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Auto Dealer Robinson-Patman Act Cases After Stevens Creek

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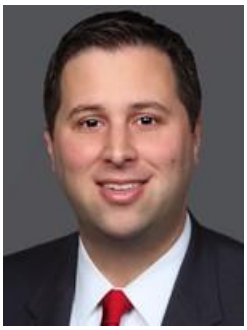

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Law360, New York (December 14, 2016, 12:05 PM EST) -- On Oct. 13, 2016, following a two-week trial and a day of deliberation, a federal jury found that Fiat Chrysler's dealer incentive program did not violate the Robinson-Patman Act's prohibition against price discrimination.[1] The verdict brought to an end more than three years of litigation between Chrysler and Stevens Creek, a San Jose, California-based car dealership. Given the limited number of Robinson-Patman cases that reach a jury verdict, the history and resolution of the case are worth careful consideration. The Stevens Creek lawsuit highlights two competing themes that have played out in recent years: (1) dealer incentive programs remain susceptible to Robinson-Patman claims that are not easily resolved at the pleadings stage; and (2) Robinson-Patman plaintiffs continue to face difficulty in successfully prosecuting their claims in light of the available defenses.

Functional Availability and the Robinson Patman Act

The Robinson-Patman Act applies whenever a manufacturer charges competing customers different prices for the same goods or provides them with different promotion packages. Section 2(a) of the act prohibits certain forms of price discrimination by sellers that threaten to injure competition, and Sections 2(d) and (e) prohibit discrimination by sellers in providing allowances or services to competing customers for the resale of the seller's products.[2]

The act contains a number of exceptions and defenses that suppliers may utilize: introductory allowances, meeting the competition, the cost justification, changing conditions, and the functional availability defense.[3] Typically relevant to customer incentive programs is the functional availability defense. This defense permits suppliers to provide different prices or promotional packages to competing customers as long as alternatives are "functionally available" and are proportionally equal in value.[4] If the same prices or promotional packages are "functionally available" to all competing customers, then "any discrimination and competitive advantage suffered by the plaintiff is attributed not to the defendant's program but the plaintiff's failure to take advantage of its opportunity to receive those prices."[5]

To establish the functional availability defense, a supplier must satisfy two requirements. First, the allegedly disfavored purchaser must have known about the lower price or promotion at the time it was offered to other purchasers.[6] Second, the lower price or promotion must have been practically achievable — i.e., the functional availability defense applies where the favorable price was available "not only in theory but in fact."[7]

The Functional Availability Defense in Auto Dealer Cases

A number of automotive dealers have brought Robinson-Patman Act claims against vehicle manufactures on the grounds that sales incentive programs discriminated against them in favor of rival dealers.[8] In these cases, the functional availability of the lower price or promotional support has been a central inquiry. In one recent high-profile example, Braman Cadillac[9] challenged a GM incentive program that required dealership showrooms to be remodeled so that the exterior walls were covered with a particular limestone.[10] Braman complained that while other dealers could relatively easily comply with the remodeling demands, it would have been forced to bulldoze and rebuild its showroom in order to receive the program's benefits.[11] Braman maintained that under these circumstances GM's dealer incentive payment was not functionally available. GM did not move to dismiss Braman's allegations and the case proceeded to discovery. The matter settled in June 2013 before any determination on the merits was reached.

In Metro Ford Truck Sales Inc. v. Ford Motor Co.,[12] a dealer claimed that Ford's Competitive Price Assistance Program provided rival dealers with greater discounts for sales of medium and large heavy duty trucks.[13] Ford responded that the CPA discounts were functionally available to all Ford dealers that sold medium and heavy duty trucks, and that Ford took steps to equalize the discounts provided to dealers that were competing to sell trucks to the same customers.[14] The district court granted Ford summary judgment and Fifth Circuit affirmed. In particular, the Fifth Circuit held that there was no Robinson-Patman violation since the plaintiff dealer "was treated the same as all other Ford dealers with respect to [discounts] for the same customer, and products of like grade and quality."[15]

Stevens Creek

At issue in Stevens Creek was Chrysler's Volume Growth Program, which provided payments to dealers who met or exceeded certain predetermined monthly sales objectives. Stevens Creek initially succeeded in meeting these objectives but fell short when a competing Chrysler dealer opened a new location in the region in late 2010. Stevens Creek argued that the incentive program did not take into account the entrance of new dealers and that Chrysler used a different formula for calculating the new competitor's sales targets. Additionally, Stevens Creek alleged that over a period of 11 months, the new competitor received more incentive payments while selling fewer cars. Stevens Creek claimed that once these incentive payments were factored in, the net prices of the vehicles Stevens Creek purchased from Chrysler were higher than those purchased by the competing dealer in violation of Section 2(a) of the Robinson-Patman Act.

At summary judgment, Stevens Creek argued that because Chrysler did not use a "uniform pricing policy" for competing dealerships including sales incentive payments that were "functionally available on an equal basis."[16] The court concluded that the availability of Chrysler's incentive program to Stevens Creek was a disputed issue of fact for the jury. The court also ruled that evidence of a 2.3 percent price difference (or about $700 per vehicle) over a period of 11 months was sufficient to trigger the "Morton Salt" inference — named after FTC v. Morton Salt Co., 334 U.S. 37 (1948), Morton Salt

permits a rebuttable inference of competitive injury upon the presentation of evidence demonstrating substantial price discrimination between competing purchasers over time.[17]

Chrysler argued to the jury that Stevens Creek had the option of lowering its prices and selling more vehicles, as neighboring dealers had done. Instead, Stevens Creek made the "irrational business decision" to keep its prices above competitive levels. The dealership responded that it could not have lowered its prices without significantly affecting its bottom line. Ultimately, the jury agreed with Chrysler, finding the evidence of potential hardship caused by lower prices unconvincing and that the incentive program was functionally available to the dealership. Because the jury concluded there was insufficient evidence of a "difference in price," it never reached the question of competitive injury.[18]

Looking Forward

While the jury verdict for Chrysler will be weighed carefully by future Robinson-Patman plaintiffs, price discrimination claims by aggrieved automobile dealers remain an ongoing litigation risk. In October, a group of Nissan dealers' Section 2(a) price discrimination claims survived a motion to dismiss.[19] The dealers claim that Nissan set up a secret anti-competitive incentive program for preferred dealers. Other such lawsuits are bound to follow, and the functional availability of manufacturer incentives is likely to be a disputed issue in those cases.

