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Third Circuit Finds Robinson-Patman Competitive Injury Between Functionally Different Products

The United States Court of Appeals for the Third Circuit handed down a controversial decision on the standard for proving competitive injury under the Robinson-Patman Act on August 14, 2007. The court held that two customers who were charged different prices by the same supplier were in "actual competition" for purposes of establishing competitive injury under the Robinson-Patman Act, even though they sold different products at different levels in the distribution chain. The result was that, under the *Morton Salt*[1] doctrine, since the price discrimination was substantial and persisted over time, the *defendant* bore the burden of rebutting the presumption of competitive injury.

The Decision

Feesers, Inc. v. Michael Foods, Inc.[2] focused on alleged competitive injury between two different methods for providing meal service to institutions. One method was for the institution to prepare the food itself from food items the institution purchased from a distributor, such as Feesers. The other was for the institution to hire a food management service, such as co-defendant Sodexho, who would prepare the meals on-site from food items that it purchased from distributors.[3]

Feesers alleged that a food manufacturer, Michael Foods, was selling certain food items to Sodexho at lower prices than it was selling the same items to Feesers. These lower prices allegedly enabled Sodexho to convert institutions from making their own meals—with food bought from Feesers—to hiring Sodexho to prepare the meals for them. When that happened, Feesers would lose the food business for that institution. Feesers sued Michael Foods for illegal price discrimination and Sodexho for illegally inducing a discriminatory price.

The district court granted summary judgment for the defendants because Feesers had failed to prove competitive injury. The court held that Feesers and Sodexho were not actual competitors for Robinson-Patman purposes because they operated at "different functional levels." Moreover, Feesers had failed to show that the cost of the food was the determining factor when institutions chose between self-operation and managed services. In other words, any conversion by an institution from self-operation with food purchased from Feesers to management of the meal service

1 *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948).

2 *Feesers, Inc. v. Michael Foods, Inc.*, No. 06-2661 (3d Cir. August 14, 2007) (*Feesers*).

3 The analysis was complicated by the fact that Sodexho negotiated prices for its food requirements directly from the food manufacturer (Michael), but the food was delivered, and payment routed, through a wholesaler (Sysco). This complication ultimately proved immaterial to the result.

by Sodexho was not attributable to the difference in food costs, but rather to the institution's preference for meal preparation and management services.

In a 2-to-1 decision, the Third Circuit reversed. In the majority's view, the district court had placed the burden of proof on the wrong party by failing to apply the *Morton Salt* presumption correctly. In *Morton Salt*, the Supreme Court held, in a case for injunctive-type relief brought by the FTC, that competitive injury at the customer level could be presumed merely from a substantial price discrimination between competing customers sustained over time. The Supreme Court later held, in a private suit for damages, that the *Morton Salt* presumption was rebuttable "by evidence breaking the causal connection between a price differential and lost sales or profits."[4] According to the court of appeals, the district judge had misapplied *Morton Salt* in two ways:

- The court incorrectly held that Feesers and Sodexho were not "actual competitors" because they sold different products. Any conversion from self-operation supplied by Feesers to a management service not supplied by Feesers meant that Feesers would lose the food business at that account. Since Feesers and Sodexho were competing for the same dollars from the same customers, they were competitors for Robinson-Patman purposes.

- The district court incorrectly imposed on Feesers the burden of proving competitive injury. Because Feesers had properly invoked the *Morton Salt* presumption, the burden should have been on the defendants to prove "that the price differential was not the reason that Feesers lost sales or profits."[5]

The court did not, however, order summary judgment for Feesers. Instead, it remanded the case for the district court to consider "in the next phase of the case" whether "the different character of Sodexho's business, rather than its lower food prices, causes customers to buy food from Sodexho rather than Feesers."[6]

Judge Jordan's dissent took the majority to task for adopting a tenuous view of "actual competition" that was at odds with the Supreme Court's recent pronouncement to construe the Act "consistently with the broader policies of the antitrust laws."[7] Noting that findings of "actual competition" in prior Robinson-Patman cases had been based on the sale of identical products, Judge Jordan likened the majority's more expansive view to concluding "that grocery stores are in actual competition with restaurants because both types of businesses sell food."[8] Judge Jordan also criticized the majority for its assertion that Sodexho sold the same food products to its clients as Feesers because food costs constituted a separate line item on some Sodexho invoices—pointing out that this was "nothing more than an accounting method that allows Sodexho and its clients to allocate potential profits or losses."

