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Trade Regulations -- Robinson-Patman Act Section 2(d) -- Promotional Allowances

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is generally unsatisfactory,[47] but he may only win damages for harm caused by workmanship unfit for the anticipated use. The defendant will be held to the standard of normal, safe construction, not to the standard of perfection.[48]

Strict liability based upon implied warranty has not yet been extended beyond the builder-vendor. The vendor who resells an old house (and who may be liable under *Restatement* § 353) stands usually on the same level as the vendee himself and cannot be analogized to the manufacturer. Courts may be hesitant also to impose strict liability upon the ordinary building contractor, because he is selling his services but not selling any goods.[49]

Although the law of builder-vendor's liability is now in a fluid state, its broad direction is evident. Special protections for the defendant are being replaced by obligations comparable to those of a supplier of chattel or of a negligent building contractor. For the individual who is injured by defective construction, the field of builder-vendor's liability offers new potential for recovery.

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Trade Regulations—Robinson-Patman Act Section 2(d)—Promotional Allowances

The Robinson-Patman Act[1] has been labeled a "masterpiece of obscurity," "prolix and perplexing," and a "hodgepodge of confusion and inconsistency."[2] As predicted,[3] the Federal Trade Commission and the

[47] One wag stated, "Today's buyers do not understand that when you buy a $10,000 house, you just can't expect gold doorknobs." Bearman 573 n.143.

[48] Schipper v. Levitt & Sons, 44 N.J. 70, 92, 207 A.2d 314, 326 (1965); Waggoner v. Midwestern Dev. Co., — S.D. —, —, 154 N.W.2d 803, 809 (1967).

[49] RESTATEMENT 2D § 402A & comment *f*; *cf.* Koenig v. Milwaukee Blood Center, 23 Wis. 2d 324, 127 N.W.2d 50 (1964). *But see* Totten v. Gruzen, 52 N.J. 202, —, 245 A.2d 1, 5 (1968), which refused to deny that strict liability would be applied to building contractors.

[1] 15 U.S.C. §§ 13, 13a-c, 21a (1964).

[2] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 19, 535 & n.4 (1962, Supp. 1964) [hereinafter cited as ROWE]. "In the end, the political process of pressure, counterpressure and compromise created a cryptic and sloppy legislative enactment, whose ineptitudes and solecisms opened up more legal questions than they closed." *Id.* at 535.

[3] Representative Celler, during debate of the proposed Act in the House of Representatives, predicted: "[T]he courts will have the devil's own job to unravel the tangle. . . . You will have the herculean task to make it yield sense." 80 CONG. REC. 9419 (1936).

courts have had a "herculean task" in attempting to make the Act yield sense.[4] In *FTC v. Fred Meyer, Inc.*[5] the Supreme Court clarified a key provision of the Act by defining the scope of the term "customer" in section 2(d).[6] It is the purpose of this note to examine the history of the case, to point out the difficulties suppliers will face in complying with the Court's decision, and to speculate as to the effect of the decision on other sections of the Robinson-Patman Act.

Fred Meyer, Inc. is the operator of a chain of thirteen supermarkets in the Portland, Oregon area. One of Meyer's principal sales promotional activities has been an annual four-week promotional campaign based on the distribution of coupon books in the Meyer stores. The coupon books consists of approximately seventy-two pages or coupons with each page featuring a product which, upon surrender of the appropriate coupon-page, is sold at a reduced price by the Meyer store. The public can obtain coupon books for ten cents each and can realize savings of up to one-third on each featured item. In addition to the nominal sum paid by the public to obtain the coupon books, Meyer finances the promotional campaign by charging the suppliers (from whom Meyer buys directly) of each featured product at least 350 dollars per coupon-page of advertising. Moreover, some of the suppliers contribute further to the financing of the campaign by replacing at no cost a percentage of the goods sold by Meyer during the campaign or by redeeming coupons in cash at an agreed rate.

The FTC found that Meyer's promotional campaign, as conducted in the years 1956 through 1958, violated section 2(d) of the Robinson-Patman Act because the 350 dollars paid by four of the participating suppliers for advertising in Meyer's coupon books represented promotional allowances which were not made available on proportionally equal terms to competing customers of Meyer.[7] However, section 2(d) applies

[4] *See, e.g.*, ROWE at 20.

