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CAN SUBSIDIARIES BE “PURCHASERS” FROM THEIR PARENTS UNDER THE ROBINSON-PATMAN ACT? A PLEA FOR A CONSISTENT APPROACH

Should a parent corporation be allowed to discriminate in favor of its wholly-owned subsidiary? Courts have long grappled with this question when interpreting section 2(a) of the Robinson-Patman Act (the “Act”).¹ Section 2(a) prohibits price discrimination between “different purchasers.”² If the subsidiary corporation is a “different purchaser” when it purchases goods from its parent, then the parent violates the Robinson-Patman Act by discriminating in the subsidiary’s favor.

Many courts, when faced with this issue, have ruled that the parent and subsidiary are per se parts of a single entity. The Fifth Circuit was the first court to adopt this per se approach, in *Security Tire & Rubber Co. v. Gates Rubber Co.*³ The analysis in *Security Tire*, however, is flawed.⁴ These flaws make the court’s approach questionable. In reviewing the “different purchaser” issue, this Comment compares three closely related doctrines: The same seller doctrine, the indirect purchaser doctrine, and the intra-enterprise conspiracy doctrine. Comparison of the per se approach to the “different purchaser” analysis with the approach of the latter three doctrines will illustrate the inherent flaws of the per se approach.

Proponents of the per se test adopted in *Security Tire* have put forth a number of arguments to justify the test. The court in *Security Tire* attempted to justify its holding by claiming that the price of goods transferred between parent and subsidiary corporations has no economic significance.⁵ In a later case, another court rationalized the per se test by claiming that application of an alternative test would pro-

1. Robinson-Patman Act, 15 U.S.C. § 13(a) (1982) (original version at ch. 323, § 2, 38 Stat. 730, 730-31 (1914)).

2. The Act prohibits price discrimination only if such discrimination may substantially reduce competition. *Id.* Price discrimination is proven under Section 2 of the Act by showing that the seller charged one purchaser a higher price for like goods than charged one of the purchaser’s competitors. 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 154 (1971). The phrase “different purchasers” is contained in section 2(a) of the Robinson-Patman Act. 15 U.S.C. § 13(a) (1982).

3. 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979); *see infra* notes 20-22 and accompanying text.

4. *See infra* notes 82-96 and accompanying text.

5. *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

hibit parent corporations from providing services to its subsidiary.⁶ This Comment will show that these arguments do not put forth a valid justification for the *Security Tire* per se test.

A better approach would be to replace *Security Tire's* per se test with the "dominion and control" test used in applying other Robinson-Patman Act doctrines.⁷ Under this test a court would examine the economic reality underlying the parent-subsidiary relationship. This test should be adopted because it is consistent with other Robinson-Patman Act doctrines and it recognizes the significance of the price given to goods transferred between parent and subsidiary corporations. A failure to adopt this test would perpetuate legal form over economic substance.

I. BACKGROUND

A. *History of the Robinson-Patman Act*

In the years following World War I, large retail store chains began to act as wholesalers.⁸ These large chain stores were able to offer consumers lower prices through operational efficiencies by integration and their ability to demand price concessions from suppliers.⁹ As a result of lower prices, the market shares of the chain stores increased dramatically in the 1920's and 1930's.¹⁰ Chain stores increased their market shares at the expense of independent retailers.¹¹

The Clayton Act, enacted in 1914, afforded some protection to small retailers by prohibiting price discrimination.¹² However, a number of deficiencies in the Clayton Act allowed large chain stores to circumvent the price discrimination prohibition.¹³ In 1936, Congress

6. *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 220-21 (6th Cir. 1985) (2-1 decision).

7. The "dominion and control" test is used for both the same seller doctrine and the indirect purchaser doctrine. A court applying the "dominion and control" test would review the actual relationship between a parent corporation and its subsidiary to determine whether the two corporations are, in substance, one economic entity or two separate entities. See *infra* notes 71-78 and accompanying text.

8. C. EDWARDS, *THE PRICE DISCRIMINATION LAW* 8-9 (1959).

9. 3 E. KINTNER & J. BAUER, *FEDERAL ANTITRUST LAW* § 19.1 (1983).

10. See generally FTC FINAL REPORT ON THE CHAIN-STORE INVESTIGATION, reprinted in S. DOC. NO. 4, 74th Cong., 1st Sess. 24-28, 53, 60 (1935).

11. J. PALAMOUNTAIN, *THE POLITICS OF DISTRIBUTION* 12-13 (1955).

12. Clayton Act, ch. 323, § 2, 38 Stat. 730, 730-31 (1914) (current version at 15 U.S.C. § 13 (1982)).

13. For example, the Clayton Act permitted a seller to grant a purchaser a lower price if the purchaser performed some cost saving service for the seller or if it purchased larger quantities. The lower price granted to the purchaser, however, was not limited to the savings achieved by the purchaser's service. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir.), cert.

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moved to correct these deficiencies by enacting the Robinson-Patman Act.

B. Origin of the Relevant Doctrines

Section 2 of the Robinson-Patman Act authorizes an action for price discrimination upon a showing that the seller charged one purchaser a higher price for like goods than that charged a "different purchaser."¹⁴ Section 2 poses a number of issues concerning the significance of transfers between parent and subsidiary corporations.

These issues have led to the emergence of three separate doctrines: The different purchaser doctrine,¹⁵ the same seller doctrine,¹⁶ and the indirect purchaser doctrine.¹⁷ The same seller and indirect purchaser doctrines are discussed in this Comment because they are often analogized to the different purchaser doctrine. The intra-enterprise conspiracy doctrine under the Sherman Act¹⁸ is also examined because it has been frequently analogized to the different purchaser doctrine. This

denied, 308 U.S. 557 (1939). A purchaser who bought goods in larger quantities could demand a price break which represented more than the cost savings to the seller. Under the Robinson-Patman Act, price differentials are limited to the actual amount of cost savings to the seller. *See, e.g., American Can Co. v. Bruce's Juices, Inc.*, 187 F.2d 919 (5th Cir.), *modified*, 190 F.2d 73 (5th Cir.), *cert. dismissed*, 342 U.S. 875 (1951).

14. Section 2 of the Act provides that "[i]t 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" Robinson-Patman Act, 15 U.S.C. § 13(a) (1982) (original version at ch. 323, § 2, 38 Stat. 730, 730-31 (1914)) (emphasis added).

15. Section 2 prohibits price discrimination among "different purchasers." 15 U.S.C. § 13(a) (1982). Courts have construed this to require at least two purchasers. *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 964 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979). Under the different purchaser doctrine, a wholly-owned subsidiary which is a different entity is a "purchaser." If the subsidiary is a "purchaser," Section 2 prevents the parent corporation from favoring the subsidiary over other purchasers. *Security Tire* adopted a per se test that prevents subsidiaries from being "purchasers" from their parent corporations. *See infra* notes 19-31 and accompanying text.

