DUAL DISTRIBUTION PROMOTIONAL ALLOWANCES: THE FRED MEYER AMENDMENT

I. Introduction

In *Federal Trade Commission v. Fred Meyer, Inc.*,[1] the FTC charged a supermarket chain with violating § 5 of the Federal Trade Commission Act[2] by knowingly receiving promotional allowances made in violation of § 2(d) of the Clayton Act as amended by the Robinson-Patman Act.[3] The case involved the interpretation of § 2(d) which prohibits a seller from making payments for the promotion of his product to any of his customers unless he makes payments available on a proportionally equal basis to "all customers competing in the distribution of such products." The Supreme Court held, in a situation where food producers sold to wholesalers and directly to a retail chain, that the wholesalers and the retail chain were not competing customers within the meaning of the quoted phrase, but that the *wholesaler's retail customers* and the *retail chain* were "competing customers" and that the wholesalers' customers were entitled to receive promotional allowances proportionally equal to those granted the chain.

II. The Promotional Allowance Plan Involved

Meyer operated a thirteen-store chain of supermarkets in the Portland, Oregon area. Its stores accounted for approximately twenty-five percent of the retail grocery business within the Portland area. It was conceded that Meyer was in competition with all retail grocery stores selling within

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1 390 U.S. 341 (March 18, 1968).

2 74 Stat. 200, 15 U.S.C. § 45(a)(1) (1965). The use of § 5 was required to bring the action against the buyer since § 2(f) of the Robinson-Patman Act, 49 Stat. 1526, 15 U.S.C. § 13(f) (1965), prohibits *only* knowingly receiving a discriminatory price. Knowingly receiving a disproportionate promotional allowance has been held to be a violation of § 5. R. H. Macy & Co. v. FTC, 326 F.2d 445 (2d Cir. 1964); Giant Food, Inc. v. FTC, 307 F.2d 184 (D.C. Cir. 1962), *cert. denied*, 372 U.S. 910 (1963); Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966).

It is assumed herein that the test used to determine a violation is the same in a *buyer* inducement case as it is in a case where the action is brought against the *seller* under § 2(d) alone. It is, of course, possible that an unfair method of competition could be found even though the promotional allowance was not made in violation of § 2(d). This is particularly true with respect to buyer inducement cases where an argument of preemption based on § 2(d) may be less persuasive because of the limited scope of § 2(f).

3 49 Stat. 1526, 15 U.S.C. § 13(d) (1965). 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.

A comprehensive text on the subject is F. Rowe, Price Discrimination Under the Robinson-Patman Act, (1962) (including a 1964 supplement).

the area. Meyer had for several years conducted an annual promotional campaign featuring a coupon book. The book generally contained seventy-two pages, each page consisting of a coupon which allowed the consumer to purchase the specified product at a reduced rate—often three units for the price of two. The book, which was sold to the consumer for ten cents, was alleged to have a value of fifty-four dollars in cost saving.

Meyer's suppliers, most of whom were food producers who sold directly to Meyer, contributed to the cost of the promotional campaign in two ways. First, the suppliers paid a flat rate, generally $350.00, for each of the featured products supplied by them to cover the cost of printing the coupon book. Secondly, the suppliers subsidized the price reduction of the featured product by redeeming the coupons or supplying without charge the additional amount of their products sold pursuant to the coupon plan.

The FTC found[4] that Meyer had violated § 2(f) of the Robinson-Patman Act[5] by knowingly receiving a discriminatory price and had violated § 5 of the Federal Trade Commission Act[6] by knowingly receiving a disproportionate promotional allowance. It further found that the subsidies were in substance price concessions and as such they were made in violation of § 2(a) of the Robinson-Patman Act,[7] which prohibits the granting of discriminatory prices, and the flat rate promotional allowances were paid in violation of § 2(d) since they were not made available to the suppliers' other customers on a proportionally equal basis. A cease and desist order was accordingly issued.[8]

Meyer appealed to the Court of Appeals for the Ninth Circuit[9] on a number of issues, only one of which reached the Supreme Court and will be considered herein. Meyer claimed that the § 2(d) violation was not established with respect to two of its suppliers, Tri-Valley Packing Association and Idaho Canning Company, because these two suppliers, unlike the other suppliers on which the § 2(d) violation was based, made no direct sales nor engaged in other direct dealings with any retail grocery stores that competed with Meyer. Although the two suppliers sold to Portland area wholesalers whose retail customers competed with it, Meyer maintained that the wholesalers were not entitled to receive proportionally equal promotional allowances because they were not competing customers

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[4] Fred Meyer, Inc., [1961-1963 Transfer Binder] CCH TRADE REG. REP. ¶ 16,368 (FTC 1963).

