Of course, it must be recognized that a decision in favor of the respondent broker in this case might well have constituted an open invitation to others to rearrange their organizational setup to skirt the provisions of § 2(c). It must also be realized that the § 2(a) requirement of a showing, for a prima facie violation, that the illicit practice has had an injurious or destructive effect on competition, together with the built-in defense of cost justification, might seriously complicate the enforcement of the Act. However, these complications should be remedied by statutory revision, not by strained constructions of existing statutes. Prior cases have held § 2(a) and § 2(c) to be independent, emphasizing that the defenses provided in the former are not applicable to § 2(c).[14] Yet throughout the majority opinion reference is made to discrimination among buyers, the Court stating in its conclusion, ". . . the reduction in brokerage was made to obtain this particular order and this order only and therefore was clearly discriminatory."[15]

In view of the difficulties presented in a proceeding under § 2(a), the decision would seem more readily justifiable if it provided a clear and settled precedent or defined the permissible scope of corporate activity. However, as was stated at page 175, "This is not to say that every reduction in price, coupled with a reduction in brokerage, automatically compels the conclusion that an allowance 'in lieu' of brokerage has been granted. As the Commission itself has made clear, whether such a reduction is tantamount to a discriminatory payment of brokerage depends on the circumstances of each case."

ANNE P. JONES

Sales—Effectiveness and Scope of Manufacturer's Disclaimer of Warranties.—***Hall v. Everett Motors, Inc.***[1]—An action was brought by the purchaser of a new automobile against a retail dealer to recover for fire damage caused by defective wiring. At the time of the sale the purchaser received and accepted a bill of sale together with the manufacturer's "service policy owner manual" containing the manufacturer's warranty which provided, inter alia, that there were no other warranties, express or implied, made by either the dealer or the manufacturer except the manufacturer's warranty against defective materials and workmanship, which warranty was limited to "making good" at its factory, within a prescribed period, parts which its examination disclosed to be defective.

---

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: Provided, that nothing contained in . . . this title 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. . . ."

[14] Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55 (1959); Oliver Bros., Inc., Biddle Purchasing Co., and Quality Bakers of America v. Federal Trade Commission, supra note 6.

[15] 363 U.S. 166, 176.

[1] 1960 Mass. Adv. Sh. 279, 165 N.E.2d 107.

The trial judge directed a verdict for the defendant on the count of breach of an implied warranty of quality, and on a similar count of express warranty, under leave reserved, entered a verdict for the defendant after the jury had returned a verdict for the plaintiff. On appeal the Massachusetts Supreme Judicial Court affirmed. HELD: Under the manufacturer's warranty excluding other express or implied warranties by the manufacturer or dealer, the dealer can successfully disclaim all warranties, the purchaser's sole recourse for damage due to defects being against the non-resident manufacturer.

Reliance is placed on the case of *Taylor v. Jacobson*[2] as binding the purchaser to the total disclaimer of all warranties by the dealer. In the *Taylor* case the retailer's implied warranty of merchantability running to the purchaser was limited to, or contingent upon, the purchaser's following the manufacturer's instructions or precautions for use printed upon the container of the product sold. The retailer's warranty to the purchaser was distinct from any warranty of the manufacturer, but was limited by the printed instructions to the same extent that any implied warranty of merchantability of the manufacturer, running to the retailer from the manufacturer, would have been similarly limited in a suit by the retailer against the manufacturer. The conspicuity of the instructions and the purchaser's knowledge of them were the essence of the *Taylor* decision. The limitation of the implied warranty of merchantability adopted by the retailer and "accepted" by the purchaser in the *Taylor* case should not, however, be a precedent barring the purchaser in the instant case from recovery. Rather it should fortify the purchaser's claim. *Taylor* recognized the relationship between the retailer and purchaser and did not concern itself with the contractual relationship existing between the manufacturer and retailer. However, the court in the instant case fails to segregate the relationships of the three parties involved. It is not known whether there existed any express or implied warranties running from the manufacturer to the dealer since an examination of the sales contract of the manufacturer and the dealer was not under scrutiny.[3] The warranties under examination were those flowing from the dealer to the purchaser and from the manufacturer to the purchaser. Since the purchaser did not rely on any warranty derivative from the dealer-manufacturer sales contract, the question arises as to the extent to which the legal relationship between the purchaser and manufacturer may alter the contractual relationship between the dealer and the purchaser.

Manufacturers have been held liable for unmerchantable products in direct actions by subvendees. The basis of liability generally rests on one of three grounds: (1) The manufacturer is deemed to have entered into a separate contract with the subvendee;[4] or (2) the manufacturer has been

---

[2] 336 Mass. 709, 147 N.E.2d 770 (1957).