16. Section 2 prohibits "any person" from engaging in price discrimination. 15 U.S.C. § 13(a) (1982). A plaintiff claiming price discrimination must show that he is an actual purchaser from the person charged with the discrimination. *Klein v. Lionel Corp.*, 237 F.2d 13, 15 (3d Cir. 1956). Under the same seller doctrine, sales from a wholly-owned subsidiary are sales from the parent if the parent retains sufficient control over the goods transferred to the subsidiary. *See infra* notes 32-36 and accompanying text.

17. Section 2 prohibits "indirect" price discrimination. 15 U.S.C. § 13(a) (1982). Under the indirect purchaser doctrine, sales by either an independent or wholly-owned intermediary corporation will be considered sales by the original seller if the original seller retains substantial control over the secondary sales price. The original seller must sell at the same price if the "purchasers" compete at the same level. *See infra* notes 37-39 and accompanying text.

18. Section 1 of the Sherman Act prohibits conspiracies in restraint of trade. Sherman Act, 15 U.S.C. § 1 (1982); *see infra* notes 40-50 and accompanying text.

Comment compares the analysis under these other doctrines to the different purchaser analysis to show that it would be logical to adopt the "dominion and control" test used in the same seller and indirect purchaser doctrine.

C. *Different Purchaser Doctrine*

The different purchaser problem arises when a corporation transfers goods to its subsidiary at a price below that available to others. An entity transferring goods to itself neither sells nor purchases.¹⁹ Thus, if a court determines that parent and subsidiary are the same entity, the Robinson-Patman Act does not apply. However, if the court says parent and subsidiary are different entities, then the subsidiary is a "different purchaser." The parent will then be liable under the Robinson-Patman Act for granting its subsidiary a more favorable price than the price charged to an unrelated purchaser.

The Fifth Circuit in *Security Tire & Rubber Co. v. Gates Rubber Co.*²⁰ was the first court to rule that, as a matter of law, a subsidiary cannot be a "different purchaser." Two other United States courts of appeals followed the *Security Tire* holding.²¹ Under these holdings, a parent corporation can never violate the Robinson-Patman Act by selling to its wholly-owned subsidiary; *Security Tire* permits the parent to freely discriminate between its subsidiary and other purchasers.²²

Before *Security Tire*, a number of federal district courts in other circuits developed different tests to determine whether subsidiary corporations should be considered different entities, and hence "different purchasers."²³ The court in *Danko v. Shell Oil Co.*²⁴ held that a subsidiary buying from its parent is always a "different purchaser" under the Act.²⁵ The court found that the parent's dominion and control

19. A sale is "[a] contract between *two parties* . . ." BLACK'S LAW DICTIONARY 1200 (5th ed. 1979) (emphasis added); see also *infra* note 62.

20. 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

21. *City of Mt. Pleasant v. Associated Elec. Coop.*, 838 F.2d 268 (8th Cir. 1988); *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214 (6th Cir. 1985) (2-1 decision). After the Fifth Circuit's split, the newly created Eleventh Circuit adopted the precedent set in *Security Tire* and other Fifth Circuit cases. See *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir. 1981) (en banc).

22. *Security Tire*, 598 F.2d at 962; *Russ' Kwik Car Wash*, 772 F.2d at 214; *City of Mt. Pleasant*, 838 F.2d at 268.

23. *Brown v. Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir. 1977); *Reines Distributions, Inc. v. Admiral Corp.*, 241 F. Supp. 814 (S.D.N.Y. 1964); *Danko v. Shell Oil Co.*, 115 F. Supp. 886 (E.D.N.Y. 1953).

24. *Danko*, 115 F. Supp. at 888.

25. *Id.*

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over its subsidiary was irrelevant to whether their relationship was that of vendor and purchaser.²⁶

The court in *Snyder v. Howard Johnson's Motor Lodges, Inc.*²⁷ adopted an approach based on passage of title. In *Snyder*, the court held that if a parent transfers title to the goods to its subsidiary, the subsidiary is a different purchaser.²⁸

Another alternative "different purchaser" test is the "dominion and control" test, adopted in *Reines Distributors, Inc. v. Admiral Corp.*²⁹ The "dominion and control" test focuses on who has dominion and control over goods.³⁰ If the parent retains dominion and control over the goods, even though physically transferred to the subsidiary, the subsidiary is not a purchaser. If the subsidiary obtains dominion and control over the goods transferred to it, however, then the subsidiary is a "purchaser" of the goods from its parent.³¹

26. The court stated that the fact that defendant may own and control the plaintiff's competitor "would not destroy the relationship of vendor and purchaser. In any event it is doubtful that such relationship, if discriminatory, would be permitted to accomplish such objective." *Id.* The opinion does not reveal whether the subsidiary in *Danko* was a legally separate corporation. Consequently, a determination cannot be made whether the court intended different purchaser status to be attached to a subsidiary which is not a legally separate corporation. Either approach directly contradicts *Security Tire*.

27. 412 F. Supp. 724 (S.D. Ill. 1976).

28. In *Snyder*, the plaintiff brought a Robinson-Patman action against a defendant who allegedly favored one of its divisions. No sale from one corporation to another occurred. The court granted the defendant's motion for summary judgment because the favored transfer was within the same corporation. The court held that "[f]or there to be a sale, title must clearly be transferred from seller to buyer." *Id.* at 731. The intra-corporate transfer in this case did not result in a transfer of title.

This test precludes the finding of different purchasers when the transfer is from one division to another division of the same corporation. No different purchaser exists in this situation because title is not transferred.

29. 241 F. Supp. 814 (S.D.N.Y. 1964). *Reines* involved a motion by an allegedly disfavored purchaser-plaintiff to declare a subsidiary of Admiral Corporation a purchaser under sections 2(a) and 2(e) of the Clayton Act. The court held that a question of fact existed as to whether the subsidiary was a purchaser within the meaning of the Robinson-Patman Act. *Id.* at 815.

30. *Id.*

31. *Id.* Under the *Reines* decision, the parent corporation has dominion and control of goods if the parent sets the pricing and distribution policies of its subsidiary. The *Reines* court relied on *Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957), a same seller case. See *infra* note 38.

In *Brown v. Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir. 1977), however, the court examined the total relationship between the parent and subsidiary. *Id.* at 972. The court determined that even though the subsidiary set its own pricing and distribution policies, the parent and subsidiary were a single economic entity. *Id.* In *Brown*, rather than being parent and subsidiary corporations, the stock of the two corporations was actually owned by a single individual. *Id.* at 970. Both corporations used the same employees, office space, records; and accounting and payroll systems. *Id.* at 971. For further analysis of the different aspects of the "dominion and control" test, see *infra* notes 71-78 and accompanying text.

