement to things that have a nexus with the channels of interstate commerce, because it would result in almost limitless jurisdiction. *Id.* at 198. Second, the Court also stated that the more liberal test of

consistently followed by the lower courts.¹⁰⁴ However, this is not a bright-line test, and even though a sale was technically intrastate in nature, if it is in the flow of commerce it may still be found to meet the requirements of the Act.¹⁰⁵

To establish liability under the Robinson-Patman Act, a price discrimination must be proven. “[A] price discrimination within the meaning of [Section 2(a) of the Robinson-Patman Act] is merely a price difference.”¹⁰⁶ Therefore, charging the same price is never a price discrimination.¹⁰⁷ Furthermore, the price discrimination must be made between commodities of the same grade and quality.¹⁰⁸

Even if a seller violates the Robinson-Patman Act, he has several statutory defenses available to him.¹⁰⁹ In *Standard Oil Co. v. FTC*¹¹⁰ the Supreme Court

only requiring a substantial effect on interstate commerce was not available under the Robinson-Patman Act because of the different language found in the Sherman and Robinson-Patman Acts. *Id.* at 199–201.

¹⁰⁴ See, e.g., *Misco, Inc. v. United States Steel Corp.*, 784 F.2d 198, 202 (6th Cir. 1986); *Black Gold, Ltd. v. Rockwool Indus., Inc.*, 729 F.2d 676, 683 (10th Cir. 1984); *Delta Marina, Inc. v. Plaquemine Oil Sales, Inc.*, 644 F.2d 455, 457 (5th Cir. 1981).

¹⁰⁵ *Standard Oil Co. v. FTC*, 340 U.S. 231, 236–38 (1951) (holding that even though sales were made at a distribution site within the state—where the demands were constant and could accurately be estimated—the sales did not lose their interstate character); *Zoslaw v. MCA Distrib. Corp.*, 693 F.2d 870, 879 (9th Cir. 1982) (holding that storage of interstate goods in an intrastate warehouse does not break the flow of commerce).

¹⁰⁶ *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 558 (1990) (quoting *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960)); see also *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*, 842 F.2d 578, 584 (2d Cir. 1987) (“For the purposes of the act, price discrimination means nothing more than a difference in price charged to different purchasers or customers of the discriminating seller for products of like grade and quality.”).

¹⁰⁷ See *Verizon N.J., Inc. v. Ntegrity Telecontent Servs., Inc.*, 219 F. Supp. 2d 616, 630 (D.N.J. 2002); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 134 F.3d 557, 570 (3d Cir. 1998); *World-Wide Volkswagen Corp. v. Autobahn Motors Co.*, 1980–81 Trade Cas. (CCH) ¶ 63,601 (S.D.N.Y. 1980).

¹⁰⁸ See, e.g., *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1407–08 (7th Cir. 1989) (finding that specials on eggs of different grades and quality did not violate the act).

¹⁰⁹ The Robinson-Patman Act includes three available defenses: a cost-justification defense, 5 U.S.C. § 13(a) (2000) (“[N]othing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered . . .”); a changing-conditions defense, *id.* (“[N]othing herein contained shall prevent price changes from time to time where in response to changing-conditions affecting the market for or the marketability of the goods concerned . . .”); and a meeting-competition defense, *id.* § 13(b). This Note will discuss only the third statutory defense, the meeting-competition defense, because it will be available in all circumstances to a seller instituting a low price guarantee; in some circumstances the other defenses may be available. The meeting competition defense provides as follows:

established that the meeting-competition defense found in Section 2(b) of the Robinson-Patman Act is available as a defense to a violation of Section 2(a) of the Act.¹¹¹ The Court maintained that the defense was absolute even if it tended to injure competition.¹¹² The test is whether the seller is trying to meet the price of a competitor in good faith.¹¹³ However, if the seller does not act in good faith and intentionally beats the price of a competitor, the defense is not available.¹¹⁴

