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Trade Regulation -- Price Discrimination under Section 2(a) of the Robinson-Patman Act

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in the management of property in the always uncertain future. . . . It is the vanity of human nature that one out of whose hands property is passing should seek to control it after it has ceased to be his.[75]

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Trade Regulation—Price Discrimination under Section 2(a) of the Robinson-Patman Act

In the recent case of *Perkins v. Standard Oil Co.*,[1] the United States Supreme Court examined an aspect of section 2(a) of the Robinson-Patman Act[2] to which it had never before affixed a decisive interpretation. The Court considered the issue of whether the protection afforded by section 2(a) extends to competitors on the fourth, and by necessity, the third functional level. The narrow questions presented by the *Perkins* decision are whether that section logically dictated the Court's holding and what the possible ramifications of the decision may be.

The Robinson-Patman Act[3] was born of a Depression fear that the small-scale merchant was on the verge of obliteration by the newly-arisen chain-store giants. Section 2 of the original Clayton Act of 1914[4] had

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[75] *Id.* at 9-10, 97 S.E. at 732.

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[1] 395 U.S. 642 (1969).

[2] 15 U.S.C. § 13(a) (1964), which 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 substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: . . . *And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market . . . .

[3] 15 U.S.C. §§ 13, 13a-c, 21a (1964).

[4] The previous section 2, 38 Stat. 730 (1914) read 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 . . . where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: *Provided*, That nothing herein contained shall prevent discrimination in price between purchasers of commodities on account of differences in the grade, quality, or quantity of the commodity sold, or that makes only due allowance for differences in the cost of selling

provided against price discrimination; but largely because that section included an exemption for quantity discounts ("so that even a minor difference in quantity could support a vast difference in price"[5]), the law was easily evaded. The Robinson-Patman Act not only amended that aspect of the section by requiring quantity discounts to be cost-justified but it also added a very important phrase. The old section had made it unlawful for a supplier to discriminate in price between purchasers where that discrimination might substantially lessen competition or tend to create a monopoly. The Robinson-Patman amendment made price discrimination unlawful not only if the effect of that discrimination were substantially to lessen competition or to tend to create a monopoly, *but also* if the effect were to injure *specific competitors*: "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."[6] It is with this added phrase, and particularly the aspect of "with customers of either of them," that the *Perkins* case, and thus this note, are concerned.

Until 1957 Clyde A. Perkins was a large independent distributor of gasoline and oil in the states of Washington and Oregon. In 1945 he contracted to buy his gasoline requirements from Standard Oil Co. of California, a billion-dollar corporation and the largest gasoline supplier in the Northwest. He continued buying gasoline from Standard until November, 1957, when he leased his stations to a subsidiary of Union Oil Co. of California.

In 1959 Perkins brought suit against Standard to recover treble damages for injuries resulting from price discriminations that Standard had allegedly perpetrated against him in the months prior to November, 1957. Perkins accused Standard of selling gasoline more cheaply to a major wholesaler, Signal Oil & Gas Co., than it sold to him, as well as of providing price assistance during price wars to dealers reselling under Standard's brands, but not providing him with such assistance.

Standard admitted selling to its "branded dealers" more cheaply than to Perkins for a very short period and selling to Signal at approximately a half-cent-per-gallon more cheaply than to Perkins, beginning in Janu-

or transportation, or discrimination in price in the same or different communities made in good faith to meet competition . . . .

[5] F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 7 (1962) [hereinafter cited as ROWE].

[6] 15 U.S.C. § 13(a) (1964). Note that the section speaks of injury to competition, not in regard to parties injured, but in regard to parties favored.

ary, 1957. Signal had in turn sold to its (sixty-per-cent owned) subsidiary, Western Hyway Co., which had in turn sold to its (fifty-five-per-cent owned) subsidiary, Regal Stations Co., the operator of three stations in Portland, Oregon. Due to his contract with Standard, Perkins could not sell gasoline in Portland, but he did sell in nearby Vancouver, Washington, and thus was in competition with Regal Stations. Perkins claimed that the lesser price to Signal was "passed on" through Western to Regal, which was then able to undercut him. Standard argued that for most of 1957, Signal's price to Western was higher than or about the same as Standard's to Perkins. However, the jury, evidently finding a "causal connection" between the lesser price offered Signal and Perkins's departure from the gasoline distributing field, found for the plaintiff.[7]

