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**PRICE DISCRIMINATION TRENDS UNDER
*PERKINS v. STANDARD OIL CO. AND
FTC v. FRED MEYER, INC.***

*by S. Powell Bridges**

United States manufacturers selling directly to domestic retailers and wholesalers (dual distribution) have until recently sold products of "like grade and quality", without legal sanction, at the same price to all classes of customers, or at different prices to retailers and wholesalers so long as the prices to retailers were no less than prices charged to wholesalers.¹ Since retailers and wholesalers ordinarily do not *directly* compete for the same trade, it was believed that injury to competition was unlikely to result from price differences in selling to different classes of customers. By selling at the same price to all customers,² manufacturers may still comply with Section 2(a) of the Robinson-Patman Act.³ The United States Supreme Court recently enunciated in *FTC v. Fred Meyer, Inc.*⁴ and *Perkins v. Standard Oil Co. of California*⁵ that manufacturers may be liable for treble damages and government prosecution if: 1) they sell to wholesalers at a lower price than they sell to retailers, and 2) the wholesalers sell at prices which are more or less than the prices charged by the manufacturer in direct sales to retailers.

Under *Perkins* a manufacturer may violate Section 2(a) when wholesale customers "pass on" their lower prices through any number of levels of distribution to retailers competing with retailers purchasing

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¹ *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

² *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960). *But see* *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954); *Maryland Baking Co. v. FTC*, 243 F.2d 716 (4th Cir. 1957); *E.B. Muller & Co. v. FTC*, 142 F.2d 511 (6th Cir. 1944).

³ 15 U.S.C. § 13(a) (1964) provides:

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

This was a 1936 amendment to the Clayton Anti-Trust Act.

⁴ 390 U.S. 341 (1968).

⁵ *Perkins v. Standard Oil Co. of California*, 395 U.S. 642 (1969).

directly from the manufacturer at higher prices. Similarly, the manufacturer may fail to comply with Section 2(a) when the wholesaler is not "passing on" the favored price, so that the wholesaler's price to his retail customer does not enable that customer to compete with a retailer purchasing at a lower price directly from the manufacturer. *Fred Meyer* held that the "passing on" of advertising allowances was prohibited under Section 2(d), unless made available to all customers,⁶ and fairness would require similar treatment as to pricing under Section 2(a).

In *Fred Meyer* and *Perkins* the Court interpreted the language of Sections 2(a) and 2(d) as intending equality between competing retailers. In *Fred Meyer* retailers purchasing through wholesalers were held to be "customers" of the manufacturer even though the manufacturer had no direct dealing with the retailer. In *Perkins* the Court extended the statutory terminology of "customer" to the "fourth level" of competition, which is one level further from the manufacturer than the "customer" of a favored "purchaser" as defined by the statute. In each case a new and liberal interpretation of the Robinson-Patman Act enabled the Court to protect a small retailer from injury caused by a large purchaser paying less for the same product.

THE PERKINS CASE

In 1955 Clyde A. Perkins was one of the largest independent wholesale and retail distributors of oil and gas in the Pacific Northwest. He purchased gasoline exclusively from the area's largest supplier and price leader, Standard Oil Company of California (Standard), and he delivered it to about sixty service stations leased by him to two wholly owned corporations which then subleased the stations to independent operators. Standard also sold oil and gasoline directly to branded dealers,⁷ wholesalers, commercial users, and directly to the public.

One of Standard's largest purchasers was Signal Gas and Oil Company (Signal), a wholesaler selling to various jobbers including its 60%

⁶ Robinson-Patman Price Discrimination Act § 2(d), 15 U.S.C. § 13(d) (1964), provides:

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 These were independent service stations selling gasoline under the trade names "Chevron" and "Signal."

owned subsidiary, Western Hyway Oil Company (Western), which in turn sold primarily to Regal Stations Company (Regal), its 55% owned subsidiary operating retail service stations in direct competition with Perkin's service stations. The minority ownership of both Western and Regal was in third parties; no officers or directors of either corporation served in a similar capacity with the other corporation, and Signal did not exercise control in the management of either corporation.

Standard's net prices to both Signal and its branded retail dealers were lower than its prices to Perkins. Standard charged branded dealers lower prices by guaranteeing them a fixed mark up over their selling price during price wars, by paying clean rest room bonuses, and by their use of Standard's credit cards. Standard's lower prices to Signal, given because Signal supplied scarce crude oil to Standard, were passed at least in part, through Western to Regal.

