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MESSAGE FROM THE CHAIR

Welcome to the latest edition of *Distribution!*

This issue includes articles on two very different topics: an analysis of automobile dealer incentive programs in the United States, and recent developments in resale price maintenance law in China. We hope you find these articles informative and useful, and we welcome any suggestions (or article submissions) for future editions of Distribution!

I also hope to see many of you at the Spring Meeting at the end of the month. As always, the D&F Committee will have a table at the networking reception on Wednesday, March 26 at 5:00pm, so please stop by and say hello. We also are sponsoring the following programs during the meeting:

Wednesday, March 26 at 1:45-3:15: "Can We Apply the Rule of Reason Reasonably?" *co-sponsored with the Pricing Conduct Committee and Economics Committee.*

Thursday, March 27 at 8:15-9:45: "Vertically Challenged: Distribution Agreements in the U.S. and Abroad," *co-sponsored with Compliance & Ethics.*

Friday, March 28 at 8:15-9:45: "Retreat from Trinko: Revisiting Refusals to Deal," *co-sponsored with Unilateral Conduct and Health Care.*

Look forward to seeing you there! In the meantime, thanks for reading.

Best regards,

Erika L. Amarante
Chair, Distribution & Franchising Committee

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Submission of Materials:

DISTRIBUTION welcomes submissions of articles and case summaries involving significant or interesting decisions, trials, or developments in antitrust law affecting all types of distribution arrangements.
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THE DISTRIBUTION AND FRANCHISING COMMITTEE LEADERSHIP

Braman Cadillac v. General Motors: Revving Up Scrutiny of Dealer Incentive Programs

by Adam Hudes and Stephen Medlock[1]

On July 2, 2012, General Motors (GM) and one of its south Florida dealers, Braman Cadillac,[2] settled a closely watched Robinson-Patman Act case concerning a GM program that conditioned incentives on the dealer making specific facility renovations.[3] The settlement dashed some dealers' hopes for a precedent-setting victory against manufacturer incentive programs with arguably inequitable conditions. Although the merits of the case were not reached, *Braman* reveals several insights about the scrutiny that dealer incentive programs may be subject to under the Robinson-Patman Act and state franchise laws. In particular, the case illustrates:

- why state franchise regulations must be observed when designing and administering a dealer incentive program;
- that Robinson-Patman Act claims remain viable despite declining success rates for plaintiffs in recent years; and
- the importance of remaining flexible in administering dealer incentive programs, including accepting reasonable alternatives so that incentives remain "functionally available" to dealers in different circumstances.

This article reviews the Robinson-Patman Act and a relevant state franchise law, the Florida Dealership Protection Act, before discussing *Braman* and its implications.

I. Functional Availability and the Robinson-Patman Act

The Robinson-Patman Act must be observed wherever a manufacturer charges competing customers different prices for the same goods or provides them with different promotional packages.[4] Specifically, sections 2(d) and 2(e) of the Act prohibit manufacturers from paying or providing advertising or other promotional allowances unless they are available to all competing retailers on proportionally equal terms.[5] This prohibition extends to allowances that indirectly support the sale of a good, such as payments made for in-store advertising or other promotional services where an item is resold.[6]

The Act contains a number of exceptions and defenses that suppliers may utilize:[7] introductory allowances,[8] the meeting competition defense,[9] the cost justification

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2 According to Forbes, Braman Cadillac's owner, Norman Braman, has a net worth of $1.9 billion, making him one of the 300 richest Americans. Luisa Kroll & Kerry A. Dolan, *Norman Braman*, FORBES (Sept. 2013), http://www.forbes.com/profile/norman-braman/. Between 1985 and 1994, Mr. Braman owned the Philadelphia Eagles. *Id.* Today, he owns 23 GM dealerships in Florida and Colorado. *Id.*

3 *See* Amended Complaint, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

4 15 U.S.C. §§ 13-13b, 21a (2013).

5 15 U.S.C. §§ 13(d), (e).

6 *See, e.g.*, Corn Prods. Refining Co. v. FTC, 324 U.S. 726, 744 (1945) (finding that respondentdextrose producer violated Section 2(e) by advertising the candy products of one company that purchased dextrose from the respondent, when it did not advertise the competing candy products of other dextrose purchasers).

7 *See, e.g.*, SECTION OF ANTITRUST LAW, AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 522-34 (7th ed. 2012) (discussing Robinson-Patman Act defenses).