D. Same Seller Doctrine

The different purchaser doctrine is often compared to the same seller doctrine. The Robinson-Patman Act only prohibits price discrimination by the same seller.³² A purchaser buying from a selling corporation may be required to pay a different price than a different purchaser buying from the selling corporation's subsidiary.³³ If the selling corporation and its subsidiary are the "same seller," they have engaged in price discrimination prohibited by the Robinson-Patman Act.³⁴

A court applying the same seller doctrine, like one applying the different purchaser doctrine, must determine whether a parent and its subsidiary corporation are distinct entities for purposes of the Robinson-Patman Act.³⁵ Unlike the different purchaser doctrine, however, under the same seller doctrine, courts unanimously hold that a parent and subsidiary are the same seller if the parent exercises dominion and control over the pricing and distribution policies of its subsidiary.³⁶

32. Robinson-Patman Act, 15 U.S.C. § 13(a) (1982) (original version at ch. 323, § 2, 38 Stat. 730, 730-31 (1914)). See *supra* note 16.

33. For example, Parent corporation (*P*) sells a good to *X* for 20 cents. *P*'s wholly-owned Subsidiary (*S*) sells the same type of good to a different purchaser at 25 cents. Are *P* and *S* the same seller under the Act?

34. 3 E. KINTNER & J. BAUER, *supra* note 9, at § 21.16.

35. In the different purchaser setting, a defendant will deny that the subsidiary and parent are different economic entities. If the defendant is successful in this argument, the plaintiff will be unsuccessful in claiming that the subsidiary is a "different purchaser." However, under the same seller doctrine, a defendant will claim that the parent and subsidiary are different economic entities. If the defendant is successful in this argument, the plaintiff will be unsuccessful in claiming that the subsidiary's sales were actually sales made by the parent.

36. See, e.g., *ACME Refrigeration, Inc. v. Whirlpool Corp.*, 785 F.2d 1240, 1243 (5th Cir.), *cert. denied*, 107 S. Ct. 171 (1986); *Miles v. Coca-Cola Bottling Co.*, 360 F. Supp. 869, 870-71 (E.D. Wis. 1973); *Baim & Blank Inc. v. Philco Corp.*, 148 F. Supp. 541, 543-44 (E.D.N.Y. 1957).

The leading same seller case is *Baim & Blank*, 148 F. Supp. at 541. In *Baim & Blank*, Baim brought suit against Philco Corporation and its wholly-owned subsidiary, Philco Distributors, Inc.. Baim alleged that the defendants had discriminated against Baim by selling to Baim's competitor at prices lower than those prices charged to Baim. *Id.* at 542. In fact, Baim never purchased goods directly from Philco, but had always dealt with Philco's subsidiary. Baim's competitor had purchased goods directly from Philco. Philco and its subsidiary filed a motion for summary judgment claiming that the sales alleged by Baim were not made by the same seller. Baim responded by alleging, "Philco so dominated and regulated the policies of its wholly owned subsidiary, Philco Distributors, that the subsidiary is merely an instrumentality or alter ego of its parent . . ." *Id.* at 543. The court granted the motion for summary judgment because both Philco and Philco Distributors set their own prices independently. The court held this factor decisive in concluding that Philco and its subsidiary were different sellers. *Id.* at 544.

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E. Indirect Purchaser Doctrine

The different purchaser doctrine is also compared to the indirect purchaser doctrine. The Robinson-Patman Act prohibits price discrimination among both direct and indirect purchasers. In an indirect purchaser case, a court must determine whether a purchaser of goods through an intermediary³⁷ is really a purchaser from the original seller.³⁸ Courts will determine that an ultimate purchaser of goods through an intermediary has "purchased" goods from the original seller if the original seller retains sufficient control over the intermediary's sales to the ultimate purchaser.³⁹ Courts thus apply the same

37. Note the distinction between the same seller and indirect purchaser doctrines. In the same seller context, the plaintiff purchases from a wholly-owned subsidiary. In the indirect purchaser doctrine, the plaintiff purchases from an intermediary which is probably not owned by the original selling corporation. Further, under the same seller doctrine, the goods which the plaintiff purchases may originate with the subsidiary rather than the parent who is accused of discrimination. Under the indirect purchaser doctrine, the goods which the plaintiff purchases originate with the corporation accused of discrimination.

Unlike the different purchaser doctrine, the indirect purchaser doctrine typically involves an independent wholesaler rather than a wholly-owned subsidiary. *See, e.g.,* FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968).

In discussing the indirect purchaser doctrine, the court in *Security Tire* stated, "[i]f there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary's sales are attributable to the parent." *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 966 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

Apparently, the court in *Security Tire* was confused on this point. Under the indirect purchaser doctrine, ownership of the controlled corporation is not necessarily the controlling factor in determining whether two economically distinct entities exist.

But cf. *Perkins v. Standard Oil Co.*, 395 U.S. 642 (1969). In this case, Standard Oil sold its products to Signal Oil and Gas Company at a lower price than it sold to Perkins. Signal sold these products to Western Hyway, who in turn sold to Regal Stations. Signal owned 60% of Western Hyway who in turn owned 55% of Regal. Regal competed with Perkins.

The Supreme Court reversed the court of appeals decision to extend liability to Standard Oil. In doing so, the Court noted that if Signal had sold directly to Regal, there would be no doubt that the Robinson-Patman Act had been violated. *Id.* at 647-48. The Court went on to state that it found "no basis in the language or purpose of the Act for immunizing Standard's price discriminations simply because the product in question passed through an additional formal exchange before reaching the level of Perkins' actual competitor." *Id.* at 648.

38. For example, Manufacturer (*M*) sells goods to Retailer at 20 cents and sells the same goods to Wholesaler (*W*) at 20 cents. *W* then sells these goods to Indirect Purchaser (*X*), a retailer, for 25 cents. Is *X* a "purchaser" from *M* under the Robinson-Patman Act even though it did not buy directly from *M*?

39. The indirect purchaser issue was first raised in *In re Kraft-Phenix Cheese Corp.*, 25 F.T.C. 537 (1937). The manufacturer, Kraft, published a price list with quantity discounts to be used by wholesalers. The Federal Trade Commission concluded that retailers buying from these wholesalers were "purchasers" from Kraft under the Robinson-Patman Act even though title was not transferred directly from Kraft to the retailers. The commission stated that "[a] retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with him directly in promoting the sale of his products and exercises control over the terms upon which he buys." *Id.* at 546. The manufacturer's control over resale terms has consistently been the test in deciding whether the indirect purchaser was a considered a "purchaser" under the

“dominion and control” test used under the different purchaser and same seller doctrines. As in applying the different purchaser doctrine, a court applying the indirect purchaser doctrine must determine whether two economically affiliated corporations should be treated as distinct entities for purposes of the Robinson-Patman Act.