[5] 49 Stat. 1526, 15 U.S.C. § 13(f) (1965).

[6] 74 Stat. 200, 15 U.S.C. § 45(a)(1) (1965). *See* note 2 *supra.*

[7] 49 Stat. 1526, 15 U.S.C. § 13(a) (1965).

[8] *Supra* note 4 at ¶ 15,704, modified, ¶ 16,368 at p. 21, 229-31.

[9] Fred Meyer, Inc. v. FTC, 359 F.2d 351 (9th Cir. 1966). To thoroughly understand the position of the court of appeals it is helpful to consider its opinions in Standard Oil Co. of Calif. v. Perkins, 396 F.2d 809 (9th Cir. 1968); Tri-Valley Packing Assn. v. FTC, 329 F. 2d 694 (9th Cir. 1964); and, Klein v. Lionel Corp., 237 F. 2d 13 (3rd Cir. 1956).

within the meaning of § 2(d). This, Meyer claimed, resulted from the established principle of law and parties who operate on different functional levels within the chain of distribution are not in competion with each other. The court of appeals on the basis of its prior ruling in *Tri-Valley Packing Assn. v. FTC*[10] agreed with Meyer and reversed the Commission on this point.

III. THE DEVELOPMENT OF THE ORIGINAL INTERPRETATION

The effect of the court of appeals decision is clearly anomalous when considered in the light of the congressional purpose[11] behind the Robinson-Patman Act. The Act was intended to protect the smaller competitors from the competitively disadvantageous situation which results when larger competitors use their buying power to obtain price or service concessions from their suppliers. The history of the Act centers around the food retailing industry. Congress considered the tremendous buying power of the chain stores to be a substantial threat to the existence of the independent retailers.

Today the chain stores, because of the tremendous volume of their purchases, buy directly from the food producers, whereas the independents are forced to buy through wholesalers. The direct buying chains, even though they are performing the function of wholesalers, are considered to be operating on the functional level of retailers. Since the wholesalers operate on a different functional level and, therefore, have not been considered competing customers within the meaning of § 2(d), the suppliers have been free to treat the chain stores and the wholesalers as different types of customers and accordingly give each different price and service treatment. Thus, the independents, for whose benefit the Act was primarily intended, are effectively excluded from it protection.

Section 2 was originally enacted in 1914.[12] It prohibited a seller from charging his competing purchasers different prices for the same grade and quantity of merchandise when the effect of the price differentials may be substantially to lessen competition. However, it was soon established that purchasers on different functional levels were not in competition with each other.[13] Price discrimination (i.e., price differentals not justified by differences in the quantity or quality of the merchandise) between different functional levels did not produce the requisite adverse effect on competition and was, therefore, outside the terms of the statute. Congressional

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10 329 F.2d 694 (9th Cir. 1964).

11 *See* Rowe, *supra* note 3, chapter 1; FEDERAL TRADE COMMISSION, FINAL REPORT ON THE CHAIN-STORE INVESTIGATION, S. Doc. No. 4, 74th Cong., 1st Sess. (1935); S. Res. No. 224, 79th Cong., 1st Sess., 69 Cong. Rec. 7857 (1928).

12 38 Stat. 730 (1914).

13 *See* General Foods Corp., 52 F.T.C. 798 (1956).

dissatisfaction[14] over the limited reach of § 2 of the Clayton Act and its failure to prevent price discrimination by indirect means, led to its amendment by the Robinson-Pattman Act[15] in 1936. The amendment changed the original § 2 in two ways. Firstly, the original § 2, which became § 2(a), was modified to prohibit price discrimination either when the effect may be substantially to lessen competition or when it may injure competition "with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." This added phrase, typical of § 2 in its lack of clarity, was construed to prohibit price discrimination when the adverse competitive effect could be shown to exist within any of the three functional levels of competition described —i.e., competition with the seller (the primary line), between the customers of the seller (the secondary line) or between the customers of the customers of the seller (the tertiary line). For example, in *FTC v. Morton Salt Co.*,[16] the Supreme Court upheld a cease and desist order restricting the price differential Morton could maintain between its wholesale and retail purchasers because the differential had an adverse effect on the ability of the wholesaler's retail customers to compete with the direct buying customers.