Although the Court of Appeals for the Ninth Circuit stated that the jury was warranted in finding competitive injury to Perkins due to the discrimination in favor of the "branded dealers," it also said that Regal Stations Co., being a customer of a customer of a customer of the supplier, was too far removed from Standard for the law to recognize any requisite causal nexus: hence, the court held that section 2(a) does not apply to the fourth line of competition. Because a substantial part of the verdict depended on the injury by Regal, the court ordered a new trial.[8]

The United States Supreme Court reinstated the verdict. Justice Black wrote that the lower court's limitation of the authority of section 2(a) to either sellers, customers, or customers of customers[9] was "wholly an artificial one."[10] Since under the decision of the court of appeals, Standard apparently would have violated the Robinson-Patman Act had Signal sold *directly* to Regal, it is clear that the basis for that decision was the presence of Western Hyway in the distribution chain. The

[7] The foregoing is but a bare outline of a complex fact pattern taken from the following sources: Perkins v. Standard Oil Co., 395 U.S. 642, 643-44 (1969); Perkins v. Standard Oil Co., 396 F.2d 809, 811-12 (9th Cir. 1968); Brief for Petitioner at 4-24, and Brief for Respondent at 3-19, Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

[8] 396 F.2d at 812-13.

[9] Justice Black actually spoke of limitation to

> (1) the seller ('any person who . . . grants . . . such discrimination'), (2) the favored purchaser ('any person who . . . knowingly receives the benefit of such discrimination'), and (3) customers of the discriminating seller or favored purchaser ('customers of either of them').

395 U.S. at 646-47.

[10] *Id.* at 647.

Supreme Court wrote that limiting the coverage of section 2(a) in this way "would allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link to the distribution chain."[11] Justice Black placed major reliance on the 1968 case of *FTC v. Fred Meyer, Inc.*,[12] in which the Court had held that the word "customer" (as used in section 2(d)[13] of the Act) was not to be narrowly defined.

If the *Perkins* holding is seen strictly in light of its particular facts, it is no more than an ordinary price discrimination case. Because Western was sixty-per-cent owned by Signal and Regal was fifty-five-per-cent owned by Western, the Signal-Western-Regal chain may be considered a single entity, a single "knowing recipient" of a price discrimination deemed by the jury to have caused injury to competition between two integrated wholesaler-retailers.[14]

The presence of majority-ownership impressed Justices Marshall and Stewart so much that, although skeptical of the decision, they concurred in reversal of the judgment of the court of appeals (though not in the reinstatement of the verdict). Justice Marshall wrote,

> Since we are dealing with a chain of majority-owned subsidiaries, it seems quite likely that the discriminatory price given Signal would have a vital effect on the pricing decisions of the stations which eventually marketed Signal's gasoline. Even if the lower price were not passed on to the company marketing the gasoline, that company would be more willing to accept losses in a protracted price war if it knew that its "grandfather" corporation were making some extra, and partially off-setting, profits. For this reason . . . I would treat Signal, the beneficiary of the discriminatory price, as if it were directly competing with petitioner's stations.[15]

[11] *Id.*

[12] 390 U.S. 341 (1968). See note 34 *infra*.

[13] 15 U.S.C. § 13(d) (1964). See note 33 *infra*.

[14] However, some courts have tended to find independence of action among commonly owned corporate entities even though these decisions might not be upheld by the United States Supreme Court today. For example, the court in Baim & Black, Inc. v. Philco Corp., 148 F. Supp. 541, 544 (E.D.N.Y. 1957), held that:

> The fact that Philco Distributors was a wholly owned subsidiary of Philco, and that the officers of Philco Distributors [with one exception] . . . were also officers of Philco, fails to demonstrate that the subsidiary was merely the alter ego of the parent.

[15] 395 U.S. at 651 (Marshall, J., joined by Stewart, J., concurring in part and dissenting in part).

He would have explicitly limited the holding to the facts of the case. He criticized its imprecision and breadth: "I can see no reason to intimate, even by indirection, what the result would be if wholly independent firms had intervened in the distribution chain."[16]

Although the opinion of the Court does allude to the double majority-ownership, it does not focus upon this seemingly crucial point. One is thus left to conclude that the decision extends to cases involving "wholly independent firms." *Perkins* is definitely treated by the Court as a "fourth level" case, not a traditional "second level" case. There are a number of reasons why this interpretation is significant.

