Audi of Smithtown, Inc. v. Volkswagen Group of America, Inc. and the New York Dealer Act

By: Mark M. Lawson & Devin C. Dolive

In *Audi of Smithtown, Inc. v. Volkswagen Group of America, Inc.*,[1] decided in May of this year, a trial court in Suffolk County, New York was presented with cross-motions for summary judgment on claims brought by franchised automobile dealers, Audi of Smithtown, Inc. and Audi of Huntington, Inc. (the "Dealers"), against their franchisor, Volkswagen Group of America, Inc. d/b/a Audi of America, Inc. ("Audi"), under the New York Franchised Motor Vehicle Act (the "Dealer Act").[2] The trial court denied Audi's summary judgment motion but granted the Dealers' motion for partial summary judgment, thereby holding that the Dealers were entitled to a declaratory judgment finding that Audi's practices violated the Dealer Act. The proceedings are on-going, and it appears that the parties will need to litigate the Dealers' pending claims for monetary damages before any appeals can be taken.

In *Audi of Smithtown*, the Dealers alleged that two incentive programs involving Audi's wholly-owned subsidiary, VW Credit, Inc. ("VW Credit"), treated new franchised dealers more favorably than existing franchised dealers and that the resulting discriminatory pricing violated the Dealer Act. The first program, called the "Keep-It-Audi Program," allowed dealers to receive better pricing on pre-owned vehicles if they purchased a higher percentage of returning off-lease vehicles directly from VW Credit. The second program, the "CPO Purchase Bonus Program," allowed dealers also to receive better pricing on new vehicles if they purchased a higher percentage of returning off-lease vehicles directly from VW Credit.

Both incentive programs appeared to serve similar purposes for Audi/VW Credit. If a dealership leased a new vehicle to one of its customers, the vehicle itself would be owned by VW Credit during the term of the lease. At the end of lease term, the vehicle would revert back to VW Credit. From VW Credit's perspective, it made sense to sell returning off-lease vehicles back to the dealership that had originally leased out the vehicles in the first place. Moreover, no manufacturer of new vehicles (much less of "luxury" brands) wishes to see a "glut" of returning off-lease vehicle hit the auction markets, because this will cause the re-sale values of all vehicles to go down. Thus, from Audi's perspective, it made sense to incentivize its dealerships to purchase returning off-lease vehicles. Indeed, placing the sale of pre-owned Audi vehicles in the hands of Audi dealerships would help to protect the residual value of new Audi vehicles, thereby making the "Audi" brand itself more attractive.

The *Audi of Smithtown* litigation arose from the status that Audi/VW Credit afforded to its new dealerships under "Keep-It-Audi Program" and the "CPO Purchase Bonus Program." Both incentive programs were based on the number of returning off-lease vehicles that a dealership purchased. However, by definition, a new dealership would not have a customer-base returning off-lease vehicles. For example, if a dealership were to sign a customer up for a three-year lease on new vehicle, it would take three years before the dealership would have the opportunity to purchase this same vehicle back from VW Credit at the end of the lease. The solution arrived at by Audi/VW Credit was to afford new dealers the most favorable treatment available under each program.

In the lawsuit, existing dealers Audi of Smithtown and Audi of Huntington cried "foul" and argued that these incentive programs resulted in new dealerships receiving more favorable pricing, both on pre-owned vehicles and on new vehicles. However, the Dealers named only Audi as a defendant; no claims were brought against Audi's subsidiary, VW Credit. Audi defended its programs on the grounds it did not own the returning off-lease vehicles at issue (these were owned by VW Credit), and Audi further argued that VW Credit (unlike Audi) was not a "franchisor" subject to the prohibitions of the Dealer Act.