The second area of amendment to § 2 was the addition of a number of subsections some of which prohibit specific forms of indirect price discrimination. Subsection 2(c)[17] prohibits the seller from granting a dummy brokerage allowance to a purchaser or agent of the purchaser. Subsection 2(d), as mentioned above, prohibits a seller from granting a promotional allowance to any customer unless such allowance is made available to all customers competing in the distribution of such product. Subsection 2(e)[18] prohibits the seller from providing services or facilities to any of its purchasers in connection with the handling or sale of his product not accorded to all purchasers on a proportionately equal basis. Unlike § 2(a), §§ 2(c), 2(d), and 2(e) do not require the showing of an adverse effect on competition.[19]

There was early and consistent agreement on one point with respect to § 2. "[T]he statute imposes a hodgepodge of confusing, inconsistant, and frequently misdirected restriction."[20] The inconsistency runs in two ways.

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14 *See* note 11 *supra.*

15 49 Stat. 1526, 15 U.S.C. § 13 (1965).

16 334 U.S. 37 (1948).

17 49 Stat. 1526, 15 U.S.C. § 13(c) (1965)

18 49 Stat. 1526, 15 U.S.C. § 13(e) (1965).

19 Note 4 *supra* at p. 21, 216.

20 390 U.S. at 359-60 (Justice Harlan). *See* Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953); Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787, 793-94 (1963).

> You might as well know that the bill finally agreed upon by the conferees . . . contains many inconsistencies, and the courts will have the devil's own job to unravel

Firstly, the "infelicitous language"[21] of the various subsections makes it difficult to interpret the subsections in a manner which gives cohesiveness to the whole of § 2. Secondly, an interpretation of § 2 which gives effect to the literal meaning of each of the subsections results in an interpretation which seems inconsistent with the purpose of the act. The court of appeals' decision in *Meyer*[22] is the consequence of a long effort to construe the Act in a manner which gives substantial effect to the literal terms of each of the subsections consistent with giving all of the subsections a compatible meaning.

It was established without significant controversy that the term customer meant one who purchased from the seller.[23] The rule that competition, within the meaning of § 2(d), does not exist between different functional levels resulted from the effect that § 2(a) had on the interpretation of § 2(d). As noted above, the original § 2 was amended in 1936 to include the customers of customers clause which defines the levels of competition to which the courts may look to find an anticompetitive effect. Because it had been judicially determined prior to the amendment that competition did not exist between different functional levels[24] and because the 1936 amendment was an attempt to expand the reach of § 2,[25] it was thought that Congress used the term competition to mean only competition within a single functional level. Otherwise the § 2(a) customers of customers clause would be meaningless. Therefore, the term competition had to be interpreted to include only intralevel competition unless it was to be given a different meaning in § 2(d) than it had in § 2(a). The courts[26] and the FTC[27] refused to give it a different meaning.[28] In

the tangle. In an endeavor to get some sort of an agreement, the [Senate bill] . . . [was] grafted onto the House bill, and we have what might be termed in common parlance somewhat of a "hodgepodge". . . . You have the herculean task to make it yield sense. 80 Cong. Rec. 9419 (1936) (remarks of Representative Celler).

21 Automatic Canteen Co. of America v. FTC, 346 U.S. 61, 78 (1953).

22 Note 9 *supra.*

23 FTC Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance With Section 2(d) and 2(e) of the Clayton Act, 16 C.F.R. § 240.3 (1968).

24 *See* General Foods Corp., 52 F.T.C. 798 (1956).

25 *See* note 11 *supra.*

26 *See* note 9 *supra.*

27 Atalanta Trading Corp., 53 F.T.C. 565 (1956), *reversed on other grounds,* 258 F.2d 365 (2d Cir. 1958); *see* General Foods Corp., 52 F.T.C. 798 (1956).