F. Intra-Enterprise Conspiracy Doctrine

Like the Robinson-Patman Act's same seller and indirect purchaser doctrines, the Sherman Act's intra-enterprise conspiracy doctrine also provides insight into the different purchaser problem.⁴⁰ The Sherman Act prohibits concerted activity in restraint of trade.⁴¹ In an intra-enterprise conspiracy case, the court must determine whether different corporations with common ownership, such as a parent and its subsidiary, can “conspire” with each other.⁴² If a court characterizes two corporations as a single entity, they cannot conspire.⁴³ Because a court must determine whether two corporations are one or two entities for the purpose of applying the Sherman Act, the intra-enterprise conspiracy doctrine is analogous to the different purchaser, same seller, and indirect purchaser doctrines.

In a number of early cases, the Supreme Court held that legally separate corporations with common ownership were capable of conspiring with each other.⁴⁴ The Supreme Court recently overruled these decisions in *Copperweld Corp. v. Independence Tube Corp.*⁴⁵ A majority of the Court held that a parent and its wholly-owned subsidiary “are incapable of conspiring with each other for purposes of § 1 of the Sherman Act.”⁴⁶ The majority reasoned that affiliated corporations will always have the “unity of purpose” which section 1 of the

Act. *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74, 84 (6th Cir. 1981); *Purolator Prods., Inc. v. FTC*, 352 F.2d 874, 880 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968).

40. Both *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 221 (6th Cir. 1985) and *Danko v. Shell Oil Co.*, 115 F. Supp. 886, 888 (E.D.N.Y. 1953) considered the intra-enterprise conspiracy doctrine a useful analogy in resolving the different purchaser problem.

41. Section 1 of the Sherman Act states that “[e]very 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 declared to be illegal” Sherman Act, 15 U.S.C. § 1 (1982).

42. Conspiracy is a “combination or confederacy between two or more persons formed for the purpose of committing, by their joint efforts, some unlawful or criminal act” BLACK'S LAW DICTIONARY 280 (5th ed. 1979) (emphasis added).

43. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 777 (1984).

44. See, e.g., *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), *overruled*, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984); *United States v. Yellow Cab Co.*, 332 U.S. 218, 227-28 (1947).

45. 467 U.S. 752, 777 (1984).

46. *Id.*

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Sherman Act seeks to prohibit.⁴⁷ The majority also feared that corporations would be deterred from forming legally distinct subsidiaries.⁴⁸ The majority reasoned that the parent should not be penalized for the decision to incorporate subsidiaries because separate incorporation may serve many legitimate interests.⁴⁹ In dissent, Justice Stevens argued that under the old rule, affiliated corporations would not be liable for mere commonness of goals unless their actions were unreasonable restraints of trade.⁵⁰

II. EVALUATION OF THE ALTERNATIVE TESTS

Courts have developed three distinct methods in these related areas of law to determine whether economically affiliated corporations are different entities.⁵¹ The *Danko* test always treats legally separate corporations as different entities.⁵² The *Security Tire* per se test always treats legally separate corporations that have common ownership as the same entity.⁵³ The "dominion and control" test examines whether one legally separate corporation has dominion and control over the other.⁵⁴

47. *Id.* at 771.

48. *Id.* at 773.

49. *Id.*

50. *Id.* at 778 (Stevens, J., dissenting).

51. A test which finds economically distinct entities within a single corporation could also be used. Such a test, however, directly contradicts legislative history. See *infra* note 60 and accompanying text. Therefore this test will not be considered here.

The transfer of title test used in *Snyder* is not considered separately in this Comment. See *supra* notes 27–28 and accompanying text. This test, however, is incorporated in the "dominion and control" test. Under the "dominion and control" test, separate entities cannot be found unless there is legal transfer of title. This is a threshold requirement that must be reached before determining whether the two legally separate corporations are two distinct economic entities. *Reines Distributions, Inc. v. Admiral Corp.*, 241 F. Supp. 814, 815 (S.D.N.Y. 1964).

52. The court in *Danko v. Shell Oil Co.*, 115 F. Supp. 886, 888 (E.D.N.Y. 1953), advocated this test in the different purchaser context. See *supra* notes 24–26 and accompanying text.

53. Under the intra-enterprise conspiracy doctrine, courts always treat economically affiliated corporations as a single entity, incapable of conspiring with itself. *Copperweld*, 467 U.S. 752. The courts in *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979), and *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 221 (6th Cir. 1985) adopted this test for use with the different purchaser problem. See *supra* notes 20–22 and accompanying text.

54. Under both the same seller and indirect purchaser doctrines, courts uniformly treat legally separate corporations as economically distinct entities only when no dominion and control exist. Economically affiliated corporations under these doctrines are considered a single economic entity when one corporation controls the pricing and distribution policy of the other corporation. *ACME Refrigeration, Inc. v. Whirlpool Corp.*, 785 F.2d 1240 (5th Cir. 1986); *Barnosky Oils, Inc. v. Union Oil Co.*, 665 F.2d 74 (6th Cir. 1981); *Purolator Prods., Inc. v. FTC*, 352 F.2d 874 (7th Cir. 1965); *Miles v. Coca-Cola Bottling Co.*, 360 F. Supp. 869 (E.D. Wis. 1973); *Baim & Blank Inc. v. Philco Corp.*, 148 F. Supp. 541 (E.D.N.Y. 1957); *In re Kraft-Phenix*

Which test is appropriate in the different purchaser context? The recent trend has been toward adopting the *Security Tire* per se test.⁵⁵ The *Security Tire* per se test is consistent with the position taken by courts in recent years limiting the application of the Robinson-Patman Act.⁵⁶ This test is inconsistent, however, with the test used in the same seller and indirect purchaser context.⁵⁷

A. Legislative History of the Act

The legislative history of the Robinson-Patman Act provides some guidance in resolving the different purchaser issue. Two relevant facts appear in the legislative history of the 1936 Act. First, the drafter of the Robinson-Patman Act⁵⁸ was concerned with the harmful effects that all discriminatory sales have on competition.⁵⁹ Second, the drafter did not intend the Act to apply to transfers within a single corporation.⁶⁰

Cheese Corp., 25 F.T.C. 537 (1937). The court in *Reines Distributions, Inc. v. Admiral Corp.*, 241 F. Supp. 814 (S.D.N.Y. 1964), adopted this test for use with different purchaser problems. See *supra* notes 31-33 and accompanying text.