---

[1] 924 N.Y.S.2d 773 (Suffolk Cty. Sup. Ct. 2011).
[2] N.Y. VEH. & TRAF. LAW § 461, *et seq.*

The trial court rejected all of Audi's arguments, specifically noting:

> [T]he actions of Defendant, Volkswagen Group of America, Inc, in creating and implementing the "Keep–It Audi Program" violated the letter and intent of the New York Motor Franchised Motor Vehicle Dealer Act. The Act specifically states that it is unlawful for a franchisor to sell directly to a franchised motor vehicle dealer motor vehicles at a price than is lower than the price the franchisor charges all other franchised motor vehicle dealers. Vehicle and Traffic Law § 463(2)(aa). This act made it unlawful for any franchisor to use a subsidiary corporation, defined in a 2009 amendment specifically to include a captive finance source that provides lease contracts for motor vehicles, to accomplish what would otherwise be unlawful conduct on the part of the franchisor. Vehicle and Traffic Law § (2)(u); Laws of 2008, c. 490.
>
> The fact that the entity actually running the incentive programs is not a "franchisor" is not sufficient to avoid Summary Judgment . . . .
>
> Plaintiffs have demonstrated that Defendant's wholly owned captive finance source offered a financial incentive program which allowed the sale of lease return vehicles at differing prices, depending on their level of participation in the program, while placing new dealers in the highest participation levels, allowing the sale of such vehicles to them at prices significantly below the price sold to the existing dealers.[3]

The court also noted that the favorable pricing provided to new dealers on pre-owned vehicles under the "Keep-It-Audi Program" magnified the discriminatory effect caused by the "CPO Purchase Bonus Program" for new vehicles:

> There is no manner in which the bonus offered on new automobile sales under the CPO program to new automobile dealers is proportionately similar to the bonus offered existing dealers. . . . New dealers can obtain the inventory necessary to obtain lower prices on new vehicles through the use of their advantageous position in the Keep It Audi Program. . . . In effect, existing dealers are required to purchase most of their pre-owned vehicles at the highest cost if they are to have the opportunity to receive the benefits of these two incentive programs, while new dealers are free to purchase their pre-owned inventory at lower prices . . . and thereby secure the benefits of both programs.[4]

For antitrust practitioners familiar with the Robinson-Patman Act, the result in *Audi of Smithtown v. Volkswagen* should come as no surprise, except, perhaps, for the New York statutory language regarding "captive finance sources." Under the RPA, any allowances must, first, be practically and realistically available to all competing purchasers, [5] and, second, be "proportionalized" on a basis that is fair to all purchasers who compete in the re-sale of the seller's product.[6] According to the FTC, "this can be done most easily by basing the payments made or the services furnished on the dollar volume or on the quantity of the product purchased during a specified time period."[7]

Here, Audi created ***two*** classes of purchasers -- existing dealership and new dealers -- with the latter receiving, in effect, a lower price on vehicles. Once the trial court accepted the premise that Audi had, in fact, created two different classes of purchasers, the result in *Audi of Smithtown* should come as no surprise. After all, the New York Dealer Act specifically prohibits

---

[3] *Audi of Smithtown*, 924 N.Y.S.2d at 779

[4] *Id.* at 780.

[5] *See, e.g., Bouldis v. U.S. Suzuki Motor Corp.*, 711 F.2d 1319, 1326 (6th Cir. 1983).

[6] *See, e.g.,* 16 C.F.R. § 240.9(a) (FTC Guides).

[7] *Id.* at § 240.9(a).

franchisors from selling to a franchised dealer any "motor vehicles, parts, warranties, or services at a price that is lower than the price which the franchisor charges to all other franchised motor vehicle dealers."[8] The Dealer Act also says that "incentives or discounts [must be] reasonably available to all franchised motor vehicle dealers in this state on a proportionally equal basis,"[9] thus tracking the authorities which address this point under the RPA. Moreover, the New York legislature also amended the Dealer Act in 2008 to add references to "captive finance sources" so as to prohibit a motor vehicle franchisor from using "any subsidiary corporation, affiliated corporation, ***captive finance source*** or any other controlled corporation, company, partnership, association or person to accomplish what would otherwise be unlawful conduct under this article on the part of the franchisor."[10] In other words, a captive finance source (like VW Credit in *Audi of Smithtown*) is, under the statute, presumed to be controlled by the franchisor, and its actions will be attributed to a franchisor to determine if there has been a violation of the New York Dealer Act.

