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Price Discrimination: Don't Make a Federal Case Out Of It

By Russell P. McRory, Esq.
Robinson Brog Leinwand Greene Genovese & Gluck, P.C.

Manufacturers have increasingly instituted incentive programs in which money is paid on a per-vehicle basis and tied to a dealer's compliance with a variety of requirements, including facility size and image standards; customer service standards; sales objectives; staffing and training mandates; and similar demands depending on the franchisors' goals. Failure to meet these requirements can result in the loss or reduction of per-vehicle incentives, meaning that non-compliant dealers effectively pay more for their inventory than compliant dealers. When that occurs, federal and state price discrimination laws come into play.

The federal price discrimination law, known as the Robinson-Patman Act ("RPA"), offers the powerful lure of treble damages that are not available under many state statutes. However, RPA claims are complex, time-consuming, difficult to prove and expensive to litigate. State law claims are often easier to plead and prove, and if there is no basis for diversity jurisdiction they may provide the opportunity to proceed in state court rather than federal court. In a lawsuit with both federal and state claims, the action must proceed in federal court where federal questions tend to dominate the discussion, potentially leaving state claims to be treated as afterthoughts.. For the reasons discussed in this article, practitioners bringing a price discrimination action should consider proceeding solely under state law and forgoing a federal Robinson-Patman claim.

A violation of the RPA is defined as follows: "It shall be unlawful for any person engaged in commerce … either directly or indirectly, to discriminate in price between different purchasers … and where the effect of such discrimination may be substantially to lessen competition … or to injure, destroy, or prevent competition …" 15 U.S.C. §13(a). Broken down, the key elements are: (1) interstate commerce; (2) price difference; (3) actual sales; and (4) injury to competition.

Probably the most important element is the injury to competition. It is not enough that the plaintiff is merely injured by a price difference, which is known as a *per se* violation. Rather, the plaintiff must show that "the effect of such discrimination may be to substantially lessen competition …, or to injure, destroy or prevent competition …" 15 U.S.C. §13(a). "By its terms, the Robinson-Patman Act condemns price discrimination only to the extent that it threatens to injure competition." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993). In fact, "[i]t is axiomatic that the antitrust laws were passed for the protection of competition, not competitors. *Id.* at 224 (internal quotation omitted).

In the event of a violation, a private right of action is available to "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws [who] … may sue therefor… and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 15 U.S.C. §15(a).

Because the RPA requires more than a per se violation, but instead requires a showing of an injury to business or property by reason of an injury to competition, the Supreme Court held that automatic damages *(i.e.* the easily calculable difference in the prices paid or "the amount of the price discrimination") are not available as a remedy under the RPA. See *J Truett Payne Company, Inc. v. Chrysler Motors Corp.,* 451 U.S. 557, 561 (1981). The Court noted that the law creating a private right of action was "essentially a remedial statute… which provides treble damages to 'any person who *shall be injured* in his business or property" by a violation, which includes an injury to competition element. *Id., quoting* 15 U.S.C. §15 (emphasis in original). Accordingly, "[t]o recover treble damages…a plaintiff must make some showing of actual injury attributable to something that antitrust laws were designed to prevent." *Id.* This means, for example, that a dealer asserting an RPA claim would have to show the effect of the price discrimination on retail prices -- in other words, that the favored dealer was passing on its lower costs to its customers and undercutting the disfavored dealer. The disfavored dealer would have to prove actual lost sales and profits attributable to the price discrimination. That can be a complex, expensive, and expert-intensive task.