55. *City of Mt. Pleasant v. Associated Elec. Coop., Inc.*, 838 F.2d 268 (8th Cir. 1988); *Russ' Kwik Car Wash*, 772 F.2d 214; *Security Tire*, 598 F.2d 962.

56. 3 E. KINTNER & J. BAUER, *supra* note 9, at § 31.21.

57. See *supra* notes 36 & 39 and accompanying text.

58. Mr. H. B. Teegarden drafted the Robinson-Patman Act. Mr. Teegarden was counsel for the United States Wholesale Grocers Association. F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 11-12 n.38 (1962).

59. Mr. Lloyd. . . . There are gas companies which are engaged in interstate commerce and who probably would be reached under this act, who make it a practice and follow this line of procedure substantially. They put in their usual lease contract a provision that controls the retailer. They fix his price. His prices must be so much and no more over what they sell to him.

. . . .

Mr. Lloyd. Then they will put their own concern in, to which they make no sale, because it is their own concern, and under your theory they would not be reached. They put that in operation next door to him and undersell him by a cent a gallon less than he can under his contract sell to the consuming public. That is one of their usual methods and that is one of the most vicious practices that I know of.

Mr. Teegarden. *Undoubtedly it is a vicious practice.* Mr. Lloyd. I am for a bill that would reach that sort of thing. It seems to me, if you would give some little thought to that— . . .

Mr. Teegarden. *I agree that it is a vicious practice.* I do not believe this bill would reach it, and offhand I doubt if it would be possible to reach it in this type of legislation.

*To Amend the Clayton Act, 1935: Hearings on H.R. 8442, H.R. 4995, Before the Comm. on the Judiciary House of Representatives, 74th Cong., 1st Sess. 229 (1935) [hereinafter *To Amend the Clayton Act*] (statements of Mr. Lloyd and H.B. Teegarden, author of the Patman Bill) (emphasis added).*

60. Mr. Lloyd. . . . It is a common practice in my country for large concerns to buy at wholesale and maintain large stocks and, at the same time, maintain a retail department. *In fact, their retail department is not segregated at all from their general business.* But the small retailer comes in there and buys from them at "wholesale prices", so-called. Manifestly, the price charged by that concern to the independent retailer contemplates a profit, and is greater than the price that it charges itself for its own retail business. How will this bill

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Congress was concerned with the practice of large vertically integrated corporations discriminating against independents in favor of their own retailing divisions.⁶¹ The Act does not apply in such situations only because those sorts of transfers are legally not sales.⁶² Congress did make the Act applicable in other cases; for example, when a parent corporation sells to a separately incorporated and economically distinct enterprise. Recent courts have refused to interpret the Act in conformity with the congressional purpose.⁶³

B. Substance or Form?

Both sides of the different purchaser issue agree that economic substance should prevail over legal form.⁶⁴ This Comment will use three examples to illuminate the dichotomy between economic substance and legal form.

In the first example, a manufacturing company forms an intra-corporate retailing division. The same management controls both divisions. The manufacturer transfers goods to its retailing division at a lower price⁶⁵ than it sells similar goods to unrelated purchasers. Both the manufacturer and the retailer are the same entity under the law and the retailing division is not, therefore, a "different purchaser."⁶⁶ Consequently, the Act does not apply.

affect that situation where this concern sells to itself for less than it sells to the independent retailer?

After Mr. Lloyd clarified a misunderstanding of Mr. Teegarden, Mr. Teegarden responded: Mr. Teegarden. There would be no question of discrimination presented as between itself and an independent retailer.

Mr. Lloyd. I wonder why.

Mr. Teegarden. Because it is not a sale to itself. This only covers discrimination in sales.

Consequently, unless there is a sale on both sides, there can be no discrimination.

To Amend the Clayton Act, *supra* note 59, at 211 (statement of Mr. Lloyd and H.B. Teegarden, author of the Patman Bill) (emphasis added).

61. See *supra* note 59.

62. A sale requires two parties. BLACK'S LAW DICTIONARY 1200 (5th ed. 1979).

Although a separately incorporated subsidiary meets the technical definition of "different purchaser," to apply the Act when the subsidiary is not an economically distinct entity from its parent would be to advance legal form over economic substance. Further, to apply the Act when the subsidiary is not an economically distinct entity would not prevent the parent from granting subsidies to the subsidiary in other forms. See *infra* text accompanying notes 109-10.

63. See, e.g., *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

64. See, e.g., *Security Tire* 598 F.2d at 967; *Brown v. Hansen Publications, Inc.*, 556 F.2d 969, 971-72 (9th Cir. 1977).

65. In this context, "price" means the amount the accounting department charged the retailing division.

66. A purchase is the "[t]ransmission of property from one person to another . . ." BLACK'S LAW DICTIONARY 1110 (5th ed. 1979). A purchaser, therefore, must be one who buys from another.

Even though the Act does not apply to the retail division because of its legal form, price discrimination may still cause economic injury to competition. As a result of receiving a lower wholesale price, the retailing division can offer a lower retail price and increase its market share at the expense of an unrelated purchaser. Loss of market share to an intra-corporate division injures competitors just as much as loss to an unrelated independent corporation. The statute, however, as a matter of congressional intent, does not provide a remedy to injury caused by an intra-corporate division.⁶⁷

As a second example, the manufacturer, for business purposes, incorporates the retailing division as a legally separate corporation. The manufacturer exercises the same amount of control over the retailing subsidiary as exercised over the division in the prior example. The manufacturer transfers goods to its retailing subsidiary at a lower price than it transfers similar goods to unrelated purchasers.

In this example, the economic injury to the unrelated purchaser remains the same. The manufacturer's control over the retailer has not changed. In substance, the retailer is still part of one economic entity with the parent. It is not a different purchaser.

The legal form in this example is, however, completely different. The Act technically applies here because a legally distinct entity or "different purchaser" has been accorded preferential treatment.⁶⁸ Yet to apply the Robinson-Patman Act where the parent completely controls the subsidiary, only because it is separately incorporated, is to choose legal form over economic substance.

Courts should not apply the Robinson-Patman Act when legal form is the only basis for the Act's application. Applying the Act to this example would prevent corporations from forming legally separate corporations. Corporations may have many valid business reasons for forming legally separate corporations rather than divisions.⁶⁹ The law should promote valid business practices when these practices do not conflict with congressional intent. In the second example, treating these two corporations as one legal entity would follow the economic substance of the congressional legislation without sacrificing the policy of allowing separate incorporation. To apply the Robinson-Patman Act to penalize a corporation for an otherwise useful change of legal form is manifestly wrong.

67. See *supra* note 60 and accompanying text.

68. See *supra* note 62.

69. See *supra* text accompanying note 49.

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As a third example, the manufacturer separately incorporates a retail division but, unlike the first two examples, the manufacturer retains no dominion and control over the retailer. The manufacturer transfers goods to the retailing corporation at a lower price than it transfers similar goods to unrelated purchasers.

