Robinson-Patman Act, Section 2(d): The Expanded Definition of "Customer"

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During the 1920's and 1930's, a new form of business organization, the chain store, threatened to capture a substantial portion of the food distribution market from traditional independent retailers and wholesalers.¹ Chain stores attained wide popular acceptance because their lower costs enabled them to sell products at lower prices than their independent competitors.² The chains were able to keep their costs low because of a number of innovations which they introduced in production, purchasing, and marketing.³ Some of these innovations by chain stores were thought to give them an unfair advantage over their independent competitors. In an attempt to deprive large chain stores of their unfair advantages and to prohibit some abuses which chain stores were committing, Congress enacted legislation during this period. One particularly abusive practice was the use which chains made of advertising allowances. Congress attempted to eliminate discrimination in the granting of advertising allowances by enacting Section 2(d) of the Robinson-Patman Act.⁴

This comment examines the background of section 2(d) and the statutory requirements for acceptable advertising allowances. Particular emphasis will be placed upon an examination of the persons to whom section 2(d) applies. This emphasis is necessary because in *FTC v. Fred Meyer, Inc.*⁵ the Supreme Court has greatly expanded the class of merchants protected from discriminatory advertising allowances.

I. THE BACKGROUND OF SECTION 2(d)

The success of the chains was attributed mainly to their ability to charge lower prices.⁶ The reason for these lower prices was cost savings ascribed largely to economies of scale and special favors granted to the chains by sellers who hoped to secure the high volume business of the chain stores. More specifically, suppliers would charge chains lower prices for their products than they charged smaller retail grocers or else suppliers would grant

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¹ "Between 1926 and 1933 chain stores nearly tripled their share of total retail sales—from 9 to 25 per cent. Conversely, the business mortality of the independent retailer waxed high, averaging about 10 per cent per year in the 1920's and 1930's." F. Rowe, Price Discrimination Under the Robinson-Patman Act 5 (1962) [hereinafter cited as Rowe]; see also Edwards, The Place of Economics in the Course on Trade Regulations, 1 J. Legal Ed. 1, 6 (1948).
⁵ 390 U.S. 341 (1968).
⁶ See FTC, Final Report, supra note 2.
indirect and often secret price rebates to the chains. One of the most commonly employed types of indirect rebates was the advertising allowance.8

Advertising allowances were payments in kind or cash, made by manufacturers to defray the advertising costs of their dealers.9 Theoretically, these allowances were granted in order to expand local advertising for the manufacturer's product and to enable the manufacturer to control its character.10 At least two serious problems arose from this practice of granting advertising allowances.11 First, as mentioned above, manufacturers often used the guise of advertising allowances to grant their large customers secret price rebates. Manufacturers accomplished this purpose by allotting payments to dealers ostensibly for advertising but without any demand, or even expectation, that any advertising services would actually be performed by the recipients. For example, in 1934 the A & P chain received $8,000,000 in advertising allowances. In the same year, A & P spent approximately $6,000,000 for advertising purposes. The difference between these two figures—$2,000,000—was the aggregate of what were, in effect, price rebates. This $2,000,000 represented over half the net profits of the A & P for that year.12 One effect, then, of advertising allowances was to place small retailers who received no allowances at a competitive disadvantage with the large chains.

The second problem that arose from the use of advertising allowances was that sellers were often compelled to grant these allowances because of pressure exerted by these larger accounts.13 Typically, a large buyer would

7 See Rowe, supra note 1, at 9-10; 79 Cong. Rec. 14412 (1935) (remarks of Representative Patterson).
8 Another device employed by appellants to extract price preferences from suppliers was the so-called “general advertising allowance.” Such allowances constituted a substantial source of preferential revenue.
9 ... The record is clear that appellants, in negotiating such contracts, systematically avoided committing themselves to any definite advertising performance. They desired to keep performance flexible.
10 The only reasonable explanation for appellants' refusal to bind themselves to any additional advertising performance in return for the contribution which they extracted from suppliers, is simply that they had no intention of furnishing additional services. A & P's attitude toward these concessions is accurately reflected by the fact that appellants originally referred to them as “rebates.” The term “advertising allowance” was adopted in 1927 because the Divisional Purchasing Directors thought that the “term covered the situation well”.
11 For a general discussion of the problems in the practice of granting advertising allowances see id. at 1086.
13 “[B]uying power is the source of the evil. The seller is merely an innocent vic-
coerce a comparably smaller seller into granting such concessions by threatening to withdraw his purchase order. The advertising allowances for Fleischman's Yeast in 1935 dramatically illustrate this problem. For the purchase of Fleischman's product, the manufacturer granted advertising allowances only to A & P and Kroger, two national chain stores. This practice meant that 250,000 other retailers of Fleischman's Yeast who received no allowance or rebate were put at a decided disadvantage when it came to selling this product. The inequity involved in the favoritism employed in granting advertising allowances assumes an even greater magnitude when viewed along with the fact that, even if the advertising services were actually rendered, the large buyers' own advertising expenses were being defrayed to the extent of the allowance. This meant that his costs were less than the smaller retailers' who received no such reimbursement.

In order to deal with the inequities of advertising allowances, Congress incorporated Section 2(d) into the Robinson-Patman Act. Section 2(d) 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 a 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.

This section is aimed at eliminating discrimination in favor of the large buyers. It prohibits manufacturers from granting advertising allowances to customers in self-defense to grant the concessions demanded. 1935 Hearings, supra note 8, at 31.