28 The effect of this interpretation has been somewhat mitigated by the "indirect customer doctrine." Under this doctrine customers who acquired a product through an intermediary have been considered to be customers of the original seller when the seller had engaged in direct dealings with a customer. *See* e.g., American News Co. v. FTC, 300 F.2d 104 (2d Cir.), *cert denied,* 371 U.S. 824 (1962) (Retailer bypassed intermediary distributor to negotiate directly with magazine publisher); Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert denied,* 331 U.S. 806 (1947) (Manufacturers who provided demonstrators for some of its customers who purchased through wholesalers was obligated under § 2(e) to provide demonstrators to all customers purchasing through wholesalers); K. S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (S.D.N.Y. 1961) (Direct dealing with manufacturer by-passing wholesaler in private action based on §§ 2(d) and (e)). *But see,* Klien v. Lionel Corp., 237 F.2d 13 (3rd Cir. 1956)

light of the fact that Congress dealt specifically with the term in § 2(a), this result seems reasonable.

The Commission maintained this position until 1959 when, in the case of *Liggett & Myers Tobacco Co. Inc.*,[29] it abandoned the theory of absolute functional segregation. In that case the Commission considered whether a cigarette manufacturer who gave promotional allowances to vending machine operators was required to make the allowances proportionally available to wholesalers whose customers sold over the counter. The Commission found that competition did not exist between the wholesalers and the vending machine operators, but unlike its prior cases, it based its decision on a lack of evidence to support the claim of competition.[30] In *Meyer* it was conceded that Meyer was in competition with all independent groceries retailing in the Portland area. The Commission found that the economic prosperity of the wholesalers was dependent on their ability to supply the independent retailers at prices and levels of assistance which would enable them to compete with the chain stores.[31] The economic interdependence between the wholesalers and their customers was enough to establish that the wholesalers were in competition with Meyer.[32]

The FTC thus gave competition a different meaning in § 2(d) than it has had in § 2(a). It attempted to justify this paradox by distinguishing the subsections in two ways.[33] Firstly, it noted that each type of conduct described in §§ 2(c), 2(d), and 2(e) is a per se violation whereas that defined in § 2(a) is prohibited only when the requisite anticompetitive effect is shown. The Commission pointed out that the Supreme Court[34] had noted that Congress may have considered the indirect forms of price discrimination prohibited by §§ 2(c), (d), and (e) to be a greater threat to competition because of their "secret" nature. Its prohibition was made absolute to force the offending seller to use the more direct forms of price discrimination because they are more easily detected and evaluated. The Commission reasoned that because Congress had acted with a greater se-

(Plaintiff attempted to invoke the doctrine on the ground that manufacturer fixed the retail price of the product. Court held that notwithsanding the fact that the doctrine might apply on these facts in an action brought by the FTC it would not apply in a treble damage action.).

29 56 F.T.C. 221 (1959).

30 *Id.* at 248.

31 This is sometimes referred to as the "conduit" theory of interfunctional level competition. *Cf.* FTC v. Sun Oil Co., 371 U.S. 505 (1963) discussed in text to note 37 *infra.*

32 Fred Meyer, Inc., [1961-1963 Transfer Binder] CCH TRADE REG. REP. ¶ 16,368 at p. 21,214-15 (FTC 1963). Notwithstanding a reversal in the court of appeals of its *Meyer* decision, the Commission again found interlevel competition in Clariol, Inc., [1965-1967 Transfer Binder] CCH TRADE REG. REP. ¶ 17,594 (FTC 1966).

33 Fred Meyer, Inc., [1961-1963 Transfer Binder] CCH TRADE REG. REP. ¶ 16,368 at p. 21,215-16 (FTC 1963).

34 FTC v. Simplicity Pattern Co., Inc., 360 U.S. 55 (1959).

verity against the "secret descriminations,"[35] it was reasonable to give the term competition a broader meaning in § 2(d) than it has in § 2(a). Secondly, the Commission emphasized the importance of the word "distribution" as used in the § 2(d) phrase "customers competing in the distribution of such products." It reasoned that because the wholesalers were engaged in the distribution of food products they were included in § 2(d) by its literal meaning.

