

A Rare, Important Robinson-Patman Decision In 9th Circ.

It is rare to see a Robinson-Patman decision these days. However, on July 19, 2013, the Ninth Circuit issued an important Robinson-Patman decision in the case of *Gorlick Distribution Centers LLC v. Car Sound Exhaust System Inc.*, Case No. 10-36083 (9th Cir. July 19, 2013). In this case, the Ninth Circuit affirmed summary judgment on behalf of the defendant ("Allied"), even where Allied admitted that it received preferential terms from the manufacturer of aftermarket auto parts. In so ruling, the Ninth Circuit enunciated principles that will make it even harder for plaintiffs to prevail on Robinson-Patman claims.



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Plaintiff Gorlick was a competing distributor of defendant Allied in the aftermarket auto parts market. Gorlick's complaint challenged the preferential terms that a manufacturer of certain aftermarket auto parts (Car Sound) offered to Allied but not Gorlick, including free shipping of its products to the Pacific Northwest; lower prices on merchandise; volume discount pricing even when the volume requirements weren't met; and higher year-end sales rebates. Gorlick sued Allied under Section 2(f) of the Robinson-Patman Act, 15 U.S.C. §13(f), asserting that Allied knew that these favorable terms were not justified by cost differences. Gorlick also brought a claim against Allied under Section 1 of the Sherman Act, 15 U.S.C. §1, arguing that the agreement between Allied and Car Sound constituted an unreasonable restraint of trade.

Background of the Robinson-Patman Act

The Robinson-Patman Act was enacted to protect smaller buyers from "the perceived harm to competition occasioned by powerful buyers" that have "the clout to obtain lower prices for goods than smaller buyers could demand." [1] Thus, the act generally prohibits sellers from discriminating on price terms in the sale of like goods, unless the price differential can be justified by savings to the seller. 15 U.S.C. §13(a). The act also contains a counterpart provision that makes it unlawful for buyers "knowingly to induce or receive a discrimination in price which is prohibited by this section." 15 U.S.C. §13(f).

Significantly, buyers are not liable if they are innocent beneficiaries of discriminatory prices. Thus, according to the Ninth Circuit, in buyer liability cases, plaintiff bears the burden of showing that the buyer knew both that (1) he was receiving a lower price than a competitor and (2) the seller would have "little likelihood of a defense" for offering that lower price. As the Ninth Circuit explained (relying on the U.S. Supreme Court case of *Automatic Canteen Co. of Am. v. Federal Trade Commission*, 346 U.S. 61 (1953)), restricting liability to situations where the buyer knowingly accepted illegal prices prevents Section 2(f) from "putting the buyer at his peril whenever he engages in price bargaining." (Slip Op. p. 6).

The issue in the appellate decision was whether plaintiff had raised a genuine issue of fact as to whether Allied (the favored distributor) had the requisite knowledge under Section 2(f). On appeal, plaintiff Gorlick argued that the district court overlooked evidence that Allied had actual knowledge, knowledge based on "trade experience", or a duty to inquire whether it was receiving prohibited prices.

The Favored Distributor's Lack of Actual Knowledge

Even though the Ninth Circuit accepted plaintiff's argument that Allied was aware of its favored position with respect to purchases of Car Sound's parts, the Ninth Circuit agreed with the district court that plaintiff failed to meet its burden of showing that Allied knew the prices it received likely did not qualify for a Robinson-Patman Act defense. The Ninth Circuit noted that plaintiff Gorlick and defendant Allied were very different Car Sound customers. Allied made Car Sound its flagship brand, purchased Car Sound products in much higher volumes and provided promotional services for Car Sound products that Gorlick did not. Thus, according to the Ninth Circuit, "even if Allied knew it received superior prices and discounts, Gorlick presents no evidence that Allied knew these benefits resulted from anything other than significant differences in how the two companies did business." (Slip Op. at p. 7)

In affirming summary judgment, the Ninth Circuit refused to agree with Gorlick's position that a factual dispute is created on a Robinson-Patman claim where the favored distributor gets better prices than those in the manufacturer's published price list or discount schedule. The Ninth Circuit disagreed, stating, "the Robinson-Patman Act doesn't prohibit buyers from haggling for a better deal. ... To put a buyer at risk of liability any time he asks for a lower-than-listed price would do enormous damage" to the "sturdy bargaining" contemplated by the antitrust laws. Thus, "the receipt of better-than-published prices, without more, does not satisfy section 2(f)'s knowledge requirement." (Slip Op. at p. 7-8)

"Trade knowledge" Did Not Create a Disputed Issue of Fact

The Ninth Circuit also rejected the argument that Allied's "trade experience" would have placed it on notice that the prices it was receiving were prohibited by the Robinson-Patman Act. The Ninth Circuit noted that Allied purchased 15 times the dollar volume of Car Sound products than Gorlick did. As the Ninth Circuit stated, "Gorlick hasn't presented evidence that Allied knew the deals it received were anything other than an incentive for its continued loyalty, much less than Allied had any insight into the pricing Car Sound offered competitors." (Slip Op. at p. 9).