8 *Id.*

9 15 U.S.C. § 13(b) (creating an affirmative defense where a seller acts "in good faith to meet an equally low price of a competitor").

defense,[10] the changing conditions defense,[11] and the functional availability defense.[12] Typically relevant to customer incentive programs (including in *Braman*) is the "functional availability" defense. This defense permits suppliers to provide different discounts or promotional packages to competing customers so long as alternatives are "available" to all competing dealers and are proportionally equal in value.[13]

There are two basic requirements to establish functional availability. First, the allegedly disfavored purchaser must know about the availability of the promotion.[14] Second, the promotion must be practically achievable, not just theoretically available to the purchasers.[15] For instance, a promotion is not functionally available if a purchaser must transform from a retailer to a wholesaler or dual distributor to obtain the lower price.[16] A disfavored customer that fails to take advantage of a promotion that is functionally available and offered on proportionally equal terms cannot establish a Robinson-Patman Act claim.[17] Conversely, where a promotion is not functionally available to competing customers, and no other defense applies, courts will find a Robinson-Patman Act violation.[18]

Automobile dealers have brought Robinson-Patman Act claims against vehicle manufacturers in the past on the grounds that manufacturers' incentive programs or other programs discriminated against them in favor of rival dealers.[19] In such cases, the functional availability defense can play a key role. For example, in *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*,[20] a Dallas-area Ford truck dealer alleged that Ford's Competitive Price Assistance Program (CPA) violated the Robinson-Patman Act because competing dealers received disproportionate CPA discounts for sales

10 15 U.S.C. § 13(a) (permitting "due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which goods are "sold or delivered"); *see also* United States v. Bowman Dairy Co., 370 U.S. 460, 469 (1962) (allowing sellers to use average costs across several customers to justify price differential where the customers are "of such selfsameness as to make the averaging of the cost of dealing with the group a valid and reasonable indicum of the cost of dealing with any specific group member.").

11 15 U.S.C. § 13(a) (including a defense for price differences resulting from a "response to changing conditions affecting the market for or marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned"); Valley Plymouth v. Studebaker-Packard Corp., 219 F. Supp. 608, 613 (S.D. Cal. 1963) (annual model changes made motor vehicles a "seasonal" good); Peter Satori v. Studebaker-Packard Corp., No. 1361-61-JWC, 1964 U.S. Dist. LEXIS 9017, at *6 (S.D. Cal. Nov. 2, 1964) (price differential for older automobiles was justified because old models were obsolete).

12 FTC v. Morton Salt Co., 334 U.S. 37, 42-43 (1948) (in Section 2(a) case, holding that a quantity discount program was not functionally available to smaller purchasers).

13 *See, e.g.*, Chapman v. Rudd Paint & Varnish, 409 F.2d 635, 643 (9th Cir. 1969) (granting summary judgment to manufacturer where a distributor refused to accept certain condition on price discount made available to all distributors).

14 *See* In re Boise Cascade Corp., 107 FTC 76, 1986 WL 722102, at *50-53 (1986), *rev'd on other grounds*, 837 F.2d 1127 (D.C. Cir. 1988); Guides for Advertising Allowances and Other Merchandising Payments and Services, 16 C.F.R. §§ 240.1-240.15 (2013).

15 *See, e.g.*, FTC v. Morton Salt Co., 334 U.S. 37, 42-43 (1948) (rejecting defense where many of defendant's customers could not, as a practical matter, purchase a large enough amount to receive the beneficial pricing); Caribe BMW, Inc. v. Bayerische Motoren Werke Aktiengesellschaft, 19 F.3d 745, 752 (1st Cir. 1994) (preferential treatment was not practically available where disfavored purchaser had to forfeit contractual benefits to receive the treatment); Calumet Breweries, Inc. v. G. Heileman Brewing Co., 951 F. Supp. 749, 753-56 (N.D. Ind. 1994) (defendant could not rely on functional availability defense because the discount levels were not practically available to plaintiff).

16 *See, e.g.*, In re Boise Cascade Corp., 107 FTC at 215-17 (stating that "[l]ower prices are not 'available' where a purchaser must alter his purchasing status before he can receive them").

17 *See, e.g.*, Krist Oil Co. v. Bernick's Pepsi-Cola, 354 F. Supp. 2d 852, 857 (W.D. Wis. 2005) (dismissing Robinson-Patman Act claim where plaintiff chose not to take advantage of available discount).

