Ninth Circuit Dismisses Robinson-Patman and Sherman Act Claims, Stating: "We Must Return This Capitalist Rumble to The Forum Where it Belongs: The Market."[1]

Antitrust lawyers well know that price discrimination claims under the Robinson-Patman Act (RPA) can be very difficult to win. For example, going as far back as 1953, the Supreme Court has held that there is no buyer liability under Section 2(f) unless the plaintiff (the disfavored buyer) can show the defendant (the favored buyer) knew ***both***: (1) that it was receiving a lower price than its competitor; ***and*** (2) that there was "little likelihood" that the discriminatory prices it received were not justified by savings to the manufacturer and, therefore, did not qualify for the RPA defense.[2]

But, does a supplier's dominant exclusive distributor's knowledge and receipt of lower prices than its smaller multi-brand competitor-buyer imply that it has a duty to inquire of the supplier whether the favorable prices it received might be prohibited by the RPA? According to the Ninth Circuit's July 19, 2013 decision in *Gorlick Distribution Centers, LLC v. Car Sound Exhaust System, Inc.*,[3] the answer now is "***No***" – the plaintiff (unfavored buyer) or the FTC must allege and prove that the defendant ***actually coerced*** the seller in some factually demonstrable fashion – *e.g.*, "insisted that none of its competitors be offered the same deal."[4] Thus, a dominant buyer permissibly may heighten the manufacturer's recognition and fear of the dominant buyer's purchasing power, and thereby compel – *i.e.*, induce – the manufacturer to grant to the buyer special concessions and lower wholesale pricing than its competition.[5] This "tacit" or "covert"

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1 *Gorlick Distribution Centers, LLC v. Car Sound Exhaust System, Inc.*, 2013 U.S. App. LEXIS 14635 at *21 (9th Cir. July 19, 2013).

2 *See Automatic Canteen Co. of America v. FTC*, 346 U.S. 61 (1953).

3 2013 U.S. App. LEXIS 14635 (9th Cir. July 19, 2013).

4 *Id.* at *12.

5 For example, by virtue of its size, purchasing and distributing market power or importance to the seller, the powerful buyer may tacitly exercise that power lawfully – *e.g.* suggest that unless the manufacturer provides lower than standard or published prices, the buyer might buy the products elsewhere, enter the

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pressure – *e.g.,* aggressive vendor bargaining by a powerful exclusive distributor – now, as a matter of law in the Ninth Circuit, no longer is sufficient to justify a *prima facie* showing that "coercion" existed, and was successfully applied by the favored buyer, in order to sustain a Section 2(f) violation.[6] This development, which abrogates the Ninth Circuit's 1966 decision in *Fred Meyer, Inc. v. FTC,*[7] undoubtedly will make what already is a rare and difficult RPA claim – Section 2(f) – even more difficult to successfully assert, at least in the Ninth Circuit.

The *Gorlick* opinion also reiterates that claims alleging vertical restraints in ostensible violation of Section 1 of the Sherman Act ***must*** plausibly show injury to competition, and the Ninth Circuit remains reluctant to provide plaintiffs latitude in the absence of demonstrative anticompetitive harm. As *Gorlick* demonstrates, even if a defendant has not raised issues of injury to competition and antitrust standing – either with the district court or on appeal – the Ninth Circuit may do so itself by requesting supplemental briefing following oral argument before the Court.[8]

Introduction

In *Gorlick,* an automotive aftermarket parts distributor (Gorlick) sued another distributor, Allied Exhaust Systems, Inc. (Allied), alleging violations of Section 2(f) of the RPA and Section 1 of the Sherman Act.[9] Gorlick and Allied were competitors in the distribution of aftermarket automotive parts in California, Oregon and Washington. Car Sound Exhaust System, Inc. (Car Sound) manufactures mufflers and catalytic converters. Both Gorlick and Allied purchased those aftermarket automotive products from Car Sound during the relevant period. Unlike Gorlick, however, Allied "made Car Sound its flagship brand, purchased Car Sound products in much higher volumes [– *i.e.*, 15 times more in product dollar amount than Gorlick –] and provided

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manufacturing market itself, or simply emphasize competitive products rather than the recalcitrant manufacturer's products.