From 1955 until 1957 a retail price war, led by Regal and the branded dealers, forced Perkins to reduce his selling prices to dealers or to accept significantly reduced sales volume. This led to serious losses by Perkins, and in 1957 he was forced to sell the remnants of his business to Union Oil Company of California, a large competitor of Standard.

The District Court held that Perkins had been injured by Standard's lower prices to both branded dealers and Signal. Perkins was awarded actual damages in excess of \$333,000 which when trebled and added to attorneys fees totaled almost \$1,300,000. On appeal the Ninth Circuit agreed as to Perkins' damages resulting from Standard's sales at lower prices to branded dealers, but it held that injury resulting from lower prices to Signal passed through Western to Regal, was beyond the scope of the Robinson-Patman Act because Regal, at the fourth level of distribution, was too far removed from Standard. Damages awarded in the lower court were not upheld because that court failed to specify the amount of damage resulting from Standard's sales to branded dealers.⁸

The United States Supreme Court, in a decision by Justice Black, reinstated the District Court's award of damages, and held that the language of Section 2(a) does not limit the application of the Act to primary line (manufacturer), secondary line (customer) or tertiary line (customer of a customer) injury. It can also apply to injury resulting from fourth level competition, which was Regal's level or, if "causal connection" can be shown between the price discrimination and the injuries suffered, damages can be recovered for injuries at *any* level of

⁸ Perkins v. Standard Oil Co. of California, 396 F.2d 809 (9th Cir. 1968), *rev'd*, 395 U.S. 642 (1969).

competition. The Court rejected a limitation to third level competition of Section 2(a) stating: "We conclude that this limitation is wholly an artificial one and is completely unwarranted by the language or purpose of the Act."⁹

The Court relied on *Fred Meyer* (discussed below) in which a retailer who buys through a wholesaler was held to be a "customer" of the original supplier within the meaning of Section 2(d) which pertains to discrimination in advertising allowances. The Court noted that:

In *FTC v. Fred Meyer, Inc.*, 390 U.S. 341 (1968), we held that a retailer who buys through a wholesaler could be considered a 'customer' of the original supplier within the meaning of § 2(d) of the Clayton Act, as amended by the Robinson-Patman Act, a section dealing with discrimination in promotional allowances which is closely analogous to § 2(a) involved in this case. In *Meyer*, the Court stated that to read 'customer' narrowly would be wholly untenable when viewed in light of the purposes of the Robinson-Patman Act. Similarly, to read 'customer' more narrowly in this section than we did in the section involved in *Meyer* would allow price discriminators to avoid the sanctions of the Act¹⁰

The Court has construed the Robinson-Patman Act to require a consistent enforcement of Section 2(a) and 2(d). Requiring equal prices to all retailers, except as provided by the statutory defenses to Section 2(a), appears to be as consistent with the purpose of the Act as does equal advertising allowances.¹¹

In *Perkins* the Court mentioned Standard's knowledge of injury to Perkins resulting from its lower prices to Signal being "passed on" to Regal. The court stated:

There was evidence that Signal received a lower price from Standard than did Perkins, that this price advantage was passed on, at least in part, to Regal, and that Regal was thereby able to undercut Perkins' price on gasoline. Furthermore, there was evidence that Perkins repeatedly complained to Standard officials that the discriminatory price advantage given Signal was being passed down to Regal and evidence that Standard officials were aware that Perkins' business was in danger of being destroyed by Standard's discriminatory practices. This evidence is sufficient to sustain the jury's award of damages under the Robinson-Patman Act.¹²

⁹ *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 647 (1969).

¹⁰ *Id.*

¹¹ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 349-52 (1968).

¹² *Perkins v. Standard Oil Co. of California*, 395 U.S. 642, 649 (1969). Compare as

If retailers having no direct contact with the manufacturer are allowed to sue the manufacturer for treble damages for violation of Section 2 (a) (discussed below), the Court's mentioning of Perkins' repeated complaints to Standard, and Standard's continued sale to Signal at lower prices, probably requires proof in such lawsuits that a manufacturer has knowledge of the injury at the retail level caused by its discounts. Arguably, if the manufacturer does not have this knowledge he may not be held liable under this interpretation of Section 2(a).