15 Fulda, supra note 3, at 1087-88.
16 "The existing evil at which this part of the bill is aimed is, of course, the grant of discriminations under the guise of payments for advertising and promotional services which, whether or not the services are actually rendered as agreed, results in an advantage to the customer so favored as compared with others who have to bear the cost of such services themselves." 80 Cong. Rec. 9418 (1936) (remarks of Representative Utterback).
17 15 U.S.C. § 13(d) (1964). The Robinson-Patman Act, as an amendment of the Clayton Act, was necessary because "[t]he price discrimination provisions of Section 2 of the original Clayton Act of 1914 proved impotent to curb excessive concessions secured by chain buyers in competition with independent merchants." Rowe, supra note 1, at 6.
18 Rowe, supra note 1, at 365. By its terms § 2(d) technically applies only to sellers. However, the courts, realizing that many discriminatory advertising allowances are induced by strong buyers, avoided this technicality by ruling that § 5(a) of the Federal Trade Commission Act may be invoked against buyers who induce sellers to violate § 2(d) of the Robinson-Patman Act. Section 5 makes any "[u]nfair methods of competition in commerce, and unfair or deceptive acts or practices" unlawful. 15 U.S.C. § 45(a) (1964). Thus, the courts have held that acts of inducing a seller to violate
ROBINSON-PATMAN ACT: "CUSTOMER"

solely to select customers; if any allowances are granted, they must be made available to all the competing customers of the supplier. The legality of an advertising allowance depends upon whether it is available on proportionally equal terms to all customers competing in the distribution of the product for which the allowance is granted.

A. Availability

The element of availability is a dual concept, requiring both notice and practicability. To comply with this standard the seller must, first, inform all his customers of his policy of granting advertising allowances and, second, fashion this advertising program to be within the economic grasp of even his smallest buyer. If one form of allowance cannot meet these tests, it is necessary to offer alternative programs that can be utilized by even the smallest competing customer. For example, a seller could not offer advertising subsidies solely on the occasion of new store openings, because not everyone opens new stores; nor could a seller make an offer for advertising allowances limited strictly to payment of television advertising costs if he had small buyers who could not afford television time. In such cases, the seller would be required to make alternative allowances, such as newspaper advertising or handbills, available to small buyers.

B. Proportionate Equality

Besides satisfying the requirement of availability, a supplier must meet the second criterion: the advertising allowances must be proportionally equal. "Proportionate equality" is a highly elusive concept. Generally, it requires that both large and small buyers receive their fair shares of advertising allowances. Large buyers may receive greater allotments because they render more elaborate services and advertise on a larger scale. Allowances, however,

§ 2(d) are "[un]fair methods of competition." By so doing, the courts have effectively brought buyers within the proscription of § 2(d). See Grand Union Co. v. FTC, 300 F.2d 92 (2d Cir. 1962); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962).

Guides for Advertising Allowances and Other Merchandising Payments and Services; Compliance with Sections 2(d) and 2(e) of the Clayton Act, as Amended by The Robinson-Patman Act [hereinafter cited as FTC Guides], 16 C.F.R. § 240.9 (1967); see Elizabeth Arden, Inc., 39 F.T.C. 288, 302 (1944), aff'd, 156 F.2d 132 (2d Cir. 1946), cert. denied, 331 U.S. 806 (1947).

Millstein, Sections 2(d) and (e) Robinson-Patman Act—Compulsory Universal Reciprocity?, 37 Antitrust L.J. 77, 91 (1968); 1 Trade Reg. Rep. § 3830, at 6011.

"To meet the availability test, a promotional payment or service must both be communicated to all those competing in the resale of the supplier's product and be within their reach as an economic matter." Manual of Federal Trade Regulations Affecting Retailers 32 (J. Bliss & I. Millstein eds. 1965) [hereinafter cited as Bliss & Millstein]; see also Austern, Difficult and Diffusive Decades: An Historical Plaint about the Robinson-Patman Act, 41 N.Y.U.L. Rev. 857, 906 (1966).

Bliss & Millstein, supra note 21, at 32.

Bliss & Millstein, supra note 20, at 92.

Bliss & Millstein, supra note 21, at 32; see also FTC Guides, supra note 19, § 240.9 (example 1).

See Rowe, supra note 1, at 399 & n.100.

Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988, 994-95 (8th Cir. 1945).
must not be limited to large customers on the ground that they alone can furnish the kind of services desired by the seller. Smaller retailers must also receive some allowance, even though the amount of the allowances may be smaller because they perform less valuable advertising services for the supplier or because they purchase fewer products. The basic premise of proportionate equality is that all customers who distribute the manufacturer's product are entitled to a proportional share of the allowance. The underlying theory is that the advertising service which a small buyer provides, while perhaps less extensive than his larger competitors', still does provide product exposure and consequently is valuable to the supplier.27

During the course of congressional debate on the Robinson-Patman Act, one Senator illustrated his understanding of the term "proportionate equality" by this example: "If one man buys $100,000 in goods and should be allowed $1,000 for advertising purposes, and another buys $10,000 in goods, he ought to be allowed $100 for advertising."28 This statement conveys the general meaning of the phrase better than most attempts at specific definition.29

C. Competing Customers

The third requirement of section 2(d) specifies the persons to whom proportionally equal allowances must be made available. It is perhaps the most important of all the requirements. Oddly enough, however, it has received the least treatment by the courts. Under section 2(d) manufacturers who grant advertising allowances are required to offer them to all their "customers competing in the distribution . . . of such products . . . ."30

Most past decisions which have interpreted this phrase have turned on the definition of "competing" rather than on the definition of "customer." The Federal Trade Commission (FTC) has stated that customers do not compete when they do not deal with the same consumers because of geographical separation.31 In addition to unity of place, the Commission has insisted on unity of time between the isolated purchases of the allegedly favored and disfavored customers. Thus, if a substantial period of time has elapsed between Buyer A's purchase and Buyer B's, the FTC will not consider them to be competing customers under the statute.32