6 *See Gorlick,* 2013 U.S. App. LEXIS 14635 at *11-12.

7 359 F.2d 351, 363 (9th Cir. 1966), *rev'd in part on other grounds*, 390 U.S. 341 (1968).

8 *See Gorlick,* 2013 U.S. App. LEXIS 14635 at *20-21.

9 *Id.* at *2.

promotional services for Car Sound products that Gorlick did not."[10] In other words, Allied, for the most part, promoted only Car Sound products, and was among its largest and most important distributors.

Gorlick, on the other hand, showed no brand loyalty to Car Sound, and also actively promoted the products of Car Sound's competitors.[11] Gorlick alleged – and Allied agreed – that Allied knowingly received discriminatorily favorable price and price-related terms from their joint supplier, Car Sound. Gorlick, however, did not receive these price concessions from Car Sound.[12] Allied knew that it was receiving lower prices than Gorlick. And, Car Sound gave Allied lower prices because the supplier sought to reward Allied for its pre-sale and post-sale Car Sound product promotional services and brand loyalty.[13]

Exclusive Dealing Distributors vs. Multi-Brand Distributors

A manufacturer's desire to favor distributors that deal exclusively in its products is not at all unusual, and represents entirely rational commercial behavior. Dealers and distributors who employ a multi-brand competitive strategy – by definition – have little intra-brand loyalty. Manufacturers often question the extent to which these dealers and distributors will favor a competitor's product over the manufacturer's product in consumer sales presentations, pre-sale investment and attentiveness, product placement – *e.g.,* shelf space, showrooms – and post-sale support, which might lead to repeat business for the manufacturer's products. And, not surprisingly, the multi-brand distributor often plays one manufacturer off the others in an effort – often very successfully – to obtain monetary incentives from the manufacturers in return for brand focus by the distributor. The problem with this from the manufacturer's perspective, of course, is that it increases a manufacturer's costs of distribution without any reasonable assurance that the distributor won't simply retain the monetary incentives provided by the

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10 *Id.* at *7.

11 *Id.*

12 *Id.*

13 *Id.*

manufacturer, decline to invest in any one brand over another, and continue to operate its distributorship with brand indifference.

A manufacturer, therefore, often seeks distributors and dealers who will deal exclusively (or, at least primarily) with that manufacturer's products. In doing so, the distributor foregoes competitive brands, but often expects – *i.e.*, demands – that the manufacturer provide direct or indirect "compensation" for the distributor's loyalty and brand focus. The manufacturer, of course, is much more willing to provide its exclusive distributors – but not its multi-brand distributors – with greater monetary incentives in the form of freight allowances, wholesale discount pricing, facility improvement assistance, sales rebates, advertising and promotional allowances and, in some instances, outright cash. The exclusive distributor often demands this type of enhanced assistance from the manufacturer because – and distributors are very effective in making this point to the manufacturer – the distributor has chosen not to – but certainly could – represent competitive products. In these situations, price discrimination issues sometimes arise under the RPA.

The Robinson Patman Act

Among other things, as the United States Supreme Court made clear in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, the Robinson Patman Act (RPA) was enacted in 1936 "to target the perceived harm to competition occasioned by powerful buyers . . . with the clout to obtain lower prices for goods than smaller buyers could demand."[14]

Section 2(a): RPA Seller Liability. Section 2(a) makes it unlawful for a seller to discriminate in price between different contemporaneous buyers of like grade or quality

[14] *See Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 175 (2006). The RPA consists of six principal provisions. Section 1 of the RPA is codified as Section 2 of the Clayton Act, 15 U.S.C. §13. This article focuses on Sections 2(a) and 2(f). Section 2(b) provides an affirmative defense if the price discrimination results from conduct designed "in good faith to meet an equally low price of a competitor." 15 U.S.C. §13(b). The seller defendant – or buyer defendant in a Section 2(f) case – bears the burden of proof on this "meeting competition" defense. *See American Booksellers Ass'n v. Barnes & Noble, Inc.*, 135 F. Supp. 2d 1031, 1056 (N.D. Cal. 2001). Section 2(c) prohibits certain commission or brokerage fees, except for services rendered. Sections 2(d) and 2(e) prohibit payments by sellers for promotional or advertising unless equivalent benefits are made available to all competing buyers.

commodities if the discrimination may adversely affect competition. Section 2(a), however, does permit price differentials that "make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities" in which the commodities are "sold or delivered."[15] This "cost justification" defense, as it generally is described, is very difficult and costly to successfully assert,[16] and the seller defendant bears the burden of proving that the defense is available.