[5] 390 U.S. 341 (1968).

[6] 15 U.S.C. § 13(d) (1964) provides:

> That it shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

[7] The FTC also found that section 2(a) of the Act was violated in that the free replacement of goods and coupon redemptions by some of the participating

only to sellers and in order to charge Meyer with a violation the Commission had to resort to section 5(a)[8] of the Federal Trade Commission Act, which makes unfair methods of competition in commerce illegal and empowers the FTC to prevent the use of such unfair methods of competition.[9] The Commission thus found that Meyer had violated section 5(a) of the Federal Trade Commission Act by knowingly inducing its suppliers to grant promotional allowances prohibited by section 2(d) of the Robinson-Patman Act.[10]

In finding a violation of section 2(d), the FTC held that the participating suppliers, having chosen to grant promotional allowances to Meyer who bought from them directly, should have made promotional allowances available on proportionally equal terms to those wholesalers who sell to retailers in competition with the Meyer stores.[11] Meyer argued, on the other hand, that wholesalers were not entitled to promotional allowances on proportionally equal terms because they were not "competing" with the Meyer stores within the meaning of section 2(d). Meyer argued further that retailers buying through wholesalers were not entitled to promotional allowances on proportionally equal terms, regardless of their competition with the Meyer stores, because they were not "customers" of the suppliers within the meaning of section 2(d). Following this line of reasoning, only those retailers who buy directly from the suppliers and are also in competition with the Meyer stores are entitled to promotional allowances on proportionally equal terms. The Commission found this conclusion "startling" and in total conflict with the objectives of the Robinson-Patman Act to protect independent retailers from the "chains' " ability to exact discriminatory concessions from suppliers.[12]

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suppliers constituted price discrimination prohibited by that section. The Commission, therefore, found Meyer to be in violation of section 2(f) of the Act which prohibits any person from knowingly inducing a price discrimination forbidden by section 2(a). [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,206 (FTC 1963). It is beyond the scope of this note to examine the violation of section 2(a) and thus the violation of section 2(f).

[8] 15 U.S.C. § 45(a) (1964).

[9] See Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962), where it was first held that a buyer's participation in transactions prohibited by section 2(d) of the Robinson-Patman Act is reachable under section 5(a) of the Federal Trade Commission Act.

[10] [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,206 (FTC 1963).

[11] *Id.* at 21,216-17.

[12] *Id.* at 21,214-16. The Commission observed:

> Thus, in a geographical market served by, say, two direct-buying "chains," and one wholesaler with 100 retailer-customers, a supplier who gave a

The FTC was still confronted with the contention that those wholesalers who sold to Meyer's retail competitors were not in fact competing with Meyer and thus not entitled to promotional allowances on proportionally equal terms. The Commission answered this contention by pointing to the language of the statute. "[T]he statute speaks of competition in the 'distribution' of the products, not merely of competition in their 'resale.' These wholesalers, through their numerous retailer-customers, are seeking exactly the same consumer dollars that respondents are after."[13] The Commission thus believed that the independent retailer could best be protected by requiring suppliers to make promotional allowances available to wholesalers who would presumably pass them on to their retailer customers or use them for the benefit of those customers.[14]

On appeal the court of appeals agreed with Meyer's interpretation of "customers competing" in section 2(d) and reversed the Commission.[15]

The Supreme Court in granting the Commission's petition for certiorari limited its review to the question "[w]hether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who sells to retailers competing with the direct buying retailer violates Section 2(d) of the Robinson-Patman Act."[16] The court agreed with the Commission in holding that the interpretation of "customers competing" in section 2(d) urged by Meyer was wholly untenable,[17] but it concluded that Meyer's retail competitors, rather than the wholesalers who sell to the retailers, were competing customers within the meaning of section 2(d) and thus

promotional allowance to Chain A would not be required by Section 2(d) to give it to either the wholesaler or the 100 independent retailers who buy from it, but would have to give it to Chain B. This would mean, of course, that the protection of Section 2(d) is accorded to those who presumably have the market power to take care of themselves (competing "chains"), but denied to those who . . . need its protection very badly indeed.

Id. at 21,214.

[13] *Id.* at 21,215.

