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Functional Discounts–A Threat to Competition?

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Conclusion

There seems to be no doubt that the land trust can be a valuable legal device in New York. The flexibility of its organization and the number of purposes for which it can be used render it particularly useful to the creative attorney. Since the beneficiary's interest is deemed personalty, partition will not lie and a judgment against the beneficiary will not act as a lien on the realty. Record title being in the trustee, the sale of jointly-owned realty is greatly facilitated and the anonymity of the beneficiaries may be preserved.

From the taxation standpoint, there is the consideration that a skilled lawyer can so establish the land trust that it will have fewer corporate than noncorporate characteristics and thus, burdensome corporate taxation may be bypassed. The relative freedom of organization when contrasted to the rigid compliance with statutory norms demanded of corporations seems to be another advantage over the corporate form.

The most serious legal roadblock to introduction of the land trust in New York is the consideration that the duties imposed on the trustee would seem to be insufficient to qualify it as an active trust and, consequently, the trust would be deemed executed. It appears that statutory exemption from sections 92 and 93 is the most practicable solution to the problem of "dry" trusts. Section 96 of the Real Property Law, as already indicated, may also require legislative amendment although there is a possibility that the courts may be able to bring the land trust under subdivision eight of that section.

In any event, the practical utility of the land trust as a legal tool is beyond question. It would appear to be merely a matter of time before its legal feasibility under New York law will be put to the test.

FUNCTIONAL DISCOUNTS — A THREAT TO COMPETITION?

The Robinson-Patman Act was established to insure competitive equality by strengthening antitrust laws and by protecting the businessman against unfair trade practices and unlawful price discrimination.[1] To accomplish this result, section 2(a) of the

[1] H.R. REP. No. 2287, 74th Cong., 2d Sess. 3 (1936). For a general survey of the origin and legal impact of the Robinson-Patman Act, see AUSTIN, PRICE DISCRIMINATION AND RELATED PROBLEMS UNDER THE ROBIN-

act prohibits direct or indirect discrimination in price by the seller if its effect "may be substantially to lessen competition, or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition. . . ."[2] A respondent may refute a prima facie illegal price discrimination by proving a cost justification defense, *i.e.*, that the price differential makes due allowance only "for the 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. . . ."[3] However, a functional discount, which is a discount granted by the supplier as compensation to a buyer for performing distributive services,[4] is difficult to justify in this manner.[5]

This discount is usually granted by the suppliers to their customers irrespective of the quantity purchased in any particular transaction. At most, the discount reflects the suppliers' prospective estimate "of the economic advantage of dealing with broad customer classes performing characteristic marketing functions."[6] Functional discounts are customarily bestowed on a graduated basis according to the buyer's respective place in the distribution chain. For example, wholesalers or jobbers receive greater discounts than retailers or dealers. So long as the group higher in the distributive chain receives the larger discount, there generally is no adverse effect on competition.[7] But, with the advent of new marketing techniques, it is not uncommon to find a large retailer performing many wholesale functions (storage, insurance, assumption of credit

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SON-PATMAN ACT (2d rev. ed. 1959); Kintner, *The Revitalized Federal Trade Commission—A Two-Year Evaluation*, 30 N.Y.U.L. REV. 1143, 1155-73 (1952); Rowe, *The Evolution of the Robinson-Patman Act: A Twenty-Year Perspective*, 57 COLUM. L. REV. 1059 (1957); Rowe, *Price Discrimination Competition and Confusion: Another Look at Robinson-Patman*, 60 YALE L.J. 929 (1951).

2 49 Stat. 1522 (1936), 15 U.S.C. § 13(a) (1958).

3 *Ibid.* There are two other statutory defenses available: That the seller's lower price was made in good faith to meet the price of a competitor, or that the challenged differential was in "response to changing conditions affecting the market . . . or the marketability of the goods concerned. . . ."