THE FRED MEYER CASE

Fred Meyer, Inc. (Meyer), a retailer, sold grocery products, drugs, variety items and wearing apparel through a chain of thirteen retail supermarkets in the Portland, Oregon area. In 1957 its sales exceeded \$40 million making this company the second largest seller of all goods in the area. Since 1936 Meyer had conducted annual promotions which were largely paid for by its suppliers. In 1957 seventy-two suppliers, such as Tri-Valley Packing Association, Idaho Canning Company and Burlington Industries, Inc., participated in Meyer's coupon book promotion by purchasing a page in Meyer's coupon book for at least \$350. Some gave additional allowances in the form of free goods, price discounts, or replacement, at no charge, of a predetermined amount of goods sold. Consumers bought these coupon books from Meyer for ten cents, and could then purchase the seventy-two products advertised in the book for as much as one-third off regular prices.

Wholesalers in the area, such as Hudson House and Waldhams & Company, who purchased the same products from the same suppliers, were not offered price discounts and advertising allowances comparable to those received by Meyer. Consequently, various retailers who purchased the products from wholesalers were competing with Meyer for retail sales without the benefit of Meyer's favored prices and advertising allowances.

The Federal Trade Commission determined that Meyer had violated Section 2(f) of the Robinson-Patman Act¹³ by inducing and receiving prices which it knew, or should have known, violated Section 2(a), and that Meyer had also violated Section 5(a) of the Federal Trade Com-

to the requirement that the manufacturer have knowledge of injury: *Standard Oil Co. v. FTC*, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

¹³ 15 U.S.C. § 13(f) (1964) provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

mission Act¹⁴ by the inducement of promotional aid forbidden by Section 2(d).¹⁵ On appeal to the Ninth Circuit, the court agreed with the Federal Trade Commission that Meyer's dealings with its suppliers could have violated both Sections 2(a) and 2(d). However, it reversed the Commission in part and held that there had been no violation of Section 2(d) since suppliers were not required to make the promotional payments paid to Meyer available to wholesalers who resold to Meyer's retail competitors. The court held that wholesalers were not competing in the distribution of such products with Meyer as would be required by a literal interpretation of Section 2(d).¹⁶

Contrary to both the Commission's and the Court of Appeals' holdings, the United States Supreme Court held that Meyer's suppliers were responsible for making available promotional allowances to retailers who competed directly with Meyer. If suppliers could not themselves effectively administer advertising allowance programs to these retailers, they could use their wholesale customers to distribute promotional allowances to retailers. Chief Justice Warren, speaking for the majority, stated:

We conclude that the most reasonable construction of § 2(d) is one which places on the supplier the responsibility for making promotional allowances available to those resellers who compete directly with the favored buyer.¹⁷

The Court rejected the argument of Meyer that for Section 2(d) to apply some direct selling contact was required between the supplier and the indirect buying retailers. The Court of Appeals' approval of the Commission's Section 2(a) order based on a finding that Meyer competed in the resale of these suppliers' products with retailers who purchased through wholesalers, led the Court to conclude that the Commission need not resort to the indirect customer doctrine. The Court stated: "Whether suppliers deal directly with disfavored competitors or not, they can, and here did, afford a direct buyer the kind of competitive advantage which § 2(d) was intended to eliminate."¹⁸ The Court did not accept the indirect purchaser doctrine¹⁹ which requires some direct contact or dealing for a supplier to be respon-

¹⁴ 15 U.S.C. § 45(a) (1969) provides:

Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are declared unlawful.

¹⁵ Fred Meyer, Inc., 63 F.T.C. 1, 26-27 (1963).

¹⁶ Fred Meyer, Inc. v. FTC, 359 F.2d 351, 369 (9th Cir. 1966).

¹⁷ FTC v. Fred Meyer, Inc., 390 U.S. 341, 357 (1968).

¹⁸ *Id.* at 354.

¹⁹ Purolator Products, Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied*, 389 U.S. 1045 (1968); Klein v. Lionel Corp., 237 F.2d 13 (3rd Cir. 1956).

sible to an indirect purchaser for discrimination. Although this ruling requires a manufacturer to make advertising allowances under Section 2(d) available to indirect buying retailers, it is arguable that it should also apply to price discrimination under Section 2(a). The small retailer competing with a large direct buying retailer is injured no less by a wholesaler's failure to "pass on" a lower price to him than he is by discriminatory advertising allowances being available only to the direct buying retailer.