[14] *Id.* Commissioner Elman, while agreeing that Meyer's promotional activities constituted violations of the Robinson-Patman Act, disagreed with respect to what made the practice illegal. He took the position that the suppliers should have made promotional allowances available directly to Meyer's retail competitors. Requiring the allowances to be made available to wholesalers whose customers compete with Meyer, he reasoned, would in no way insure that Meyer's retail competitors will receive the protection that the Act intended them to have. *Id.* at 21,231-32.

[15] 359 F.2d 351, 362-63 (9th Cir. 1966).

[16] 386 U.S. 907 (1967).

[17] 390 U.S. at 349.

entitled to promotional allowances on proportionally equal terms.[18] Starting with the proposition that "the Robinson-Patman Act was enacted in 1936 to curb and prohibit all devices by which large buyers gained discriminatory preferences over smaller ones by virtue of their greater purchasing power,"[19] the Court undertook a review of the legislative history surrounding the enactment of section 2(d). The Court concluded that section 2(d) was aimed at a form of indirect price discrimination which resulted from the "chains" being able to command large promotional allowances from their suppliers while the small independent competitors of these "chains" were in no position to command such allowances. These allowances enabled the "chains" to shift part of their advertising costs to their suppliers while the smaller competitors could not.[20]

While recognizing that legislative history is inconclusive with respect to the meaning of "customer" in section 2(d), the Court found that its definition of customer "to include retailers who purchase through wholesalers and compete with direct buyers" was necessary to prevent anomalous results. "If we were to read 'customer' as excluding retailers who buy through wholesalers and compete with direct buyers, we would frustrate the purpose of 2(d). We effectuate it by holding that the section includes such competing retailers within the protected class."[21]

In rejecting the Commission's findings that wholesalers who sold to retail competitors of Meyer are competing customers within the meaning of section 2(d), the Court held that the Commission's definition of competition was too broad. Once again the Court found legislative history to be inconclusive, but concluded that it does "strongly suggest that the competition with which Congress was concerned in 2(d) was that between buyers who competed in resales of the supplier's products."[22] Moreover, the Court pointed to section 2(a) of the Robinson-

[18] *Id.* at 352.

[19] *Id.* at 349, *quoting* FTC v. Henry Broch & Co., 363 U.S. 166, 168 (1960).

[20] 390 U.S. at 350-51.

[21] *Id.* at 352.

> On the one hand, direct-buying retailers like Meyer, who resell large quantities of their suppliers' products and therefore find it feasible to undertake the traditional wholesaling functions for themselves, would be protected. . . . On the other hand, smaller retailers whose only access to suppliers is through independent wholesalers would not be entitled to this protection. Such a result would be diametrically opposed to Congress' clearly stated intent. . . .

Id.

[22] *Id.* at 355-56. "While it cannot be doubted that Congress reasonably could have employed such a broad concept of competition in § 2(d), we do not believe that the use of the word 'distribution' rather than 'resale' is a clear indication that it did, . . ." *Id.* at 356.

Patman Act and its broad definition of competition[23] as evidence that Congress did not intend competition in section 2(d) to have such a broad scope. "When Congress wished to expand the meaning of competition to include more than resellers operating on the same functional level, it knew how to do so in unmistakable terms."[24]

As indicated above the *Fred Meyer* decision answers important questions concerning section 2(d) of the Robinson-Patman Act. It is well known that the Robinson-Patman Act grew out of a fear, widespread during the 1930's, that the independent retailer was about to be swallowed up by the large "chain" stores.[25] An investigation ordered by Congress revealed that the "chains" by virtue of their greater purchasing power could exact concessions from their suppliers which the independent retailers could not obtain.[26] Among these concessions were large allowances for advertising and other sales promotional activities.[27] The investigation also revealed that these concessions were wholly beyond the reach of existing antitrust laws.[28] Congress attacked this type of discrimination by providing in sections 2(d) and 2(e)[29] of the Robinson-Patman Act that any services or facilities[30] or payment in consider-

[23] Section 2(a) prohibits price discrimination that may "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."

[24] 390 U.S. at 356-57.