4 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 202 (1955). It has been suggested that a functional discount is the price differential granted to the buyer because of the performance by the buyer of distributive functions which give him greater bargaining power than that possessed by other buyers, whereas a trade discount is the price differential granted to a buyer because of the classification of the buyer by the seller at a particular level of distribution. *Ibid.*; Kelley, *Functional Discount Under the Robinson-Patman Act*, 40 CALIF. L. REV. 526 (1952). However, since this subjective distinction has not been made by the FTC or the courts, this note will not distinguish between trade and functional discounts.

5 EDWARDS, THE PRICE DISCRIMINATION LAW 313-17 (1959).

6 ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 203 (1955).

7 ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 174 (1962).

risks) or a wholesaler selling direct to consumers as well as to retailers. This "proliferation of modern marketing units" obviously creates legal complications in the functional discount area.[8] For instance, when the wholesaler is performing dual functions, should he be legally entitled to receive a wholesale discount on the merchandise sold directly to consumers? Likewise, should a wholesaler who ordinarily resells only to "jobbers,"[9] but who also resells to retailers in competition with jobbers, be entitled to receive a lower price than the jobber? In other words, should the discount relate solely to a purchaser's position in the chain of distribution or should due recognition be given also to the activities of a buyer which, in one manner or another, benefit the suppplier. This note will attempt to examine these questions in the light of the legislative and judicial history of the act.

Historical Background

The traditional distribution chain, composed of supplier, wholesaler, jobber and retailer, has been continuously challenged by less orthodox and more dynamic marketing organizations.[10] This rivalry started in the post-World War I period with the rapid growth of large chain stores and mail-order merchandisers.[11] These large organizations invested capital in facilities for performing bulk storage, redelivery and financing, in order to integrate the retailing and wholesaling functions within their organization. This enabled them to deal directly with the manufacturer and to obtain large price concessions. As might be expected, these occasionally excessive discounts posed a great threat to conventional wholesalers.

The Clayton Act of 1914[12] proved impotent to curb this abuse.[13] This act was originally interpreted to apply only to oppressive or collusive pricing practices inimical to competition among sellers.[14] Not until 1929 did the Supreme Court validate the application of the Clayton Act to situations involving price discrimination by a seller which caused injury to competition among

[8] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 204 (1955).

[9] "In the theoretical economic sense a jobber is a functionary in the wholesaling process. He buys from the manufacturer, or from another wholesaler who has bought from the manufacturer, and sells to the dealer. The jobber's service is that of relieving the manufacturer, or in some instances the wholesaler, from the necessity of direct contact with the dealer. . . ." United States v. United States Gypsum Co., 67 F. Supp. 399, 481 (D.D.C. 1946).

[10] ROWE, *op. cit. supra* note 7, at 4.

[11] Comment, 54 MICH. L. REV. 659, 661 (1956).

[12] 38 Stat. 730 (1914).

[13] ROWE, *op. cit. supra* note 7, at 6-7.

[14] See, *e.g.*, National Biscuit Co. v. FTC, 299 Fed. 733, 739 (2d Cir. 1924); Mennen Co. v. FTC, 288 Fed. 774, 778-79 (2d Cir. 1923).

his customers.[15] This change was of little significance since unlimited price differentials were allowed by the courts in the form of quantity discounts regardless of cost or competitive considerations.[16] By 1922 it appeared that a continuation of unrestrained competition between the chain stores and independent retailers might well result in the elimination of the latter from the marketplace. Hopefully, the traditional distributors called upon their state legislatures to enact curative legislation. State antitrust laws were amended so as to apply more directly to corporate chains,[17] and tax revisions enacted to deter the operation of a large number of stores by any one company.[18]

These efforts by the states proved to be inadequate, and with the worsening of economic conditions in the early 1930's and the continued growth of mass distributors, congressional attention was focused upon the problem. The Codes of Fair Competition authorized by the National Industrial Recovery Act of 1933 [19] were an attempt, in many cases, by independent merchants to enact the orthodox patterns of distribution into law.[20] For example, some codes classified chain distributors and mail-order houses as retailers, thus barring them from obtaining a wholesale discount even though they performed the typical wholesale function. However, even before the N.R.A. was declared unconstitutional,[21] the codes were hopelessly in confusion and ineffective due to public apathy and organized resistance by mass distributors.[22] Within this context, Congress passed the 1936 Robinson-Patman amendments to the Clayton Act [23] as a second attempt to "curb and prohibit all devices by which large buyers gained discriminatory preferences over small ones by virtue of their greater purchasing power." [24] Considerable congressional attention was given to the question of functional discounts prior to passage of these amendments.

