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TRADE REGULATION—PRICE DISCRIMINATION—Liability for "Fourth Level" Injury Falls Within the Scope of Section 2(a) of the Clayton Act, as Amended by the Robinson-Patman Act—*Perkins v. Standard Oil Company of California**

During the mid-1950's Clyde A. Perkins, a major independent wholesaler and retailer operating in the states of Washington and Oregon, bought substantial quantities of gasoline and oil from Standard Oil Company of California. During the same period, Standard also sold gasoline and oil to Signal Oil and Gas Company, a large wholesaler whose subsidiaries operated at wholesale and retail levels in the same area as Perkins.[1] The price Standard charged to Signal,

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* 395 U.S. 642 (1969).

1. In addition, Standard sold directly to its Branded Dealers, which are retailers that, in effect, comprise Standard's retail division.

however, was lower than the price it charged to Perkins.[2] Signal passed on the advantages of this lower price to its subsidiary, Western Hyway, which in turn sold at a reduced price to one of its own subsidiaries, Regal Stations Company. The competitive effect of this price differential was that the retail stations operated by Regal were able to undercut Perkins' retail price. Perkins' consequent inability to compete resulted in a decline in sales and induced him to sell his business at a low price. He then sued Standard Oil for treble damages under section 2(a) of the Clayton Act, as amended by the Robinson-Patman Price Discrimination Act,[3] alleging that the financial injuries he suffered while competing with Regal at the retail level were a result of Standard's price discrimination at the wholesale level.[4]

The United States District Court for the District of Oregon entered judgment in favor of Perkins;[5] but the Court of Appeals for the Ninth Circuit reversed, holding that the injury incurred by Perkins as a result of Regal's low retail prices occurred too far down the distribution chain for Standard to be liable under section 2(a).[6] The court of appeals noted that the coverage of the Robinson-Patman Act is restricted to injuries caused by an impairment of competition with (1) the seller ("any person who . . . grants . . . such discrimination"), (2) the favored purchaser ("any person who knowingly receives the benefit of such discrimination"), or (3) customers of the discriminating seller or favored purchaser ("customers of either of them").[7] Regal clearly did not fall within the first two categories, since it obviously was not the "seller" or the

2. The Branded Dealers were also charged a lower price than was Perkins.

3. 15 U.S.C. § 13(a) (1964) provides in pertinent part:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them . . . .

4. In two additional causes of action, Perkins claimed that his losses due to Standard's discrimination stemmed from his inability to compete (1) at the wholesale level because of Standard's lower price to Signal, and (2) at the retail level because of Standard's lower price to its Branded Dealers.

5. The district court found Standard liable on all three counts. The district court's opinion is unreported.

6. Standard Oil Co. of Cal. v. Perkins, 396 F.2d 809, 812 (9th Cir. 1968). The court of appeals, however, concurred with the trial court's finding that Standard was clearly liable under the two additional causes of action, for the injury caused by its discrimination at the wholesale level in favor of Signal, and for that caused by its discrimination at the retail level in favor of its Branded Dealers. *See* note 4 *supra*.

7. These quotations are from the Clayton Act § 2(a), *as amended*, Robinson-Patman Act § 1, 15 U.S.C. § 13(a) (1964). *See* note 3 *supra*.

"favored purchaser." Moreover, the court of appeals reasoned, in terms of the distribution chain, Regal was too far removed from Standard or Signal to be considered a "customer of either of them." The Supreme Court, however, speaking through Justice Black, disagreed with the Ninth Circuit's interpretation and held that this "fourth level" competitive injury fell within the scope of section 2(a).[8] Under the Court's expansive reading of the statute, Regal qualified as being a "customer" of a person who knowingly received the benefit of price discrimination.[9]

In order to analyze the degree to which the Court has extended the protection of the Robinson-Patman Act in *Perkins,* one must examine the decision in light of the polestar case in this area—*FTC v. Fred Meyer, Incorporated.*[10] In *Meyer* a retail supermarket chain (Meyer) induced suppliers to make contributions of money and goods to the supermarket's annual coupon book promotion. Such payments were not made, however, either to retailers in competition with the supermarket chain or to the wholesalers who supplied them.[11] The Federal Trade Commission sought to enjoin the suppliers from participating in this coupon book campaign, alleging that participation was a violation of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act.[12]