The meaning of the word "customer," on the other hand, has received little attention. In the FTC's Guides, a customer was defined as "someone who buys directly from the seller or his agent or broker."33 Until very recently, this interpretation was never seriously questioned by the courts. However,

27 See 1935 Hearings, supra note 8, at 38.
29 80 Cong. Rec. 3116 (1936) (remarks of Senator Logan).
30 See, e.g., FTC Guides, 16 C.F.R. § 240.7. Here the Commission has said that the term proportional equality "means that payments or services must be proportionalized on some basis that is fair to all customers who compete."
32 FTC Guides, 16 C.F.R. § 240.12.
33 See, e.g., Atalanta Trading Corp. v. FTC, 258 F.2d 365 (2d Cir. 1958). The Commission has indicated, however, that the requirement of unity of time may be met in the case where "there is a showing of continuous sales of regularly promoted items." Joseph A. Kaplan & Sons, [1963-1965 Transfer Binder] Trade Reg. Rep. § 16,666, at 21,552-53 (FTC 1963).
34 FTC Guides, 16 C.F.R. § 240.3.
32 years after the passage of the Act, the Supreme Court, in *FTC v. Fred Meyer, Inc.*, not only questioned the FTC's interpretation of "customer" but essentially rewrote the definition to embody an entirely novel meaning. The remainder of this comment will investigate the background and validity of the Court's expanded definition of "customer" and will examine the implications of this new meaning.

II. Meyer's Redefinition of "Customer"

Fred Meyer, Inc. operated thirteen supermarkets in the Portland, Oregon area. These stores were principally engaged in the sale of retail merchandise including groceries, drugs, variety items and a limited line of clothing. Annually, Meyer sponsored a four-week promotional campaign featuring "coupon books." The coupon books entitled consumers to price reductions on the items illustrated within. These books were purchased by Meyer's customers for the nominal price of ten cents per book. This campaign was underwritten by manufacturers who paid Meyer $350 for a coupon-page illustrating their product. The sum of these $350 contributions more than covered Meyer's costs of publishing, distributing and publicizing the books. In addition, many suppliers also granted Meyer price reductions on their products sold during the campaign, provided free stock replacements or redeemed the coupons at face value.

When this promotional campaign was conducted in 1957, both Tri-Valley Packing Association and Idaho Canning Company purchased pages in Meyer's coupon book. These particular coupon-pages entitled Meyer's customers to three cans of the suppliers' products for the price of two. To defray further Meyer's cost in such an offering, both suppliers also agreed to supply Meyer, free of charge, with replacements for every third can of their products sold as a part of this campaign. In effect, it cost Meyer nothing to offer his customers three cans of these products for the price of two.

Tri-Valley and Idaho Canning did not sell directly to any retailers besides Meyer in the Portland area. They did, however, sell to various wholesalers in that area. Two of these wholesalers, Hudson House and Wadhams Company, sold to independent retailers who were in direct competition with Meyer. Tri-Valley and Idaho Canning did not offer Hudson and Wadhams or any Portland area retailers an advertising allowance similar to that offered to Meyer.

Because Meyer was the only Portland area retailer who received allowances under this advertising campaign, the FTC brought an action against Meyer in which it ruled that Meyer had (1) violated Section 5 of the Federal Trade Commission Act by engaging in unfair methods of competition, by

34 390 U.S. 341 (1968).
35 Id. at 364 (dissenting opinion).
knowingly inducing discriminatory advertising allowances in violation of Section 2(d) of the Robinson-Patman Act\(^\text{37}\) and (2) violated Section 2(f) of the Robinson-Patman Act\(^\text{38}\) by knowingly inducing direct price discriminations prohibited by Section 2(a)\(^\text{39}\) of the same Act.

In order to constitute discrimination under section 2(d), a course of conduct must result in different treatment to "competing customers." In deciding whether there was discrimination in *Meyer*, the Commission was faced with a dilemma. On the one hand, Hudson House and Wadhams, being wholesalers, did not "compete" with Meyer, a retailer, in the resale of the goods.\(^\text{40}\) On the other hand, the retailers who did compete with Meyer did not purchase directly from the manufacturers who gave allowances and, hence, were not direct customers of the manufacturers. In short, the customers of the donors of the allowances were not in competition with the recipients, and the merchants who competed with the recipients were not customers of the donors.

Apparently, then, the allowances granted to Meyer were technically within the law\(^\text{41}\) even though their effect was to give Meyer an advantage over his competitors. The FTC, however, placed substance over form, and ruled against Meyer. In so doing it reversed its earlier decisions and held that wholesalers like Hudson and Wadhams did in fact compete with retailers like Meyer because all were involved in the distribution of Tri-Valley peaches and Idaho Canning corn.\(^\text{42}\) Consequently, the $350 advertising allowances paid by these suppliers to Meyer violated Section 2(d) of the Robinson-Patman Act because proportionally equal shares were not made available to the two wholesalers, Hudson and Wadhams.

One Commissioner dissented in part, arguing that the retailers, who competed directly with Meyer in the resale of the products, would be most directly injured. Thus, he contended that the retailers rather than the wholesalers should be treated as "customers" of Tri-Valley and Idaho Canning and that the retailers should be entitled to proportionally equal shares of the advertising allowances.\(^\text{43}\)

The Court of Appeals for the Ninth Circuit modified the Commission's decision in part. The court held that a section 2(d) violation had not been shown since Meyer's competitors were not *customers* of Tri-Valley and Tri-Valley's customers, the wholesalers, were not *competitors* of Meyer.\(^\text{44}\)


\(^{40}\) Prior to the *Fred Meyer* case, the Commission had seemingly adopted the position that customers not on the same functional level do not compete with each other. (Functional level, as used here, means status or position in the distribution system of manufacturer, wholesaler and retailer.) See Atalanta Trading Corp., 53 F.T.C. 565, 566 (1956), rev'd on other grounds, 258 F.2d 365 (2d Cir. 1958); Liggett & Myers Tobacco Co., 56 F.T.C. 215 (1959).