[25] *See, e.g.*, ROWE at 3-14. Appearing before the House Judiciary Committee, Representative Patman stated:

> I believe it is the opinion of everyone who has studied this subject, that the day of the independent merchant is gone unless something is done and done quickly. He cannot possibly survive. . . . So we have reached the crossroads; we must either turn the food and grocery business of this country . . . over to a few corporate chains, or we have got to pass laws that will give the people, who built this country in time of peace and saved it in time of war, an opportunity to exist. . . .

Hearings on H.R. 8442, 4495, 5062 *Before the House Comm. on the Judiciary*, 74th Cong., 1st Sess. 5-6 (1935).

[26] FTC, FINAL REPORT ON THE CHAIN STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. 57-65 (1935).

[27] *Id.* at 44-46, 61.

[28] *Id.* at 63-65.

[29] 15 U.S.C. § 13(e) (1964) 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.

[30] See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.5 (1968), for examples of services and facilities covered by sections 2(d) and 2(e).

ation of such services or facilities cannot be granted to one customer or purchaser unless made available to all competing customers or purchasers on proportionally equal terms.[31]

Section 2(d) applies to the situation where payments are made to a customer and the customer himself furnishes the services or facilities in connection with the distribution of the supplier's products. Section 2(e) applies to the situation where services or facilities are furnished directly to the customer.[32] The application of these two sections is relatively simple when a supplier is dealing with customers on the same functional level. However, complex problems arise when a supplier deals with customers on different functional levels, such as direct-buying retailers and wholesalers. As the Supreme Court pointed out in *Meyer*, the Robinson-Patman Act was intended to prevent a supplier from granting discriminatory promotional allowances such as those granted to Meyer.[33] However, prior to the *Meyer* decision the language of section 2(d), specifically the phrase "customers competing," presented an obstacle to the FTC and to the courts in barring such allowances when the supplier was dealing with customers on different functional levels.

One device that might have been used to combat the discriminatory granting of promotional allowances to direct-buying retailers by suppliers dealing on different functional levels was the "indirect purchaser doctrine," whereby a retailer buying the supplier's product through a wholesaler is nevertheless treated as the supplier's customer.[34] In

[31] Although there are several semantic disparities in sections 2(d) and 2(e), the courts have generally interpreted the two sections as being two sides of the same coin. *See, e.g.*, Exquisite Form Bra., Inc. v. FTC, 301 F.2d 499, 502 (D.C. Cir. 1961).

[32] See ROWE at 373-76 for examples of typical arrangements subject to sections 2(d) and 2(e).

[33] 390 U.S. at 352.

[34] For a discussion of the doctrine see ROWE at 57-59, 398-99. Formulated by the FTC, the indirect purchaser doctrine "treats as the supplier's own customers, in contemplation of the law, the accounts of his [the supplier's] distributors whose autonomy he has supplanted by his own activities." *Id.* at 57. *But see* Klein v. Lionel Corp., 237 F.2d 13, 15 (3d Cir. 1956), where the validity of the doctrine has been questioned, at least with respect to treble-damage actions. The doctrine has evidently not been used in the situation where a supplier, dealing on different functional levels, grants discriminatory promotional allowances to a direct-buying retailer. However, its applicability in such a situation was recognized in Tri-Valley Packing Ass'n v. FTC, 329 F.2d 694, 709-10 (9th Cir. 1964). The indirect purchaser doctrine has normally been used in connection with section 2(d) when a supplier, whose products are distributed exclusively by wholesalers, grants promotional allowances to certain of its indirect-buying retailers while not making such allowances available to the indirect-buying competitors of the favored retailers. If the doctrine is applicable, then all indirect-buying retailers

order for this doctrine to be applicable there must be some kind of direct-dealing between the supplier and the indirect purchaser.[35] In the *Meyer* case, for example, the court of appeals found no evidence of direct-dealing between the suppliers participating in Meyer's promotional scheme and those of Meyer's competitors who bought the suppliers' products through wholesalers. Finding the "indirect purchaser doctrine" inapplicable, the court held there was no violation of section 2(d).[36] Another device available to the Commission was to include in appropriate cease and desist orders a ban on the granting of discriminatory promotional allowances to direct-buying retailers by suppliers dealing on different functional levels.[37] When confronted with a case in which discriminatory promotional allowances were granted to a direct-buying retailer, the FTC wavered as to the proper application of section 2(d). In the *Atalanta Trading Corp.* case,[38] the Commission held that promotional payments to a direct-buying retail "chain" did not require that similar payments be made available to wholesalers whose retail customers competed with the "chain." In the later *Liggett & Myers* decision,[39] the FTC was divided on the question. Although a majority of the Commission refused to decide the issue because they felt there was insufficient evidence to raise it,[40] the dissenting opinion, following the reasoning of a district

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are "customers" within the meaning of section 2(d) and thus entitled to the protection of that section. See American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir. 1962). The *Fred Meyer* decision would seem to obviate the need to resort to the doctrine in this situaion.