In general, section 2(d) mandates that the supplier of goods must make promotional allowances available on comparable terms to all customers competing in the distribution of such products. Prior to *Meyer* the Supreme Court had never extended the protection of section 2(d) to include third-line injury.[13] In *Meyer,* however, the

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8. Perkins v. Standard Oil Co. of Cal., 395 U.S. 642, 646-49 (1969).

9. In addition, the Supreme Court concurred with the Ninth Circuit's findings regarding Standard's liability on the other two counts. *See* note 6 *supra.*

10. 390 U.S. 341 (1968). For an extended discussion of the *Meyer* decision, see *The FTC and Promotional Allowances: The Fred Meyer Quagmire,* 55 VA. L. REV. 718 (1969).

11. 390 U.S. at 345.

12. 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 proportionately equal terms to all other customers competing in the distribution of such products or commodities.

13. Earl Kintner defines third-line competitive injury as that injury which "is suffered by the customers of the supplier's buyer three steps down the distribution chain." AN ANTITRUST PRIMER 67 (1964). In the context of § 2(d), this definition means that if the supplier sells to a wholesaler who in turn sells to retailers, then those who purchased from that wholesaler must be provided with promotional allowances comparable to those granted to a retailer who bought directly from the supplier and who competes for sales with the purchasers in question. Following Kintner's reasoning, fourth-line competitive injury is that injury which occurs four steps down the dis-

Court held that the supplier had the burden of ensuring that promotional allowances were available on comparable terms to all dealers which were competing for sales at the retail level, regardless of whether the retailers bought directly from the supplier or through a wholesaler.[14] According to the Court, failure to comply with this mandate resulted in liability when there was injury to competition at the third functional level. Thus, if one assumes, as do most writers,[15] that *Meyer* provided the key theoretical jump necessary to extend the scope of the Robinson-Patman Act past the second level of competitive injury,[16] then it becomes obvious that *Perkins* is merely an extension of protection to the next distributional level.

It is clear that the majority of the Court in *Perkins* felt that its decision was merely an extension of the philosophy that it had expressed in *Meyer*. In his opinion for the majority, Justice Black noted the similarities between the type of action involved in *Perkins* and that in *Meyer*; and he stated that "to read 'customer' more narrowly in this section than we did in the section involved in *Meyer* would

tribution chain. In the *Perkins* context, it means that when Standard charged a discriminatory price as between Signal and Perkins, there was an injury to those retailers who bought from Perkins and who competed at the retail level with Regal, a purchaser from Western Hyway who, in turn, had bought from the favored Signal. The retail customers of Perkins were injured because when Regal received the benefit of the price discrimination which was passed down to it by Signal and Western, it was at a competitive advantage, and consequently other retailers were unable to compete effectively. Thus, Perkins, as a retailer, had a treble-damage action against Standard for an injury which manifested itself four steps down the distribution ladder.

14. 390 U.S. at 358.

15. *See, e.g., The Supreme Court, 1967 Term*, 82 HARV. L. REV. 95, 266-71 (1968); *The FTC and Promotional Allowances: The Fred Meyer Quagmire*, 55 VA. L. REV. 718 (1969); *cf.* E. KINTNER, AN ANTITRUST PRIMER 68 (1964). *But see* F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 205 (1962). For extended discussion, see note 16 *infra*.