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15 George Van Camp & Sons Co. v. American Can Co., 278 U.S. 245 (1929).

16 Goodyear Tire & Rubber Co. v. FTC, 101 F.2d 620, 623 (6th Cir. 1939). Although the court's decision permitting unlimited quantity discounts did not come until 1939, that interpretation was anticipated in the 1935 hearing on the Robinson-Patman proposals. See Rowe, *op. cit. supra* note 7, at 7-8 n.15.

17 FTC, *Final Report of Chain Store Investigation*, S. Doc. No. 4, 74th Cong., 1st Sess. 82-84 (1934).

18 Bloomfield, Chain Stores and Legislation 108 (1939); Legislation 80 U. Pa. L. Rev. 289 (1931); Comment, 45 Yale L.J. 314 (1935).

19 48 Stat. 195 (1933).

20 Rowe, Price Discrimination Under the Robinson-Patman Act 10 (1962). For a study of these code provisions, see Zorn & Feldman Business Under the New Price Laws 28-30 (1937).

21 Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

22 Rowe, *op. cit. supra* note 20, at 10-11.

23 38 Stat. 730 (1914), as amended, 15 U.S C. §§ 12-27 (1958).

24 FTC v. Henry Broch & Co., 363 U.S. 166. 168 (1960).

Legislative History of Functional Prices

In 1935 legislation was introduced in both the House and Senate to amend Section 2 of the Clayton Act. The Robinson Bill that passed the Senate permitted price differentials based solely on the purchaser's position within the distributive hierarchy.[25] Thus, a wholesaler who bought the same amount of merchandise from the supplier as a direct-buying retailer would be allowed a larger discount solely because he was a wholesaler. In the House, the Patman Bill, as reported out of committee, had an added provision that clearly specified that "the character of the selling of the purchaser and not the buying shall determine the classification . . . ." of customers capable of legally receiving functional discounts. Furthermore, the bill classified any purchaser who "does both a wholesale and retail business . . . (1) as a wholesaler on purchases for sale to retail dealers only, . . . and (2) as a retailer on purchases for sale to consumers."[26] The report by the House Judiciary Committee indicated that these provisions were necessary in order to prevent "unwarranted disturbance of existing habits of trade."[27] However, the agricultural purchasing cooperatives, fearful that these provisions would require them to pay the same prices as other retailers, exerted pressure for the removal of these provisions.[28] Whether as a result of this pressure, or other political considerations, both the Senate and House provisions on functional discounts were omitted from the final bill. Unfortunately, neither the conference reports nor subsequent discussions by Congress indicated the reason for the deletion.

It is arguable then that Congress thought a difference in price between the traditional functional classes was so ingrained in the business world that it was not necessary to protect the price difference by specifically exempting it from the ambit of the legislation. Also it could be maintained that Congress believed that the absence of competition between functional classes would prevent a price discrimination from having any injurious effect it might otherwise have on competition. On the other hand, Congress might have intended functional discounts to undergo the same test of legality regarding injury and cost justifications as is applied to other price discriminations.[29] The answers to the

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25 S. 3154, 74th Cong., 1st Sess. (1936).

26 H.R. REP. No. 2287, 74th Cong., 2d Sess. 1-2 (1936).

27 H.R. REP. No. 2287, 74th Cong., 2d Sess. 10-11 (1936).

28 EDWARDS, THE PRICE DISCRIMINATION LAW 286 (1959); See Bartenstein, *Functional Discounts Under the Robinson-Patman Act*, 4 WASH. & LEE L. REV. 121, 122 n.6 (1947).

29 EDWARDS, *op. cit. supra* note 28, at 287.

problems were left entirely to the Federal Trade Commission and to the courts.