18 *See, e.g.*, Nat'l Dairy Prods. Corp. v. FTC, 395 F.2d 517, 523 (7th Cir. 1968) (finding for plaintiffs because lower prices were not functionally available because distributor had to join co-op to obtain them).

19 *See, e.g.*, Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 147-48 (3d Cir. 2008) (challenging Ford's Blue Oval Program); Cascade Motorsports of Oregon v. Am. Suzuki Motor Corp., 2004-2 Trade Cas. ¶ 74,549 (D. Or. Aug. 16, 2004) (alleging that Suzuki discriminated against plaintiff in refusing to grant discounts for cash payments while offering such discounts to other dealers); George Haug Co., Inc. v. Rolls Royce Motor Cars Inc., 148 F.3d 136, 144-45 (2d Cir. 1998) (challenging Rolls Royce's practice of giving "authorized" dealers better credit terms and lower prices for replacement parts)); In re Am. Honda Motor Co., Inc. Dealerships Relations Litig., 941 F. Supp. 528, 565 (D. Md. 1997) (challenging under Section 2(c) of Robison-Patman Act, Honda's alleged practice that required dealers to make certain "gifts" to Honda executives in order to obtain a favorable allocation of vehicles); Liberty Lincoln-Mercury, Inc. v. Ford Motor Co., 923 F. Supp. 665, 670 (D.N.J. 1996) (challenging differences in Ford's reimbursement rates for warranty parts across competing dealers); Capital Ford Truck Sales, Inc. v. Ford Motor Co., 819 F. Supp. 1555, 1569 (N.D. Ga. 1992) (challenging Ford's Competitive Price Assistance and Government Price Concession programs).

20 145 F.3d 320 (5th Cir. 1998).

of medium and heavy duty trucks.[21] The Fifth Circuit relied on the functional availability defense in finding the program to be lawful.[22] In particular, the Fifth Circuit held that there was no violation of the Robinson-Patman Act because the plaintiff dealer "was treated the same as all other Ford dealers with respect to CPA for the same customer, and products of like grade and quality… [T]he CPA program functioned to ensure that all Ford dealers issuing bids to the same customer received equal CPA, and that all Ford dealers could meet the competition from other original equipment manufacturers[.]"[23]

Automobile dealers sometimes find it difficult to certify a class in cases brought under the Robinson-Patman Act.[24] In *Danvers Motor Co., Inc. v. Ford Motor Co.*,[25] the plaintiff alleged that Ford's Blue Oval Program (BOP), a system of monetary and non-monetary benefits tied to new vehicle sales, violated Sections 2(a), 2(d), and 2(e) of the Robinson-Patman Act, the Automobile Dealer's Day in Court Act, and various state franchise laws.[26] The complaining dealers argued that the BOP's benefits were not available on proportionally equal terms because some dealers were allowed simply to certify their compliance with the program's conditions, while others were audited by J.D. Power and Associates.[27] After surviving a motion to dismiss, the nine named plaintiffs moved to certify a class of Ford dealers that were allegedly affected by the BOP.[28] The district court and Third Circuit held that a class could not be certified because "as implemented, the BOP impacted individual dealers differently."[29] This denial of class certification effectively ended the litigation.

II. The Florida Automobile Dealership Protection Act

State laws also play an important role in the relationship between a vehicle manufacturer and its dealers.[30] In many cases, these state law franchise claims are litigated in tandem with Robinson-Patman Act claims.[31] This was the case in *Braman*, where the plaintiff dealership alleged that GM's incentive program also violated the Florida Automobile Dealership Protection Act.[32]

In Florida, the state has "substantially regulated the relationship between motor vehicle manufacturers and motor vehicle dealers since 1970."[33] The Florida Automobile Dealership Protection Act prohibits vehicle manufacturers from taking several acts.[34] For example, a manufacturer is prohibited from "fail[ing] or refus[ing] to offer a bonus, incentive, or other benefit program" to a dealer that it offers to other dealers of the same line

21 *Id.* at 325.

22 *Id.* at 326.

23 *Id.*

24 *See, e.g., Danvers Motor Co., Inc. v. Ford Motor Co.*, 543 F.3d 141, 147-48 (3d Cir. 2008).

25 543 F.3d 141 (3d Cir. 2008).

26 *Id.* at 143-44.

27 *Id.* at 143.

28 *Id.* at 148.