16. This may be a questionable assumption in light of the decision in Standard Oil Co. v. FTC, 340 U.S. 231 (1951). In that case, Standard of Indiana sold gasoline to large wholesalers at a price 1½¢ per gallon less than that which it charged to comparatively smaller service stations in the same geographical area. Some, but not all, of the wholesalers passed on these savings to retailers to whom they sold. Third-line injury, then, was clearly at issue. In its decision, the Supreme Court implied that it was deciding the case on the assumption that there was price discrimination (340 U.S. at 236), and it then held that Standard had the right under § 2(b) of the Clayton Act to establish a "meeting the competition" defense. Standard proved that defense, and the Supreme Court reaffirmed its position in FTC v. Standard Oil Co., 355 U.S. 396 (1958). One possible interpretation of the Court's implied assumption in its earlier decision is that there would have been liability for third-line injury but for the fact that the discrimination was justified in terms of meeting the competition. *See* E. KINTNER, *supra* note 15, at 68. Rowe, however, disagrees, arguing that because the Solicitor General repudiated the order of the Federal Trade Commission which established third-line liability, the government clearly was not prosecuting a third-line-injury suit. *See* F. ROWE, *supra* note 15, at 205. But this position makes little sense in light of the fact that the repudiation came in oral argument in the 1958 case and had no effect on the assumption made by the Court in 1951 when the case was decided. *Id.* at 200.

allow price discriminators to avoid the sanctions of the Act by the simple expedient of adding an additional link in the distribution chain."[17]

Furthermore, there is a considerable amount of language in the *Meyer* decision which can be interpreted as laying the foundation for the *Perkins* extension. For example, although the *Meyer* Court was dealing with a section 2(d) case, it noted that Congress, when it drafted section 2(a), intended a very broad meaning for the word "competition" under that section, a meaning perhaps broader than that intended under section 2(d).[18] This dictum in a section 2(d) case made it easier for the Court, at a later date, to construe section 2(a) liberally enough to protect against the fourth-level injury in *Perkins*. Another way in which *Meyer* set the groundwork for the *Perkins* decision was the *Meyer* Court's agreement with an FTC finding that the extra value given to Meyer in the form of promotional expenses not only constituted a violation of section 2(d), but also amounted to price discrimination which was prohibited by section 2(a).[19] By equating the two sections in this manner, and then by extending section 2(d) to include third-line injury, the *Meyer* Court both implicitly expanded section 2(a) to include the third functional line and also shortened the step from section 2(d) to section 2(a).

One should not conclude pre-emptorily, however, that *Perkins* is anything more than a *limited* extension of the *Meyer* doctrine. Because the third and fourth distributional levels in *Perkins* were occupied by partially owned subsidiaries of the second-level corporation which had received the direct benefit of the price discrimination, it is possible that the case will be limited to its facts. Justice Black hinted at such a limitation in his majority opinion when, after pointing out that Signal owned sixty per cent of the stock of Western Hyway, and that Western Hyway in turn owned fifty-five per cent of the stock of Regal Stations Company, he asserted that there was "no basis in the language or purpose of the Act for immunizing Standard's price discrimination simply because the product passed through an additional *formal* exchange before reaching the level of Perkins' actual competitor."[20] Justice Black's emphasis on the degree of ownership in the various subsidiaries, and his curious reference to a "formal" exchange, may indicate a willingness to limit the decision to situations involving wholly or partially owned subsidiaries. Justice Marshall underscored this possibility in his dissent, when he urged the majority to clarify this point so as not

17. 395 U.S. at 647.

18. 390 U.S. at 356-57.

19. 390 U.S. at 345.

20. 395 U.S. at 648 (emphasis added).

to imply by indirection that the same principles would apply if wholly independent firms intervened in the distributional chain.[21]

On the other hand, there are several factors which militate against the conclusion that *Perkins* will be limited to situations involving subsidiaries. The Court did not specifically so limit its decision; and thus, since it was undoubtedly aware that such an alternative existed, the Court *did* imply "by indirection" that it intended no such limitation. Furthermore, the Court failed to implement the indirect-purchaser doctrine, which provides that if a manufacturer deals with a retailer through the intermediary of a wholesaler, dealer, or jobber, the retailer may nevertheless be considered a "customer" or "purchaser" of the manufacturer so long as the latter deals directly with the retailer and controls the terms on which it buys.[22] Although the Court in *Meyer* had explicitly rejected the necessity of resorting to the indirect-purchaser doctrine as a means of extending the protection of the Robinson-Patman Act,[23] it clearly could have resorted to it in the *Perkins* case by holding that Signal controlled Western Hyway and thereby controlled Regal's buying power and pricing policies. In this way the Court could have accomplished the same result in the case before it, without implying a further extension of the Act to cover fourth-line injury. However, since the Court did not explicitly limit the case to its facts, and since it further refused to apply either the "subsidiary" rationale sug-