Legal Status of Functional Discounts

Soon after the passage of the Robinson-Patman Act, the Commission in effect reinstated the deleted portions of the House and Senate bills. The Commission, after approving a classification of customers based on the character of the selling of the customer, decided that a jobber's discount could not be granted to a dual-distributor jobber—a jobber who sells both at wholesale and at retail—for those goods which he would resell directly to the consumer.[30] However, the discount could be granted on those goods resold to retailers. The FTC was of the opinion that the jobber receiving the greater functional discount could resell to consumers at lower prices than a direct-buying retailer who received a smaller discount, thus resulting in an injury to competition. Evidently, the fact that the wholesale-retail venture of the jobber required a capital investment over and above that of the direct-buying retailer was not thought to be of any relevancy. Moreover, the fact that the dual-distributor jobber might perform services for the supplier which were related to the entire amount of goods purchased and not merely to those to be resold to retailers was not given consideration. Subsequent adjudications not only reaffirmed the principle that the purchaser's resale activity determines his eligibility for a functional discount, but also compelled the seller to secure reasonable assurance from its customers as to the ultimate destination of the goods.[31] This was to ensure that the customers were properly classified within the discount structure.

It had been generally felt that the single-function middleman presented no problem of classification, for he bought as well as sold in one distributive role, *i.e.*, as a wholesaler or a retailer.[32] Since the eligibility for the functional discount was based on the buyer's selling activity, this type of discount would seem entirely lawful. However, in 1945, the FTC's *Standard Oil* opinion raised some doubt even about this legality.[33] Standard Oil, a dual marketer, selling its gasoline through jobbers as well as

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[30] Albert L. Whiting, 26 F.T.C. 312, 318 (1938); Agricultural Laboratories, Inc., 26 F.T.C. 296 (1938); Hansen Inoculator Co., 26 F.T.C. 303 (1938); Nitragin Co., 26 F.T.C. 320, 326 (1938).

[31] See Sherwin-Williams Co., 36 F.T.C. 25, 64-65 (1943).

[32] The supplier's customers who were retailers were not considered to be competing with the "pure" wholesalers.

[33] Standard Oil Co., 41 F.T.C. 263 (1945), *aff'd*, Standard Oil Co. v. FTC, 173 F.2d 210 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

directly to retail service stations, had granted to several jobbers buying in tank-car lots at Standard's bulk plant, a 1½ cent discount from the price paid by retailers who took delivery at their premises in smaller tank-wagon lots. All of the jobbers who received the discount utilized their own equipment for storage and transportation from the bulk plant to service stations. Some of these jobbers resold the gasoline to independently-owned retail service stations which were in competition with the retailers purchasing directly from Standard. Standard's discount to the jobbers permitted those jobbers to sell to their customers at a price lower than that at which Standard was selling to its direct-buying retailers—thus placing the latter at a competitive disadvantage.[34] According to the FTC, this was enough to establish the statutory injury to competition. Therefore the Commission issued an order precluding the supplier from granting any discount on gasoline sold to jobbers in cases where jobbers saw fit to sell to their retail customers at a price below that offered by Standard.[35] Subsequently, the Court of Appeals modified the order by conditioning liability on the reasonable knowledge of Standard that its jobbers were undercutting Standard's price in the sale of gasoline to its retailers.[36] It would seem that the Commissioner's order in *Standard Oil* would require a supplier to control the resale prices of his independent distributors. This result has been criticized by many legal authorities as contradicting the basic antitrust policy of fostering a free competitive economy.[37]

Besides this objection, the overall policy followed by the FTC seemed to discourage the supplier from using various distributive channels, thereby thwarting competition and efficiency in marketing and inevitably leading to higher consumer prices.[38] Legal complications were likely to arise if the supplier distributed his product at a discount to his dual distributors while not granting it to his customers who were independent retailers.[39] Similarly, if the supplier decided to sell to single function middlemen at a discount while selling to direct-buying retailers at the regular price, he would be subject to the type of restrictions imposed in the *Standard Oil* decision.[40] Consequently, possible litigation could be avoided only by selecting one type of customer (either retailers, or whole-

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[34] *Id.* at 276.