There are very few published decisions that focus on price discrimination claims under state law. The most notable is *Audi of Smithtown Inc. v. Volkswagen Group of America, Inc.,* 32 Misc.3d 409, 924 N.Y.S.2d 773 (N.Y. Sup. Ct. Suffolk Co. 2011), *aff'd* 100 A.D.3d 669, 954 N.Y.S.2d 106 (N.Y. App. Div. 2d Dep't 2012). *Audi of Smithtown* involved two Audi incentive programs that, based on the number of off-lease returns purchased by a dealer, offered lower prices on both new vehicles from Audi of America (via a percentage of MSRP rebate) and off-lease vehicles from Audi Financial Services (via direct lower prices). The crux of the case was that brand new dealers were automatically placed in the highest participation category, which gave those new dealers the lowest prices on off-lease purchases from Audi Financial, which in turn made it much easier for new dealers to earn the rebate on new vehicles. Two existing dealers near the favored new dealer sued under two price discrimination provisions of New York's dealer act, which provide in pertinent part as follows:

> It shall be unlawful for any franchisor … [t]o sell or offer to sell any new motor vehicle to any franchised motor vehicle dealer at a lower actual price therefor than the actual price offered to any other franchised motor vehicle

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> dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price...This paragraph shall not be construed to prevent the offering of incentive programs or other discounts if such discounts are available to all franchised motor vehicle dealers in this state on a proportionately equal basis.

N.Y. Veh & Tr. L §463(2)(g).

> It shall be unlawful for any franchisor … [t]o ... sell directly to a franchised motor vehicle dealer…motor vehicles…at a price that is lower than the price which the franchisor charges to all other franchised motor vehicle dealers….

Id. at §463(2)(aa). The language in New York's statute is similar to that found in other states' dealer acts. *See e.g.* S.C. Code Ann. 56-15-40(3)(e) [South Carolina]; 815 Ill. Cons. Stat. 710/4(e)(2) [Illinois]. Furthermore, New York's dealer act permits any "…dealer who is or may be aggrieved by a violation of this article shall be entitled to… sue for, and have, injunctive relief and damages ..." N.Y. Veh. & Tr. L § 469(a).

There are striking differences between the New York dealer act and the RPA: (1) there is no interstate commerce element; (2) there is no injury to competition element thus allowing *per se* violations; (3) it encompasses mere "offers to sell" and not only actual sales; and (4) any dealer who is merely aggrieved may sue for damages.

In *Obstetrical & Gynecological Associates of Neenah, S.C. v. Landig,* 129 Wis. 2d 362, 384 N.W. 2d 719 (Wis. App. 1986), the Wisconsin Court of Appeals addressed the interplay between an injury to competition element and *per se* violations. *Landig* noted that certain industry–specific statutes, including most notably Wisconsin's dealer act, allowed for *per se* liability because they made no mention of an injury to competition. *Id.* at 365 ("The Wisconsin legislature apparently has enacted anti-trust laws containing a *per se r*ule."). However, where a statute contains an express reference to competition, the *per se* rule did not apply. *Id.* at 369 ("We conclude that had the legislature wanted a per se rule, it would have been a simple matter to excise the language regarding the effect upon the competitors or competition.").

Indeed, the same analysis has been applied to other sections of the RPA itself, which also outlaws discriminatory payments by a seller to a customer for services and facilities provided by the customer and the discriminatory provision of services and facilities by the seller to the customer. 13 U.S.C. §§13(d)&(e). Both subdivisions contain a safe harbor for payments, facilities and services available to all customers on "proportionately equal terms." In *FTC v. Simplicity Pattern Co.,* 360 U.S. 55 (1959), the United States Supreme Court held that because sections 13(d) and 13(e) do not contain a competitive injury element, they create *per se* violations.

What all of this means is that it is much easier to win under state price discrimination statutes that do not contain an injury to competition element than under the RPA. Thus, when a state statute contains no reference to an injury to or effect upon competition, a dealer can prevail simply by proving a *per se* violation: an unlawful price difference outside of any safe harbor. That, combined with the typically more generous standing requirements of state statutes (*i.e.* New York's "is or may be aggrieved"), means that automatic damages that are unavailable under the RPA may be available under state law. These represent significant advantages over federal law.