Section 2(f): RPA Buyer Liability. Section 2(f), which the Ninth Circuit was asked to address in *Gorlick,* prohibits the knowing inducement or receipt by a competing ***buyer*** of a price discrimination that is unlawful under Section 2(a). Thus, "a buyer cannot be liable if a *prima facie* case could not be established against a seller or if the seller has an affirmative defense."[17] For example, in *Great Atlantic & Pacific Tea Co. v. FTC*, the FTC initially determined that A&P had violated Section 2(f) by knowingly inducing and receiving price discrimination from Borders. The Supreme Court reversed the FTC, and emphasized that "[t]he clear language of §2(f) states that a buyer can be liable only if he receives a price discrimination 'prohibited by this section.' If a seller has a valid meeting–competition defense, there is simply no prohibited price discrimination."[18]

The underlying rationale for this is that buyer liability cannot be found unless the seller has violated Section 2(a) – *i.e.*, buyer liability is necessarily derivative of the seller's liability.[19] It is for this reason that the Supreme Court, in *Great Atlantic & Pacific Tea Co. v. FTC,* explained

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15 15 U.S.C. §13(a).

16 *See Automatic Canteen Co. of America v. FTC,* 346 U.S. 61, 79 (1953) ("Proof of cost justification being what it is, too often no one can ascertain whether a price is cost-justified."); *Texaco Inc. v. Hasbrouck,* 496 U.S. 543, 561 n. 18(1990) (acknowledging that in the context of functional discounts, the cost justification defense is rarely effective); *American Booksellers Ass'n v. Barnes & Noble, Inc.,* 135 F. Supp. 2d 1031, 1064 (N.D. Cal. 2001) (summary judgment on cost justification defense denied when opinions of experts conflict).

17 *Great Atlantic & Pacific Tea Co. v. FTC*, 440 U.S. 69, 76 (1979).

18 *Id.* at 78.

19 *See Klamath-Lake Pharm. Ass'n v. Klamath Med. Serv. Bureau*, 701 F.2d 1276, 1283 (9th Cir. 1983) ("A buyer who receives a price differential cannot be liable under the Robinson-Patman Act unless the seller is in violation of the Act as well.").

that "a buyer who ***has done no more than accept*** the lower of two prices competitively offered does not violate §2(f), provided the seller has a meeting-competition defense."[20] It is important, then, to keep in mind that, in order to prevail on a Section 2(f) claim, the plaintiff (disfavored buyer) must prove, among other things, two essential elements of the claim: (1) that there is an illegal price discrimination; and (2) that the buyer defendant ***knowingly*** induced or received it.

This means that, unlike a Section 2(a) claim against a seller defendant, a Section 2(f) claim requires the plaintiff to show that the buyer defendant, "knowing full well that there was little likelihood of a defense for the seller, nevertheless proceeded to exert pressure for lower prices."[21] Taken to its extreme, this could mean that in a Section 2(a) claim against the seller, it is the seller's burden to prove that the price differential was "cost-justified" – a very difficult and costly burden that rarely is successful[22] – but, in a Section 2(f) claim against the favored buyer, ***the plaintiff*** must prove that the price differential was ***not*** "cost-justified," and the buyer defendant knew it. If this were the test, then the FTC or the plaintiff (disfavored buyer) in private litigation would rarely – if ever – successfully assert a Section 2(f) claim because, as the Supreme Court declared in *Automatic Canteen Co. of America v. FTC,* "[p]roof of a cost justification being what it is, too often no one can ascertain whether a price is cost-justified."[23] For the very same reason, if ***the defendant*** (favored buyer) were required to prove that the price differential ***was*** "cost-justified," then the defendant (favored buyer) would rarely – if ever – successfully defend a Section 2(f) claim. In 1953, in *Automatic Canteen Co. of America v. FTC,* the Supreme Court was asked to reconcile this conundrum.