[35] *Id.* at 285.

[36] Standard Oil Co. v. FTC, 173 F.2d 210, 217 (7th Cir. 1949), *rev'd on other grounds*, 340 U.S. 231 (1951).

[37] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 206, 207 (1955). See, *e.g.*, Bartenstein, *Functional Discounts Under the Robinson-Patman Act*, 4 WASH. & LEE L. REV. 121, 137-38 (1947); Kelley, *Functional Discounts Under the Robinson-Patman Act*, 40 CALIF. L. REV. 526, 544 (1952).

[38] EDWARDS, *op. cit. supra* note 28, at 345.

[39] See notes 30 & 31 *supra*.

[40] See note 33 *supra*.

sale-retailers, or "pure" wholesalers),[41] or by adopting a uniform pricing system for all class of customers.[42] The latter method is not subject to the regulations of the act because a price discrimination has been interpreted to mean a price difference.[43] Thus, it seemed the net economic effect of the FTC's policy was to stifle the stimulus to vigorous competition that would result from the use of different channels of distribution.

The report of the Attorney General's National Committee took issue with the fairness of a policy which maintained that a functional discount must relate to the purchaser's resale activity.[44] The Committee stated:

> [T]o relate discounts or prices solely to the purchaser's resale activities without recognition of his buying functions . . . compels affirmative discrimination *against* a substantial class of distributors, and hence serves as a penalty on integration. If a businessman actually fulfills the wholesale function by relieving his suppliers of risk, storage, transportation, administration, etc., his performance, his capital investment, and the saving to his suppliers are unaffected by whether he also performs the retailing function, or any number of other functions. A legal rule disqualifying him from discounts recognizing wholesaling functions actually performed compels him to render these functions free of charge. The value of the service is pocketed by the seller who did not earn it.[45]

Furthermore, the Committee asserted that if a differential accords

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[41] *E.g.*, Bird & Son, 25 F.T.C. 548 (1937). Here the FTC stated: "the Act does not purport to interfere with the right of the seller to select his customers. He may discriminate in the choice of the customers. Not until there is a discrimination in price among those chosen does Section 2(a) of the Act have any application." *Id.* at 553.

[42] FTC v. Anheuser-Busch, Inc., 363 U.S. 536 (1960). According to the Court's summation: "when this Court has spoken of price discrimination in § 2(a) cases, it has generally assumed that the term was synonymous with price differentiation." *Id.* at 549. Sano Petroleum Corp. v. American Oil Co., 187 F. Supp. 345, 353-54 (E.D.N.Y. 1960); Bird & Son, 25 F.T.C 548, 553 (1937).

[43] *Ibid.* Referring to this policy, the court commented in Klein v. Lionel Corp., 138 F. Supp. 560 (D. Del.), *aff'd*, 237 F.2d 13 (3d Cir. 1956) that a uniform price quoted to both retail and wholesale distributors would "accomplish precisely that which the Act was intended to prevent, viz., a discrimination in price between two purchasers from the same seller." *Id.* at 565. Consequently, there have been congressional proposals to expand the definition of discrimination so as to require the supplier to grant greater price differentials to wholesalers than to retailers, regardless of the marketing function performed. *E.g.*, H.R. 3465, 87th Cong., 1st Sess. (1961); S. 315, 86th Cong., 1st Sess. (1959). However, the FTC and the Justice Department have maintained that these bills are incompatible with broad antitrust objectives, since it projects the seller into the cost and price relationships of independent distributors when he is determining what the legally required differential should be. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 101, 102 (1962).

[44] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 207 (1955).

[45] *Ibid.*

merely due recognition and reimbursement for actual marketing functions an injury to the buyer's competitors could not be "the effect" of the differential.[46] As long as the amount of the discount is reasonably related to the expenses assumed by the buyer it would be fully absorbed by the buyer and could not have the requisite causal effect on competition. Thus, the supplier should not be held responsible for his customer's price cutting.[47] In effect, this approach would allow a functional discount to those buyers who performed identical services in terms of distribution of the sellers product as the traditional distributors. The fact that the dual distributor is selling in competition with groups not receiving the discount, such as independent retailers, would not be relevant.