\(^{41}\) Under § 2(d), manufacturers who grant advertising allowances are only required to offer them to their "customers competing in the distribution of [their] products or commodities." 15 U.S.C. § 13(d) (1964).


\(^{44}\) *Fred Meyer*, Inc. v. FTC, 359 F.2d 351, 359 (1966).
court found that, while Meyer and Hudson House and Wadhams were "customers" of Tri-Valley and Idaho Canning, they were not "competing customers" because they operated on a different functional level. On the other hand, the retailers who did compete with Meyer were not customers of Tri-Valley and Idaho Canning under the statute since they purchased the products through wholesalers and not directly from the manufacturers.\(^45\)

On February 13, 1967, the Supreme Court granted certiorari limited to the question: "Whether a supplier's granting to a retailer who buys directly from it promotional allowances that are not made available to a wholesaler who resells to retailers competing with the direct-buying retailer violates Section 2(d) of the Robinson-Patman Act."\(^46\)

In an opinion by Chief Justice Warren, the Court held that retailers who purchase a manufacturer's products through wholesalers are "customers" of the manufacturer for the purposes of Section 2(d) of the Robinson-Patman Act. Therefore, suppliers who grant promotional allowances to direct-buying retailers must also make them available on proportionally equal terms to retailers who buy the suppliers' products through wholesalers and then compete for resales with the direct-buying retailers.\(^47\) Further, the Court held that direct-buying retailers and wholesalers do not compete with one another because they are not on the same functional level of distribution.\(^48\)

In Meyer, the Court sets forth a novel definition of "customer," a definition which greatly expands the number of buyers who must be offered advertising allowances. The Court extended the meaning of the word "customer" to include buyers not in privity with the original seller. In deciding Meyer, the Court was faced with the choice of either giving "customer" a novel meaning in section 2(d) or else placing small retailers outside the protection of section 2(d) in some circumstances. If the Court chose the latter alternative it would have excluded small, indirect-buying retailers from the protection of the Act while affording protection to large, direct-buying chain stores. Thus, if there were another direct-buying chain in the Portland area which competed with Meyer, it would have been entitled to advertising allowances, but the independent retailers who didn't buy directly would not have been entitled to them. Consequently, the protection of section 2(d) would be accorded to those chains who presumably have the economic power to take care of themselves while it would be denied to the small retailers who, as the Meyer case demonstrates, need the protection very strongly.\(^49\) Such a result would lie in direct opposition to the congressional intent of section 2(d).

A. Meyer in the Light of Statutory Intent

The validity of the Court's novel interpretation of "customer" may be examined, first, in the light of judicial latitude in the process of statutory construction and, second, in the light of the force and clarity of the congres-

\(^{45}\) Id.
\(^{46}\) 386 U.S. 907 (1967).
\(^{48}\) Id. at 355-56.
sional intent. It can be argued that the Court’s action was an unwarranted revision of legislation not within the province of the judiciary. This argument rests upon the fact that what appears to be congressional intent from an examination of pre-enactment debates is quite often different from what the statute actually says in its final form. To allow the judiciary too broad discretion in reading a statute of course tampers with the constitutional separation of legislative from judicial power. Furthermore, if the courts have such broad discretion the meaning of legislation will be unknown, arbitrary or uncertain, and the doctrine of stare decisis with its valuable element of predictability will be devalued.

It is submitted, however, that a closer examination of the Meyer case reveals that in redefining “customer” the Court was not taking unwarranted liberties. The Court did what was necessary in order to give meaning to the statute while at the same time reaching an equitable result in the case. Furthermore, the Court’s interpretation by no means constituted a drastic departure from prior law. In fact it marked another case in a continuous line formed by the liberal construction of that Act by the Court. Because from its enactment the statute has been repeatedly assailed as ambiguous and because the FTC and the courts have been forced to adopt strained interpretations to implement its underlying congressional intent, the rule of the Meyer case cannot be viewed as a surprise.

Because of the flagrant discrimination in the Meyer case and the means of its achievement, there is a strong public policy argument in favor of the result reached by the Court. Testimony in the record shows that Meyer was forcing comparably smaller sellers to participate in its advertising campaign regardless of whether or not they desired to do so. (While Meyer’s sales in 1957 were $40,000,000, Tri-Valley’s were $22,000,000 and Idaho Canning’s were slightly over $1,000,000.) Furthermore, as a result of these allowances and rebates, Meyer was able to sell his products to consumers at prices lower than what it cost his smaller competitors to stock their shelves. If the Court had allowed Meyer to continue these practices, it would have been condoning precisely that type of activity which Congress intended the Robinson-Patman Act to eliminate. Indeed, the Court based its decision on the fact that it was implementing congressional intent. The majority opinion states that a narrower reading of “customer” would be “diametrically opposed to Congress’ clearly stated intent to improve the competitive position of small retailers by eliminating what was regarded as an abusive form of discrimination.”