29 *Id.*

30 *See, e.g.*, GA. CODE ANN. §§ 10-1-620-670 (West 2013) (Georgia Motor Vehicle Franchise Practices Act); 815 ILL. COMP. STAT. 710/4 (2013) (Illinois Motor Vehicle Franchise Act); N.J. STAT. ANN. § 56:10-15(a) (2013) (New Jersey Franchise Practices Act); N.Y. VEHICLE AND TRAFFIC LAW § 463 (McKinney 2013) (New York Franchised Motor Vehicle Dealer Act).

31 *See Danvers Motor Co.*, 543 F.3d at 141-43 (various state franchise law claims brought with Robinson-Patman Act claims).

32 Amended Complaint at ¶¶ 51-106, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

33 Walter E. Forehand & John W. Forehand, *Motor Vehicle Dealers and Motor Vehicle Manufacturers: Florida Reacts to Pressures in the Marketplace*, 29 FLA. ST. U. L. REV. 1057, 1058 (2001-2002).

34 FLA. STAT. § 320.64.

or make of cars in Florida.[35] A manufacturer may only fail to offer a sales incentive to a dealer if the decision "is reasonably supported by substantially different economic or marketing considerations."[36]

Particularly relevant to the *Braman* case, the Florida Automobile Dealership Protection Act contains specific restrictions on renovations to a dealer's facilities or incentive programs based on facility improvements. First, the Act places direct limits on manufacturer-mandated dealership renovations.

> [A] licensee may not require a motor vehicle dealer, by agreement, program, policy, standard, or otherwise, to make substantial changes, alterations, or remodeling to, or to replace a motor vehicle dealer's sales or service facilities unless the licensee's requirements are reasonable and justifiable in light of the current and reasonably foreseeable projections of economic conditions, financial expectations, and the motor vehicle dealer's market for the licensee's motor vehicles.[37]

Second, the Florida Automobile Dealership Protection Act limits how incentive programs may be tied to facility improvements.

> A licensee may offer a bonus, rebate, incentive, or other benefit program to its dealers … which is calculated or paid on a per vehicle basis and is related in part to a dealer's facility or the expansion, improvement, remodeling, alteration, or renovation of a dealer's facility. Any dealer who does not comply with the facility criteria or eligibility requirements of such program is entitled to receive a reasonable percentage of the bonus, incentive, rebate, or other benefit offered by the licensee.[38]

A sales incentive is assumed to be a "reasonable percentage," "if it is not less than 80 percent of the total of the per vehicle bonus, incentive, rebate, or other benefits offered under the program."[39]

Equally important, the Florida Automobile Dealership Protection Act has teeth. A plaintiff that has been injured by a violation of the Florida Automobile Dealership Protection Act can recover treble damages and reasonable attorneys' fees and costs.[40]

III. *Braman*: Factual Background

Braman is among the most recent illustrations of the importance and at times practical difficulty in ensuring that a manufacturer's incentives are functionally available to all similarly situated customers. According to Braman's allegations, GM instituted an incentive program called the Essential Brand Elements program (the EBE Program).[41] GM promised to make quarterly, per vehicle payments (the EBE Bonus) to eligible dealers that complied with the four elements of the EBE Program: (a) meeting GM's dealership training requirements; (b) complying with GM's Digital Component Package; (c) agreeing to a Data Sharing Agreement; and (d) complying with GM's Facility Image Program (the Facility Element).[42] Dealers that complied with all four elements of the EBE Program received

35 FLA. STAT. § 320.64(38).

36 *Id.*

37 FLA. STAT. § 320.64(10)(b).

38 FLA. STAT. § 320.64(38).

39 *Id.*

40 FLA. STAT. § 320.697.

41 *See* Ex. 1 to Defendant General Motors LLC's Answer And Affirmative Defenses at 1, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 5, 2012) (ECF No. 16) at 1 (dealer services agreement dated November 1, 2010).

42 *Id.*

quarterly payments "based on the actual number of eligible new [vehicles] invoiced to the dealer during the applicable calendar year as of the end of the applicable quarter."[43] The EBE Program provided that Florida dealers that complied with all but the Facility Element received only 20% of the full EBE Bonus.[44]

Braman alleged that in order to comply with the Facility Element of the EBE Program, GM required the showroom of Braman's Miami Cadillac dealership to be remodeled so that the exterior walls were covered with a particular limestone.[45] GM required Braman to purchase the limestone from a single supplier.[46] Because Braman's showroom was not designed to support the weight of this limestone, Braman alleged that it would have been forced to demolish and rebuild its showroom in order to comply with the Facility Element.[47]