IV. The Supreme Court's New Interpretation

The Supreme Court granted certiorari "because the case presents important questions concerning the scope of a key provision of the Robinson-Patman Act."[36] It agreed with the court of appeals that the two wholesalers were not in competition with Meyer. The Supreme Court's 1963 decision, *FTC v. Sun Oil Co.*,[37] was thought to be contolling on this point. In that case Sun had granted price reductions to one of its service-station dealers to enable him to meet the price of a competing retailer across the street. The FTC found that Sun had violated § 2(a) of the Robinson-Patman Act because its other dealers in the area were not given the same price reduction and, as a result, they lost business to the favored dealer. Sun claimed that its price reduction was made "to meet an equally low price of a competitor" and thus allowed as a defense under § 2(b).[38] Sun argued that even though the § 2(b) defense does not expressly apply to a situation where a distributor grants a reduced price to meet the threat from his customers competitors, it should apply because Sun was in substance competing in the retail gasoline market, and because § 2(b) was intended as a defense to § 2(a) and should be as broad in scope as § 2(a). The Court held, however, that

> There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning of competition or competitor which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary.[39]

In *Meyer*, the Court reasoned analogously with respect to § 2(d). It emphasized

> that 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 unmistakeable terms. It did so in section § 2(a). . . .[40]

To avoid sanctioning the anomalous result reached by the court of appeals, the Court, in what Mr. Justice Harlan called a judicial *tour de*

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[35] *Id.* at 68, n. 12.
[36] 390 U.S. at 343.
[37] 371 U.S. 505 (1963).
[38] 49 Stat. 1526, 15 U.S.C. § 13(b) (1965).
[39] 371 U.S. at 515.
[40] 390 U.S. at 356-57.

force[41] and Mr. Justice Stewart called a denial of due process,[42] redefined the term customer. For the first time in thirty-two years, the Court decided that the wholesaler's customers who were in competition with Meyer were customers of their wholesaler's suppliers.[43] The Court recognized that Commissioner Elman had argued for this position[44] and that it had been rejected by the Commission, to whose expertise deference is accorded. But the Court was of the opinion that its interpretation was the "most reasonable."[45] It emphasized that under the Commission's interpretation the wholesaler would not be required to pass on the promotional allowance it received to its customers and that it could not be presumed that Congress intended the allowances to be paid to a party in a higher level in the chain of distribution who may or may not pass it on to the level where the impact would be felt directly.[46]

It is interesting to consider the significance of the pass-on question. The Court's concern appears to be not that the benefits of the promotional allowance in fact are passed on to the wholesaler's customers but that the wholesaler's customers be able to participate directly in the promotional plan if they so desire.[47] What seems important for the protection of free competition is that the independents receive the same proportionally equal economic benefits that their competitors (the chains) receive. Due to the nature of promotional allowances, it is unlikely that a wholesaler would be able to receive a promotional allowance without substantially passing on the economic benefits of that allowance to its customers.[48]

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[41] 390 U.S. at 359.

[42] 390 U.S. at 363-64. Mr. Justice Stewart noted that certiorari had been granted limited to the single question whether the wholesalers were entitled to receive the promotional allowances; and that the theory on which the Court based its decision was not briefed or argued before the Court. Justice Stewart, citing *cf.* Cole v. Arkansas, 333 U.S. 196 (1948), thought that Meyer at least should have the opportunity to defend.

[43] 390 U.S. at 348.

[44] Fred Meyer, Inc., [1961-1963 Transfer Binder] CCH TRADE REG. REP. ¶ 16,368 at p. 21,231 (FTC 1963). Commissioner Elman (concurring in part and dissenting in part) noted that §§ 2(d) and 2(e) were *in pari materia* and that in Elizabeth Arden v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert denied*, 331 U.S. 806 (1947), an order was sustained under § 2(e) compelling Arden to make demonstrators available to retailers who purchased from wholesalers and were in competition with retailers who had received demonstrators directly from Arden. But the *Arden* case, because the favored retailers purchased their products through wholesalers, has been considered an "indirect customer" case, (discussed at note 28 *supra*) and is of questionable support for Commissioner Elman's argument; *see also* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, (1962) at 398.

[45] 390 U.S. at 357. It has not infrequently been held that the FTC will be upheld if its decision is not unreasonable or unsound. *E.g.*, P. Lorillard Co. v. FTC, 267 F.2d 439,443 (3rd Cir. 1959).

[46] 390. U.S. at 357.

[47] *Id.* at 356.