In this case the economic substance as well as the legal form has changed. The legal form differs from the first example because the manufacturer, through incorporation, has created a separate legal entity.⁷⁰ The economic substance differs because the retailing corporation is also an economically distinct entity from the parent. In substance, the retailer is a different purchaser.

Security Tire's per se test assumes that the economic substance underlying the last two examples is the same. The "dominion and control" test, however, focuses a court's attention on whether the two corporations are, in substance, two economically distinct entities. The "dominion and control" test is the better alternative because it looks to economic substance rather than legal form.

C. Clarifying Dominion and Control

The "dominion and control" test is the proper test to determine whether a separately incorporated subsidiary is a different purchaser for purposes of the Robinson-Patman Act. However, the test needs to be clarified. In determining what constitutes "dominion and control," courts have looked to different economic factors. Some focus on control over pricing policy.⁷¹ Others look to the entire relationship between the two corporations.⁷²

The court in *Reines Distributors, Inc. v. Admiral Corp.*⁷³ asserted that pricing policy is essential in determining whether a parent corporation exercises economic dominion and control over its subsidiary. The court based this assertion on the same seller doctrine.⁷⁴ The same seller doctrine is intended to prevent a parent corporation from incorporating a subsidiary to sell at a discriminatory price to a disfavored or favored class of purchasers.⁷⁵ The subsidiary is therefore held to be the "same seller" as the parent if the parent sets the pricing and distribution policies of the subsidiary. Determining who sets the pricing

70. A corporation is a legal entity. BLACK'S LAW DICTIONARY 307 (5th ed. 1979).

71. *Reines Distribs., Inc. v. Admiral Corp.*, 241 F. Supp. 814 (S.D.N.Y. 1964).

72. *Brown v. Hansen Publications, Inc.*, 556 F.2d 969 (9th Cir. 1979).

73. 241 F. Supp. 814 (S.D.N.Y. 1964).

74. *Id.* at 815.

75. See *supra* notes 32-36 and accompanying text.

and distribution policy, therefore, is fundamental when applying the same seller doctrine.

The different purchaser doctrine, however, is intended to prevent a parent corporation from selling at a favored price to its subsidiary when the subsidiary is a distinct economic entity.⁷⁶ Dealings between the parent and subsidiary are as meaningful to this determination as the parent's control over dealings between the subsidiary and the ultimate purchaser.

*Brown v. Hansen Publications, Inc.*⁷⁷ adopted the better approach by examining the entire relationship between the parent and subsidiary. All factors in the relationship are important in determining whether, in substance, the parent and subsidiary are a single economic entity. The *Brown* approach includes investigation into whether both corporations share employees, officers, office space, and record keeping systems.⁷⁸

Of course, control of the subsidiary's pricing policy is one factor in the relationship between the parent and the subsidiary. A court employing the "dominion and control" test in the different purchaser context needs to review control of the subsidiary's pricing policy along with the many other factors affecting the relationship between parent and subsidiary. In the different purchaser context, however, control of pricing policy should not be emphasized as strongly as in those cases involving the same seller doctrine.

D. *Substance, Form, and Security Tire*

Although the "dominion and control" test previously analyzed advanced economic substance over legal form,⁷⁹ the court in *Security Tire* argued to the contrary. The court in *Security Tire* adopted a per se rule that wholly-owned subsidiaries are never different purchasers under the Robinson-Patman Act. The court posited that the veil of separate incorporation was merely legal form.⁸⁰ The court also stated that the fact that a subsidiary is wholly owned by its parent indicates

76. *Brown v. Hansen Publications, Inc.*, 556 F.2d 969, 972 (9th Cir. 1977).

77. 556 F.2d 969 (9th Cir. 1977).

78. *Id.* at 971-72.

79. Except, of course, when a division is a distinct economic entity. In this situation, the language of the statute and the clear congressional intent prevent courts from looking to the economic substance of the relationship. A division cannot be a "different purchaser." *See supra* note 60.

80. *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

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that the economic substance of the structure is a single economic unit manufacturing and marketing its product.⁸¹

The *Security Tire* court, however, erred in this conclusion because economic substance is determined by more than corporate ownership. The “dominion and control” test goes beyond the mere legal form of separate incorporation. The “dominion and control” test addresses the actual relationship between the parent and subsidiary. A court applying the “dominion and control” test reviews the factual setting and inner workings of the parent and subsidiary to determine if the substance of the structure is actually that of a single economic unit manufacturing and marketing its product. The “dominion and control” test, therefore, considers both economic substance and legal form.

E. Reasoning By Analogy and Security Tire

The most obvious error in the *Security Tire* analysis is its use of analogies. Reasoning by analogy is often used in legal analysis⁸² in order to take advantage of prior analysis in related areas of the law. This also provides for consistency across related areas of law. This consistency results in a certain predictability which allows the public to plan its business efficiently within the legal parameters.

To reason by analogy one must identify related areas of law.⁸³ The next step is to identify the tests used to resolve the issues in those areas.⁸⁴ If related areas of law use different tests, then one must identify which related area is closest to the area of law in controversy.⁸⁵ The best test is the one that arises from the area of law most analogous⁸⁶ to the area of law at issue.⁸⁷

Three areas of law related to the different purchaser doctrine are the same seller, indirect purchaser and intra-enterprise conspiracy doctrines. Courts applying the same seller and indirect purchaser doc-

81. *Id.*

82. E. LEVI, AN INTRODUCTION TO LEGAL REASONING 1 (1949). Levi uses the term “example” rather than “analogy,” but he refers to the same mode of analysis.

83. *Id.* at 2. Levi refers to similarity in cases. Similarity in cases generally means that similar areas of law are being analogized. When cases in similar areas of law are compared, the cases are also similar.

84. *Id.*

85. Or, more precisely, which area of law contains key similarities to the area of law at issue. *Id.* at 3.

86. To determine the most analogous area of law, one must look to the source of the law and the policy reasons that created the law.

87. This theory is sustained only if the tests used in those related areas of law are logical. A bad test, consistently applied, is not preferable to an inconsistent test. This is an inherent limitation in reasoning by analogy.

trines use the "dominion and control" test. This test examines the actual economic relationship to determine whether a parent and subsidiary are a single economic entity. Conversely, courts applying the intra-enterprise conspiracy doctrine use a per se rule that assumes parent corporations and their wholly-owned subsidiaries are always single economic entities. Because the related areas of law use different tests, a decision must be made as to which is most closely related to the different purchaser doctrine.