Automatic Canteen Co. of America v. FTC

In *Automatic Canteen,* the FTC initially found that Automatic Canteen had violated Section 2(f), and entered a cease and desist order against the company. The FTC's finding was predicated upon a simple showing that Automatic Canteen received, and sometimes solicited,

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20 440 U.S. 69, 81 (1979) (footnote omitted) (emphasis added).

21 *See Automatic Canteen Co. of America v. FTC,* 346 U.S. 61, 79 (1953).

22 *See* fn. 16.

23 *See Automatic Canteen Co. of America,* 346 U.S. at 79.

prices that it knew were 33% lower than prices that the seller charged Automatic Canteen's competitors.[24] The FTC made no attempt to prove that the lower prices were "cost-justified," having taken the position that the evidence of the receipt of lower prices than the competition alone showed a *prima facie* violation of Section 2(f), and the burden therefore shifted to Automatic Canteen to prove that the lower price was "cost-justified." [25] This, of course, was next to impossible to do.

When Automatic Canteen failed to produce evidence supporting a "cost-justification" defense, the FTC "made findings that [American Canteen] knew the prices it induced were below list prices and that it induced them without inquiry of the seller, or assurance from the seller, as to cost differentials which might justify the price differentials."[26] The Seventh Circuit affirmed, holding that the FTC's "*prima facie* case under Section 2(f) does not require showing absence of cost-justification."[27]

The Supreme Court granted certiorari. The question presented was whether, as the FTC argued, a "substantive violation [of Section 2(f)] occurs if the buyer knows only that the prices are lower than those offered other buyers."[28] If so, then the FTC had met its burden of going forward – *i.e.,* presented a *prima facie* case – and the burden of proof shifted to American Canteen, the favored buyer, to bear the seller's burden of proof showing that its lower price was "cost-justified."

The obvious problem with this approach was two-fold: *First,* as both the Supreme Court and the Ninth Circuit (in *Gorlick*) point out, the RPA does not "put[ ] the buyer at his peril whenever he engages in price bargaining:"

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24 *Id.* at 62.

25 *Id.*

26 *Id.* at 63.

27 *Id.*

28 *Id.* at 71.

> ... the Robinson-Patman Act doesn't prohibit buyers from haggling for a better deal. To put a buyer at risk of liability anytime he asks for a lower-than-listed price would do enormous damage to the sturdy bargaining between buyer and seller for which scope was presumably left [in the areas of our economy not otherwise regulated]. The receipt of better-than-published prices, without more, does not satisfy section 2(f)'s knowledge requirement.[29]

Common sense suggests that the FTC's approach in *American Canteen* would only result in higher prices to consumers – an outcome that is antithetical to the underlying purpose of the antitrust laws.

Second, placing the burden of proof as to the seller's cost savings upon the defendant (favored buyer) – evidence which presumably is accessible to the seller alone – would be so heavy, difficult and unfair that it would be unreasonable to construe the language of the RPA so as to impose such a requirement.[30] By the same token, however, if the burden of proof resides with the plaintiff (disfavored buyer), this would simply result in the arbitrary and unfair transfer of this difficult, unreasonable and rarely successful showing to the plaintiff (disfavored buyer). And, it seems fair to say that, in most every Section 2(f) case, the allocation of the burden to prove (or negate) the Section 2(a) "cost-justification" defense would turn out to be outcome determinative: whomever is assigned the burden of proof ends up losing the Section 2(f) claim.

The Supreme Court, in *Automatic Canteen,* recognized that there could be no bright line test. Noting that "precision of expression is not an outstanding characteristic of the Robinson-Patman Act"[31] – a notion that almost all antitrust lawyers would appreciate and commend – the

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29 *Gorlick,* 2013 U.S. App. LEXIS 14635 at *8 (*quoting, in part, Automatic Canteen*) (internal quotations omitted).