2. Low Price Guarantees do not Violate the Robinson-Patman Act

This Part will argue that low price guarantees do not violate the Robinson-Patman Act. First, in many circumstances, sellers who have low price guarantees will not satisfy the “in commerce” requirement of the Act. Second, low price guarantees are not exclusively used on commodities, and when not used with commodities, they do not fall within the ambit of the Act. Third, low price guarantees are not price discriminations within the meaning of the Act. Finally, even if low price guarantees do otherwise violate the Act, sellers will be able to satisfy the requirements of the meeting-competition defense. Therefore, low price guarantees do not violate the Robinson-Patman Act.

[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.

Id.

¹¹⁰ 340 U.S. 231 (1951).

¹¹¹ *Id.* at 241.

¹¹² *Id.* at 250–51. *But see* Edlin, *supra* note 2, at 563–65 (arguing that the defense should not be available when there is primary line injury as opposed to secondary line injury).

¹¹³ *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 438 (1983) (“The seller must show that under the circumstances it was reasonable to believe that the quoted price or a lower one was available to the favored purchaser or purchasers from the seller’s competitors.”); *United States v. United States Gypsum Co.*, 438 U.S. 422, 451 (1978) (The Court held that a meeting-competition defense “ ‘at least requires the seller, who has knowingly discriminated in price, to show the existence of facts which would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor.’ ”) (quoting *FTC v. A.E. Staley Mfg. Co.*, 324 U.S. 746, 759–60 (1945)). The seller does not have to actually meet the price, but can beat the price as long as in good faith he only intended to meet it. *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69, 83 (1979) (“Since good faith, rather than absolute certainty, is the touchstone of the meeting-competition defense, a seller can assert the defense even if it has unknowingly made a bid that in fact not only met but beat his competition.”).

¹¹⁴ *Falls City Indus., Inc.*, 460 U.S. at 446 (“[T]he lower price must be calculated and offered in good faith to ‘meet not beat’ the competitor’s low price.”); *see also* *Great Atl. & Pac. Tea Co.*, 440 U.S. at 83; *United States Gypsum Co.*, 438 U.S. at 451; *A.E. Staley Mfg. Co.*, 324 U.S. at 759–60.

In many circumstances firms that offer low price guarantees will not meet the “in commerce” requirement of the Robinson-Patman Act.¹¹⁵ This is particularly true of retailers.¹¹⁶ However, it will depend on the nature of each business whether or not the low price guarantee can even be reached by the Robinson-Patman Act. While in some circumstances this requirement could be satisfied, there are many cases in which it could not be met. Furthermore, to fall within the restrictions of the Act the price discrimination must be made on a commodity.¹¹⁷ Again, in some circumstances this requirement will be met, but not in all.

A low price guarantee is not a price discrimination within the meaning of the Act. Under the Robinson-Patman Act a price discrimination is simply a price difference.¹¹⁸ If the seller offers the same price it will not violate the Robinson-Patman Act.¹¹⁹ When a seller offers a given price with a low price guarantee, he is effectively offering the same price to all customers. Each customer faces the same price—either the quoted price or the lowest price available in the market. As long as the price is effectively available to all customers it is not a price discrimination.¹²⁰ In many circumstances low price guarantees are available to all

¹¹⁵ See 15 U.S.C. § 13(a) (2000); *supra* notes 99–106 and accompanying text.

¹¹⁶ See *Walker Oil Co. v. Hudson Oil Co.*, 414 F.2d 588, 589 (5th Cir. 1969); *Cliff Food Stores, Inc. v. Kroger, Inc.*, 417 F.2d 203, 208 (5th Cir. 1969); see also Sherie L. Coons, Note, *Robinson-Patman Act Jurisdiction Over Retail Sales: A Reexamination of the Cases and the Case for Reform*, 21 J. CORP. L. 541, 556–57 (1996) (Coons notes that “[t]he majority rule . . . holds that the Robinson-Patman Act normally does not have jurisdiction over intrastate retail sales of interstate commodities.”). For a good argument that this should not be the case, see generally *id.*

¹¹⁷ See, e.g., *Metro Communications Co. v. Ameritech Mobile Communications, Inc.*, 984 F.2d 739 (6th Cir. 1993) (holding cellular services are not a commodity and therefore not covered by the Act).