Unlike the same seller and indirect purchaser doctrines, which interpret the Robinson-Patman Act, the intra-enterprise conspiracy doctrine interprets the Sherman Act. The Sherman Act is intended to prevent concerted activity which restrains trade.⁸⁸ The intra-enterprise conspiracy doctrine is properly a per se rule because corporations with common ownership cannot have the divergent interest that the Sherman Act attempts to foster.⁸⁹ This reasoning, however, does not apply to the different purchaser doctrine under the Robinson-Patman Act because the Robinson-Patman Act prohibits the anticompetitive activity of a single actor.⁹⁰ Because the same seller and indirect purchaser doctrines arise under the Robinson-Patman Act, they serve as more useful analogies to the different purchaser doctrine.

The court in *Security Tire* agreed that the different purchaser doctrine was much closer in relationship to the same seller and indirect purchaser doctrines than to the intra-enterprise conspiracy doctrine. Comparing the two doctrines, the court in *Security Tire* stated that the

88. See *supra* note 41.

89. *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 222 (6th Cir. 1985) (Kennedy, J., dissenting).

90. *Russ' Kwik Car Wash*, 772 F.2d at 222. The *Copperweld* Court adopted a per se test for intra-enterprise conspiracy problems because the previously applied single entity test failed to distinguish between concerted and independent activity. *Russ' Kwik Car Wash*, 772 F.2d at 222. The *Copperweld* Court noted that Congress treated concerted behavior much more strictly because of the anti-competitive risk inherent in concerted activity. *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768-69 (1984). Concerted behavior "deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands." *Id.* at 769. The Court noted, however, that in the parent-subsidiary situation both the parent corporation and the subsidiary begin with common interests. No bringing together of independent centers of decisionmaking occurs in a parent-subsidiary conspiracy case because the parent corporation and subsidiary are already together. *Id.* at 771. Therefore, preventing the parent corporation and subsidiary from acting in their similar interests is unwarranted. *Id.* at 771.

Judge Kennedy argued that, by contrast, liability under the Robinson-Patman Act is "not limited to concerted activity. A single seller violates § 2(a) by charging one purchaser a higher price than that charged the purchaser's competitor." *Russ' Kwik Car Wash*, 772 F.2d at 222. Judge Kennedy also noted that, for Robinson-Patman Act purposes, the competitive relationship between the purchasers is more important than the relationship between seller and purchaser. *Id.*

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intra-enterprise conspiracy doctrine involves “the rather remote question whether a partially-owned subsidiary corporation could conspire with its parent corporation in violation of the Sherman Act.”⁹¹

At this point, though, the court faltered. The court, although purporting to use analogous doctrines, adopted a test entirely different from that uniformly applied in the two analogous areas of law.⁹² Reasoning by analogy should result in conformity of applicable tests in the most analogous areas of law. Although correct in ascertaining the close relationship between these two doctrines and the different purchaser doctrine, the court mistakenly concluded that the same seller and indirect purchaser doctrines supported its holding.⁹³

The court correctly stated that under the same seller doctrine, if “there is an affirmative showing that the parent actively controls a wholly-owned sales subsidiary, then the subsidiary’s sales are attributable to the parent.”⁹⁴ However, the court then illogically concluded that since application of the same seller doctrine may result in a finding of one economic entity, this supports the rule that a finding of a single entity is mandated in the different purchaser context.⁹⁵

The same seller doctrine does not employ a per se test.⁹⁶ Rather than offering support for the per se rule adopted in *Security Tire*, the same seller analogy suggests that a subsidiary is a different purchaser if the parent does not actively control the wholly-owned subsidiary. If an affirmative showing of parent control renders a parent and subsidiary the same seller under the Robinson-Patman Act, conversely, an affirmative showing that no such control exists should render the subsidiary an economically distinct entity and therefore a different purchaser.

F. Discrimination in the Provision of Other Services

A subsequent court has attempted to justify *Security Tire*’s per se test on the grounds that a different result would mean that the Robin-

91. *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962, 965 (5th Cir.), cert. denied, 444 U.S. 942 (1979).

Admittedly, this decision occurred prior to the judgment in *Copperweld* which changed the test used in intra-enterprise conspiracy problems to one analogous to the test used by the court in *Security Tire*. However, the manner in which the doctrine applies to resolve issues does not effect how analogous the doctrine is to other doctrines.

92. *Security Tire*, 598 F.2d at 966.

93. *Id.* The court went on to explain the same seller doctrine and noted that the same test is applied to determine whether a remote purchaser is an indirect purchaser.

94. *Id.*

95. *Id.*

96. See *supra* text accompanying note 36.

son-Patman Act prohibits a parent from providing special services to its subsidiary.⁹⁷ Section 2(e) of the Robinson-Patman Act does prohibit discrimination in the provision of services.⁹⁸ Yet parent corporations typically provide accounting services, key personnel, and capital to their subsidiary corporations. Indeed, a parent corporation could not avoid providing special services to its subsidiary.⁹⁹ A prohibition of such activities would severely disrupt business.

Security Tire's per se test cannot be justified on this ground, however, because such services are not connected with the sale of transferred goods and, therefore, are not within the ambit of the statute.¹⁰⁰ Section 2(e) prohibits only discrimination in services "connected with the processing, handling, sale, or offering for sale of" the goods in question.¹⁰¹

*I. M. Skinner v. U.S. Steel Corp.*¹⁰² illustrates how the Act is restricted to only those services connected with sales. In *I. M. Skinner*, the defendant manufacturer supplied a wholly-owned subsidiary retail store. The defendant, at the request of its employees, deducted employee purchases made at the subsidiary retail store from the employees' paychecks.¹⁰³ A retail competitor of the store alleged that

97. *Russ' Kwik Car Wash, Inc. v. Marathon Petroleum Co.*, 772 F.2d 214, 220-21 (6th Cir. 1985).

98. *FTC v. Simplicity Pattern Co.*, 360 U.S. 55 (1959).

Section 2(e) of the Act provides:

It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

Robinson-Patman Act, 15 U.S.C. § 13(e) (1982) (original version at ch. 323, § 2, 38 Stat. 730, 730-31 (1914)).

99. *Russ' Kwik Car Wash*, 772 F.2d at 220-21. The court in *Russ' Kwik Car Wash* stated that:

It is impossible for parent corporations to avoid giving special benefits to their subsidiaries. Here parent Marathon paid the salary of Emro's president. Parent corporations without exception provide capital for their subsidiaries. The price at which the product is transferred from parent to subsidiary may be only a small part of what is contributed by the parent to the subsidiary and to the subsidiary's ability to compete.

Id. at 220-21.

100. *I. M. Skinner v. U.S. Steel Corp.*, 233 F.2d 762 (5th Cir. 1956).