[48] It is important to note that this argument (suggested here with respect to whether the wholesaler or his customers should receive the allowances) is distinguishable from the "cow bell" theory argued unsuccessfully as a defense to § 2(d) and § 2(e) cases. e.g. Elizabeth Ar-

There is a substantial question whether the Court's decision requires the supplier to do what cannot practically be done.[49] Wholesalers exist primarily because the customers they serve are too numerous and too small to be dealt with directly by the supplier. Prior to the *Meyer* case a supplier could segregate his customers by the use of wholesalers and deal directly only with those customers who were large enough to make direct dealing practical. Since a supplier cannot legally use a promotional allowance plan which cannot be made proportionately available to all of its customers, practical problems of reaching the many small retailers may substantially reduce the use of promotional allowances. Not only is the reduction in the use of promotional allowances contrary to the intention of § 2(d) which requires only proportionality in treatment, but it may be harmful to competition as well. Promotional allowance plans might well be a successful means by which a small supplier can introduce his product into a new market or an established supplier gain acceptance for a new product.

Mr. Chief Justice Warren suggested that this problem could be eliminated by a supplier using his established wholesale connections to make promotional allowances available to the independents "so long as the supplier takes responsibility . . . for seeing that the allowances are made available to all who compete in the resale of his product."[50] Mr. Justice Harlan argued that on the basis of *Albrecht v. Herald Co.*[51] a supplier could not compel his wholesalers to pass on the benefits to his customers without violating the Sherman Act.

Mr. Justice Fortas' brief opinion ostensibly concurring with the Court

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den v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947). In *Arden* the argument was that product demonstrators provided a few large retailers would benefit all retailers selling the product since the customer might be persuaded to buy the product in one store and actually purchase it in another. Here the argument is that the retailer will be benefited if his *wholesaler* receives the allowance or service. Unlike the "cow bell" theory, no contention is implied that the retailer will not be harmed competively if neither he nor his wholesaler receives an allowance or service given to other retailers or their wholesalers.

At the very least it could be argued that allowances received by the wholesalers would enhance their financial strength and, thus, their ability to supply their customers at prices and service levels that would make them more able to compete successfully with the chains. Accordingly, benefits received by wholesalers would indirectly accrue to their customers.

49 Mr. Justice Stewart and Mr. Justice Harlan, in their dessenting opinions, criticized the Court's holding in this regard.

50 390 U.S. at 358.

51 390 U.S. 145 (1968). In *Albrecht* defendant newspaper hired an independent contractor to solicit business away from one of its franchised delivery route operators who had been charging retail prices for the newspapers greater than those "suggested" by defendant. The Court held that a Sherman Act § 1 "combination" existed between the newspaper and the contractor-solicitor because the latter was aware that the purpose of the job for which he was hired was to force the delivery route operator to lower his prices. The Court also found the enforcement of a maximum price was unreasonable per se. If a supplier attempted to force his wholesalers to pass-on a promotional allowance to the wholesaler's customers, it is quite possible that the Court would find the supplier to be in a combination with his wholesalers, and that the forced pass-on was in effect a mandatory price reduction, or fixed maximum price, and unreasonable per se.

raises some question as to the nature of the supplier's obligation to afford his wholesaler's customers an opportunity to participate in an allowance plan, suggesting that the intention of Congress

> can best be squared with the language of § 2(d) by the device of regarding the wholesaler and his retail customer as a unit for purposes of that section. . . . The supplier may satisfy this obligation by direct dealing with the competing retailer or by arrangement with the wholesaler *reasonably designed* [emphasis added] to transmit to the retailer participation in the program if the retailer chooses to accept.[52]

It is questionable what "reasonably designed" requires the supplier to do and if the term means the same as the Court meant by the supplier taking the responsibility of providing its wholesaler's customers with an opportunity to participate. That is, has a supplier violated § 2(d) if, in a particular situation, a customer of its wholesaler actually was denied an opportunity to participate, or does a violation result only if the plan used by the supplier did not, at the time of its initiation, offer a reasonable likelihood that the wholesaler would provide a means by which its customers could directly participate. For example, is the supplier in violation if he offers his wholesaler an allowance plan whereby the supplier provides a substantial subsidy for the cost of newspaper advertising, providing that the advertisement identifies any of the wholesaler's customers who distribute the product and request that their retail establishments be identified as a distributors of the product, and the wholesaler refuses to accept the allowance? In addition there is a question of how direct the participation by the wholesaler's customers must be. That is, assuming that the economic benefit of an allowance is substantially transmitted to the wholesaler's customers by the wholesaler using the allowance to advertise the product, how much control over the details of the plan must be given to the retail customers. For example, in the above mentioned hypothetical, would that plan result in a violation if each of the wholesaler's customers were not afforded the same degree of control over the format of the advertisement as a direct buying chain was allowed, even though the wholesaler was given control equal to that given the chain? Or could the wholesaler rotate on a daily or weekly basis the retailers who were identified in the advertisement to avoid overly detracting from the value of the advertisement by using an inordinant amount of the space to list its hundreds of retail customers? These questions were not covered in the *Meyer* decision. They are suggested here as factors on which future cases may be distinguished.