It should be noted that in practice the recommendation of the Committee would prove to be difficult to administer. The buyer would only be entitled to a discount for the services he actually performs on that part of the goods for which he performs it. Thus, it must be determined in each case exactly what part of the wholesaling functions a given distributor performs. Then, the figure must be applied to that portion of the goods purchased for which the distributor actually performs wholesale functions. In addition to these administrative difficulties, this procedure changes the nature of the functional discount from one granted to a class of distributors to a discount granted on an individual basis. This approaches a theory which would demand a cost justification under section 2(a) for all functional discounts.

Nevertheless, the ideas expressed in the Attorney General's Report were temporarily accepted by the FTC in its *Doubleday* opinion.[48] In that case the supplier attempted to justify a greater discount given to one of three competing groups by classifying the discounts as compensation for services and facilities furnished by the favored group. By admitting this evidence, the FTC overruled the hearing examiner's adjudication that it is only the seller's costs, not the buyer's, which may be used defensively under the law itself.[49] The opinion noted that the performance by a distributor of various wholesale functions, such as providing storage, traveling salesmen, and distribution of catalogues, could be compensated for by the supplier, so long as the size of the discount was "reasonably related to the expenses assumed by the buyer." [50]

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[46] *Id.* at 208.
[47] Rowe, *op. cit. supra* note 43, at 192.
[48] Doubleday & Co., 52 F.T.C. 169 (1955).
[49] *Id.* at 169 n.7. Since no attempt had been made by the seller to correlate the alleged payments for services with actual performance, the evidence was considered insufficient to demonstrate the required reasonable relationship between the discount and services rendered.
[50] *Id.* at 209. Two commissioners who concurred with the majority did

As long as the amount of the discount corresponds with the cost of the function assumed by the distributor, it will be absorbed by the buyer, and, consequently, cannot be the cause of any injury to competition. Under this interpretation of the *Doubleday* opinion, a proper discount could never result in an injury to competition.[51] In addition, as subsequently indicated in the *Mueller* decision, it is possible to interpret *Doubleday* as holding that a price differential granted as compensation for services performed is permissible regardless of the ultimate injury to competition.[52] This latter interpretation would add a defense to a prima facie violation of section 2(a) which is not included in the statute.[53] However, it is unlikely that this is what the commission intended in its *Doubleday* decision, since the opinion noted that a functional discount was safe under the act only if it created no competitive injury.[54]

The *Doubleday* doctrine was cast into doubt by the Commission's *General Foods* ruling in 1956.[55] The supplier in that case had granted lower prices to its Institution Contract Wagon Distributors than to its conventional wholesalers. In return, these distributors agreed to perform a multitude of merchandising activities that none of the conventional wholesalers undertook.[56] Not following the *Doubleday* rationale, the examiner excluded proof of the cost of various services that the Institution Contract Wagon Distributors had performed.[57] Since the services were rendered in connection with the resale of merchandise that was now owned by the wholesaler, the examiner maintained that the supplier was actually paying the distributors for doing their own work. The examiner realized that the performance of these services benefited the supplier, but he felt that the wagon distributor was the primary beneficiary. Thus, the distributor's greater business cost could not be accepted as justification for a price differential.

Referring to this situation, the examiner commented:

> This is exactly what the law says cannot be done. Otherwise respondent

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not feel that a change in the law was appropriate. *Id.* at 211 and 212 (concurring opinions).

[51] ROWE, *op. cit. supra* note 43, at 192.

[52] Mueller Co., 3 CCH TRADE REG. REP. ¶ 15686 at 20519 (FTC Jan. 12, 1962).

[53] *Ibid.*

[54] Doubleday & Co., *supra* note 48, at 207.

[55] General Foods Corp., 52 F.T.C. 798 (1956).

[56] The contract required the distributor to arrange for distribution and use of promotional material, handle damaged merchandise, maintain adequate stock, arrange for appropriate displays, move older stock first, provide delivery to dealers, maintain replacement parts for coffee-making equipment, and use its best efforts to promote General Foods. *Id.* at 802.