In the first place, never before in the thirty-three-year history of the Robinson-Patman Act has the purview of the Act been held to extend to the fourth level. Prior to the decision of the court of appeals, in fact, *only* injury to competition resulting from price discrimination involving suppliers or immediate favored purchasers had been deemed within the purview of the Act. The *Perkins* litigation made a jump of two steps, not one, in widening the effective Robinson-Patman ambit.

The apparent breadth of *Perkins* does not mean that the Supreme Court has overthrown any prior precedent with a startling new doctrine. Only once did the Court have the opportunity to decide the *Perkins* issue, and that was in the famous *Standard Oil Co.*[17] litigation of the late forties and early fifties, which involved a fact pattern of favored retailers on the third level. However, in that litigation the Supreme Court never decided the question of whether Standard (of Indiana) should have been liable for injury to competition two levels removed.[18]

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[16] *Id.*

[17] *In re* Standard Oil Co., 41 F.T.C. 263 (1945), *modified,* 43 F.T.C. 56 (1946), *modified,* 173 F.2d 210 (7th Cir. 1949), *rev'd,* 340 U.S. 231 (1951), *modified,* 49 F.T.C. 923 (1953), *set aside,* 233 F.2d 649 (7th Cir. 1956), *aff'd,* 355 U.S. 396 (1958).

[18] Standard Oil of Indiana had sold gasoline more cheaply to four "jobbers" than to its own retail dealers. The court of appeals agreed with the FTC that section 2(a) had been violated, but the court emphasized that the supplier must have *known* of the illicit lesser price. Said the court:

> The petitioner has no control and can have no control over the price of the gasoline after it is sold to the wholesalers. The latter may put any price on it they choose. They may give it away if they like. The petitioner should not be required to police its wholesalers and to sell to them at the petitioner's peril. The petitioner shall be liable if it sells to a wholesaler it knows or ought to have known is engaging or intends to engage in the competitive practices condemned by this proceeding.

Standard Oil Co. v. FTC, 173 F.2d 210, 217 (7th Cir. 1949). The United States Supreme Court reversed and remanded the decision on the unrelated ground of "meeting competition." 340 U.S. 231 (1951). When the case came before the

Impressed by the absence of decision as to "third-line" competitive injury in the *Standard Oil Co.* litigation and, in fact, by the absence of any decision on that point since passage of the Robinson-Patman Act in 1936, Frederick Rowe wrote in 1962 that the theory of "third-line" competitive injury was in all likelihood "discredited"[19] and "buried."[20] *Perkins,* of course, demonstrates that that theory was not "buried," and in light of the wording of the statute, which embraces that theory with the words "injure . . . competition . . . with customers of either of them," one scarcely can imagine how the theory could have been "buried" lawfully, absent Congressional action.

This analysis must be carried beyond considerations of third-line competitive injury, however, because *Perkins* does take the aforementioned additional step to the fourth level. While section 2(a) may speak, as noted above, of customers of customers, it does not speak of customers of customers of customers. Standard relied heavily on this point in its brief:

> . . . Congress recognized the realities of the marketplace by focusing on specific competition at distinct levels in the chain of distribution. If it were otherwise, the elaborate definitional language in the Robinson-Patman amendment would have been superfluous, for Congress could simply have forbidden price discrimination whose effect may be 'to injure, destroy, or prevent competition with any person.'[21]

Court again seven years later, the Solicitor General failed to pursue that portion of the FTC order impugning Standard's discounts to the four "jobbers." The Solicitor General indicated that such an order would likely compel resale price maintenance on Standard's part, which would be in direct conflict with antitrust policy. See ROWE 200.

[19] ROWE 205.

[20] *Id.* 200. Rowe very much wanted the theory of third-line competitive injury to be "discredited" and "buried," no matter how incorrect he was in so labeling it.

> [T]his esoteric doctrine appears of dubious validity today. For it not only regulates competitive effects which are only remotely related to the seller's price differentials, but invariably entails controls by the supplier over his distributors' resale prices capable of creating serious antitrust conflict.

Id. 196.