Furthermore, *Audi of Smithtown* held that the New York statute's safe harbor for incentive programs that result in price differences if they are available to all dealers in a proportionately equal basis is not satisfied if a disfavored dealer must incur higher costs to reap the benefits of the lower pricing:

> The plaintiffs established that they faced higher costs to qualify for the CPO Purchase Bonus than did newly franchised dealers, which, by virtue of their automatic Champion status in the Keep It Audi program, could purchase their used inventory from any source and in any combination, including from the lowest-cost auctions and for the lowest available price on AudiDirect.com.

Audi of Smithtown, 100 A.D.3d at 671. This concept opens up the door to attacks on many manufacturers' incentive programs. For example, if an incentive program rebate is tied to fulfilling facility requirements that are much more expensive for a certain dealers due to land and building costs, that program may constitute unlawful price discrimination. A similar concept can also be applied to rebates tied to meeting sales objectives. If an incentive program's sales objective is tied to a state or regional benchmark that is more difficult for a particular dealer to attain due to local market conditions and consumer preferences, that incentive program may also run afoul of a state price discrimination statute.

In *Audi of Smithtown,* Volkswagen Group argued that post-sale rebates of a percentage of MSRP did not result in "lower actual prices" which are proscribed in New York's dealer act. Volkswagen Group relied on one of the other rare cases involving price discrimination prohibitions in a state dealer act. *See Knauz Continental Autos, Inc. v. Land Rover North America, Inc.,* 842 F. Supp. 1034 (N.D. Ill. 1993). The Illinois statute read as follows:

> To offer to sell or lease, or to sell or lease, any new motor vehicle to any motor vehicle dealer at a lower actual price therefor than the actual price offered to any other motor vehicle dealer for the same model vehicle similarly equipped or to utilize any device including, but not limited to, sales promotion plans or programs which result in such lesser actual price or fail to make available to any motor vehicle dealer any preferential pricing, incentive, rebate, financing rate, or low interest loan program offered to competing motor vehicle dealers in other contiguous states.

Id. at 1036-1037, *quoting* 815 Ill. Cons. Stat. 710/4(e)(2).

The similarities between the New York and Illinois statutes are obvious: both refer to sales and offers to sell at lower actual prices and both refer to devices, including sales promotion plans or programs, which result in lower actual prices. But the Illinois statute does not contain New York's safe harbor language and the New York statute does not contain Illinois' language requiring price parity with the contiguous surrounding states. Volkswagen Group latched onto language in *Knauz* that the inclusion of the price parity clause meant that the Illinois statute, "did not intend to prohibit incentive, and other such plans, so long as manufacturers also offered them in Illinois." *Id.* at 1037. According to *Knauz*, the Illinois statute was "... intended to prohibit those 'sales promotion plans' where manufacturers discounted motor vehicles to some dealers but not others, to help specific, possible favored, dealers. Thus such plans which affect the price a dealer pays would be prohibited, but plans that are linked to dealer performance after receipt of the vehicle are allowed." *Id.*

The *Knauz* court's reasoning on this point is suspect. It is not clear why the pricing parity clause protecting Illinois dealers from lower pricing in the surrounding states was used to limit the scope of the prohibition on price discrimination *within* Illinois. *See id.* n. 4, at 1038. Adding more to the confusion, the *Knauz* court then appears to go in the opposite direction: "[t]he price the General Assembly was concerned about was the real price paid by the dealer as opposed to some theoretical invoice price …This interpretation does not, however, undermine the concept that the ultimate cost to the dealer can be affected by a program recognizing, in a *non-discriminatory way,* post-delivery performance." *Id.* at 1038-1039 (emphasis added). Thus, although it gets there in a roundabout way, the *Knauz* court ultimately agrees that programs recognizing post-delivery performance *in a discriminatory way* would be unlawful.