The New York statute's reference to "captive finance sources" begs some interesting questions for the practitioner versed in the RPA. For example, some courts have frowned upon the use of a subsidiary corporation to make discriminatory sales that, if made by the parent, would violate the RPA: "One would not want a seller to be able to defeat the statute's clear objectives by transforming unlawful, into lawful, price discrimination through the creation of a separately formed distributor that sells to the disfavored customers."[11] However, such cases brought under the RPA are rare, and their outcome may depend on how much evidence exists that the parent company actually "controlled" its subsidiary's pricing decisions.[12] In contrast, the court in *Audi of Smithtown* specifically noted: "It is the act of violating the statute through the captive entity, and not the intent to violate the act itself, which is made unlawful under the subject section."[13]

It is not just New York Dealer Act's extended reach to "captive finance sources" that may surprise antitrust practitioners more familiar with the RPA. Indeed, a number of states have enacted price discrimination statutes specifically applicable to motor vehicle dealers[14] or franchisees in general.[15] The New York Dealer Act and these other state statutes can differ in significant respects from the RPA and thus may present potential traps for the unwary practitioner who mistakenly assumes that these state statutes mirror the RPA.

First, perhaps unsurprisingly, the New York Dealer Act, unlike the RPA, does not contain an "interstate commerce requirement."[16] Like many other state motor vehicle dealer acts and other state price discrimination statutes applicable to specific businesses and trades, the New York Dealer Act requires that the dealer merely do business in the state.[17] As such, these statutes are not merely "intrastate analogues" to the RPA; such statutes apply regardless whether one of the sales (or offers to sell) crosses a state line.

---

[8] N.Y. VEH. & TRAF. LAW § 463(2)(aa).

[9] *Id.* at § 463(2)(g).

[10] *Id.* at § 463(2)(u) (emphasis added). The Dealer Act defines a "captive finance source" as "any finance source that provides automotive-related loans, or purchases retail installment contracts or lease contracts for motor vehicles and is, directly or indirectly, owned, operated or controlled, in whole or in part, by a manufacturer, factory branch, distributor or distributor branch." *Id.* at § 462(16).

[11] *Precision Printing Co. v. Unisource Worldwide, Inc.*, 993 F. Supp. 338, 349 (W.D. Pa. 1998).

[12] *See Baim & Blank, Inc. v. Philco Corp.*, 148 F. Supp. 541, 543-44 (E.D.N.Y. 1957) ("The fact that Philco Distributors was a wholly owned subsidiary of Philco . . . fails to demonstrate that the subsidiary was merely the alter ego of the parent. . . . As appears from the depositions, however, there were no consultations, between parent and subsidiary in respect to establishing pricing policies to compel the conclusion that the prices of both companies were controlled by Philco, or that they acted in legal effect as one seller.").

[13] 924 N.Y.S.2d at 779.

[14] *See, e.g.,* ARK. CODE ANN. § 23-112-403(a)(2)(F); DEL. CODE ANN. tit. 6, § 4913(b)(10); GA. CODE ANN. § 10-1-662(a)(12); 815 ILL. COMP. STAT. § 710/4(e)(3); KAN. STAT. ANN. § 8-2410(b)(3); MASS. GEN. LAWS ch. 93B, § 4(c)(5); ME. REV. STAT. ANN. tit. 10, § 1174(3)(E); MISS. CODE ANN. § 63-17-73(1)(d)(6); 63 N.C. GEN. STAT. § 20-305.6(1); N.D. CENT. CODE § 51-07-02.3(4); NEV. REV. STAT. § 482.36386(1); N.H. REV. STAT. ANN. § 357-C:3(III)(e); N.M. STAT. § 57-16-5(I); N.Y. VEH. & TRAF. LAW § 463(2)(g); PA. CONS. STAT. § 818.12(b)(18); R.I. GEN. LAWS § 31-5.1-4(c)(4)(i); S.C. CODE ANN. § 56-15-40(3)(e); VA. CODE ANN. § 46.2-1568.1(1-2); W. VA. CODE § 17A-6A-10(2)(v); WASH. REV. CODE § 46.96.185(1)(a).

[15] *See, e.g.*, 815 ILL.COMP. STAT. § 705/18; IND. CODE § 23-2-2.7-2(5); WASH. REV. CODE § 19.100.180(2)(c).

[16] *See* 15 U.S.C. §§ 13(a) & (d).