21. 395 U.S. at 651. Justice Marshall suggested that, as an alternative, the Court use the fiction of regarding the wholesaler and his retail customer as a unit for purposes of § 2(a). This approach is basically the same as the one suggested by Justice Fortas in his concurrence in *Meyer.*

22. The indirect-purchaser doctrine has been utilized to broaden the scope of the word "purchaser" under § 2(a) and that of the word "customer" under § 2(d). Cases arising under § 2(a) have required that two factors be present. The first is that the manufacturer must control the price which the wholesaler charges the retailer. *See* Purcolator Prods., Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968); Champion Spark Plug Co., 50 F.T.C. 30 (1953); Dentists' Supply Co., 37 F.T.C. 345 (1943); *cf.* Kraft-Phenix Cheese Corp., 25 F.T.C. 537 (1937). For cases in which lack of control has prevented application of the indirect-purchaser doctrine, see Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957); Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), *affd.,* 237 F.2d 13 (3d Cir. 1956) (case severely questions the use of the doctrine); W.F. Shraft & Sons Corp., [1963-1965 Transfer Binder] TRADE REG. REP. ¶ 16,882 (FTC 1967). The second requirement is that the manufacturer must have dealt directly with the retailer. This requirement has been satisfied by direct negotiation of franchise agreements as well as by solicitation by the manufacturer of orders to be filled by the wholesaler. Purcolator Prods., Inc., v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968) (solicitation); Champion Spark Plug Co., 50 F.T.C. 30 (1953) (franchise). The efficacy of the second requirement has recently been called into question by the decision in Purcolator Prods., Inc. v. FTC, 352 F.2d 874 (7th Cir. 1965), *cert. denied,* 389 U.S. 1045 (1968). *See generally* Note, *The Robinson-Patman Act—Price Discrimination—Indirect Purchaser Doctrine,* 12 N.Y.L.F. 91, 104 (1966). In addition, the efficacy of the entire doctrine has been questioned. *See* F. ROWE, *supra* note 15, at 58.

23. 390 U.S. at 354.

gested by Justice Marshall[24] or the indirect-purchaser doctrine,[25] it must be concluded that *Perkins* was intended to be a full extension of the *Meyer* doctrine.[26]

There remains some confusion, however, as to the future application of the *Perkins* rationale. In particular, there may be some doubt concerning the extent to which future treble-damage plaintiffs occupying the third or fourth distribution levels in cases like *Perkins* must show injury to competition at those levels. In part, this confusion stems from the language of the Court's opinion itself. There is no mention of injury to *competition* at Perkins' level. Indeed, the Court speaks only in terms of damage to the single *competitor*, Perkins himself. This omission of any reference to injury to competition, and the correlative emphasis on injury to the individual competitor, lead to the possible interpretation that *Perkins* gives a cause of action for price discrimination to a business far down the distribution chain whenever that business can show causally related damage to itself. Under that view, the competitor need not make a general showing of injury to competition at its level of distribution.

Such an interpretation, however, seems to be an improper reading of the *Perkins* opinion. Proof of injury to competition at the plaintiff's level of distribution has always been considered an essential element in a cause of action for price discrimination; and it is doubtful that the Court would seize upon the *Perkins* fact situation to make such an abrupt departure from the accepted literal interpretation of the Robinson-Patman Act.[27] Moreover, it seems that injury

24. *See* note 21 *supra*.

25. *See* note 22 *supra* and accompanying text.