30 *See Automatic Canteen,* 346 U.S. at 67. The reason that the burden of proof is placed upon a seller in a Section 2(a) claim is because the burden "ought to be on the one who has at his peculiar command the cost and other record data by which to justify such discriminations." *See id.* at 78-79.

31 *Id.* at 65.

Supreme Court adopted a porous fact-based "balance of convenience" rule requiring that the plaintiff initially bear the burden of going forward with evidence showing that the buyer knew the price discrimination was illegal.[32] After the plaintiff has made this *prima facie* showing, the burden of proof shifts to the defendant to show that the lower prices were cost-justified.[33] The "balance of convenience" test has been difficult to apply prospectively, but does allow the plaintiff to meet its burden of going forward by introducing evidence of the buyer's expertise and "trade experience," from which its knowledge of an unlawful price discrimination can be inferred.[34]

"Trade Experience" Knowledge. The sufficiency of this going forward evidence depends upon the nature of the favored and the disfavored buyers – *i.e.,* the plaintiff and the defendant. If the defendant (favored buyer) knows that it "buys in the same quantities as [the plaintiff (disfavored buyer)] and is served by the seller in the same manner or with the same amount of exertion" as the plaintiff, then the defendant's knowledge of the price differential itself will establish the requisite *prima facie* case.[35] This is because it can be inferred from these facts that the defendant has notice that the price differential was not related to cost savings by the manufacturer.[36]

If, on the other hand, the seller either serves the two competitor-buyers in a different manner or with different quantities or amounts of exertion, then the plaintiff must introduce factual evidence sufficient to infer that the defendant was aware that such differences could not give rise to sufficient cost savings by the manufacturer.[37] And, recognizing that there can be no well-defined description of this factual evidence, the Court explained that:

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32 *Id.* at 74-75.

33 *Id.*

34 *Id.* at 79-80; *see also Fred Meyers, Inc. v. FTC,* 359 F.2d 351,364 (9th Cir. 1966), *rev'd in part on other grounds,* 390 U.S. 341(1968) (sufficient for FTC to show that the buyer defendant was not "an unsuspecting recipient of prohibited discriminations.") (quoting *Automatic Canteen,* 346 U.S. at 81).

35 *American Canteen,* 346 U.S. at 79-80.

36 *Id.*

37 *Id.* at 80.

> [w]hat other circumstances can be shown to indicate knowledge on the buyer's part that prices cannot be justified we need not now attempt to illustrate; but surely it will not be an undue administrative burden to explain why other proof may be sufficient to justify . . . that the buyer is or is not an *unsuspecting recipient* of prohibited discriminations.[38]

Not surprisingly, given the necessarily vague nature of the so-called "balance of convenience" test, the subsequent application of the *Automatic Canteen* rule by lower federal courts to "buyer cases under both Section 2(f) and Section 5 of the FTC Act typically [have] involved sharply contested [factual] issues on the sufficiency of the 'trade experience' evidence offered to show the buyer's knowledge of the illegality of its price or allowance.[39]

Fred Meyer, Inc. v. FTC[40]

In *Fred Meyer, Inc. v. FTC* – the only Ninth Circuit Section 2(f) decision until *Gorlick* – following a full evidentiary hearing, the FTC found that Fred Meyer's conduct violated Section 2(f), and entered a cease and desist order against the company.[41] On appeal to the Ninth Circuit, the Court affirmed, and found that the FTC had satisfied its burden of going forward with sufficient evidence that Fred Meyer either knew or had reason to know that the payments it received were unlawful under Section 2(f).[42] The Ninth Circuit ruled that, although the FTC was required to prove that the buyer defendant knew or should have known that the price differential was not cost-justified, the burden normally can be met by inferences alone.[43] And, the FTC – or plaintiffs – need not prove precise costs, commenting that "[c]osts surveys are expensive and

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38 *Id.* at 80-81.

39 *See* ABA Section of Antitrust Law, *Antitrust Law Development* at 556 (7th ed. 2012); *see also id.* at 556-558.