Braman claimed that it offered GM a reasonable alternative — using a different type of limestone lining that would not require Braman to construct a new showroom.[48] The alternative material would allow for the remodeling of Braman's showroom in accordance with applicable building and zoning standards and regulations, and would be virtually identical in appearance to the limestone selected by GM.[49] GM rejected this alternative, and withheld the entirety of Braman Cadillac's 2011 EBE Bonus for failure to comply with the Facility Element.[50] There was no dispute that Braman had complied with the other elements of the EBE Program.[51]

In January 2012, Braman brought suit in Miami-Dade County Circuit Court.[52] The following month, the case was removed to the U.S. District Court for the Southern District of Florida.[53] In its amended complaint, Braman alleged that the discounts provided to competing Cadillac dealers in Florida through the EBE Program were not functionally available to Braman Cadillac.[54] As a result, Braman claimed that the EBE program created a two-tiered pricing system in violation of the Robinson-Patman Act.[55]

In addition, Braman contended that GM violated Florida's Automobile Dealer Protection Act.[56] As discussed above, the Act provides that if a dealer does not meet one component of a facility improvement bonus program, the manufacturer (GM) must pay no less than 80 percent of the bonus, provided that the dealer meets all of the other components of the program.[57] However, according to Braman, the EBE

43 *Id.* at ¶ 13.

44 *Id.* at ¶ 15.

45 Amended Complaint at ¶ 17, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

46 *Id.*

47 *Id.*

48 *Id.* at ¶¶ 18-19.

49 *Id.* at ¶ 19.

50 *Id.* at ¶ 20.

51 *Id.* at ¶ 21; *see also* Defendant General Motors LLC's Answer And Affirmative Defenses at ¶ 12, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 16).

52 *See* Notice of Removal at Exs. 3-4, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Feb. 17, 2012) (ECF No. 1, Exs. 3-4) (state court complaint).

53 *See* Notice of Removal, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Feb. 17, 2012) (ECF No. 1).

54 Amended Complaint at ¶ 112, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

55 *Id.* at ¶ 109.

56 FLA. STAT. ANN. §§ 320.60-320.70 (West 2013).

57 Specifically, FLA. STAT. ANN. § 320.64(38), provides: "the facility criteria or requirements is presumed to be 'reasonable' if it is not less than 80 percent of the total of the per vehicle bonus, incentive, rebate, or other benefits offered under the program."

Program provided that Florida dealers that complied with all but the Facility Element were eligible to receive only 20 percent of the EBE Bonus, not the 80 percent required by Florida law.[58] Moreover, Braman argued that GM disregarded its own policy and withheld all payments due to Braman Cadillac under the EBE Program.[59]

GM and Braman repeatedly advised the court that they were attempting to mediate the dispute, and asked that trial and other deadlines be delayed.[60] On May 29, 2013, Braman and GM informed the court that they had "reached an agreement in principle" to settle the case.[61] The case settled on June 28, 2013 and was dismissed with prejudice a week later.[62]

IV. Key Takeaways

Braman confirms the willingness of some automobile dealers to use the Robinson-Patman Act to challenge vehicle manufacturers' promotional programs, despite the decreasing success rates for Robinson-Patman Act plaintiffs in recent years.[63] Given this, Robinson-Patman Act analysis should not stop at the inception of a dealer incentive program. Counsel need to closely monitor the implementation of these programs on an ongoing basis.

A degree of strategic flexibility, within the bounds of the Robinson-Patman Act, may be necessary to preserve the functional availability defense. In *Braman*, approving the use of a second type of limestone might have saved GM considerable legal expenses, though it may have angered another dealer if any had already torn down and replaced its showroom. The earlier such Robinson-Patman Act problems can be detected and addressed, the more likely it is that a palatable business solution will be reached.

Next, *Braman* demonstrates the importance of analyzing Robinson-Patman Act implications in tandem with relevant state law regulations on discount programs. Braman identified in its complaint several portions of the Florida Automobile Dealership Protection Act that the express terms of the EBE Program appeared to violate. Manufacturers can avoid taking on added legal risk by working with counsel to identify these regulations early and ensuring that the terms of an incentive program and its implementation conform to the rules.

In addition, *Braman* demonstrates the complex and long road that manufacturers and dealers may face in litigating Robinson-Patman Act disputes. GM did not move to

58 Amended Complaint at ¶ 15, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

59 *Id.* at ¶ 16.