26. Indeed, such an interpretation of *Perkins* seems even more appropriate when one considers the difficulty that would ensue in attempting to establish substantial identity under existing case law for purposes of the unit device. The standard under the antitrust laws for establishing substantial identity between parent and subsidiary corporations is so stringent that the parent's control over the subsidiary must render the subsidiary a mere tool and compel the conclusion that corporate identity is a mere fiction. *See, e.g.*, National Lead Co. v. FTC, 227 F.2d 825 (2d Cir. 1955); Baim & Blank, Inc. v. Philco Corp., 148 F. Supp. 541 (E.D.N.Y. 1957). These cases stand for the notion that even though the subsidiary is wholly owned, has an interlocking board of directors and the same operating officers, and has closely correlated operations, it is not sufficiently interrelated with the parent to establish a substantial identity. Since the Court in *Perkins* certainly realized difficulties of proving such a substantial identity and still failed either to distinguish the case on its facts or to use a fiction to blunt its thrust, it apparently meant *Perkins* to be a full extension of the protection of the Robinson-Patman Act to cover fourth-line injuries.

27. As has been seen, section 2(a) of the Clayton Act, 15 U.S.C. § 13(a) (1964), provides in part:

> It shall be unlawful for any person engaged in commerce . . . to discriminate in price . . . *where the effect of such discrimination may be substantially to lessen competition* or tend to create a monopoly in any line of commerce, *or to injure, destroy, or prevent competition* with any person who either grants or knowingly receives the benefit of such discrimination or with customers of either of them . . . . [Emphasis added.]

to competition at the fourth level could easily have been proved in *Perkins*, regardless of the motives behind Standard's price discrimination. [28] To begin with, any price differential in the retail gasoline market, however small, may seem substantial to the consumer. In addition, Perkins and other retailers operating at the fourth level were dealing with a standardized product and probably were operating on tight profit margins. These factors lead to the probable conclusion that Standard's discrimination resulted in appreciable shifts of consumer trade and formed a plausible basis from which the Court could have inferred injury to competition at Perkins' level.[29] It appears, then, that *Perkins* does not give a cause of action to the fourth-level operator unless that operator can show that the price discrimination resulted in injury to competition at its level.

Beyond this problem, there are some additional questions about the long-range practical effects of the *Perkins* decision. First, it is doubtful that *Perkins* really extends the protection of the Robinson-Patman Act in as direct or effective a manner as did the *Meyer* decision. In *Meyer*, the Court held that when a supplier provides promotional allowances directly to one retailer, those same promotional allowances must be offered at comparable terms to all other retailers, even those who buy through wholesalers, and that the supplier has the onus of guaranteeing equality of treatment at the retail level.[30] This holding means that even if the supplier offered the allowances to all wholesalers on comparable terms, the supplier could nevertheless be held liable for treble damages should the wholesaler fail to pass on the allowances to retailers.[31] That mandate directly promotes equality of treatment in the availability of promotional allowances and arguably protects competition at the retail level.[32]

28. There are at least three possible explanations for Standard's actions. One is that Standard desired simply to increase profits without regard to present antitrust legislation. A second and more plausible explanation is that Standard originally felt that its discriminatory prices were cost justified, but that they could not be proved to be so at trial. A final, but unlikely, explanation is that Standard was the victim of the superior economic power of the "middlemen," Signal or Western Hyway.

29. F. Rowe, *supra* note 15, at 181.

30. 390 U.S. at 358.

31. This interpretation follows from a literal reading of the following language of the opinion: "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." 390 U.S. at 357. Since this result is so harsh, the Court may later read the quoted language as placing only a duty of due care on the supplier. To date, however, the supplier must still be viewed as the insurer of equality at the retail level.