[57] *Id.* at 809-10.

> [the supplier] could appraise the cost of doing business of its customers, evaluate their efforts and efficiencies, subsidize their deficiencies, and have a different selling price for each—an end which the law was designed to prevent.[58]

Furthermore, when the supplier alleged that the Institution Contract Wagon Distributors were a functionally distinct group, the Commission indorsed, without mentioning *Doubleday,* the earlier rule which disapproved of a functional classification that granted different prices to competing sellers.[59] Thereafter, the Commission concluded that the supplier could only pay for "services and facilities furnished" in the resale of goods if he complied with section 2(d) of the act.[60] This section requires the seller to make sure that payments given to his favored distributors are also available "on proportionately equal terms to all other customers competing in the distribution of such products or commodities."[61] Having sanctioned the applicability of this section, the opinion then held that it did not apply to distributive functions which are incapable of proportionalization or "having a price or tag put on it."[62]

This utilization of section 2(d) in the functional discount area was not generally anticipated.[63] In the first place, the purpose of that section was to prohibit the discriminatory practices by which advertising allowances were employed by sellers to bring about price discrimination.[64] Accordingly, the section was not ordinarily considered applicable to cases where the supplier,

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58 *Id.* at 810.
59 *Id.* at 824.
60 *Id.* at 825.
61 49 Stat. 1522 (1936), 15 U.S.C. § 13(d) (1958). It should be noted that in order for this provision to apply the supplier must have actually sold the goods to the distributor. Moreover, the payment must be made in connection with the resale of the goods so bought. Accordingly, the section does not apply where the supplier through his own salesmen sells directly to a particular customer, but arranges to have the distributors select goods from their own stock and make delivery of the goods to the customer. Any payment compensating the distributor for the services performed are, therefore, not restricted under § 2(d). Furthermore, no price discrimination under § 2(a) will arise unless the reimbursement is "grossly in excess of the cost or value of services rendered." General Foods Corp., *supra* note 55, at 828.
62 General Foods Corp., *supra* note 55, at 823-25.
63 See Rowe, Price Discrimination Under the Robinson-Patman Act 191 (1962).
64 Typical arrangements that come under the scrutiny of § 2(d) involve payment by the supplier to selected customers for advertising the seller's product. See, *e.g.,* Kay Windsor Frocks, Inc., 51 F.T.C. 89 (1954). The only reason the words "service or facilities" rather than "advertising allowance" were employed was to prevent evasion. Southgate Brokerage Co. v. FTC, 150 F.2d 607, 611 (4th Cir.), *cert. denied,* 326 U.S. 774 (1945).

as in *General Foods,* gave a greater discount to distributors equipped to cultivate an institutional market by carrying stocks and furnishing various extra promotional services. In addition, the legal standards of 2(d) are considered more severe than the standards applicable to 2(a). For example, section 2(d) applies irrespective of any adverse impact on competition. Furthermore, a prima facie unlawful arrangement cannot be justified through the employment of defenses available to validate a price discrimination subject to the prohibitions of section 2(a).[65] Thus, the FTC and the courts have traditionally confined this section to its legislative contemplated province.

Since *General Foods* did not mention *Doubleday,* some writers have suggested that it is not inconsistent with the latter opinion.[66] Emphasis was placed on the nature of the arrangement between the suppliers and the respective buyers.[67] For instance, in *General Foods,* unlike *Doubleday,* the Institution Contract Wagon Distributors group received the greater discount for contracting to sell in a particular manner rather than for the actual performance of specific services.[68] Under these circumstances the functional discount was not related to the actual services performed. Also, since *General Foods* involved a new method of distribution, it was suggested that the FTC was applying a stricter standard than it would apply to a more traditional type distributor as was the case in *Doubleday.*[69] Significantly, the subsequent *Mueller* decision did not accept these distinctions.[70]

The FTC's *Mueller* ruling resolved in the negative the issue of whether or not a greater discount granted to specific distributors rendering very definite, substantial and valuable services which otherwise would have to be performed by the seller at a cost exceeding or equalling that of the distributor.[71] Rejecting the *Doubleday* doctrine that no competitive injury was possible in such circumstances, the Commission emphasized that this doctrine "ignores the fact that the favored buyer can derive substantial benefit to his own business in performing the distributional function paid for by the seller."[72] In this case, the larger discount was given to the favored distributors for the warehousing of certain

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[65] ROWE, *op. cit. supra* note 63, at 364.