[3] Since the manufacturer-dealer sales contract is not under examination, the possibility exists that all warranties were expressly disclaimed.

[4] Timberland Lumber Company Consolidated v. Climax Manufacturing Company 61 F.2d 391 (3d Cir. 1932).

found to have made representations through advertisements relied upon by the subvendee, which advertisements have given rise to an action of deceit;[5] or (3) the manufacturer is considered to be in sufficient privity with the dealer-purchaser relationship to sustain a direct action by the purchaser against him.[6] However, a conspicuously common characteristic of these various approaches is that the manufacturer is not considered to be a party to the sales contract between the purchaser and dealer although he is held liable in a direct action by the purchaser in order to achieve the desired economic and sociological result. Since in the instant case the bill of sale between the purchaser and the dealer contained no disclaimer of warranties and since the bill of sale was not accepted by the court as the integrated contract between them,[7] it seems unsound to remove from the jury the question of the intention of the parties to the dealer-purchaser contract with respect to the exclusion or inclusion of any limitation of warranty similar to that which existed between the manufacturer and the purchaser.

If the contract had been entered into under the Uniform Commercial Code, subsequently adopted in Massachusetts, the purchaser would probably be more successful even if the court insisted upon integrating the manufacturer's disclaimer of dealer warranties into the purchaser-dealer sales con-

---

[5] Roberts v. Anheuser Busch Brewing Association, 211 Mass. 449, 98 N.E. 95 (1912).

[6] At common law, the manufacturer could not be held liable for negligence in an action by a subvendee because the manufacturer and subvendee were not considered in privity.

The Courts have resorted to various legal fictions to put the responsibility where they agreed it belonged:

(a) Warranty Runs with the Article. The manufacturer can be subjected to an action by the subvendee in an action of tort (negligence). Of course the proof of said action is facilitated by the doctrine of res ipsa loquitur. This doctrine has apparently been restricted to foodstuffs and dangerous instrumentalities. Klein v. Duchess Sandwich Co., 14 Cal. 2d 278, 93 P.2d 799 (1939); Anderson v. Tyler, 223 Iowa 1033, 274 N.W. 48 (1937); Chenault v. Huston Coca Cola Bottling Co., 156 Miss. 366, 118 So. 177 (1928).

(b) Warranty is Assignable. In these cases the dealer forfeits his right of action against the manufacturer. Hunter-Wilson Distilling Company v. Forest Distilling Company, 181 F.2d 543 (3d Cir. 1950); 4 Williston, Contracts § 998 at 2753 (rev. ed. 1936).

(c) Ultimate Consumer is Third Party Beneficiary. Singer v. Fabelin, 24 N.Y.S. 2d 962 (N.Y. County Ct. 1941); Ward Baking Company v. Trizzino, 27 Ohio App. 475, 161 N.E. 557 (1928).

(d) Public Policy. Regardless of any legal fictions, the liability lies where it should. Jacob Decker & Sons Incorporated v. Capps, 139 Tex. 609, 164 S.W.2d 829 (1942).

(e) Dealer is Agent of Manufacturer. Additional contacts are needed between the manufacturer and purchaser to establish a direct contractual relationship between them, distinct from the relationship between dealer and purchaser. Timberland Lumber Company Ltd. v. Climax Manufacturing Co., 61 F.2d 391 (3d Cir. 1932).

(f) Vendee is Agent of the Consumer. This category, which has been limited to the members of the immediate family of the vendee in the sale of foodstuffs, brings the consumer into privity of contract with the seller and he can thus maintain a direct action in contract against the seller. Ryan v. Progressive Grocery Stores, Inc., 255 N.Y. 388, 175 N.E. 105 (1931); Wisdom v. Morris Hardware Co., 151 Wash. 86, 274 Pac. 1050 (1929).

[7] See, Restatement, Contracts § 228 (1936).

tract as a matter of law. Section 2-316 requires a disclaimer of an implied warranty of merchantability to mention merchantability by name and requires such a disclaimer, if in writing, to be conspicuous. Even assuming the manufacturer's disclaimer of all warranties by the dealer satisfied the former requirement, its conspicuity would appear to have fallen short of minimum requirements. In addition § 2-302 provides that a court may refuse to enforce a particular contract or clause, as a matter of law, if it is found to be unconscionable. This section would relieve a court of the necessity of making a pronouncement contrary to its sense of justice as the court felt obligated to do in the instant case.

CHARLES D. FERRIS