60 *See, e.g.*, Joint Motion for Enlargement of Time of Certain Deadlines at ¶5, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Nov. 20, 2012) (ECF No. 42) ("The Parties would like to attempt mediation early before costs rise in this case in the discovery and motions process. The Parties are currently discussing potential mediators."). Ultimately, the court set a trial date for February 10, 2014. *See* Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM, slip op. at ¶ 2 (S.D. Fl. Feb. 6, 2013) (order resetting calendar call and trial date) (ECF No. 81).

61 Joint Notice and Request to Postpone May 30 Meet and Confer Deadline and June 4 Briefing Deadline at 1, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. May 29, 2013) (ECF No. 95).

62 *See, e.g.*, Notice of Settlement and Joint Stipulation of Dismissal, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. June 28, 2013) (ECF No. 98); Final Order of Dismissal with Prejudice and Order Denying All Pending Motions as Moot, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. July 3, 2013) (ECF No. 99).

63 Ryan Luchs, et al., *The End of the Robinson-Patman Act? Evidence from Legal Case Data*, 56 MANAGEMENT SCIENCE 2123, 2127 (Dec. 2010) (finding that between 2006 and 2010 only 4 percent of Robinson-Patman Act cases were won by the plaintiff, compared to 23 percent between 1993 and 2006 and correlating decline to decisions in Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) and Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164 (2006)). Cf. ROBERT H. BORK, THE ANTITRUST PARADOX: A POLICY AT WAR WITH ITSELF 382 (1978) (describing the Robinson-Patman Act as "the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory"); Robert L. Wald, *Cordwin D. Edward's The Price Discrimination Law: A Review of Experience*, 55 Nw. U. L. Rev. 653 (1960) (describing Robinson-Patman Act case law as "bogged in a dense undergrowth of confusion, ambiguity, controversy and babel") (book review).

dismiss Braman's claims, and the decision may have been wise in light of other automobile manufacturers' lack of success in disposing of dealer Robinson-Patman Act claims through a motion to dismiss.[64] Obtaining dismissal of Braman's claims may have proven difficult because Braman included a number of factual allegations concerning its inability to comply with the Facility Element and GM's failure to comply with the Florida Automobile Dealership Protection Act.[65] An adverse motion to dismiss ruling might have encouraged follow-on suits and provided added ammunition to complaining dealers.

Assuming Braman's allegations were borne out by the facts, Braman's argument that the EBE Bonus payments were not functionally available might have been persuasive — it would have been challenging for GM to argue, in the dealer's home court, that the EBE Bonus was functionally available where (a) Braman was effectively required to tear down and rebuild its showroom, and (b) the seemingly reasonable alternative proposed by the dealer was rejected by GM.

GM's business justification for insisting on the particular limestone would have been important in deciding the merits of Braman's Robinson-Patman Act claims, as would examples of other dealers with showrooms similar to Braman's that complied with the Facility Element. However, the weighing of such evidence in order to resolve the "functional availability" question might not have been possible on summary judgment and thus could have required GM to endure the inherent uncertainties of trial. Under that scenario, GM also ran the very real risk of creating bad precedent, long-term damage to its relationship with Braman, loss of goodwill with other dealers, and the potential to incur litigation costs that may have exceeded the settlement that the parties ultimately reached.

Although none of the recent Robinson-Patman Act cases brought against manufacturers has resulted in a verdict for a dealer plaintiff, some law firms continue to recruit plaintiffs to file law suits similar to *Braman*.[66] Manufacturers should be aware that potential antitrust plaintiffs and their lawyers are closely watching manufacturer incentive programs and should exercise appropriate caution.

64 *See, e.g.*, Danvers Motor Co., Inc. v. Ford Motor Co., 543 F.3d 141, 147-48 (3d Cir. 2008) (dealer Robinson-Patman Act claim survived a motion to dismiss, but a class could not be certified); Metro Ford Truck Sales, Inc. v. Ford Motor Co., 145 F. 3d 320, 325 (5th Cir. 1998) (plaintiff's Robinson-Patman Act claims not dismissed until summary judgment stage).

65 *See, e.g.*, Amended Complaint at ¶ 17-21, Irma Braman, et al. v. General Motors, LLC, Case No. 1:12-cv-20671-JEM (S.D. Fl. Mar. 6, 2012) (ECF No. 17).

66 *See, e.g.*, ANDERSON & MAAS, PLC, DEALER REVIEW: DO INCENTIVE PROGRAMS HIDE TWO-TIER PRICING? (Fall 2013), *available at* http://www.aresonlaw.com/wp-content/uploads/2013/11/Dealer-Law-Review-Winter-2013.pdf.