Another important question is raised by the Court's holding that the wholesalers were not competing customers within the meaning of § 2(d).

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[52] 390 U.S. at 359.

They were, therefore, not entitled to receive promotional allowances.[53] Does a wholesaler whose business has been damaged or destroyed by a supplier's favoritism for a direct buying chain have a cause of action against the supplier?[54] To deny the wholesaler a cause of action would seem to disregard unfairly the economic realities resulting from the fiscal interdependence between the wholesaler and his customers.[55] Furthermore, the Court emphasized[56] just three months after the *Meyer* decision that important public purposes are served through the treble damage action by arming private attorney generals to enforce the antitrust laws. Although the independent retailers outnumber the wholesalers, their relatively small scale operations on limited financial resources make them much less likely candidates to prosecute a treble damage action.

It would be paradoxical for the Court to deny the independent retailers a cause of action for a § 2(d) violation since the Court held in *Meyer* that the independents were entitled to receive the allowances. But nothing in the *Meyer* decision necessarily precludes both the independents and the wholesalers from being considered competitive customers for the purposes of a private action. Damages could possibly be allowed to a wholesaler on the basis of an apportionment between the wholesaler and his customers. This approach could perhaps be strengthened by the argument that since the chains perform for themselves a wholesaler function, the chains are competing with the wholesalers at least to the extent of their wholesale operations. A second possible theory on which recovery could be allowed is to permit the wholesaler to show that he suffered damages from a loss of sales which occured because his customers were at a competitive disadvantage to an illegally favored chain and, as a result, suffered a loss of sales themselves. Both theories would, of course, produce very complex—and perhaps overly speculative—problems in calculating damages. Still, in those situations where the violation is a continuing one, an injunction may be a practical remedy for a wholesaler.

Questions also arise as to what effect the Court's new interpretation of § 2(d) will have on the interpretation of the other subsections of § 2. For example, § 2(e), which requires that a seller who provides services or facilities to any of his purchasers make the services or facilities available on a proportionally equal basis to all of his purchasers is very similar in its proscription to § 2(d). Although § 2(d) uses the term customer whereas § 2(e) uses the term purchaser, it has been held that the statutes

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[53] [O]n the facts of this case, § 2(d) reaches only discrimination between customers competing for resales at the same functional level and, therefore, does not mandate proportional equality between Meyer and the two wholesalers. 390 U.S. at 348-49.

[54] It should be remembered that no private action will lie against the buyer under § 5 of the Federal Trade Commission Act.

[55] *See e.g.*, Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.N.J. 1956).

[56] Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

are *in pari materia*[57] and that the terms customer and purchaser are to be given the same meaning.[58] There seems little reason why § 2(e) will not be controlled by the *Meyer* decision.

The effect of the *Meyer* decision on the interpretation of the term purchaser as used in § 2(a) is, however, a different question. Here the old meaning will probably prevail. Firstly, because if a *Meyer* meaning were given to the term purchaser in § 2(a), the customers of customers clause would be made virtually meaningless since it is difficult to imagine a situation where customers on the same functional level were not in competition but their customers (or the customers of their customers) were competing. Secondly, there is Supreme Court precedent recognizing purchasers in different functional levels as purchasers within the meaning of § 2(a).[59]

It is quite possible then, that the term purchaser will be given a double meaning within § 2. This will create no less of a paradox than giving competition a double meaning. It is also interesting to note that § 2(a), which, as the Court noted in *Sun Oil*,[60] was expressly given a broad meaning, may now be more limited than §§ 2(d) and 2(e). As noted above, § 2(a) applies only if the anticompetitive effect is shown to exist within the sellers functional level of either of two functional levels below the seller. It has been held[61] that the subsection does not apply when the anticompetitive effect is within the third level below the seller[62]—i.e., competition with a customer or a customer of a customer of the seller. *Meyer*, however, may be taken to mean that one who competes with a direct buyer is a "customer" regardless of how many intermediaries are between him and the seller.