32. It is arguable, however, that the *Meyer* mandate ensures equality while destroying competition at the retail level. For example, if it becomes too expensive to ensure equal treatment of small neighborhood grocery stores, large suppliers of

The *Perkins* decision, however, does not ensure such equality. In *Perkins*, the Court did not say or even imply that the prices ultimately offered to all retailers must be equal. It held merely that if the seller discriminates at the second level and the effect of that discrimination is passed on down the distribution chain, then the seller is liable for whatever damage to competition at the retail level was caused by its discrimination at the wholesale level.[33] Thus, unless some deterrent value is garnered by exposing the supplier to increased liability such that it will act to ensure equality of the prices charged to retailers,[34] the Court has not taken a large step toward promoting competition. Even if the supplier sells to all wholesalers at an equal price in an attempt to comply with *Perkins*,[35] the large, vertically integrated firms may continue to undercut independent operators which must deal through independent wholesalers. Of course, their ability to do so depends on the economic circumstances of the situation, since increased size does not necessarily increase the ability to compete. But in many circumstances, the large, integrated firms will be able to take advantage of economies of scale in order to persist in charging lower retail prices than can independent operators, and will thereby continue to capture a large part of the retail market. Thus, it appears that unless *Perkins* can be read as requiring suppliers to ensure the equality of the prices to retailers, or unless it can be presumed that sufficient deterrence is gained by exposing the supplier to increased liability such that it will decide on its own to ensure competition at the retail level, the *Perkins* decision fails to achieve the same sweeping degree of protection of competition that the *Meyer* decision accomplished.

In addition, there is the collateral problem that suppliers like Standard may find it difficult, if not impossible, to comply with the holding in *Perkins*. The next step in the analysis, then, is to examine a supplier's possible modes of compliance. There are two such methods and they are based on alternative interpretations of

grocery items will concentrate on increasing their sales to the large, vertically integrated firms and will refuse to sell to the smaller retailers. Consequently, if the neighborhood retailers are unable to buy standard brands, they may not be viable competitors and may be forced out of business. Their failure would, in turn, reduce competition.

33. The plaintiff must, of course, prove a causal connection between the prohibited price discrimination and the injury suffered. In *Perkins*, the Court held that this proposition was true regardless of the level at which the injury occurs. The Court further noted that the standard for proving this element of the cause of action is to present enough evidence to support an inference of causation. After this burden is satisfied, the jury then decides whether the inference is valid, and, if so, the amount of damages. 395 U.S. at 648.

34. *See* text accompanying notes 42-50 *infra*.

35. *See* note 37 *infra* and accompanying text.

the supplier's duty under *Perkins*: either the supplier can comply with the holding by charging the same price to all wholesalers, or it can comply only by ensuring equal prices to all retailers.

Obviously, the preferable course of action from the supplier's point of view is for it to escape liability by charging the same price to all wholesalers. As indicated above, this mode of compliance seems to be based on the more appropriate interpretation of *Perkins*, since the decision probably does not require the supplier to ensure equality of prices at the retail level.[36] Nevertheless, charging equal prices to all wholesalers does not make sense from an economic point of view, since some wholesalers buy in considerably greater quantities than others and the resulting lower costs to the seller entitle the larger buyers to pay lower prices per unit.[37]

The obvious response to this problem is that the supplier could vary its prices to different wholesalers; such variation is permissible so long as the unequal prices are cost justifiable.[38] This approach seems ideal from a theoretical point of view; but in practice it may not represent an effective solution to the supplier's problem, since cost justification defenses are not only expensive to establish but very difficult to prove.[39] Indeed, as of January 1964, the FTC had rejected twenty-three cost justification defenses, while allowing only six to succeed.[40] These statistics have led many to conclude that the cost justification of price differentials has often remained illusory in practice.[41] Thus, a supplier may be left with no practicable course of action with respect to wholesalers. It may find it economically infeasible to charge equal prices to all wholesalers; but if it attempts to charge them unequal prices, it cannot depend on the success of a cost justification defense in vindicating those prices.

Therefore, a supplier may simply continue to charge discriminatory prices, accept the risk of some liability as a fact of commer-

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36. *See* text accompanying notes 30-35 *supra*.

37. Obviously, if quantity sales reduce the cost per unit, then the purchaser is entitled to some or all of the economic benefit of that reduced cost per unit.

38. Clayton Act § 2(a), 15 U.S.C. § 13(a) (1964), allows for a cost justification defense:

> *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered.