[21] Brief for Respondent at 41, Perkins v. Standard Oil Co., 395 U.S. 642. It should be pointed out that on two occasions the United States Supreme Court has emphasized that Congress clearly delineated in section 2(a) the *exact* levels to which that section extends. The Court in *Fred Meyer,* 390 U.S. at 356-57, placed reliance on the statement in FTC v. Sun Oil Co., 371 U.S. 505 (1963), that "Congress expressly demonstrated in [section 2(a)] that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminating price . . . with *clarity of expression. . . .*" *Id.* at 514-15 (emphasis added). With *Perkins* the Court indicates that perhaps Congress was not so exact in section 2(a), after all. Speaking of the "intent" of Congress in the area of Robinson-Patman is in reality fruitless: "[I]f ever there were a

As a rationale for the possible desire of Congress to end Robinson-Patman jurisdiction at the third level, the defendant argued that with every addition of a link to the distribution chain another source of independent judgment is interposed, so that by the fourth level proof of the requisite causal nexus between price difference and alleged injury has become more a matter of guesswork than of solid reasoning.[22] The Court was apparently unimpressed by these contentions; no doubt it believed that any possible obstruction to the analysis of causation would be less injurious to society than permitting large suppliers to avoid the effect of the Act by adding a link to the distribution chain.

Not surprisingly, *Perkins* may upset certain standard practices. Suppliers have traditionally been permitted to sell to wholesalers and retailers at the same prices and to sell to wholesalers at lower prices than to either retailers or wholesalers who also retail.[23] The question presents itself whether suppliers will be permitted to continue selling in this manner.

If a supplier sells to two customers, one of which is a wholesaler and one a retailer or an integrated wholesaler-retailer, he logically has three pricing options: to sell at the same price to each, or at a higher price to one than the other. Until now, only a scheme permitting sales to the wholesaler at a higher price than a direct-buying retailer has been held to be forbidden by the Robinson-Patman Act. This rule was enunciated by *FTC v. Morton Salt Co.*,[24] and it is clearly dictated by the language of section 2(a), even if that section is stripped of its "third-line" wording; for, where the direct-buying retailer is favored, competition has been injured *with* the immediate recipient of the discrimination, even if the disfavored direct competitor is separated from the seller by an intermediary.

Section 2(a) has also been held to sanction without reservation com-

perfect example of the legislature not knowing the consequences of its actions, and not knowing what it intended, this was it." Adelman, *Price Discrimination as Treated in the Attorney General's Report*, 104 U. PA. L. REV. 222, 233 (1955).

[22] See Brief for Respondent at 34.

[23] See ROWE 32-34. Integrated wholesaler-retailers have not been permitted the wholesale discount despite their having provided suppliers with identical valuable wholesaling functions as "pure" wholesalers.

[24] 334 U.S. 37 (1948). The respondent had taken issue with a portion of the FTC order barring "respondent from selling to a retailer at a price lower than that charged a wholesaler whose customers compete with the retailer." 334 U.S. at 55. With little effort and no explication, the Court replied, "Section 2(a) of the Act specifically authorizes the Commission to bar [such] discriminatory prices . . . ." *Id.*

plete price uniformity as to all immediate purchasers, whether wholesalers, jobbers, direct-buying retailers, or whatever.[25] A case in point is *Klein v. Lionel Corp.*[26] The plaintiff was a retailer who bought toy trains, manufactured by the defendant, through a middleman at a forty per cent discount. Competing chain retailers bought directly from the defendant at a fifty-two percent discount, the same discount afforded the plaintiff's middleman. Relying upon the phrase "or with customers of either of them," the plaintiff contended that section 2(a) required him to receive the fifty-two percent discount. The court disagreed, construing that phrase not to define the word "purchaser" found earlier in the section but to indicate "the conditions under which a discrimination is actionable."[27]

There was of course no *immediate* price discrimination in *Klein*; however, the retailer in direct competition with the direct-buying retailer with a more favorable price was clearly disadvantaged. How well does this fact comport with the "ultimate intention" of the Robinson-Patman Act? More particularly, how well does it comport with "the broad, and somewhat vague"[28] *Perkins* holding—that injury to competition on the third level (or fourth level) is not to be tolerated? Seen in light of this question, *Perkins* may have initiated a trend that will eventually spell the downfall of even the venerable sanction of price equality.[29]

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[25] This sanctioning of price equality without regard to function of the purchaser brings about price discrimination in the *economic* sense. To the extent that a wholesaler provides a supplier with valuable warehousing and distributive services not provided by retailers, the supplier reaps an unearned profit from the wholesaler by charging a uniform price. Retailers who buy from the wholesaler are also disadvantaged in the process, if the wholesaler makes any profit at all.