One further question should be considered with respect to the application of *Meyer*. Will it apply when the wholesaler, rather than a direct buying retailer, receives the favored treatment?[63] Even if the wholesaler is considered in this situation to be a "customer," a result consistent with *Meyer* may dictate a finding that the wholesaler was not in competition with the direct buying chain. On the other hand, if the independent retailers (the wholesaler's customers) are considered to be customers for the purpose of § 2(d), did they "receive" the promotional allowance the supplier paid the wholesaler?

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[57] Elizabeth Arden, Inc. v. FTC, 156 F.2d 132 (2d Cir. 1946), *cert. denied*, 331 U.S. 806 (1947).

[58] Exquisite Form Brassiere, Inc. v. FTC, 301 F.2d 499, 502 (D.C. Cir. 1961), *cert. denied*, 369 U.S. 88 (1962).

[59] FTC v. Morton Salt Co., 334 U.S. 37 (1948).

[60] FTC v. Sun Oil Co., 371 U.S. 505 (1963).

[61] Standard Oil Co. of Calif. v. Perkins, 396 F.2d 809 (9th Cir. 1968).

[62] It has been suggested that it is a practical impossibility to substantiate a claim of an injurious effect below the secondary level. *See* Rowe, note 3 *supra* at 1964 Supp. p. 89.

[63] This situation existed in *Tri-Valley Packing Assn.* v. FTC, 329 F.2d 694 (9th Cir. 1964).

V. Conclusion

On the facts of this case there seems to be little question that the holding of the Court (aside from the unanswered practical questions of compliance discussed above) gives § 2(d) a meaning which produces a rational result. The method used to produce the result is, of course, a highly transparent fiction. The question of whether the fiction used by the Court is more or less transparent than the fiction used by the FTC is moot. The two different fictions may, however, produce significantly different results. It is perhaps appropriate to restate that the theory accepted by the Court was rejected by the Commission; and to note that the Court's theory was not briefed or argued before the Court.[64]

The real problem involved in the *Meyer* case (and many other § 2 cases) is that it falls within "The Gap in Lawmaking," described by Judge Friendly,[65] created by "Judges Who Can't and Legislators Who Won't" rewrite confusing, inconsistant, and misdirected statutes to give them a meaning which produces a rational and desirable result. Presumably, judges "can't" because to do so would be a usurpation of legislative authority. But it appears that legislative authority can be usurped as much through the use of fiction as without; and the meaning produced by fiction is perhaps more likely to compromise on the rationality of the result. Possibly it is thought that even the obvious use of a fictional cloak aids the preservation of judicial integrity. Yet, it is difficult to see how such indulgence does not contribute to an illusion of disprobity and favor the opposite effect. The poignant question is "Why Can't Judges."[66]

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[64] 390 U.S. 341, 363-64. *See* note 42 *supra.*

[65] Friendly, *The Gap in Lawmaking—Judges Who Can't and Legislators Who Won't*, 63 COLUM. L. REV. 787 (1963).

[66] It is interesting to note Judge Wortendyke's opinion in Krug v. International Tel. & Tel. Corp., 142 F. Supp. 230 (D.C.N.J. 1956), which indicates it was written by a judge too attentive to the administration of justice to partake in the semantic gymnastics characteristic of many § 2 cases. In this case the plaintiff's wholesale business had been destroyed by IT&T's price and allowance favoritism of direct buying retailers. After overruling a motion to dismiss the § 2(a) count of plaintiff's treble damage complaint, Judge Wortendyke answered a motion to dismiss the § 2(d) count in the following manner:

> The conclusion reached by the Supreme Court was arrived at by reading the "infelicitious language * * * as enacting what we take to be its purpose" [Automatic Canteen Co. of America v. FTC, 346 U.S. 61 (1953)]. That approach will be followed here.
>
> It is concluded that the purpose of Section 2(d) is to place discriminatory allowances on the same basis as price discriminations prohibited by Section 2(a) and that consequently the same set of circumstances give rise to a cause of action under Section 2(d), if the discrimination takes the form of unequal allowances or services, as would be the case if the discrimination were a direct price discrimination under Section 2(a). *Id.* at 236.