[17] *See Peugeot Motors of America, Inc. v. Eastern Auto Distributors, Inc.*, 892 F.2d 355, 358 (2d Cir. 1989) ("Section 462(7) defines 'franchised motor vehicle dealer' as 'any person required to be registered pursuant to section four hundred fifteen of this chapter.' Section 415(3) requires registration only if the dealer intends to engage in business 'in this state.'").

Second, the N.Y. Dealer Act and other state motor vehicle dealer acts do not appear to include a "competitive injury" requirement. [18] Although authority on this point is sparse, the New York Dealer Act may, in fact, establish a *per se* violation, regardless of competitive injury.[19]

Third, the New York Dealer Act and other state statutes explicitly encompass mere "offers to sell."[20] This is another significant departure from the RPA, which requires that the Plaintiff prove an actual sale at a discriminatory price. Indeed, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[21] the Supreme Court rejected a Plaintiff truck dealer's attempt to prove price discrimination by showing that the manufacturer had quoted the Plaintiff prices (where the dealer was requesting a price quote in order submit a competitive bid to a potential end purchaser) that were higher than the prices the manufacturer had charged other dealers (who had successfully competed for competitive bids for sales to other end purchasers).

Fourth, although case law on this point is also sparse, the New York Dealer Act and other state statutes may allow so-called "automatic damages" -- i.e., the easily-calculable difference between the two prices at issue. This again is in marked contrast with the RPA; the Supreme Court held in *J. Truett Payne Co. v. Chrysler Motors Corp.*[22] that so-called "automatic damages" could not to be the measure of damages for RPA claims. However, because the New York Dealer Act does not appear to require "competitive injury" and makes mere "offers to sell" at a "lower actual price" unlawful, it is hard to imagine that the measure of damages would not, at a minimum, include the easily-calculable price difference. For example, if a Plaintiff's evidence consists of a defendant's mere "offer to sell" to another purchaser at a price lower than the actual price the defendant charged Plaintiff and if the Plaintiff puts on no evidence of "competitive injury," the damage would, by definition, appear to be the difference between the (lower) price offered to the favored purchaser and the (higher) price actually paid by the Plaintiff. It should also be noted that the New York Dealer Act and other states' statutes prohibit sales at a "lower" price[23] (versus a prohibition of "discriminating" in price between "different" purchasers under the RPA).[24] This reference to a "lower" price further supports an argument that the difference between the lower and higher price may be the starting point to any damage calculations.[25]

Fifth, the New York Dealer Act permits the recovery of punitive damages in the event that the Defendant's actions constitute gross, highly immoral, or wantonly dishonest conduct and are aimed at the public generally.[26] Other state motor vehicle dealer statutes include like provisions.[27] On the other hand, some states more closely follow the RPA, in that they allow the recovery of treble damages or otherwise limit punitive damages to an amount not exceed three times the actual damages.[28]

[18] *See, e.g.*, DEL. CODE ANN. tit. 6, § 4913(b)(10); GA. CODE ANN. § 10-1-662(a)(12); ME. REV. STAT. ANN. tit. 10, § 1174(3)(E); MASS. GEN. LAWS ch. 93B, § 4(c)(5); NEV. REV. STAT. § 482.36386(1); N.H. REV. STAT. ANN. § 357-C:3(III)(e); N.Y. VEH. & TRAF. LAW § 463(2)(g); R.I. GEN. LAWS § 31-5.1-4(c)(4)(i); VA. CODE ANN. § 46.2-1568.1(1-2); WASH. REV. CODE § 46.96.185(1)(a). Nonetheless, and like the RPA, some of the state motor vehicle statutes in fact include a competitive injury requirement. *See, e.g.,* N.M. STAT. § 57-16-5(I); S.C. CODE ANN. § 56-15-40(3)(f); W. VA. CODE § 17A-6A-10(2)(v).

[19] *See, e.g., Obstetrical & Gynecological Assocs. of Neenah, S.C. v. Landig*, 384 N.W.2d 719, 721 (Wis. Ct. App. 1986) ("The Wisconsin legislature apparently has enacted anti-trust laws containing a *per se* rule. . . . [S]ec. 218.01(9), Stats., dealing with auto dealerships, appear to have undergone *per se* treatment."); *see also* Bruce P. White, *Arizona's New Equipment Dealer Protection Laws*, 30-FEB ARIZONA ATT'Y 20-22 (Feb. 1994).