[26] 138 F. Supp. 560 (D. Del.), *aff'd*, 237 F.2d 13 (3d Cir. 1956).

[27] *Id.* at 563. The court elaborated as follows:

> In effect [plaintiff] contends that in order to obtain the same discount that the chain stores and mail order houses enjoy and at the same time allow a reasonable profit to the middleman, or jobber from whom Klein must purchase, that the discount allowed to the middleman or jobber must be considerably in excess of that allowed to chain stores and mail order houses. It is difficult to see, however, how the conclusion contended for would not result in a flagrant violation of the Robinson-Patman Act and accomplish that which the Act was intended to prevent, viz., a discrimination in price between two purchasers from the same seller.

Id. at 565.

[28] 395 U.S. at 650 (Marshall, J., joined by Stewart, J., concurring in part and dissenting in part).

[29] Whatever the "ultimate intention" of the Robinson-Patman Act, the exact words of section 2(a) make it unlawful "to discriminate in price between different purchasers," and if the sanction of price uniformity as to all immediate purchasers is indeed jeopardized by *Perkins*, such jeopardization shall have to be

It is more likely that *Perkins* will have an effect upon the last of the three above-delineated pricing options—the practice of offering wholesalers lower prices than retailers or integrated wholesaler-retailers. The FTC has traditionally permitted price differentials between purchasers performing different distributive functions where such differentials have been biased in favor of the (unintegrated) purchaser performing the more valuable function and such purchasers have not directly competed with one another.[30] The differentials have not had to be "cost-justified" with any sort of accounting precision.[31] Suppliers have been permitted to take cognizance of the different distributive services provided by their different customers and reward them appropriately through simple "functional discounts" without much concern with the technical accounting problems involved in demonstrating precise savings.

It is true that *Perkins* is by no means a "pure" case of retailer versus wholesaler. On the contrary, Perkins was primarily a wholesaler, although he did operate one gas station in Vancouver, Washington, and leased many others. Nevertheless, the Supreme Court *treated* Perkins as primarily a retailer. Signal was no ordinary wholesaler, but a gigantic conglomerate that had power enough to force a price concession from Standard, "allegedly because [Signal] furnished Standard with part of [Standard's] vital supply of crude petroleum."[32] Despite this divergence from the above-described "pure" paradigm, *Perkins* bears enough similarity to it that speculation as to the case's effect on the "functional discount" is not unwarranted. Signal, so far as this case is concerned, *was* solely a wholesaler; and it was Signal that received the discount. The facts presented no *Morton Salt* situation. Neither was there a *Fred Meyer* situation, despite the Court's reliance on that case. *Fred Meyer* was a promotional allowance (sec-

in the face of that wording. However, this fact did not daunt the Court in *Fred Meyer*, a decision which the Court in *Perkins* seems to rely upon heavily. *Fred Meyer*, a section 2(d) case, determined that a purchaser from a wholesaler is a purchaser from the seller. See note 34 *infra*.

[30] See Rowe 174.

[31] The usual FTC attitude toward cost-justification has not been so lenient. According to Rowe, the FTC has required unrealistically strict accounting—objective exactitude—before accepting a section 2(a) cost-justification defense (see note 2 *supra*). Rowe 303-12.

[32] 395 U.S. at 647. Standard certainly did not "offer" Signal the discount, but rather Signal insisted upon it. Moreover, Standard never satisfied Signal: About the time Perkins terminated his contract with Standard, the contract between Signal and Standard also was terminated. Brief for Respondent at 10.

tion 2(d)[33]) case, in which the direct-buying retailer, and not the wholesaler, was favored.[34] The facts in *Perkins* bear repeating: One powerful

[33] 15 U.S.C. §§ 13(d) & 13(e) (1964) provide that:

(d) 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.

(e) 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.

[34] Fred Meyer, Inc., a chain store in Oregon, had initiated a promotional program whereby suppliers' products were advertised, and given a reduced price, in a coupon book that consumers could purchase for a dime. To participate in this program, certain suppliers had to pay Fred Meyer, Inc., 350 dollars; naturally, wholesalers who bought from these suppliers were not afforded the same "promotional allowance." The FTC sought to force the suppliers to provide the wholesalers with the promotional allowance in much the same way as the Morton Salt Co. had been forced to provide wholesalers with price discounts similar to those that had been provided giant retailers in *Morton Salt.* However, the FTC encountered the major obstacle of the difference in wording between section 2(a) and section 2(d); the latter does not speak of "customers of customers."