In any event, to the extent *Knauz* could be used by a manufacturer to argue that post-sale rebates of a percentage of MSRP do not affect the price of the vehicle, that argument was firmly rejected by both the trial and appellate courts in *Audi of Smithtown.* See *Audi of Smithown,* 100 A.D.3d at 671 ("Contrary to Audi's contention, it is not relevant that the discount was not offered at the time of purchase, since the rebates, although made at a later time, resulted in a lower actual price.").

Last, but certainly not least, by foregoing a Robinson-Patman claim, a case commenced in state court might not be removable to federal court. That is precisely what happened in *Audi of Smithtown,* where the plaintiffs named the new dealer receiving the preferential pricing as a necessary party under state law. Volkswagen Group removed the case to federal court, arguing that the new dealer was fraudulently joined to defeat diversity jurisdictions and was, in any event, a nominal party that should be disregarded for purposes of evaluating diversity. The federal court in the Eastern District of New York disagreed, holding that the new dealer was a necessary party under state law and thus properly joined in the first instance. *See Audi of Smithtown, Inc. v. Volkswagen Group of America, Inc.,* 2009 U.S. Dist. LEXIS 10213, 2011 WL 385541 (E.D.N.Y. Feb. 11, 2009). Moreover, the new dealer was not merely a nominal party because, if the plaintiff dealers prevailed, the new dealer would lose the benefit of the discriminatory pricing it was currently receiving. Accordingly, the case was remanded back the state court. However, where the relief requested does not expressly seek injunctive relief to deprive the favored dealer of its price advantage, that dealer may not be deemed a necessary party under state law for diversity purposes. *See CLM Volkswagen Holdings, LLC v. Volkswagen Group of America, Inc.,* 13-cv-03929 (NSR) (Dkt. No 27) (S.D.N.Y. Dec 6, 2013).

In short, when bringing a price discrimination action, foregoing a claim under Robinson-Patman and proceeding under state law should be considered. Depending on the language of the state statute, a plaintiff dealer may face a significantly easier burden of pleading and proving both a substantive violation and damages. In many cases, all that will need to be proven is that a manufacturer's incentive program results in some favored dealers paying lower prices than others outside of any statutory safe harbor. Moreover, a successful plaintiff may be entitled to automatic damages in the form of the actual amount of the price differences. Lastly, the benefit of possibly keeping the case in state court should not be underestimated. ■

Mr. McRory is a partner at Robinson Brog Leinwand Greene Genovese & Gluck PC and head of its Automobile Franchising Practice Group.

President's Message

Oren Tasini
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NADC President

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I am pleased to report that we had another successful meeting for our Fall Conference. As always the breadth and depth of the presentations were quite impressive.

I am also pleased to report that our membership continues to grow and the word continues to spread about the value of the NADC to dealership lawyers. But as always there is more to be done to continue to build the organization. And for that I ask your help. If each member were to recruit one new member, we could double our membership and dramatically improve what is already an outstanding organization. So please reach out to lawyers you know and advertise the benefits of being a member of the NADC.

Needless to say, I am excited about our upcoming 10th Annual NADC Member Conference at the Four Seasons in beautiful Palm Beach, Florida. It is never too early to register for what promises to be a great program. The program committee is hard at work putting together a slate of great presentations. As always, it will be a chance to learn and reconnect with old friends and hopefully make some new ones.

Lastly, as we are a member driven organization I encourage you to reach out at any time to me or any member of the Board with your questions or concerns. The more information we have about the needs of our members, the stronger we become. So please get engaged. Write an article for the *Defender*, volunteer to speak at a conference, encourage other lawyers to join the NADC. With your help the NADC will continue to grow and prosper.

Wishing you and your family a healthy and happy holiday season! ■

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Protect Your Customer … Protect Yourself

Feature Article

By Steve Gibson
President, Dealer Risk Services, Inc.

In today's business environment, consumers are constantly asked to provide confidential and personal information for identification and verification purposes – when they visit the Bank … to open an account or secure a mortgage; when they visit the doctor … for a procedure or check-up; and certainly when they visit an automobile dealership … to negotiate the purchase of a vehicle. In all of these instances, consumers providing the information trust the security of that business and/or professional to safeguard it and keep it confidential.