[20] N.Y. VEH. & TRAF. LAW § 463(2)(g) & 463(2)(h). Other states motor vehicle statutes have a similar scope. *See, e.g.,* DEL. CODE ANN. tit. 6, § 4913(b)(10); GA. CODE ANN. § 10-1-662(a)(12); ME. REV. STAT. ANN. tit. 10, § 1174(3)(E); NEV. REV. STAT. § 482.36386(1); N.H. REV. STAT. ANN. § 357-C:3(III)(e); R.I. GEN. LAWS § 31-5.1-4(c)(4)(iS.C. CODE ANN. § 56-15-40(3)(e); VA. CODE ANN. § 46.2-1568.1(1) & 46.2-1568.1(2); WASH. REV. CODE § 46.96.185(1)(a).

[21] 546 U.S. 164, 176-79 (2006).

[22] 541 U.S. 557, 561 (1981).

[23] N.Y. VEH. & TRAF. LAW §§ 463(2)(g) & 463(2)(h); s*ee also* note 20, *supra.*

[24] *See* 15 U.S.C. § 13(a).

[25] For example, Oregon's price discrimination statute applicable to the sales of commodities and services provides: "[T]he Plaintiff, upon proof that the Plaintiff has been unlawfully discriminated against by the defendant, shall conclusively be presumed to have sustained damages equal to the monetary amount or equivalent of the unlawful discrimination…." OR. REV. STAT. § 646.160.

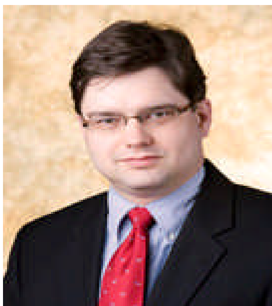
[26] *See, e.g., Kristal Dodge Corp. v. Chrysler Motor Corp.*, 584 N.Y.S.2d 580, 581 (1992).

[27] *See, e.g.,* N.C. GEN. STAT. § 20-308.1 (actual damages plus punitive damages and attorney's fees may be awarded if violation is willful, malicious, or wanton or if continued multiple violations occur).

[28] *See, e.g.*, KY. REV. STAT. § 190.070(6); NEV. REV. STAT. § 482.36423(2); W. VA. CODE § 17A-6A-16(1).

Because of these differences with the RPA, in some respects, the stakes for violations of state statutes can be even higher than those for violating the RPA -- after all, the disfavored purchaser may not need to prove as much to prevail on a state law claim as on a claim under the RPA, and the disfavored purchaser may be able state a claim for damages not otherwise recoverable under the RPA. Of course, given these high stakes, one may wonder what the defendant in *Audi of Smithtown* could have done differently (other than discontinuing its incentive programs altogether, as Audi apparently did). Had Audi not allowed its new dealers (who, by virtue of being new, had no customers returning off-lease vehicles) to participate in the "Keep-It-Audi Program" and the "CPO Purchase Bonus Program," Audi might, instead, have been faced with Dealer Act claims brought by its new dealers rather than by its existing dealers. Regardless, the trial court's holding in *Audi of Smithtown* can serve as a cautionary tale for any distributor of products governed by an industry-specific state price discrimination statute. Antitrust practitioners may wish to keep an eye on the on-going proceedings in *Audi of Smithtown* and on other cases brought under the New York Dealer Act and similar price discrimination statutes in other states.

Mark Lawson is a Partner in the commercial litigation group at Burr & Forman, LLP in Birmingham, Alabama. Mark's antitrust practice includes counseling manufacturers and distributors on pricing policies and other related matters and litigating price discrimination cases in federal and state courts. Mark received his J.D. from Columbia University and his undergraduate degree from the University of South Carolina.



Devin Dolive has a broad-ranging commercial litigation and labor & employment practice at Burr & Forman, LLP in Birmingham, Alabama. Devin has been extensively involved in litigation over the pricing of motor fuel at the wholesale and retail levels, including claims under the RPA, state motor fuel marketing acts, and the UCC. Devin received his J.D. from the University of Virginia and his undergraduate degree from Amherst College.