¹¹⁸ *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 558 (1990).

¹¹⁹ See, e.g., *Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557, 571 (3d Cir. 1998).

¹²⁰ See *FTC v. Morton Salt Co.*, 334 U.S. 37, 42 (1948) (finding that the discounts on salt were theoretically available to all consumers, but functionally were not available and therefore were price discrimination); *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 326 (5th Cir. 1998) (“If the challenged lower price was in fact—and not merely theoretically—made available to the allegedly disfavored purchasers, the seller cannot be held liable under section 2(a).”); *Comcoa, Inc. v. NEC Tel., Inc.*, 931 F.2d 655, 664 (10th Cir. 1991) (upholding a jury instruction that said there was no price discrimination if the discounts were functionally available to all customers); *Bouldis v. United States Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983) (holding that the conditioning of prices on the quantity does not violate the Robinson-Patman Act if the prices are equally and functionally available to all purchasers); *FLM Collision Parts, Inc. v. Ford Motor Co.*, 543 F.2d 1019, 1024–25 (2d Cir. 1976) (finding that when Ford charged different prices when a purchaser was acting as a wholesaler as opposed to acting as an independent body shop, there was no price discrimination because Ford charged different prices for different functions in an even-handed manner).

consumers on equal terms. They must search for a lower price and bring it to the guarantor's attention. Most of the time, prices on products are readily available to the public, and therefore everyone has an effective and functional opportunity at the discounted price. As a result, low price guarantees are not price discrimination within the meaning of the Robinson-Patman Act.

Finally, low price guarantees do not violate the Robinson-Patman Act because a seller can establish the meeting-competition defense.¹²¹ A seller will easily be able to satisfy the good faith requirement of meeting the competition of a competitor.¹²² By requiring the buyer to bring the competitor's price to its attention and verifying it, the seller will usually in fact meet the competitor's price. Furthermore, there is no requirement that the seller not injure competition by meeting the competition.¹²³

Because a low price guarantee is not price discrimination it does not violate the Robinson-Patman Act. In addition, many sellers will not fall within the jurisdiction of the Act because they will not be engaged "in commerce" or in the selling of a commodity. Finally, many sellers will be able to establish the meeting-competition defense.

V. PROPOSED LEGISLATIVE SOLUTIONS TO LOW PRICE GUARANTEES

This Part will propose possible legislative solutions to the potential problem caused by low price guarantees.¹²⁴ Any congressional action will depend on the determination by Congress that low price guarantees are in fact harmful to competition. Three possible solutions will be discussed: first, Congress could outlaw the use of low price guarantees; second, Congress could set up a regime similar to the antitrust laws and allow courts to determine whether particular low price guarantees have a negative impact on competition; and third, Congress could limit the nature of low price guarantees by requiring firms to lower the price for all consumers if they match it for one consumer and allow the antitrust laws to augment the limitation in the face of tacit collusion. Ultimately, this Note will conclude that the third alternative is the most appropriate course.

Congress should not completely outlaw the use of low price guarantees. While this solution would destroy the negative impact low price guarantees have on competition, it would also eliminate any potential benefits. Firms would no longer be able to use low price guarantees as a valuable signaling tool.¹²⁵ In many

¹²¹ See *supra* notes 109–14 and accompanying text. However, this defense would not be available to a seller who guarantees to beat the price of their competitors as opposed to just meeting the price of their competitors.

¹²² See *supra* notes 112–14 and accompanying text.

¹²³ *Id.*

¹²⁴ See *supra* Part III.A.