No Duty to Inquire

Finally, the Ninth Circuit rejected Gorlick's argument that its dealings with Car Sound put it on inquiry notice that it was receiving discriminatory prices not within a Robinson-Patman Act defense. The Ninth Circuit refused to follow its 1966 decision in *Fred Meyer Inc. v. FTC*, 359 F.2d 351 (9th Cir. 1966), rev'd on other grounds, 390 U.S. 341 (1968). The Ninth Circuit noted that in the *Fred Meyer* case, the buyer induced the preferential prices and insisted that none of its competitors be offered the same deal. Such evidence was lacking in this case. The Ninth Circuit concluded, "Holding that Allied had a duty to inquire into the prices offered to its competitors would drastically expand the scope of that duty, and we decline to do so here." (Slip Op. at p. 10).

Rejection of Section 1 Claim

The Ninth Circuit also affirmed summary judgment with respect to Gorlick's Section 1 claim, finding that the vertical restraints at issue in this case did not injure competition in the market as a whole, as opposed to merely injuring one competitor (Gorlick). In this regard, the court noted that the aftermarket automotive exhaust products manufactured by Car Sound faced competition from similar products manufactured by other manufacturers. As the Ninth Circuit recognized, "So long as other manufacturers compete with Car Sound, which they do, and Gorlick sells those other brands, which it does, vibrant interbrand competition will act as a check on any intrabrand advantage that Allied may receive on Car Sound products." (Slip Op. at p. 14)

Thus the Ninth Circuit observed:

While Gorlick may be unhappy that Allied got a better deal, it can't turn its individual grievance into a general claim of harm to competition. (Slip Op. at p. 16).

The Ninth Circuit concluded by noting that favorable prices that improve one distributor's competitive position do not necessarily violate the antitrust laws. Thus, in affirming summary judgment, the

Ninth Circuit noted that it was returning “this capitalist rumble to the forum where it belongs: the market.” (Slip Op. at p. 17).

Impact of the Decision

There are several reasons why the Robinson-Patman Act is not a favored weapon in the arsenal of plaintiffs’ antitrust counsel. First, there is no real government enforcement of the Robinson-Patman Act. Although the Federal Trade Commission has jurisdiction to enforce the Robinson-Patman Act, it has brought few cases since the 1980s and last brought a case in 2000.[2] Second, the Robinson-Patman Act applies only to the sale of “commodities” (e.g., tangible goods), not to intangible items such as services.

Third, the Robinson-Patman Act applies only to actual sales, not to licenses or leases. Fourth, Robinson-Patman claims for price discrimination must meet several specific legal tests: there must be reasonably contemporaneous sales to two buyers of goods of “like grade and quality”; normally the sales must be “in” interstate commerce (that is, at least one of the sales must be across a state line); that the challenged sales are not subject to a statutory defense (e.g., meeting competition or cost justification or functional availability); and that the private plaintiff shows actual harm to his or her business (not merely a price differential).[3]

In the Gorlick case, the Ninth Circuit accepted the reasons for the price differential to the favored customer as legitimate business justifications as a matter of law. The Ninth Circuit also stressed the requirement of a plaintiff showing injury to the market, not nearly injury to itself. After this decision, plaintiffs will have an even harder time prevailing on Robinson-Patman claims, at least in the Ninth Circuit.

--By Samuel R. Miller

[1] *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006).

[2] Note, however, that the FTC has recently solicited comments on whether it should modify its Guides for Advertising Allowances and Other Merchandising Payments and Services, which were last published in 1990, in light of the growth of internet commerce. See 77 Federal Register 233 (Dec. 4, 2012); See generally 16 C.F.R. § 240.1 et. seq. These Guides relate to the provision of advertising and promotional allowances subject to attack under Sections 2(d) and 2(e) of the Robinson-Patman Act. The Antitrust Section of the American Bar Association submitted detailed comments on January 29, 2013. (www.ftc.gov/os/comments/fredmeyerconsent/563686-0005-85431.pdf)

[3] See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (a private plaintiff in a Robinson-Patman price differential case is not entitled to a presumption of injury and “automatic damages” based upon the amount of the price discrimination). See generally “FTC Guide to the Antitrust Laws – Price Discrimination Against Buyers: Robinson-Patman Violations” (www.ftc.gov/bc/antitrust/price_discrimination.shtm).