Of the three entities listed above … which one is the most "vulnerable" to Identity Theft?

Banks/Financial Institution? Medical Facilities/Physician's Offices?
Automobile Dealerships?

The answer to the question can be found in the underlying elements of the exposure. That being: the ***amount*** of information at risk; the ***access*** to that information; and the potential for ***intrusion***.

Certainly, an automobile dealership that sells 250 vehicles per month and has a "closing ratio" of 50% (wouldn't that be great) would obtain 500 personal records per month. Projected onto an annual basis … that totals 6000 records per year … not including the information (credit card and otherwise) obtained in the Service Drive.

Multiply these factors by the turnover ratios and high customer/vendor traffic at the Dealerships … and the exposure becomes the "storm on the horizon."

An automobile dealer who reflects on these statistics can realize the volume of the information at stake and the need for solid risk management practices.

Ironically, while most automobile dealers have sound insurance and disaster preparedness plans for weather-related events, the dealer community as a whole lacks insurance coverage in the security and privacy area.

Granted, most dealers have policies and procedures in place, and some of the best systems money can buy. However, is the dealership truly ready … and has it prepared for this type of "storm?" The answer is always revealed at the time of loss.

Those in the security arena tell us that data breaches are a fact and that everybody will be breached eventually. The past 3 years have certainly made that painfully evident for even the most sophisticated firms: Apple, Sony, Wyndham Hotels, Yahoo, Nationwide Insurance, LinkedIn … and the largest protector of our personal information, the Federal Government. All have been compromised.

Still, the skeptics abound ... "Will it ***really*** happen to us … We've ***never*** had a security problem … ?"

It is critical for dealers to develop a viable crisis management plan prior to a security/privacy breach event. There must be an analysis and response program in place that provides timely notification and begins immediate damage control to protect the dealer's public image.

Let us examine the response to the event because it consists of three distinct parts: notification, crisis management, and identity restoration.

Notification. Leading security response firms advise us that the notification costs will range from $ 25 to $ 65 per individual. The numbers can quickly become staggering.

But, the "issue" does not stop here … in fact, it ***begins*** here.

Crisis Management. Promptly handling customer notification is both a required and prudent action by a dealer organization. But, telling customers that the dealership "failed" to properly protect their information is like telling them that it "lost" their car they left it for service … only worse. The public relations nightmare has just begun.

All of the dollars spent on image-promoting advertisements can be tainted' by intrusion into the dealer's files or system. Immediately the dealer understands that "something bad has happened" but neither the extent of the breach nor the damage is immediately clear.

Identity Restoration. Whether dealing with intrusion into the dealer's customer base or employee data, the restoration process needs to be handled by skilled professionals and a firm capable of performing the task in an efficient and prompt manner.

While it is vitally important to be proactive in the effort to stop data breaches, a dealer must understand that they do and will happen to even the most tech savvy organization. While a dealer may do its very best to secure the information entrusted to it, a dealer must be mindful of the adage … "the good guys have to be right ***all of the time*** … the bad guys only have to be right ***once***."

The insurance marketplace hosts numerous carriers with specialty programs for security and privacy related events and issues. AIG, Hiscox, Liberty International and other highly rated carriers offer a range of coverage at affordable premiums. Several of these programs have top quality firms "on retainer" to handle even the most complex event … with an 800 call. There is no need to go "uncovered/exposed" in this area.

Your dealer clients have resources that are available to help should they face an inevitable breach, but they are best advised to be proactive in exploring coverage. ■

Steven P. Gibson is the President of Dealer Risk Services, Inc., a Florida based firm that provides insurance expertise to the Automotive Industry. With over 25 years of experience, Gibson leads DRS by specializing in Risk Management, Product Development, Program Management and Education for the Dealer community.

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