39. Rowe, *The Federal Trade Commission's Administration of the Anti-Price Discrimination Law—A Paradox of Antitrust Policy*, 64 COLUM. L. REV. 415, 424 (1964); Note, *Functional Discounts Under the Robinson-Patman Act: The Standard Oil Litigation*, 67 HARV. L. REV. 294, 295 (1953).

40. Rowe, *supra* note 39, at 424. The citations for these cases may be found in F. ROWE, *supra* note 15, § 10.10, at 63 (Supp. 1964).

41. Rowe, *supra* note 39, at 424.

cial life, and adopt the expedient of attempting to reduce the amount of liability which it could incur. In particular, the supplier may attempt to decrease the amount of exposure to liability resulting from suits by retailers, as opposed to those by wholesalers.[42] It is necessary, then, to examine whether practicable methods exist for attaining that objective.

Presumably, a reduction or elimination of potential liability at the retail level can be accomplished only by ensuring that all retailers pay the same price for their products, since there probably will be no injury to retailers when they are all charged the same price. This solution, however, is identical to that which was postulated for the second, and more tenuous, reading of the *Perkins* case, that is, that suppliers can comply with the holding only by ensuring the equality of prices to retailers. Thus, the merit of the *Perkins* decision may ultimately rest on the resolution of the problem of controlling the prices charged to retailers. If Standard and the other major suppliers can find some way to control those prices, they will eliminate exposure to liability and at the same time ensure competition at the retail level. If suppliers cannot find such a solution, however, *Perkins* may have resulted in nothing more than an increase in the number of privately instigated antitrust suits without any commensurate increase in competition.

The obvious line of analysis, then, is to examine the possible solutions open to suppliers like Standard. One superficial solution is for the supplier to enter into resale price limitation agreements with the wholesalers to whom it sells. This practice, however, would obviously fall within the proscription of section 1 of the Sherman Act.[43] Another possible solution is to charge the same price to all retailers and wholesalers. This course of action would be foolish not only from an economic point of view,[44] but also in terms of antitrust policy, since it would eliminate most of the wholesaler's business and thereby establish competition at the retail level by destroying it at the wholesale level.[45] A further possibility along

42. Of course, the supplier would still be vulnerable to suits from wholesalers, but it was liable in that area before *Perkins* and was able to include the costs of such suits in its pricing structure.

43. 15 U.S.C. § 1 (1964). *See, e.g.*, United States v. McKesson & Robbins, Inc., 351 U.S. 305 (1956). In that case, the Court held that McKesson & Robbins, a drug firm which served as both a manufacturer and a wholesaler, committed a per se violation of § 1 of the Sherman Act when it, as a wholesaler, entered into resale price maintenance contracts with other wholesalers.

44. This approach would be foolish in terms of economics for the same reasons that would make it foolhardy to sell to all wholesalers at the same price. *See* text accompanying note 37 *supra*.

45. If wholesalers and retailers all bought at the same price, there would be no possible profit margin left for the wholesalers, except perhaps for that on freight charges, and consequently the wholesalers could not afford to stay in business.

this same line is for the supplier to integrate vertically and to take over the wholesale function entirely. Here again, however, the supplier would possibly be guilty of violating antitrust laws.[46] One final possibility is for the supplier to sell to its wholesalers on a consignment basis and in that way exercise more control over the ultimate price of the goods. That solution also seems doomed to failure. Although this exact issue has never been litigated, the theory on which the cases dealing with consignment sales to retailers have been decided demonstrates that a consignee may be considered a purchaser for section 2(a) purposes if the facts indicate that the consignment relationship is being used as a covert means of price control.[47] Thus, in light of the precedent, it appears that if this type of arrangement were ever tested by litigation, it would be held to be illegal price fixing violative of both the Sherman Act[48] and the Robinson-Patman Act.[49] While the preceding list may not be exhaustive, it illustrates the extreme difficulty that suppliers face in trying to find both a legal *and* a practical form of compliance with the Court's decision in *Perkins*.[50]

No doubt the independent wholesalers realized this possibility after the *Meyer* decision when they strongly urged the FTC not to pass its amended guides for advertising because those guides would give the suppliers more control and would both increase expenses for wholesalers and cut their profit margins. *See generally* Comments of the National Oil Jobbers Concerning Proposed Amended Guides for Advertising Allowances and Other Merchandising Payments and Services (Sept. 31, 1968) (open letter to the FTC). *See also* Note, *The FTC and Promotional Allowances: The Fred Meyer Quagmire*, 55 VA. L. REV. 718 (1969).