40 359 F. 2d 351 (9th Cir. 1966), *rev'd in part on other grounds,* 390 U.S. 341 (1968).

41 *Id.* at 355.

42 *Id.* at 365.

43 *Id.* at 364.

labyrinthine proceedings whose results are often dependent upon the cost accounting theory used."[44] Although the Court found that the FTC had made out a *prima facie* case through actual or trade knowledge, the Ninth Circuit, following the underlying rationale of *American Canteen,* also found that the FTC's *prima facie* case could be grounded on "inquiry knowledge" – *i.e.,* the favored buyer has "information sufficient to put upon it the duty of making inquiry" to determine whether the prices it received were prohibited.[45]

Actual or Trade Knowledge. The FTC's evidence, which the Ninth Circuit described as "weak, but not insufficient" – *i.e.*, hardly a ringing endorsement[46] – consisted of the following: (a) discounts on product purchases amounting to 33% off the supplier's standard list price (the suppliers did not provide quantity discounts as a standard practice); and (b) a contrasting purchase price over the course of the previous year – *i.e.,* 11 months of purchases at the supplier's standard wholesale list price, followed by one month of purchases at unpublished 33% discounts.[47] This evidence was sufficient to infer that Fred Meyer was "not an *unsuspecting recipient* of prohibited discriminations."[48]

Inquiry Knowledge. The Ninth Circuit, however, also found that the FTC had met its burden of going forward, predicated solely upon the fact that Fred Meyer – which was the second largest retail supermarket seller of grocery products in the Portland, Oregon market – possessed "self-professed market power" which, by itself, was tantamount to "covertly" – meaning that the supplier might not want to disappoint its powerful buyer – "pressuring" its supplier to provide unlawful price differentials to Fred Meyer. [49] Rejecting Fred Meyer's

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44 *Id.*

45 *Id.* at 365-366.

46 *Id.* at 365.

47 *Id.* at 364.

48 *Id.* (emphasis in original).

49 *Id.* at 363.

argument that the FTC was required to demonstrate that a favored buyer "exerted 'pressure' amounting to outright extortion,"[50] the Ninth Circuit made clear that:

> the fact of Meyer's self-professed market power, and the [FTC's] superior fact-finding position are sufficient to persuade us . . . that whatever may be the degree of 'pressure' necessary to sustain a 2(f) violation, that pressure existed and was successfully applied.[51]

The Ninth Circuit declined to "finally decide here whether actual coercion is necessary to establish the *prima facie* case"[52] but, *in dicta,* made clear that the legislative history of the RPA expressly suggested that:

> it is the manufacturer's ***recognition*** that the [large and powerful] buyer with its tremendous purchasing and distributing power, may do things [–*e.g.*,] buy the goods elsewhere, proceed to manufacture its own, or conduct its stores so as to discourage therein the sale of the recalcitrant manufacture's goods [–] and ***not the 'threat' of the chain to do them*** that is the real inducement for granting the special concession.[53]

In circumstances involving dominant or powerful buyers, the Court seemed to conclude that, given that the discount it received was as great as 33%, the buyer had a duty to inquire of the seller whether the favorable pricing was cost-justified. Fred Meyer's failure to do so constituted a sufficient *prima facie* case.[54] Pursuant to the Ninth Circuit's recent decision in *Gorlick,* however, that no longer is correct. Now, in the absence of actual or "trade experience" knowledge, some form of actual coercion is necessary to establish a *prima facie* case, even when

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50 *Id.*

51 *Id.*

52 *Id.* at 363 n. 12.

53 *Id. (quoting* Final Report on the Chain-Store Investigation, S. Doc. No. 4, 74th Cong., 1st Sess., p. 49 (1934)) (emphasis added).

54 *Id.* at 363.

the favored buyer is dominant or powerful and the disfavored buyer is not. This is a non-trivial development in the law.