The legislative history of the Robinson-Patman Act clearly indicates that Congress intended to prevent the kind of activity and the resulting

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51 Marchese v. United States, 126 F.2d 671, 674 (5th Cir. 1942).
55 Id. at 26-27.
56 390 U.S. at 352.
ROBINSON-PATMAN ACT: "CUSTOMER"

discrimination found in the Meyer case. The Act grew out of the feeling that as a matter of public policy economic Darwinism was not desirable. The bill was meant to protect independent retailers by restoring equality of opportunity in business. To do so, the legislature attempted to insure that the prices charged to large and small retailers would vary only because of the relative economic efficiencies of the buyers, and attempted to eliminate price differentials which reflect only the exercise of economic power by large retailers. This view derives support from the reports of both the House and Senate Judiciary Committees. The Report of the former states: "The purpose of the proposed legislation is to restore, so far as possible, equality of opportunity in business. . . ." Certainly the Meyer decision is an attempt to restore equality between Meyer and the independents in competition with it. The Senate Judiciary Committee Report said that the object of the bill was "to suppress more effectually discriminations between customers of the same seller not supported by sound economic differences in their business position or in the cost of serving them." This statement supports the position taken by the Court in Meyer because none of the concessions made to Meyer were cost-justified. Consequently it can be said of Meyer that although the Court interpreted the word "customer" so as to give it a broad meaning, the result is consistent with the purpose of the Act.

To insure that the legislative intent to restore equality was carried out, the Court in Meyer concentrated more on economic realities than on a literal interpretation. Such action, rather than being a revision of legislation and a radical departure from precedent, implements the judicial policy of construing a statute in such a way as to carry out the congressional intent.

B. The Expansion of the Customer Concept

The Court in Meyer recognized that a manufacturer maintains a special relationship with all merchants who deal with his product. The word "customer," as used in common parlance, does not adequately describe the relationship because it connotes privity. For this reason, the Court was compelled to lengthen the reach of that term. Even before Meyer, the requirement of privity had been eroded in several Robinson-Patman decisions. Meyer simply completed this erosion. As a recognition of the relationship which exists between a manufacturer and all his retailers, whether they are in privity with the manufacturer or not, and in light of the clear intent of Congress to guarantee equal treatment to all retailers who share this relationship with

59 "The purpose was not merely to strengthen the precautionary element in the antitrust laws but to afford equality of opportunity to commercial buyers." C. Edwards, supra note 57, at 29; FTC v. Sun Oil Co., 371 U.S. 505, 520 (1963).
60 1935 Hearings, supra note 57, at 6-8, 34.
manufacturer, it is submitted that the Court's enlarged definition of "customer" was both necessary and desirable.

This undefined relationship is more readily understood if one discards privity and its concept of a one-to-one relationship applied to "customer" in favor of the more modern approach of a "marketing system." The marketing system is, of course, the means by which the manufacturer transports his product to the ultimate consumer. The final sale is the most significant to the manufacturer because it is, after all, his motivation for initiating production in the first place.

The special relationship between manufacturers and subsequent dealers is not unique to Robinson-Patman Act cases. It has received recognition in the areas of fair trade, products liability and equitable servitudes on chattels. Under state and federal fair trade legislation, manufacturers of some goods are allowed to set the price at which retailers may sell their products to the public. Fair trade may apply to retailers who have purchased through wholesalers as well as direct-buying retailers. The principal justification for fair trade is that manufacturers require some control over retailers who distribute their products, since they have a proprietary interest in goods carrying their trade names or brands.\(^4\) Similarly the irrelevance of privity of contract has been recognized in the area of products liability. A manufacturer is liable in tort to remote purchasers as well as to those directly in privity with him for harm resulting from his defective product.\(^5\)

The upholding by courts of contracts which impose equitable servitudes on chattels is probably the most explicit recognition in the law of the relationship which all distributors share in the goods produced. An equitable servitude may take the form of resale price restrictions, territorial limitations on sales, restrictions on the form in which the article may be resold, restrictions on the use of the chattel itself or tying restrictions involving complementary products. These restrictions are attempts by the manufacturer to make the intermediary transfers of title to wholesalers and retailers legally immaterial in order that the manufacturer may retain some control over their ultimate disposition or use.\(^6\)

The validity of equitable servitudes on chattels, the expansion of a manufacturer's product liability and the existence of fair trade legislation all constitute recognition in law that there is a special relationship between manufacturers and subsequent dealers in their products, a relationship which does not depend upon privity of contract for its existence. The areas of law mentioned above illustrate the unity of interest which the various parties have in a product even after it has passed out of their hands. All those who are connected with the product, albeit on different levels, share a responsibility for its availability and quality, and in this regard the acts of one affect the others, both from legal and economic viewpoints.

1. The Indirect Purchaser Theory.—Both the FTC and the courts had given some recognition to the existence of this relationship in Robinson-

\(^4\) FTC, Report on Resale Price Maintenance 4-5 (1945).
\(^5\) Prosser, The Fall of the Citadel (Strict Liability to the Consumer), 50 Minn. L. Rev. 791 (1966).
\(^6\) Chafee, Equitable Servitudes on Chattels, 41 Harv. L. Rev. 945 (1928).
ROBINSON-PATMAN ACT: "CUSTOMER"

Patman cases prior to Meyer. Recognition of this principle is implicit in the "indirect purchaser" theory, an early expansion of the concept of "customer" beyond the confines of privity.67 The indirect purchaser doctrine expanded the meaning of customer to the point where only direct dealing, not privity through a direct sale,68 was required under the Robinson-Patman Act. In effect, this doctrine provides that where the manufacturer retains sufficient control over the operation of wholesalers in distributing to retailers, then the retailers may be considered customers or purchasers of the manufacturer under the statute even though they purchase from controlled wholesalers and not directly from the manufacturer.70

In the development of the "indirect purchaser" doctrine, two cases are particularly noteworthy in their relationship to Meyer.71 In Kraft-Phenix Cheese Corp.,72 the FTC invoked the "indirect purchaser" doctrine for the first time. Kraft-Phenix manufactured cheese and sold it to jobbers and wholesalers. As a matter of policy, Kraft solicited retail customers for its distributors and it regulated the prices at which the distributors could resell Kraft's products. Kraft exercised an effective control over its products until they arrived in the hands of the retailers. In its decision in an action alleging a section 2(a) violation, the Commission said:

A retailer who purchases [the manufacturer's] goods from jobbers and wholesalers is considered by the Commission to be a "purchaser" of [the manufacturer] within the meaning of the Robinson-Patman Act as well as retailers buying direct. This is because of the fact that [the manufacturer] recognizes the retailers buying through jobbers as customers by personally soliciting them and by making effective its price policies and schedules as applied to them. A retailer is none the less a purchaser because he buys indirectly if, as here, the manufacturer deals with [the retailer] directly in promoting the sale of his products and exercises control over the terms upon which he buys.73

Since Kraft's actions showed that it recognized indirect-buying retailers

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68 "The Elizabeth Arden case is not contrary to this holding. There the manufacturer, in furnishing demonstrator service, discriminated between retailers who purchased the manufacturer's product from wholesalers and other retailers who purchased direct from the manufacturer. A direct relationship existed between manufacturer and retailer." Skinner v. United States Steel Corp., 233 F.2d 762, 765 (5th Cir. 1956).
70 Champion Spark Plug Co., 50 F.T.C. 30 (1953).
71 These two cases along with the two others mentioned below form a syllabus of the development of the Robinson-Patman Act before the decision in Meyer. Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937) ("indirect purchaser" doctrine invoked for the first time); Champion Spark Plug Co., 50 F.T.C. 30 (1953) (first application of the doctrine to a section 2(d) case); K.S. Corp. v. Chemstrand Corp., 198 F. Supp. 310 (S.D.N.Y. 1961) (initial judicial acceptance of the doctrine); American News Co. v. FTC, 300 F.2d 104 (2d Cir. 1962) (first application of the "indirect purchaser" doctrine in a proceeding against a buyer under § 5 of the Federal Trade Commission Act and § 2(d) of the Robinson-Patman Act).
72 25 F.T.C. 537 (1937).
73 Id. at 546.
as purchasers, the Commission decided that it would do likewise. The case is significant because it established in 1937 (only one year after enactment of Robinson-Patman) that the FTC would not be bound by too literal an interpretation if a literal interpretation would undermine the congressional intent behind the Act.

In 1961, in *K.S. Corp. v. Chemstrand Corp.*, the "indirect purchaser" doctrine received its initial judicial acceptance. The case concerned a manufacturer of acrylic fibers who sold them to mills; the mills in turn sold them to converters. As in *Kraft*, the manufacturer dealt directly with the retailer in promoting sales and exercised some control over the intermediary mills. The court stated that privity between the manufacturer and converter was not a necessary condition for the converters to be considered purchasers under the law. Thus, it held that the manufacturer violated sections 2(d) and 2(e) by granting promotional allowances and furnishing services to the converters. In arriving at this decision, the court reasoned: "The term 'customer' used in Section 2(d) of the Robinson-Patman Act is to be given the same meaning as 'purchaser' in Sections 2(a) and 2(e) of the act, in order to harmoniously effectuate the purpose of the parallel provisions."  

2. The Distribution Unit Theory.—The indirect purchaser theory is not the only conceptual device which has been used to eliminate the requirement of privity in cases which recognize the special relationship between a manufacturer and the intermediate dealers in his product. For example, another approach which reaches the same result as the *Meyer* case, but differs in that it attempts to stay within the literal confines of the language of the Act, is the "distribution unit" theory. The major premise of this theory is that the word "customer" implies a one-to-one buyer-seller relationship. The manufacturer-wholesaler-retailer distribution system is conceptually tailored to accommodate the "customer" designation when either the supplier and wholesaler are treated as a single seller or when the wholesaler and retailer are treated as a single buyer. For example, in *Reines Distribs., Inc. v. Admiral Corp.* the single seller hypothesis was proposed to include a supplier and its wholly-owned subsidiary distributor. The Court said: "The corporate veil between parent and subsidiary distributor will be discarded when control asserted by the parent is significant and they will be regarded as the same seller for Robinson-Patman purposes."  

3. The Significance of Meyer.—In the indirect purchaser cases and in the distribution unit cases, the element of control exerted by the supplier over the subsequent purchasers was the key to the application of these doctrines. This element of control is lacking in the *Meyer* case and therefore distinguishes it from the cases previously discussed. Nevertheless, at this point the evolutionary trend toward *Meyer* can be clearly recognized. Despite a substitution of control for privity, a marked change in the traditional concept.

75 Id. at 312.
76 Id.
78 Id. at 585. But see Nuarc Co. v. FTC, 316 F.2d 576 (7th Cir. 1963).
of customer is apparent throughout the cases dealing with the indirect purchaser and the distribution unit doctrines.

Before Meyer, however, even the control requirement was eased. The FTC had accepted the view that if by its own actions the manufacturer recognizes a buyer-seller type of relationship with the indirect-buying retailer, then the FTC would consider this retailer a customer of the manufacturer regardless of the amount of actual control exerted by the manufacturer over intermediaries. This expansion of "customer" was made in the Sunbeam Corp. case. This is probably the most significant case in terms of foreshadowing the direction of the Court in Meyer.