The court of appeals adhered to the strict statutory wording of section 2(d) and held that since Fred Meyer, Inc., and the "disadvantaged" wholesalers were not "customers competing," the suppliers were not obligated to pay the wholesalers "proportionally." FTC v. Fred Meyer, Inc., 359 F.2d 351, 362-63 (9th Cir. 1966). The Supreme Court found this result insufferable since the lower court's holding would protect the larger direct-buying retailers from the effects of 2(d) while the smaller indirect-buying retailers would not be entitled to this protection. 390 U.S. 341, 352 (1968).

Adherence to the section 2(a) logic and to the seeming meaning of the word "customer" in section 2(d) (or "purchaser" in section 2(e)) would require that the *wholesaler* be provided with payment for the promotional scheme. However, since the Court felt that the wholesaler "might or might not pass [the allowances] on to the level where the impact would be felt directly," 390 U.S. at 357, it held that "'customers' in § 2(d) *includes retailers* who buy through wholesalers and compete with a direct buyer in the resale of the supplier's product. . . ." *Id.* at 354 (emphasis added). Moreover, "the most reasonable construction of § 2(d)," the Court said, "is one which *places on the supplier the responsibility* for making promotional allowances available to those resellers who compete directly with the favored buyer." *Id.* at 357 (emphasis added).

The effect of placing this responsibility squarely on the supplier's shoulders has been two-fold. First, suppliers now face an incredible amount of administrative problems when seeking to promote an advertising scheme. *See* FTC Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. § 240 (1969); Note, *Trade Regulations—Robinson-Patman Act Section 2(d)—Promotional Allowances,* 47 N.C.L. Rev. 243, 251 (1968); Note, *The FTC and Promotional Allowances: The* Fred Meyer *Quagmire,* 55 Va. L. Rev. 718, wholesaler *exacted* from the supplier a discount (not offered in repayment for functional services) that caused eventual injury to a wholesaler-retailer buying directly from the supplier. Unless the Court in the future proceeds with caution in restricting *Perkins* to these facts, the previously sanctioned functional discount may be threatened with extinction. For it is no great jump to proceed from the *Perkins* fact pattern, which does not involve a functional discount, to the similar, and simpler, paradigm of a price discrimination offered a typical wholesaler not immediately competing with a direct-buying retailer.

If *Perkins* does indeed jeopardize the functional discount, it contravenes a long-accustomed and much-supported[35] way of doing business. Suppliers are by now acquainted with the rigors of *Fred Meyer*; if the *Perkins* decision is not contained within narrow limits, then together these decisions may presage an era of hardship for suppliers in formulating and executing pricing policies. The *Fred Meyer* decision has led to much added administrative complexity for suppliers in the area of promotional allowances and, coincidentally, has made it more likely that suppliers will encounter Sherman Act penalization.[36] Similarly, it would seem that *Perkins*, if it is to mean the attenuation of the functional discount, will extend these problems of "busy work" and the Sherman Act into the area of pricing. This burden will be considerably greater, of course, if suppliers are no longer allowed to rely on the safe measure of offering all customers the same price on commodities of like grade and quality.

HAYWOOD RANKIN

738 (1969). Second, as Justice Harlan emphasized in his dissent in *Fred Meyer*, a supplier may possibly run afoul of the Sherman Act *either* by forcing wholesalers to pass on an allowance *or* by bypassing the wholesaler and dealing directly with the retailers. 390 U.S. at 361.

[35] The Attorney General's National Committee to Study the Antitrust Laws rendered a very favorable opinion on the subject of functional discounts:

> The Committee recommends . . . that suppliers granting functional discounts either to single-function or to integrated buyers should not be held responsible for any consequences of their customers' pricing tactics. Price cutting at the resale level is not in fact, and should not be held in law, 'the effect of' a differential that merely accords due recognition and reimbursement for actual marketing functions. The price cutting of a customer who receives this type of differential results from his own independent decision to lower price and operate at a lower profit margin per unit. The legality or illegality of this price cutting must be judged by the usual legal tests. In any event, consequent injury or lack of injury should not be the supplier's legal concern.

REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 208 (1955).

[36] See note 34 *supra*.