The Court discussed the legislative history and purpose of the Robinson-Patman Act as follows:

The draftsman of the provision which eventually emerged as Section 2(d) explained that, even when such payments were made for actual sales promotional services, they were a form of indirect price discrimination because the recipient of the allowances could shift part of his advertising costs to his supplier while his disfavored competitor could not.²⁰

That the purpose of Section 2(d) is to supplement Section 2(a) by curbing preference of large buyers, based on their greater purchasing power, is made manifest throughout the opinion.²¹ Although the Court was not required here to rule on Section 2(a) issues, protection of small retailers competing with larger retailers, in fairness, should apply to all forms of price discrimination, whether under Section 2(d) or 2(a).

SYNOPSIS

Perkins and *Fred Meyer* dictate that Sections 2(a) and 2(d) must be applied consistently to accomplish the purposes of the Robinson-Patman Act. In both cases the Court expands the Act to protect the small retailer from the purchasing power of the large buyer. The *Perkins* decision allowed a retailer to recover damages from a supplier by the Court's extension of the term "customer" under Section 2(a) to include any customer at any level of distribution so long as the "causal connection" is established between the price discrimination and the injury. In *Fred Meyer*, the Court expanded the meaning of the term "customer" under Section 2(d) to include indirect buying retailers, and it thereby made manufacturers responsible for making advertising allowances available to indirect buying retailers, or for the "supervision or policing" of wholesale customers to insure that the manufacturers' promotional allowances pass through wholesalers to indirect buying retailers.

²⁰ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 351 (1968).

²¹ *Id.* at 349-52.

Retailers purchasing through wholesalers have never been able to sue the manufacturer for treble damages for price discrimination unless they had some direct contact with the manufacturer.²² *Fred Meyer* makes manufacturers responsible to retailers with whom they have no direct contact, and these indirect buying retailers are probably able to recover damages from manufacturers only. The tendency of the Court to extend the Robinson-Patman Act's application to protect small retailers against the buying power of large purchasers may enable retailers, not directly purchasing from the manufacturer, to bring lawsuits for treble damages, caused from and related to, the manufacturer's sale to a wholesaler without having sufficient "supervision" over the wholesaler's selling prices, to be certain that indirect buying retailers are paying no more than larger direct buying retailers.

Perkins makes clear that in a lawsuit for treble damages the retailer must prove that his injury was caused by the manufacturer's original price discrimination being "passed on" (or not being passed on as in *Fred Meyer*) to the retail level. For example, a multi-product retailer may be unable to prove injury from price discrimination caused by the purchase of only one product at an unfavorable price. All or only part of the favored price may be passed (or not passed as in the *Fred Meyer* case) through the wholesaler to the retailer. The retailer may injure his business by over-pricing his product, he may be injured by failure to geographically locate his business as well as the favored retailer or, the retailer's injury may be due to a more efficient business operation by the favored retailer. If the retailer might have obtained a lower price for the same product from a different supplier, his failure to do so would break the causal connection between the price discrimination and the injury.²³ These factors show the possibility that the retailer's injury may result, in whole or in part, not only from his supplier's pricing policies, but from other factors of causation which may diminish or eliminate his recoverable damages.

A retailer's claim for damages resulting from price discrimination by a supplier might be defeated by the Robinson-Patman Act's statutory defenses.²⁴ If in the case of a favored retailer the supplier were actually

²² See cases cited *supra* note 19.

²³ *Tri-Valley Packing Ass'n v. FTC*, 329 F.2d 694 (9th Cir. 1964).

²⁴ Robinson-Patman Price Discrimination Act § 2, 15 U.S.C. § 13 (1964) provides in relevant part:

(a) . . . [T]hat 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. . . .

(b) . . . [T]hat nothing herein contained shall prevent a seller rebutting the

meeting a competitor's equally low price to the retailer, this fact would remove the supplier's liability to retailers purchasing through a wholesaler.²⁵ A large retailer may legally purchase, at cost-justified quantity price discounts, to the detriment of competing small retailers whether purchasing directly or through wholesalers.²⁶

In *Perkins*, the Court apparently required evidence that the manufacturer had knowledge of the injury to the direct buying retailer caused by wholesalers "passing on" their lower prices to the indirect buying retailer.²⁷ This test for illegality under Section 2(a) in "dual distribution" pricing situations makes the manufacturer responsible for violation only if he had knowledge of the injury caused by the wholesaler's "passing on" lower prices or failure to "pass on" lower prices. Retail price familiarity by the manufacturer or complaints from retailers being discriminated against (as in *Perkins*) are seemingly required, and failure to produce this information could defeat a retailer's claim for damages.

