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Is it Possible to Plead a Robinson-Patman Act Case at All?

Theodore Banks (Scharf Banks Marmor, LLC) · Tuesday, November 30th, 2010

The recent decision in *Coalition for a Level Playing Field, LLC v. Autozone, Inc.,* 2010-2 Trade Cas. ¶ 77,182 (S.D.N.Y. Sept. 16, 2010) was a bit surprising to me. The essence of the case was that a group of smaller purchasers of auto parts ("jobbers") felt that the big competitors were getting illegally discriminatory prices. The case has gone through a number of convolutions, including a trial with a defense verdict, but the court's summary disposition of the latest complaint seemed to stretch the law of pleading a bit too far.

The court stated that the *Twombly* and *Iqbal* decisions required much more specific pleading aimed at showing exactly how the complained-about practices were illegal. If it were possible that the price differences were consistent with properly granted functional discounts, then failure to allege facts to show that discounts were not legitimate functional discounts was fatal to the claim. Perhaps it was just sloppy pleading by the plaintiffs. The court said that to address the notion that functional discounts were presumptively legal under *Hasbrouck,* they should have alleged facts to support the proposition that discounts are given for services that are not being performed at all, or the amount of discounts greatly exceeds the value of the services provided by the retailer defendants.

The court also wanted to dispose of the case by attributing the competitive impact on the plaintiffs to nonprice terms of sale that were available to the defendants. It reviewed the discussion of this point by the *Corn Products* decision, particularly the fact that the phrase "terms of sale" was removed from the final bill that became the Robinson-Patman Act. It held that different terms of sale to different customers were not covered by the Act. But *Corn Products* specifically held that if different terms of sale have the practical effect of establishing a discrimination in price, then they could be reached by the Act. And a number of cases have held that differences in credit terms not justified by legitimate credit considerations can be considered part of price for Robinson-Patman Act purposes. But these claims were swept aside.

Perhaps the decision reflects the frustration of the court in continuing to deal with a case that has been around for many years, and is not quite gone yet. But the net result seems to be, if followed elsewhere, that a plaintiff will need to allege specific facts to counter every affirmative defense that is possible under the Act. A price could be illegally discriminatory, or it could be legal because it was meeting competition,

cost justified, subject to changing conditions, etc. Or am I reading this holding incorrectly? Would love to hear what folks think.

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