[35] *E.g.*, American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962). The doctrine was invoked where the supplier controlled retail prices and negotiated directly with the indirect-buying retailers.

[36] 359 F.2d at 362-63.

[37] See FTC v. Elizabeth Arden, 39 F.T.C. 288 (1944), *aff'd*, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947), a case involving section 2(e), where the FTC issued a cease and desist order directing Arden to restrain from discriminating among competing purchasers of its product by furnishing cosmetic demonstrators "to any retailer purchasing their products when such services are not accorded on proportionally equal terms to . . . other retail purchasers who in fact resell such products in competition with retailers who receive such services." 39 F.T.C. at 305. Some commentators interpreted the *Elizabeth Arden* decision as meaning that "purchaser" in section 2(e) includes not only those purchasers buying directly from the supplier but also those purchasers who buy the supplier's products through independent wholesalers. This view was adopted by Commissioner Elman in his *Fred Meyer* dissenting opinion. [1961-1963 Transfer Binder] TRADE REG. REP. ¶ 16,368 at 21,231 (FTC 1963). Other commentators and courts interpreted the decision as merely a recognition by the court of the "indirect purchaser doctrine" since Arden was dealing directly with the retailers involved.

[38] 53 F.T.C. 565, 566, 573 (1956) (by implication).

[39] 56 F.T.C. 215 (1959).

[40] *Id.* at 250-52.

court decision,[41] stated that where promotional payments are made to a direct-buying retail "chain," comparable payments must be made available to wholesalers whose customers compete with the direct-buying "chain."[42] The *Liggett & Myers* dissenting opinion became the view of the Commission in *Fred Meyer*.

Numerous difficulties confront the supplier in complying with the dictates of the *Meyer* decision. If a supplier desires to undertake the financing of a retailer-oriented promotional plan, he has the responsibility of making the plan available to all competing customers, both direct-buying and indirect-buying (buying through wholesalers) customers, on proportionally equal terms. This responsibility involves a duty to inform all competing customers of the existence of the plan, its terms, and the availability of any alternative plans.[43] Informing those retailers to whom he sells directly presents no problem to the supplier. However, informing those retailers who buy through wholesalers presents a formidable problem. The supplier may be able to utilize his wholesalers to inform the indirect-buying retailers. However, the Court in *Fred Meyer* made it clear that the responsibility remains on the supplier to see that all competing customers are informed of the availability of the plan.[44] Thus the supplier may be unable to utilize his wholesalers to discharge his duty to inform because he knows them to be unreliable. The supplier himself might undertake to inform the indirect-buying retailers of the availability of the plan, but such an undertaking would also require reliable, cooperative wholesalers to identify those retailers who buy the supplier's products. If the supplier is unable to obtain the co-operation of his wholesalers, then he must inform the indirect-buying retailers by some other means. The FTC's Proposed Guides suggest that the supplier might publicize his promotional plan in trade publications or in advertising brochures.[45] However, the supplier cannot be certain that all retailers entitled to be informed of the plan will have access to such publications and brochures. Another suggested

[41] Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230, 236 (D.N.J. 1956).

[42] 56 F.T.C. at 253-57.

[43] See Vanity Fair Paper Mills, Inc. v. FTC, 311 F.2d 480, 485 (2d Cir. 1962); FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. 240.8 (1968); proposed amendments to FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10617-18 (1968).

[44] 390 U.S. at 358.