Future Implications

Claims for Treble Damages

This case was unusual in that it was a private action solely for injunctive relief—no claim was made for damages. The *Morton Salt* presumption can satisfy the requirement for proving competitive injury as a matter of liability under Section 2(a) of the Robinson-Patman Act, but it cannot satisfy the added requirement to prove causation and damages under Section 4 of the Clayton Act.[9] Had Feesers been claiming damages, it would have retained the burden of proving, without the benefit of a presumption, that the differential in food prices was a substantial factor in causing loss of sales to specific competitors who were getting lower prices from the same food producer. Claims for injunctive relief, however, are not brought under Section 4 of the Clayton Act, but under Section 16,[10] and a plaintiff

4 *Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (*Falls City*).

5 *Feesers*, slip. op. at 16.

6 *Id.* at 17-18 n. 9.

7 *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 126 S.Ct. 869, 873 (2006).

8 *Feesers*, slip op. at 32 (Jordan, dissenting).

9 *See Falls City* at 434-35.

10 15 U.S.C. § 26.

can obtain relief under that provision even if it has not yet suffered competitive injury.[11] Fortunately, the court's analysis appears to leave intact the existing standards for proving causation and damages in actions for treble damages. Companies that have taken comfort from those standards in determining the risk of *damages* for difficult pricing decisions may continue to do so.

Claims for Injunctive Relief

If the defendants fail to overcome the *Morton Salt* presumption on remand, one can expect a very interesting battle over the form of injunctive relief. Robinson-Patman injunctions can easily inflict harm on consumers. The *Feesers* court itself recognized that the effect of Michael Foods' price discrimination was that "Sodexho customers end up paying less for products from Michael Foods than they would pay if they were self-operated and purchased the same products from Feesers."[12] An injunction merely prohibiting such differentials would therefore likely result in higher prices to consumers.

Minimizing that possibility while still eliminating any law violation will be a challenge, as several other remedial precepts also come into play. The Supreme Court has generally disfavored Robinson-Patman orders that eliminate statutory defenses and exceptions.[13] By this principle, an injunction should also not deprive the defendants of the opportunity to argue in a future contempt proceeding that a price discrimination did not injure competition. And there is no reason to assume that the *Morton Salt* presumption would or should apply where the issue is contempt. The court could quite properly require competitive harm to be proven by a higher standard in a contempt proceeding than in the injunction proceeding.

An injunction that merely tracks the statute, permitting all defenses and exceptions, would still be problematic. The Court in *Morton Salt* struck down portions of the FTC's order permitting an exception for price discrimination that did not "tend to lessen, injure, or destroy competition" because it "shift[ed] to the courts a responsibility in enforcement proceedings of trying issues of possible injury to competition, issues which Congress has primarily entrusted to the Commission." Such an order would also raise issues of notice and compliance with Rule 65.[14] Finally, because of the threat of contempt, a court should consider the possibility that even a narrowly drawn injunction could introduce rigidity into food manufacturers' prices, potentially harming consumers.

In summary, the principal fallout from this decision, if any, will be in the prospect of injunctive relief. However, it will be difficult to foresee the full implications of the decision until the scope of any injunction is determined. Unless the courts are sensitive to the possibility of consumer injury from overly broad injunctions, the implications could be profound.

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11 *See Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130 (1969).

12 *Feesers*, slip op. at 7.

13 *See FTC v. Henry Broch & Co.*, 368 U.S. 360, 366-67 (1962) (FTC Robinson-Patman order interpreted not to deprive respondent of "statutory defenses or exceptions"); *FTC v. Ruberoid*, 343, U.S. 470, 475-76 (1952) (same).

14 *See City of Mishawaka v. Am. Electric Power Co.*, 616 F.2d 976,991-92 (1980) (injunction that "merely incorporates the broad language of Section 2 of the Sherman Act" violates the requirement of Rule 65(d) that an ordinary person should be able to ascertain from the document itself exactly what conduct is proscribed).

Practice group contacts

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