Stevens Creek confirms that the functional availability defense will apply if each customer is economically feasible of qualifying for the lower price, even if they would prefer not to do so.[20] Dealers should be prepared to prove that incentive payments are contingent on sales targets or other goals that are not feasibly obtained. Indeed, Stevens Creek did not try to compete on price and (as Chrysler argued at trial) failed to present evidence that its sales goals could not be achieved. The jury ultimately agreed with Chrysler that Stevens Creek made an "irrational business decision" not to compete on price.

However, a manufacturer's ability to effectively argue that a lower price or promotion is available to a dealer is not without limits. For instance, a promotion is not functionally available if a purchaser must transform his business model in order to receive the benefit.[21] In Braman, a similar question was raised (though not resolved) of whether a promotional payment is functionally available if it requires a showroom to be demolished and rebuilt. And while Stevens Creek's failure to compete on price appears to have doomed its price discrimination claim, complaining dealers may rely on more developed and varied economic evidence in future cases to demonstrate that a sales goal cannot be obtained. To ensure defensibility, manufacturers are advised to consider the economic interests of their customers when structuring their incentive programs. In addition, the term of the program should be monitored to account for potentially disruptive events, such as the arrival of a new distributor.

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[1] See Jury Verdict, Mathew Enter., Inc. v. Chrysler Grp. LLC, 5:13-cv-04236 (N.D. Cal. Oct. 13, 2016) (ECF No. 331).

[2] See 15 U.S.C. § 13(a), (d)-(e).

[3] See, e.g., Am. Bar Ass'n, Antitrust Law Developments 522-34 (7th ed. 2012) (discussing Robinson-Patman Act defenses).

[4] 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).

[5] Brentlinger Enterprises v. Volvo Cars of North America, LLC, 2016 U.S. Dist. LEXIS 113978, at *11 (S.D. Ohio 2016) (quoting Am. Tara Corp. v. Int'l Paper Co., No. 79C1470, 1981 WL 375752, at *1 (N.D. Ill. 1981)).

[6] 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).

[7] Smith Wholesale Co. v. R.J. Reynolds Tobacco Co., 477 F.3d 854, 864 (6th Cir. 2007).; Comcoa, Inc. v. NEC Telephones, Inc., 931 F.2d 655, 664 (10th Cir. 1991); Edward J. Sweeney & Sons, Inc. v. Texaco, Inc., 637 F.2d 105, 120 (3rd Cir. 1980).

[8] 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 Or. v. Am. Suzuki Motor Corp., 2004-2 Trade Cas. 74, 549 (D. Or. 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 Realtors Litig., 941 F. Supp. 528, 565 (D. Md. 1997) (challenging under Section 2(c) of Robinson-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. 1555, 1569 (N.D. Ga. 1992) (challenging Ford's Competitive Price Assistance and Government Price Concession programs).

[9] See 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) (EFC No. 17).

[10] See id. at ¶ 17. Braman was closely watched due in part to the identify of the plaintiff, Norman Braman. According to Forbes, Mr. Braman has a net worth of $1.69 billion, making him one of the 350 richest individuals in the United States. Between 1985 and 1994, Mr. Braman owned the Philadelphia Eagles. Id. Today he owns more than 20 GM dealerships in Florida and Colorado. See Forbes, The World's Billionaires: Norman Braman, http://www.forbes.com/profile/norman-braman/ (last accessed Dec. 12, 2016).

[11] Id. Braman offered GM an alternative—using a different type of limestone that could be supported by Braman's existing showroom and was virtually identical in appearance. GM rejected this alternative.

[12] 145 F.3d 320 (5th Cir. 1998).

[13] Id. at 325.

[14] See Metro Ford Truck Sales, Inc. v. Cord Motor Co., 1997 WL 671323, at *5 (N.D. Tex. 1997) (noting that "the record reveals that the CPA program was open to all dealers on an equal basis and that Ford equalized CPA given to every Ford dealer known to be bidding for the same customer.").

[15] Metro Ford Truck Sales, Inc., 145 F.3d at 326.

[16] Mathew Enter., Inc. v. Chrysler Grp., LLC, 2016 U.S. Dist. LEIXS 108693, at *42 (N.D. Cal. 2016).

[17] Id. at *18-25.

[18] See Jury Verdict, Mathew Enter., Inc. v. Chrysler Grp. LLC, 5:13-cv-04236 (N.D. Cal. Oct. 13, 2016) (ECF No. 331).

[19] Bedford Nissan, Inc. v. Nissan N. Am., Inc., 2016 U.S. Dist. LEXIS 149762, at *14-15 (N.D. Ohio 2016).

[20] See, e.g., Edward J. Sweeney & Sons v. Texaco, Inc., 637 F.2d 105, 120-21 (3d Cir. 1980) (dual pricing system is nondiscriminatory if lower price is available to all purchasers).

[21] See, e.g., In re 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).

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