¹²⁵ See *supra* note 65 and accompanying text.

industries this is a highly valuable tool for signaling low prices to consumers. Take, for example, an electronic and media retail store, which sells a variety of electronics, CDs, movies, videogames, and software. It would take an amazing amount of time for a consumer to compare prices on every product, and in many cases they may be unwilling to do so.¹²⁶

Another possible solution is to set up a regime similar to the antitrust laws. Congress could outlaw all low price guarantees that have a negative impact on competition. In this case, the courts would make a determination of whether a particular low price guarantee was anti-competitive. However, Congress would be ill-advised to adopt such a regime. The anti-competitiveness of low price guarantees is anything but certain.¹²⁷ Not only is it difficult to determine the effect of low price guarantees theoretically, it is also difficult to obtain empirical evidence of their effect.¹²⁸ Because of the difficulty of ascertaining the effects of low price guarantees, the courts are not the appropriate place to make this determination. Courts are subject to considerable time constraints and have limited resources. Furthermore, the courts are legal experts and not economic experts. Therefore, Congress should ultimately make the determination of whether low price guarantees have a negative impact on competition.

Congress could limit the nature of low price guarantees. Firms would still be able to offer low price guarantees, however, as soon as one customer exercised the offer, the firm would be required to lower the price for all consumers.¹²⁹ This would prevent firms from price discriminating between uninformed and informed consumers.¹³⁰ Furthermore, any unilateral attempts to raise prices would be prevented because the low price guarantee would reduce the price to the lowest market price.¹³¹ Firms still would be able to collude tacitly or explicitly to artificially inflate prices, but because of the inability to unilaterally raise prices, prices could only be raised through collusion. The antitrust laws already outlaw this type of practice, and could be used to curtail any such abuses.¹³² Therefore,

¹²⁶ Cf. *supra* notes 50–54. Similar hassle costs would be associated with comparative shopping. The consumer would have to search out and discover each price, and then choose to shop at the store with the lowest prices. A consumer would only choose to comparative shop if his expected savings exceeded his perceived cost of finding the lowest prices.

¹²⁷ See generally *supra* Part III.

¹²⁸ See *supra* note 68.

¹²⁹ For example, if a firm with a low price guarantee was selling a widget for \$10 and a customer came in with a price from another firm of \$9, the price-matching firm would match the offer and instantaneously lower its price for all customers to \$9.

¹³⁰ See *supra* notes 40–44 and accompanying text.

¹³¹ If a firm raised its price from \$9 to \$10 while another firm was pricing at \$9, it would only take one consumer inducing the price-matching policy to reduce the price to \$9.

¹³² See *supra* Part IV.

Congress should adopt this legislative regime to prevent any anti-competitive effects of low price guarantees.

VI. CONCLUSION

Contrary to conventional wisdom, low price guarantees could have a negative impact on competition.¹³³ However, the impact of low price guarantees on competition is not clear, and they may also have positive effects on competition.¹³⁴ Section one of the Sherman Act does not proscribe low price guarantees absent an agreement between firms.¹³⁵ Because firms have incentives to institute low price guarantees unilaterally, the Sherman Act will not sufficiently curtail the use of low price guarantees.¹³⁶ Furthermore, low price guarantees do not violate the Robinson-Patman Act because they are not price discrimination within the meaning of the Act.¹³⁷ Even if low price guarantees fall within the ambit of the Robinson-Patman Act, sellers will be able to establish a meeting-competition defense to escape liability.¹³⁸ However, because of the potential for negative impact, Congress should assess the consequences of low price guarantees and should try to prevent the negative consequences, while at the same time preserving the positive effects.¹³⁹

¹³³ See *supra* note 2.

¹³⁴ See *supra* Part III.

¹³⁵ See *supra* Part IV.A.

¹³⁶ See *supra* Part IV.A.2.

¹³⁷ See *supra* notes 118–20 and accompanying text.

¹³⁸ See *supra* notes 121–23 and accompanying text.

¹³⁹ See *supra* Part V.