[66] Note, 66 YALE L.J. 243, 256 (1956); see Comment, 54 MICH. L. REV. 659, 678 n.75a (1956).

[67] See Note, *supra* note 66, at 249-50; Comment, 54 MICH. L. REV. 659, 678 n.75a (1956).

[68] *Ibid.*

[69] See Note, *supra* note 66, at 249-50 (1956).

[70] In *Mueller* the FTC specifically stated that *General Foods* had in effect overruled *Doubleday.* Mueller Co., 3 CCH TRADE REG. REP. ¶ 15686 at 20520 (FTC Jan. 12, 1962).

[71] Mueller Co., 3 CCH TRADE REG. REP. ¶ 15686 (FTC Jan. 12, 1962).

[72] *Id.* at 20520.

products commonly employed by the ultimate users, often to meet an emergency. Accordingly, the selected distributors, having the product readily available, were in a better position than their competitors.[73] Relying on the *General Foods* opinion, the supplier then alleged that section 2(d) applied irrespective of injury.[74] Since the arrangement was not available on proportionately equal terms to all of the competing customers, the FTC did not decide whether 2(d) was applicable.[75] However, since this opinion approved of the use of 2(d) in *General Foods,* it would seem that despite competitive injury a discount would be permissible if it satisfied the 2(d) requirements.[76]

Once again, the predominate test relates to the purchaser's resale activity. But, the possibility of incorporating the 2(d) requirements into a situation like that presented in *Mueller* might very well be a satisfactory solution to a difficult problem. As long as the FTC finds an injury to competition before requiring the seller to prove proportional equal treatment, this would seem not to unduly interfere with the free competitive process. But, if the Commission applied 2(d) prior to applying 2(a), a functional discount could be declared unlawful, even though there was no competitive injury. Which of the alternatives will finally be accepted by the FTC must depend on future decisions.

Conclusion

It has been stated that progress in distribution has lagged behind progress in manufacturing, that the distributive methods are often wasteful, and that the opportunities to improve the efficiency of distribution are substantial. That being the case, it would seem that a policy encouraging experiment with distributive methods should be pursued. No doubt, experimentation would result in some harm to particular classes of distributors. However, considering the total effect, a change in distributive methods would, just as likely, increase or leave unchanged the dynamic quality of the competitive forces that mold the market.[77] Accordingly, since the present system is not considered very efficient, a strict rule dedicated to preserving the status quo, as exemplified by the pre-*Doubleday* approach, does not seem beneficial.

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[73] *Ibid.*
[74] *Id.* at 20521.
[75] *Ibid.*
[76] *Id.* at 20520; see ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 191-92 (1962).
[77] EDWARDS, THE PRICE DISCRIMINATION LAW 344-45 (1959); see Note, 66 YALE L.J. 243 n.1 (1956).

On the other hand, it is clear that functional classification can be used as a device for discrimination which is injurious to competition thereby unfairly handicapping particular distributors. Consequently, whether the injury is deemed to be the result of a price discrimination or the result of the discriminatory selection by the seller of a favored buyer to perform specific services is not important to the affected buyers. The harm is real.

Therefore, what is needed is a rule that does not unduly prohibit experiment, or unfairly injure a particular class of distributors. As previously suggested by the *Mueller* opinion, if the injury results from a discount that is reasonably related to the expenses assumed by the buyer, the discount should not be illegal if all competing purchasers were offered proportionately equal treatment. The rule has the advantage of encouraging change while preventing discriminatory selection by the seller. Thus, it fosters competition in the distributive process without any substantial lessening of protection accorded to the buyers.