In Sunbeam, the respondent distributed its electric shavers directly to certain retailers and indirectly, through appliance and drug wholesalers, to other small retailers. Respondent devised a promotional plan through which he offered uniform allowances to all competing retailers whether they were direct or indirect purchasers. The plan did, however, require a minimum purchase of $440. The FTC's complaint averred a violation of section 2(d) because the advertising allowances were not available to all retailers on proportionally equal terms. The Commission found no discrimination and dismissed the complaint. However, in making its determination the FTC had to consider whether the disfavored retailers were "customers" under the statute. The Commission established that, although the product was sold to the smaller retailer through a wholesaler, the promotional allowance in question had been granted directly to the allegedly disfavored retailer by the manufacturer. From these facts the Commission drew the following conclusion:

As the direct and intended recipients of payments by respondent for the promotion of respondent's goods under a plan devised and implemented by respondent, these retailers were, we think, "customers" of respondent within the meaning of the statute. Any other construction would defeat the plain intent of Congress in enacting section 2(d)—to prevent sellers from discriminating between competing resellers in the granting of advertising and other promotional allowances.80

Since here the manufacturer offered allowances to both direct- and indirect-buying retailers, it would seem to be in line with the Kraft case where the FTC said that since the manufacturer by its actions recognized indirect-buying

79 [1963-1965 Transfer Binder] Trade Reg. Rep. ¶17,178 (FTC 1965). It is worthwhile to compare Commissioner Elman's opinion in this case with his dissent in Fred Meyer, Inc., [1961-1963 Transfer Binder] Trade Reg. Rep. ¶16,368, at 21,206 (FTC 1963). In Meyer, he argued that the Commission's decision in Elizabeth Arden, 39 F.T.C. 288, aff'd, 156 F.2d 132 (2d Cir. 1946), should control. The Commission's order in Arden required the manufacturer to make his promotional services available "to competing retailers on proportionally equal terms." 39 F.T.C. at 305. Commissioner Elman stated that the majority refused to follow their earlier Arden decision because that case concerned §2(e), whereas the instant case, Fred Meyer, concerned §2(d). He argued that this conclusion is incorrect since it is inconsistent with the generally accepted view that §§2(d) and 2(e) are parallel provisions and should be construed as such. Fred Meyer, Inc., [1961-63 Transfer Binder] Trade Reg. Rep. ¶16,368, at 21,231-32 (FTC 1963).

retailers as customers the Commission would do the same. However, the Commission did not make this argument nor did it explicitly invoke the "indirect purchaser" doctrine; instead it apparently attempted to move away from it. Although Sunbeam rejected the "indirect purchaser" fiction, the decision was in line with Kraft in that both recognized the same economic reality even though they expressed it differently. In "indirect purchaser" cases, the FTC had stressed the number of contacts between the manufacturer and ultimate purchaser and the control exerted by the manufacturer over intermediary purchasers. In Sunbeam, however, no control was exerted, and the only contact between the retailer and the manufacturer was the product itself and the offer of a promotional allowance. Thus, the element of control, so necessary for invocation of the indirect purchaser doctrine, had now been superseded by only a tacit recognition by the supplier that this retailer is something akin to a customer and should be treated as such.

In arriving at its decision in Sunbeam, the FTC relied not on a fiction but rather on the fact that to find that the indirect-buying retailers were not customers would defeat the congressional intent behind the Robinson-Patman Act. In doing so, the Commission based its decision on the same grounds as the Court did in Fred Meyer. Thus, it seems that the Meyer case followed the reasoning of the Sunbeam case, but because of the absence of tacit recognition by the parties that the direct-buying and indirect-buying retailers were equally entitled to allowances, Meyer carried the conclusions even one step further.

An examination of the Robinson-Patman Act cases from Kraft through Meyer is essentially a tracing of the historical development of the concept of customer as used in section 2(d). The evolution of the meaning of this word demonstrates that Meyer is not a drastic judicial revision of legislation but rather an expansion of a flexible concept permitting the legislative purpose behind the statute to be achieved regardless of changes in the economic frame of reference.

The Court could have avoided a redefinition of "customer" by applying either the indirect purchaser doctrine or the distribution unit theory in the Meyer case. Also, it would have facilitated its determination of which party, the retailer or the wholesaler, should receive the allowance. If the wholesaler and the manufacturer are treated as one, then the only customer of this unit is the retailer. However, the difficulties in application of these theories to Meyer seem to outweigh any advantages available through their use. A comparison of the Meyer rationale with the distribution unit concept makes this point clear. Most of the cases brought under the Robinson-Patman Act are similar to Meyer in that there is no proprietary nexus between the supplier and the wholesaler. In practice, then, the single seller theory will not apply because there is no ground upon which to base the alleged relationship of the supplier and the wholesaler.

The buyer corollary of this consolidation approach treats the wholesaler

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ROBINSON-PATMAN ACT: “CUSTOMER”

and the retailer as a single entity—a distribution unit. This theory was advanced in the Monroe Auto Equipment Company case. Here the retail customers of the wholesale distributors shared in the distribution of profits in such a way that the parties formed a single unit and, therefore, the retailers were considered to be “direct purchasers” for section 2(d) purposes. In the Fred Meyer case, unlike Monroe, this connection between the wholesaler and the retailer was non-existent.

In its treatment of the retailer and wholesaler as a single distribution unit, this theory does accurately conceptualize their relationship. However, treating the retailer and wholesaler in Meyer as one customer rather than as members of a marketing system seems to be an oversimplified fiction and thus does not really solve the problem. In Meyer, the Court avoids all pretense and simply states that, for the purposes of section 2(d), all competing retailers will be considered customers of the suppliers if any competing retailers are “customers.”

III. IMPLICATIONS OF THE MEYER DECISION

The obvious implication of the Meyer case is that indirect-buying retailers must be offered advertising allowances if allowances are offered to their direct-buying competitors. The case may not, however, result in an increase in the number of retailers who receive allowances; Meyer may actually have the opposite effect. Because of the difficulties suppliers will face if they wish to offer allowances to all retailers, many suppliers may decide to discontinue providing allowances to the direct-buying retailers who presently receive them. There are two ways by which manufacturers can offer allowances to indirect-buying retailers in compliance with Meyer. The supplier can shift the administration of the allowances to the wholesalers, or the supplier can administer the program itself. Neither alternative is particularly attractive.