[45] See proposed amendments to FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10618 (1968).

means of informing indirect-buying retailers of the availability of a promotional plan is to print the offer on shipping containers or to pack "fliers" describing the plan in the containers,[46] and this appears to be the best means for the supplier to be assured that its duty to inform has been discharged.[47]

Another problem confronting the supplier is the task of formulating a flexible promotional plan so that all competing customers can participate. A plan designed to suit the needs and capabilities of certain retailers may be unsuitable to the needs and capabilities of others. Providing a flexible plan in which all competing customers can participate has always been a requirement of section 2(d),[48] but the task now involves a greater burden since the competing customers entitled to participate under *Fred Meyer* are likely to be more multifarious than before—from the nation-wide "chain" store to the neighborhood grocery store, from the large discount department store to the small town novelty store.

The *Meyer* decision also complicates the supplier's obligation under section 2(d) to make promotional payments in consideration for services or facilities available on proportionally equal terms. This requirement that payments be made on proportionally equal terms is often satisfied by proportioning payments according to the number of units of supplier's products purchased by each customer over a certain period of time or according to the dollar volume representing each customer's purchases. Therefore, in order to use the number of units sold or dollar volume as a basis for proportioning payments among indirect-buying retailers, the supplier must have access to his wholesalers' records. Thus, once again the supplier is placed at the mercy of his wholesalers.[49]

In light of these difficult problems, the supplier may desire to turn over a large portion of the administration of his retail-oriented promotional plans to his wholesalers and compensate them to administer the plan with respect to the indirect-buying retailers entitled to participate.[50] Once again, the supplier remains ultimately responsible for

[46] *Id.*

[47] However, many suppliers believe that informing indirect-buying retailers of the availability of promotional plans by these means is impractical. Most promotional plans are short term, and since the supplier has no way of controlling the distribution of the cases containing information of the plan, retailers will be receiving the cases long before the promotion and long after the promotion.

[48] See FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240.9 (1968).

[49] *See* BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-3 (May 14, 1968).

[50] The Court specifically stated in *Fred Meyer* that a supplier may utilize its

seeing that the plan is properly administered and "[s]ome manufacturers consider their independent wholesalers much too apathetic about retailer-advertising assistance to be counted on for a vital role in administration of a cooperative-advertising program."[51] With so many problems confronting him in complying with the *Fred Meyer* decision, the supplier may choose to discontinue entirely retailer-oriented promotional activities and to concentrate, instead, on conducting such activities exclusively on a regional or nation-wide basis.

While the Supreme Court's *Fred Meyer* decision deals only with section 2(d) of the Robinson-Patman Act, the repercussions of the decision may very well affect other sections of the Act. The decision's most direct effect will be on section 2(e) where the term "purchaser" will almost certainly be interpreted coextensively with the Court's interpretation of "customer" in section 2(d).[52]

Another more far-reaching consequence of the *Meyer* decision may be its effect on section 2(a)[53] of the Robinson-Patman Act. In cases involving the Act there is a great deal of language indicating that the terms "customer" and "purchaser" in sections 2(a), (d), and (e) should be interpreted to have the same meaning.[54] Thus, it is arguable that "purchaser" in section 2(a) should now be interpreted to include not only those purchasers who buy directly from the supplier but also those purchasers who obtain the supplier's products from a direct-buying purchaser. If this interpretation is accepted, then the scope of section 2(a)

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wholesalers "to distribute payments or administer a promotional program." 390 U.S. at 358.

[51] BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-3 (May 14, 1968). Furthermore, Mr. Justice Harlan, dissenting in *Fred Meyer*, states that "the supplier could deal through his wholesalers, imposing restrictions on them to guarantee that an 'allowance' is actually passed through to retailers, only by running afoul of the Sherman Act." 390 U.S. at 361.

[52] *See* proposed amendments to FTC Guides for Advertising and Other Merchandising Payments and Services, 33 Fed. Reg. 10615, 10616 (1968); note 31 *supra*.

[53] 15 U.S.C. § 13(a) (1964) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be . . . 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. . . .