101. 15 U.S.C. § 13(e); *Harper Plastics, Inc. v. Amoco Chem. Corp.*, 617 F.2d 468 (7th Cir. 1980); *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819 (M.D. Tenn. 1974); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); *see also* FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.5 (1987).

102. 233 F.2d 762 (5th Cir. 1956).

103. *Id.* at 763.

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the defendant failed to provide the plaintiff the same service as the defendant provided to its wholly-owned subsidiary. The court held that Section 2(e) of the Robinson-Patman Act was not intended to apply to all services, but only to those services connected with the processing, handling, or sale of the good transferred.¹⁰⁴ The court ruled in favor of the parent corporation because the payroll deductions were not connected with the processing, handling, or sale of the goods transferred.¹⁰⁵ Similarly, services which parent corporations typically provide their subsidiaries, such as accounting and key personnel, would not be prohibited by Section 2(e).¹⁰⁶

G. *Economic Significance of the Transfer Price*

The court in *Security Tire* tried to justify its per se holding on the grounds that the transfer price between the parent and subsidiary corporation has no economic significance.¹⁰⁷ Because this nonmarket transaction cannot be meaningfully compared to a market transaction, a court cannot determine whether price discrimination has occurred. Therefore, parent transfers to subsidiaries should be per se exempt from the Robinson-Patman Act.¹⁰⁸

If the parent and subsidiary corporation are part of one economic entity, this analysis is correct. Even if the parent transfers goods to the subsidiary at the same price at which it sells goods to the subsidiary's competitors, the subsidiary could still sell goods at or below the transfer price and cause the same injury to the subsidiary's competitor.¹⁰⁹ The parent could loan money to the subsidiary or buy more stock in the subsidiary to allow the subsidiary to continue functioning without profit.

104. *Id.* at 765.

105. *Id.* at 765-66.

106. Despite the *Skinner* decision, a parent corporation which discriminates in favor of a subsidiary by providing some services not accorded other purchasers is not necessarily exempt from liability under § 2(e). Services which would violate § 2(e) include provision of advertising, handbills, window and floor displays, demonstrators and demonstrations, catalogs, and accepting returns for credit. See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.5. (1987). The services which concerned the majority in *Russ' Kwik Car Wash*, such as providing corporate officers, accounting services, and capital, however, are not within the scope of § 2(e). See *supra* note 99.

107. *Security Tire & Rubber Co. v. Gates Rubber Co.*, 598 F.2d 962,967 (5th Cir.), *cert. denied*, 444 U.S. 942 (1979).

108. Birrell, *The Integrated Company and the Price Squeeze Under the Sherman Act and Section 2(a) of the Clayton Act, as Amended*, 32 NOTRE DAME L. REV. 5, 24-30 (1956).

109. Alternatively, it may be argued that it is not harmful for the manufacturer to sell at this low price. However, a disfavored purchaser in this situation is injured in the same manner and magnitude as when the favored purchaser is an unrelated corporation. 3 E. KINTNER & J. BAUER, *supra* note 9, at § 21.15.

In this situation, the subsidiary does not have the independence to maximize subsidiary profits.¹¹⁰ It is useless, therefore, to regulate the transfer price when the parent and subsidiary function as a single economic entity. In this situation, the transfer price is not economically significant.

If the subsidiary functions as an economically distinct entity,¹¹¹ however, the subsidiary would likely set its own pricing policy and would be unlikely to adopt a pricing policy which causes it to suffer a loss.¹¹² The price at which the parent corporation transfers goods to its subsidiary has economic significance in this case. The transfer price facilitates the low retail price to the subsidiary which causes the injury to the subsidiary's competitor.

When the parent and subsidiary are, in substance, a single economic entity, the subsidiary's competitor will still be injured. This injury, however, is in the nature of competition with a larger adversary rather than a favored purchaser. When the parent and subsidiary are, in substance, different economic entities, the "dominion and control" test would prevent the injury from occurring. The injury prevented is that injury intended to be prohibited by the Robinson-Patman Act. Therefore, the "dominion and control" test should be adopted.

III. CONCLUSION

Three United States courts of appeals have ruled that a plaintiff has no remedy under the Robinson-Patman Act for injury from price discrimination when the favored purchaser is a subsidiary of the discriminating seller. These courts assume that a parent corporation and its subsidiary are always a single economic entity. Because the subsidiary does not have the status of a different entity, it cannot meet the statutory requirement of being a different purchaser.

110. The subsidiary could be subject to Sherman II liability for predatory pricing if it had a very large share of the market. See *infra* note 112.

111. If the subsidiary does not function as an economically distinct entity, the result of applying the "dominion and control" test and the *Security Tire* test are the same. Transfers between the parent and subsidiary would not be considered sales. Therefore, no cause of action would exist.

112. Management of the subsidiary corporation would attempt to maximize profits for the subsidiary even if such a policy did not optimize long run profits for the entire family of corporations. Additionally, if the subsidiary sold below its purchase price, this would clearly be predatory. If the subsidiary had a large enough market share, a plaintiff would have a clear cause of action against the subsidiary under Sherman II for monopolization or attempting to monopolize. Sherman Act, 15 U.S.C. § 2 (1982). See Annotation, *Price Cutting—Sherman Act*, 52 A.L.R. FED. 728 (1981); see also 54 AM. JUR. 2D *Monopolies, Restraints of Trade, and Unfair Trade Practices* § 105 (1971).

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This approach is in conflict with other Robinson-Patman Act doctrines. Both the Robinson-Patman Act's same seller and indirect purchaser doctrines use the "dominion and control" test. The "dominion and control" test examines the actual economic relationship to determine if the subsidiary is a different purchaser for purposes of the Robinson-Patman Act. Only the intra-enterprise conspiracy doctrine considers two legally separate corporations to be a single entity under any circumstances. This doctrine arises under the Sherman Act which makes concerted activity in restraint of trade illegal. Conversely, the Robinson-Patman Act prohibits the anticompetitive behavior of a single entity.

The per se approach adopted by these courts is also inconsistent with congressional intent. By promulgating the Robinson-Patman Act, Congress intended to offer a remedy for competitive injury that results from giving a price advantage to one firm over another. Price discrimination in favor of a subsidiary results in competitive injury to the subsidiary's competitor because of the comparative price disadvantage. Study of the Robinson-Patman Act itself indicates that application of the Act to parent corporations with no dominion and control over their subsidiaries would fulfill the congressional intent.

Economic substance should prevail over legal form. The "dominion and control" test, as defined in this Comment, examines the actual relationship between parent and subsidiary corporations to determine if they are, in substance, one economic entity or two. Courts should study the entire relationship between parent and subsidiary corporations in order to decide whether the subsidiary is a different purchaser under the Robinson-Patman Act. This "dominion and control" test would best assure that economic substance would prevail over legal form.

John Huddleston