The majority in Meyer recommends that suppliers shift administration of their programs to wholesalers. There is a danger in this solution because the wholesalers may absorb the allowances by charging the retailer higher prices or simply may not pass the allowances on to the retailers. The supplier, in attempting to prevent this result, might run “afoul of the Sherman Act.” He might be regarded as effectuating a program of resale price maintenance similar to the one which the Court found in Albrecht v. The Herald Co.

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84 Nevertheless, in Meyer, the single buyer theory was argued in a more general way by the FTC. This argument was based on the idea of a “distribution network.” Brief for Appellant at 9, FTC v. Fred Meyer, Inc., 390 U.S. 341 (1968). In a concurring opinion, Justice Fortas accepted the FTC’s view. 390 U.S. at 359. However, the Commission thought that the wholesaler should receive the advertising allowances, whereas Justice Fortas agreed with the majority in Meyer and bestowed them on the retailer.
85 390 U.S. at 359.
86 Millstein, Sections 2(d) and (e) Robinson-Patman Act—Compulsory Reciprocity?, 37 Antitrust L.J. 77, 90 (1968).
87 390 U.S. at 358.
88 Id. at 361; see also Millstein, supra note 86, at 89.
89 390 U.S. 145 (1968). In Albrecht, the respondent, a newspaper publisher, sold its papers to a wholesaler who in turn sold them to an independent newspaper carrier. Re-
Justice Harlan, who dissented in *Meyer*, thinks "[i]t is difficult to see why an agreement between supplier and retailer sufficient to insure that wholesalers in the middle do not absorb promotional allowances would not constitute a combination in restraint of these wholesalers." Perhaps Justice Harlan's conclusions will never be borne out, but many manufacturers will probably reject this course of action because there is a substantial risk of antitrust liability.

The alternative, administration of the increased program by the supplier, is unattractive because administration is a costly, troublesome chore. Many small suppliers who could comfortably administer programs for a few direct-buying retailers simply cannot assume the burden of administering a program which includes all retailers. Thus, one possible implication of the *Meyer* decision is that it may prevent small manufacturers from granting advertising allowances because, with the additional expense of administering the program, the cost may outweigh its value. Consequently, a supplier who previously could afford to grant advertising allowances to selected customers, but who does not have the financial means to grant them to all his customers must now abandon his entire program. Furthermore, even those suppliers who could afford to grant advertising allowances on the expanded scale required by *Meyer* may not desire to do so because the increased expense of administering such a program would be prohibitive. This result would be most likely to occur where the manufacturer is forced to deal directly with the small retailers when such retailers are actually too small and too numerous to make direct dealing efficient.

Another undesirable consequence of *Meyer* is that even those suppliers who can afford a wide scale advertising program will eventually expend money for services which they do not want or do not need. For example, it is easy to visualize a small retailer who functions in a very stable market and whose sales of a particular product would not increase regardless of the amount of money expended on advertising. In this situation it is apparent that what the supplier would be required to pay as an advertising allowance would be a waste of money. One Commissioner of the FTC stated, even before the *Meyer* decision, that the rulings of the courts and the FTC in the area of advertising allowances may demand "a misallocation of economic resources for wasteful or useless advertising." He conceded that the FTC is insisting that allowances be given to retailers who cannot effectively promote the manufacturer's product.

By requiring suppliers to pay for services which are of no value to them, the Act very obviously discourages the practice of granting advertising allowances. This result, however, may well have been Congress' purpose in enacting *Meyer*.

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spondent was found liable in a treble-damage suit brought under § 1 of the Sherman Act which charged a combination to fix the maximum retail prices at which petitioner could sell respondent's newspapers. See 10 B.C. Ind. & Com. L. Rev. 208 (1968).

90 390 U.S. at 361 n.5.

91 Millstein, supra note 86, at 90.


ROBINSON-PATMAN ACT: "CUSTOMER"

ing Section 2(d) of the Robinson-Patman Act. At that time, advertising allowances were looked upon as concealed discounts. It was suggested in testimony before a Subcommittee of the Senate Committee on the Judiciary that, if such were the legislative intent, then advertising allowances should be abolished outright. The proportioning scheme was viewed as a compromise because it was lacking in prohibitive force.

Since Meyer may restrict their use, it is necessary to observe that advertising allowances do have justifiable value. An advertising allowance is often a payment for legitimate advertising services. As such it is beneficial to both manufacturer and retailer and has its place in their business transactions. Justice Harlan referred to these allowances as a "significant form of competition" between suppliers. Thus, the view of promotional allowances taken by Congress in enacting Robinson-Patman may not be entirely justified. It may be argued that promotional allowances in some cases do serve a useful purpose. Before these practices are abandoned perhaps their value should be more closely examined.

Whether or not advertising allowances will in fact be abandoned is a matter of speculation. The fact does remain, however, that if advertising allowances are given to direct-buying retailers they must be made available on proportionally equal terms to all competing indirect-buying retailers. In the final analysis, this new rule seems better than the old because it implements the congressional intent behind the Robinson-Patman Act by restoring equality of opportunity to competing retailers.

ANDREW J. McElANEY, JR.

95 Hearings on S. 4171 Before a Subcomm. of the Senate Comm. on the Judiciary, 74th Cong., 2d Sess. 31 (1936).
96 See, e.g., 80 Cong. Rec. 8126, 8127 (1936) (remarks of Representative Crawford).
97 Hearings on S. 4171, supra note 95.
98 C. Edwards, supra note 57, at 158.