How Thirty-Four Words May Make A Difference

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Many New Jersey automobile dealers have suffered at the hands of a longstanding factory practice, namely the use of two-tiered pricing or, more often than not, unlawful price discrimination. Most, if not all, manufacturers engage in this practice in one way or another. Manufacturers often offer better rebates, allowances or discounts to dealers as incentives to encourage particular dealer action, such as: (1) building bigger and better facilities; (2) selling more vehicles; (3) participating in an "image program"; or (4) utilizing more (or particular) advertising. Many dealers, whether because of the size of their property, zoning limitations or some other restrictions, are unable to meet the requirements of the stair-step incentive programs, meaning that manufacturers charge them a higher price for vehicles.

A federal statute, the Robinson-Patman Act of 1936 (15 U.S.C. §13(a) and (d)), prohibits just this sort of price discrimination by manufacturers. The Robinson-Patman Act states that a manufacturer may not offer products or commodities for sale to its customers [read "dealers"] or distributors unless such offers are "available on proportionally equal terms to all other customers competing in the distribution of such products or commodities." Moreover, the Robinson-Patman Act specifically prohibits discrimination in price between different purchasers of like grade and quality products where the effect of that discrimination would be to substantially lessen competition or tend to create a monopoly.

The Robinson-Patman Act, unfortunately, has by and large proven to be an ineffectual tool for automobile dealers seeking to combat these discriminatory practices, as federal courts have routinely and consistently refused to certify class actions where dealers seek to band together within a single litigation. The effect of these rulings means that an aggrieved dealer would be forced to file suit under this federal statute on his/her own, and without similarly affected dealers helping to establish the price discrimination (to say nothing of sharing in the significant legal bills and costs that such litigation requires). In other words, federal court decisions make it both expensive and impractical for an automobile dealer to seek redress under the Robinson-Patman Act.

What many New Jersey dealers may not be familiar with, however, is a provision tucked away within the New Jersey Franchise Practices Act that prohibits the same type of price discrimination outlawed by the Robinson-Patman Act. In fact, with the benefit of NJ CAR's

active efforts and involvement, the New Jersey Legislature amended relevant provisions of the Franchise Practices Act in 2011, with one such amendment specifically outlawing price discrimination. Because federal antitrust laws do not generally preempt state law, there is potential for aggrieved New Jersey dealers to seek redress for unlawful discriminatory pricing under the Franchise Practices Act that, practically speaking, has been unavailable or unattainable under the Robinson-Patman Act.

N.J.S.A. 56:10-7.4 of the Franchise Practices Act provides a list of 19 manufacturer actions that are prohibited. N.J.S.A. 56:10-7.4(h) is particularly relevant to the rampant issue of price discrimination, and makes clear that many of the stair-step incentive programs put into place by manufacturers, in fact, violate New Jersey law.

N.J.S.A. 56:10-7.4(h) provides that it is a violation of State law for any motor vehicle manufacturer to fail or refuse to sell or offer to sell to all motor vehicle franchisees in a line make every motor vehicle sold or offered for sale to any motor vehicle franchisee of the same line make, **or to fail or refuse to sell or offer to sell such motor vehicles to all motor vehicle franchisees at the same price for a comparably equipped motor vehicle, on the same terms, with no differential in discount, allowance, credit or bonus, and on reasonable, good faith and non-discriminatory allocation and availability terms.**

The statutory language in **bold** above, which was added to the Franchise Practices Act in the 2011 amendments, on its face, prohibits price discrimination by manufacturers.

The statute, however, is equally clear that certain exemptions apply to this prohibition. A manufacturer's failure to deliver a motor vehicle to a dealer as discussed above is not a violation of the statute if the failure is not arbitrary and is due to: (1) a lack of manufacturing capacity; (2) a strike or labor difficulty; (3) a shortage of materials; (4) a freight embargo; or (5) other cause over which the franchisor has no control (such as, by way of example, a natural disaster).

The amendments to the Franchise Practices Act could very well prove to be a new avenue of relief for New Jersey dealers damaged by improper price discrimination.

In sum, the Franchise Practices Act is a potential alternative means of redress for New Jersey motor vehicle dealers who fall victim to price discrimination. Because a group of dealers is unlikely to obtain class action certification in a stair-step price discrimination case under the Robinson-Patman Act, if various past federal court decisions – such as the Blue Oval class action suit in the past decade – are any indication, exploring potential claims under the Franchise Practices Act may be a helpful endeavor. These claims, even if initiated in State court, will ultimately land in the federal courts, as manufacturers will almost always seek removal of these cases to the federal courts. Even with removal, however, the State Franchise Practices Act, with its simpler language and clearer intent, will be the applicable law, not the Robinson-Patman Act.

If a dealer has been the victim of price discrimination, the dealer should promptly seek legal counsel experienced in the auto industry and antitrust law. As always, it is important for dealers to recognize that any such litigation, whether by a single dealer or a group seeking class certification, would be both expensive and time consuming. Moreover, dealers should understand that no court – whether State or federal – has addressed or interpreted the 2011 amendatory language added to the Franchise Practices Act. Manufacturers will presumably respond to any attempt by dealers to certify a class under the Franchise Practices Act in much the same way as they would under the Robinson-Patman Act — by asserting that the dealers' claims lack the required commonality and predominance required to be certified as a class action.

Recognizing this reality, the clear prohibitions against price discrimination included in the recent amendments to the Franchise Practices Act raise an interesting option for an aggrieved dealer: initiating litigation under the recently added State provisions unilaterally. Indeed, nothing prevents an individual dealer from pursuing claims against a manufacturer for price discrimination, whether pursuant to the federal Robinson-Patman Act or the New Jersey Franchise Practices Act.

Until a court interprets the relevant 2011 amendments to the Franchise Practices Act, some uncertainty here is inevitable. Seeking to certify a class of similarly affected dealers may, in fact, still be the preferable route, particularly when weighing cost considerations. History, however, dictates that a group of dealers would probably need to show an extraordinarily high degree of commonality amongst their claims, particularly as to damages, in order to proceed with a class action.

The costs of a single dealer testing a significant price discrimination situation under the New Jersey Franchise Practices Act, even if the manufacturer removed such an action to federal court, would be significant, but potentially not cost prohibitive in the right case. The amendments to the Franchise Practices Act could very well prove to be a new avenue of relief for New Jersey dealers damaged by improper price discrimination. **nj car**

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