46. In United States v. Paramount Pictures, Inc., 347 U.S. 89 (1955), the Court held that although vertical integration per se does not violate § 2 of the Sherman Act, 15 U.S.C. § 2 (1964), it may become illegal if it is entered into with a specific intent to control the market. Furthermore, if the attempt is done through the vehicle of corporate merger, it may be circumscribed by § 7 of the Clayton Act, 15 U.S.C. § 18 (1964). *See also* Brown Shoe Co. v. United States, 370 U.S. 294 (1962). *See generally* Blackford, *Vertical Acquisition and Section 7 of the Clayton Act*, 17 W. RES. L. REV. 102 (1965). Finally, regardless of the manner in which the integration is accomplished, the process requires a huge amount of cash. Today, due to the tightness of the money markets, available funds are either minimal or nonexistent.

47. Students Book Co. v. Washington Law Book Co., 232 F.2d 49 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 988 (1956); Stanton v. Texaco, Inc., 289 F. Supp. 884 (D.R.I. 1968).

48. For a discussion of Sherman Act liability, see First Natl. Bank of Ariz. v. Cities Serv. Co., 391 U.S. 253 (1968); Albrecht v. Herald Co., 390 U.S. 145, 156 (1968) (Justice Harlan, dissenting); Simpson v. Union Oil Co., 377 U.S. 13 (1964); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

49. For a discussion of Robinson-Patman Act liability, see note 47 *supra*.

50. Indeed, faced with the probable failure of any attempt to comply effectively with *Perkins*, the suppliers can take only defensive action. They cannot set up a reserve to insure themselves against damages resulting from private antitrust suits, since all of the events which fix the amount of liability and which establish the liability itself do not occur in the proper sequence. Consequently, the suppliers must wait until the losses actually occur before they can write off both the damages and the legal fees as tax-deductible expenses. *See* Commissioner v. Fifth Avenue Coach

One must conclude, then, that the Court has placed suppliers like Standard in an untenable position without a commensurate increase in the amount of competition at the retail level. If the supplier chooses to comply with *Perkins* by charging all wholesalers the same price, it will be forced to act uneconomically and there will not be an appreciable effect on competition at the retail level. Furthermore, if the supplier attempts to comply by charging different prices to different wholesalers—its most probable course of action—it runs the serious risk of being unable to prove that its prices are cost justified. Conversely, if it decides to comply by controlling the price charged to retailers, it may destroy competition at the wholesale level in order to establish it at the retail level; and thus, there will be no net gain in the total amount of competition. In addition, the supplier may expose itself to liability for violation of other antitrust laws. Therefore, regardless of the interpretation of *Perkins*, the effect of the case may be economic loss to the supplier with little gain in the over-all amount of competition. Moreover, while the *Perkins* rationale may be a desirable approach when a huge corporation like Standard is involved, it would certainly yield disastrous results if applied to smaller suppliers which might be forced out of business by the resulting losses. Accordingly, if the *Perkins* decision is not subsequently overturned or at least limited to its facts, it may impede competition rather than promote it.

Lines, Inc., 281 F.2d 556 (2d Cir. 1960); INT. REV. CODE OF 1954, § 162(a); Rev. Rul. 64-224, 1964-2 CUM. BULL. 52; Wright, *Tax Formula To Restore the Historical Effects of the Antitrust Treble Damage Provision*, 65 MICH. L. REV. 245 (1966). To make up the difference between the amount of the total loss and the resulting tax saving, suppliers may simply raise the price of gasoline so as to pass on the costs of the Court's edict to the consumer.