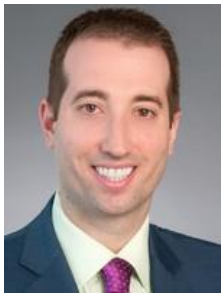
Manufacturers Need To Mitigate Risk Of Price Bias Claims

By **Morgan Nickerson, Michael Murphy and Jack Brodsky** (April 12, 2019)

Morgan Nickerson



Michael Murphy

Jack Brodsky

Rebates and other volume discounts are a frequent practice in businesses today. While few manufacturers recognize that pure volume discounts and other forms of rebates — unless designed and implemented properly — can run afoul of the antitrust laws, resellers have quickly realized just that. As we highlighted in a Law360 guest article last year,[1] a recent spate of Robinson-Patman Act lawsuits have highlighted the need for manufacturers to evaluate their pricing strategies and ensure that documented justifications or "defenses" exist for any rebates and discounts offered to their resellers.

Not only have resellers recently begun to bring the Robinson-Patman Act into focus, but more and more courts, too, have realized the viability of these claims. Just earlier this month, the U.S. District Court for the District of New Jersey denied Firestone Building Products' latest attempt to halt Marjam Supply Co.'s Robinson-Patman Act claims, setting the stage for trial on Firestone's pricing policies for its roofing products.

The Robinson-Patman Act

The Robinson-Patman Act, enacted in 1936 and controlling law to this today, prohibits a manufacturer "to discriminate in price between different purchasers of commodities of like grade and quality ... where the effect of such discrimination may be substantially to lessen competition."[2] The U.S. Supreme Court has developed a four-prong test in order to establish a prima facie Robinson-Patman Act violation:

> (1) the relevant ... sales were made in interstate commerce;
>
> (2) the [commodities] were of "like grade and quality";
>
> (3) "discriminat[ion] in price between" ... purchaser[s] ... ; and
>
> (4) "the effect of such discrimination may be ... to injure, destroy, or prevent competition" to the advantage of a favored purchaser, i.e., one who "receive[d] the benefit of such discrimination."[3]

Further, the Supreme Court has highlighted three categories of competitive injury that may give rise to a Robinson-Patman Act claim — primary-line involves injuries to competition at the level of the seller and its direct competitors; secondary-line involves injuries to competition among the seller's customers; and tertiary-line involves injuries to competition at the level of the purchaser's customers.[4]

In short, the Robinson-Patman Act is intended to provide a level playing field among resellers by ensuring that smaller resellers pay the same price as larger resellers. The Robinson-Patman Act applies both to a situation where the manufacturer seeks to actually charge different resellers different prices for goods of "like grade and quality" (also known as "direct" pricing issues), and to a situation in which the manufacturer provides promotional payments and discounts to different resellers that otherwise pay the same list price (also known as "indirect" pricing issues). Under the Robinson-Patman Act, it is

necessary to consider the "net price" received by resellers after all promotional payments and discounts are taken into account.

Because many justifications and "defenses" exist for various rebates or volume-based pricing policies, not all price differences violate the Robinson-Patman Act. These justifications and defenses are largely intended to afford leeway for legitimate business purposes and help establish a manageable framework for the act. Some justifications and defenses are statutorily proscribed by the Robinson-Patman Act, while courts recognize several nonstatutory defenses. Ultimately, whether a pricing strategy violates the Robinson-Patman Act depends on the unique facts and circumstances of each decision.

Accordingly, it is important for manufacturers, when creating rebates or volume-based pricing strategies, to have counsel identify which potential justifications or defenses exist and what guidelines and protocols can be instituted to document the communications and decisions that form the basis of these pricing strategies. Absent a solid legal framework for a pricing strategy, manufacturers may find themselves at one end of a lengthy and costly Robinson-Patman Act lawsuit, where successful reseller plaintiffs are entitled to treble damages and attorney fees.[5]

A Robinson-Patman Act Trial: Marjam v. Firestone Building Products

More than eight years after filing its complaint in December 2011 in the U.S. District Court for the District of New Jersey, Marjam is now preparing for trial in its Robinson-Patman Act suit against Firestone.[6] Marjam's claims center on Firestone's pricing strategy that offered more favorable terms for its roofing products to Marjam's competitors.

Marjam alleged that "commencing in or about 2010, if not earlier in time, Firestone offered and granted to the Favored Purchasers volume and non-volume discounts and rebates on the sale of Firestone Products within the Territories, in the form of periodic credits against which purchases which were not made available or given to Marjam."[7] As a result, these "favored distributors" could offer Firestone roofing products at cheaper prices than Marjam, which Marjam alleges harms competition.

On April 3, 2019, the court denied Firestone's summary judgment motion seeking to toss Marjam's claims. After discovery and numerous depositions, Firestone's chief argument was that Marjam could not prove the prima facie elements of its Robinson-Patman Act claims, namely competitive injury (element four above) in the form of "direct evidence of displaced sales." The court disagreed.

The court credited deposition testimony of two of Marjam's employees indicating that Marjam was losing sales due to Firestone's favorable pricing to Marjam's competitors. For example, one Marjam employee stated: "The customer indicated to us that our pricing was not in line." Another testified: "I don't know what my customers are giving them. I'm just being told that I'm high from my customer." The court concluded that "this evidence raises a triable issue of fact as to whether Marjam suffered a competitive injury." Therefore, having survived summary judgment, Marjam and Firestone now face a trial where a jury must determine whether Firestone's pricing strategy has violated the Robinson-Patman Act.

Practical Implications

Marjam's allegations and recent summary judgment success make clear that resellers are now aware of their rights and motivated to challenge unjustified disparate pricing strategies, which can result in costly and lengthy litigation. As reseller plaintiffs have success in bringing these claims, others are encouraged to do the same.

Although the Robinson-Patman Act has existed since 1936, it has made a resurgence in the past few years as the landscape of retail continues to change and evolve. Large resellers will continue to grow and command greater negotiating leverage with manufacturers. This will create elevated pressures on manufacturers to offer piecemeal volume discounts and rebates to resellers.

While rebates and volume discounts can be offered in certain circumstances, they are illegal without a judicially recognized justification or defense. Manufacturers must take care at the outset to analyze the risks associated with their pricing strategies and record their justification for their decisions.

When manufacturers are able to assert strong, well-documented justifications for their prices in response to a reseller's Robinson-Patman Act allegations, they may avoid prolonged — and potentially successful — litigation that Firestone faces now. Without recognized justifications or defenses in a manufacturer's arsenal, it is likely left to challenge the prima facie elements of a reseller's claims. While it certainly can be done, Marjam v. Firestone suggests that this may be a tougher hill to climb.

Morgan Nickerson and Michael Murphy are partners and Jack Brodsky is an associate at K&L Gates LLP.

[1] https://www.law360.com/articles/1013964/disfavored-retailers-turn-up-volume-on-robinson-patman.

[2] 15 U.S.C. § 13(a).

[3] See Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 546 U.S. 164, 176–77 (2006).

[4] See id.

[5] 15 U.S.C. § 15(a).

[6] Marjam Supply Co. v. Firestone Bldg. Prods. Co. LLC, C.A. No. 2:11-cv-07119 (D.N.J. 2011).

[7] First Amended Complaint, ¶ 86 (ECF No. 92).