[54] *E.g.*, "The term 'customer' in § 2(d) should be given the same meaning as 'purchaser' in § 2(a) and (e) in order to harmonize parallel sections of a statute aimed at a common purpose." American News Co. v. FTC, 300 F.2d 104, 109 (2d Cir. 1962).

is greatly expanded. For example, in one typical situation the supplier sells both to wholesalers who in turn sell to retailers and to direct-buying retailers. Employing a functional discount schedule, the supplier charges the same price to both his wholesalers and his direct-buying retailer customers. The result of this distribution system is that the direct-buying retailer is able to sell the supplier's products at lower prices than his retail competitor who buys the supplier's products through wholesalers, resulting in competitive injury within the meaning of section 2(a). However, it has been held that there is no violation of section 2(a) because there is but one price and that price is paid by all purchasers. Thus, there is no discrimination in price between different purchasers—those purchasers being the wholesaler and the direct-buying retailer.[55] But if retailers buying through wholesalers are "customers" for the purpose of section 2(d), it can be argued that they are "purchasers" for the purposes of section 2(a). Therefore, in addition to competitive injury within the meaning of section 2(a), there are two prices, the price paid by the direct-buying retailer to the supplier and the inevitably higher price paid by the indirect-buying retailer to the wholesaler, resulting in discrimination between different purchasers—those purchasers being the direct-buying retailer and the indirect-buying retailer. If such an application of section 2(a) is correct, it seems likely that suppliers will discontinue their use of functional discounts and will begin to employ quantity discounts exclusively, effectuating this policy by refusing to sell in small lots. Under this type of discount schedule it would be possible for retailers buying through wholesalers to obtain a supplier's products at lower prices than their retailer competitors who buy directly from the supplier.

Because it would so greatly expand the scope of section 2(a), the above application of the *Fred Meyer* decision may not be accepted. However, the decision has another potential effect on section 2(a). It is possible that in complying with the *Meyer* decision a supplier's collaboration with his wholesalers or indirect-buying retailers to insure that promotional allowances are made available to all competing customers on proportionally equal terms might reach such a point that under the "indirect purchaser doctrine" the indirect-buying retailers would be con-

[55] Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353-54 (E.D.N.Y. 1960); Klein v. Lionel Corp., 138 F. Supp. 560, 565-66 (D. Del. 1956); Bird & Son, 25 F.T.C. 548, 553 (1937). *Cf.* FTC. v. Morton Salt Co., 334 U.S. 37, 55 (1948); Guyott Co. v. Texaco, Inc., 261 F. Supp. 942, 950-51 (D. Conn. 1966).

sidered the supplier's own customers.[56] In that case the indirect-buying retailers would be entitled, under section 2(a), to purchase the supplier's products at the same price as their direct-buying retail competitors.

The *Fred Meyer* result is sound in light of the legislative history of the Robinson-Patman Act. It is at least arguable however that the benefit that will be realized by the small retailer buying suppliers' products through wholesalers is at most minimal and does not justify the predicament in which suppliers now find themselves. If suppliers decide to continue retail-oriented promotional plans, the cost of administering such plans is likely to be substantially increased because of the new requirements imposed by the *Meyer* decision. Furthermore, the suppliers' higher cost will then be passed on in the form of higher product prices which will ultimately be borne by the consumer. In addition, a number of suppliers believe that many small indirect-buying retailers who buy in one or two case lots will not take advantage of the promotional allowances made available to them, because of the red tape they will encounter in collecting the small payments to which they are entitled. However, if small indirect-buying retailers band together and act jointly to collect the payments to which they are entitled, then the potential benefit to these retailers may be substantial.

To be extricated from the precarious position in which they now find themselves, suppliers will have to turn to Congress for relief in the form of amendments to the Robinson-Patman Act. Realistically, however, it is doubtful that the *Meyer* decision will precipitate congressional action. Therefore, suppliers can only hope that the FTC will issue a definitive set of guidelines to aid them in complying with the *Meyer* decision. No set of guidelines can possibly be expected to cover every situation and, consequently, an increased reliance on FTC advisory opinions is likely. Further complicating the suppliers' dilemma is the FTC's relative inactivity recently in the Robinson-Patman area.[57] "Therefore, it may be that the most substantial immediate hazard for suppliers who stray from the narrow path of proportional equality is treble-damage liability in private civil actions."[58]

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[56] See note 34 *supra.*

[57] During the period from May 1967 to May 1968 the FTC filed only three complaints under the Robinson-Patman Act. BNA ANTITRUST & TRADE REG. REPORT No. 357 at B-4 (May 14, 1968).

[58] *Id.*