Finally, the interpretation of Section 2(a) which gives all retailers purchasing through a wholesaler, the opportunity to purchase the same product from a manufacturer at the same price that large direct buying retailers pay may place the manufacturer in jeopardy of violation of the Sherman Act.²⁸ In *Fred Meyer*, the Court concluded that the manufacturer could use his wholesaler, "consistently with other provisions of the anti-trust laws,"²⁹ to distribute promotional payments to indirect buying retailers. Justice Harlan, dissenting in *Fred Meyer*,³⁰ noted that *Albrecht v. Herald Co.*,³¹ a price fixing case, would make it un-

prima-facie case thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

²⁵ *American Oil Co. v. FTC*, 325 F.2d 101 (7th Cir. 1963), *cert. denied*, 377 U.S. 954 (1964).

²⁶ *Reid v. Harper & Bros.*, 235 F.2d 420 (2d Cir. 1956), *cert. denied*, 352 U.S. 952 (1956). The discount must be justified by reduced cost of manufacturing or by reduction in the cost of packaging or delivery. Conjectural accounting estimates of these factors may be considered by the jury.

²⁷ See cases cited *supra* note 12.

²⁸ Sherman Anti-Trust Act § 1, 15 U.S.C. § 1 (1964) provides in relevant part: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal

²⁹ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 358 (1968). Compare *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911), with *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951).

³⁰ *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 361 n.4 (1968).

³¹ 390 U.S. 145 (1968).

lawful "per se" for a manufacturer to require a wholesaler to pass through an advertising allowance to his retail customers. Similarly, an illegal combination in restraint of the wholesaler may result if the manufacturer and small retailer agreed in such a way that the wholesaler could not absorb promotional allowances.

CONCLUSION

A case has not yet arisen which allows the United States Supreme Court to extend the *Fred Meyer* advertising allowance theory under Section 2(d) to price discrimination under Section 2(a). Nor has there been a ruling by that Court allowing treble damages to a plaintiff who has not dealt directly with the seller-defendant. Both *Fred Meyer* and *Perkins*, however, illustrate the Court's tendency to interpret the Robinson-Patman Act to protect small retailers against the purchasing power of the large buyer. Even though *Fred Meyer* was a governmental injunctive action against a retailer, these cases seemingly place liability for unfair treatment of small retailers squarely on the manufacturer-seller. Based on these cases it seems reasonable to speculate that the Court will: 1) require manufacturers selling to both wholesalers and retailers at different prices to not "knowingly" sell or allow others to sell their products to competing retailers at discriminatory prices, and 2) if manufacturers allow this, the Court will permit direct or indirect buying retailers to recover from manufacturers damages caused by the price discrimination.

Manufacturers selling to wholesalers and retailers now appear to have the responsibility to act when they perceive an injury occurring at the retail level due to competing direct and indirect buying retailers paying different prices for their products. If a manufacturer receives from retailers complaints that they are paying higher prices than competing retailers because a wholesaler is failing to pass on its lower prices to indirect buying retailers, the manufacturer would no doubt be justified in refusing to sell to such a wholesaler if he continued to price in this manner.³² Any action taken cannot, however, serve to fix prices or otherwise restrain wholesalers, unless the manufacturer has knowledge that such injury is occurring at the retail level. A manufacturer might also adjust its own selling prices to wholesalers or direct buying retailers to reduce or eliminate differences between prices charged to direct and indirect buying retailers.

³² This again could give rise to a violation of the Sherman Anti-Trust Act § 1. See note 28 *supra*.

Small retailers who get no relief after complaining to the manufacturer will likely find the courts receptive to their complaints, although the chances of success of such litigation are lessened under Section 2(a) by: 1) various statutory requirements such as "like grade and quality" and "interstate commerce", 2) statutory defenses such as cost justification, 3) the requirement that the injury be caused by the price discrimination, 4) the possible requirement that the manufacturer have knowledge of the injury, and 5) the ambiguities and inconsistencies of present law.