Gorlick Distribution Centers, LLC v. Car Sound Exhaust System, Inc.[55]

Gorlick's Section 2(f) Claim. In *Gorlick*, Allied received "lower prices on merchandise; volume discount pricing even when the volume requirements weren't met; and higher year-end sales rebates."[56] These price concessions were not made available to Gorlick. After discovery was completed, Allied moved for summary judgment on Gorlick's Section 2(f) claim.[57] Allied conceded for purposes of the motion – and the district court assumed it to be true – that the prices Allied paid to Car Sound were prohibited by Section 2(a). Instead,[58] Allied argued that Gorlick had not raised a genuine factual dispute as to whether Allied ***knowingly*** induced or received the admitted illegal price discrimination.

Gorlick's evidence was thus[59]:

- Allied was aware that it received more favorable pricing than competitor Car Sound buyers, including Gorlick;
- Allied's buyers "bragged that they were 'buying better' than their competition;"
- Allied's internal memos "trumpeted" its superior purchasing discounts; and
- Allied had planned to ask Car Sound to raise Gorlick prices, but there was no evidence to prove that it had actually done so

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55 2013 U.S. App. LEXIS 14635 (9th Cir. July 19, 2013).

56 *Id.* at *3.

57 *Id.* at *4. Gorlick originally sued Car Sound, alleging that it violated Section 2(a) of the RPA, but later dismissed the seller from the case.

58 *Gorlick*, 2013 U.S. App. LEXIS 14635 at *4-6.

59 *Id.* at *6-7, 12.

In opposition to the motion, Gorlick argued that its factual showing was sufficient in one or more of three ways to meet its burden to establish a *prima facie* case that Allied knew there was "little likelihood" that Car Sound's pricing was "cost-justified:" (a) Allied had actual knowledge; (b) Allied's "trade experience" was sufficient to impute to it such knowledge; and (c) at the very least, Gorlick's factual showing was sufficient to put Allied on notice that it had a duty to inquire of Car Sound whether the lower prices were "cost-justified."[60] The district court, however, granted Allied's motion for summary judgment, finding that Gorlick's facts did not establish a *prima facie* case. On appeal, the Ninth Circuit affirmed.

The Ninth Circuit initially determined that Gorlick failed to establish that Allied had actual or "trade experience" knowledge.[61] The Court noted that Allied "was undoubtedly aware of its favored position among Car Sound buyers," and "knew that it received superior prices and discounts" than Gorlick and its competition. [62] Nevertheless, these facts did not suffice to infer that Gorlick knew that the prices it received did not qualify for the "cost-justification" defense, or that the favorable pricing "resulted from anything other than the significant differences in how the two companies did business."[63] In other words, because Allied was an exclusive distributor for Car Sound – and purchased its products in amounts that were 15 times the dollar amounts purchased by Gorlick (who was a multi-brand distributor) – the fact that Allied knew that it was getting much better pricing did not suggest that the price breaks it received might not be justified by Car Sound's cost savings.[64]

The Court also rejected Gorlick's argument that Allied's dealings with Car Sound put it on inquiry notice that it was receiving discriminatory prices that might not be "cost-justified."[65]

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60 *Id.* at *6-7.

61 *Id.* at *7-11.

62 *Id.* at *7.

63 *Id.* at **7-8.

64 *Id. See also, Id.* at 10-11 ("Gorlick hasn't presented evidence that Allied knew the deals it received were anything other than an incentive for its continued loyalty, much less that Allied had any insight into the pricing Car Sound offered competitors.").

65 *Id.* at *12.

In doing so, the Ninth Circuit curtailed – if not outright abrogated – its prior decision in *Fred Meyer* on this issue. According to the Ninth Circuit in *Gorlick,* the dominant favored buyer has no duty to inquire unless it not only has induced the preferential prices, but also has overtly coerced the seller by, for example, "insist[ing] that none of its competitors be offered the same price."[66]

Gorlick, then, now stands for the proposition that a dominant or powerful buyer – *e.g.,* an exclusive distributor purchasing in larger quantities than its smaller or multi-line competitor – who knowingly has induced a seller to provide lower prices than the competition is not obligated to inquire or investigate whether those lower prices are justified by cost-savings to the seller, unless that dominant buyer has overtly or actually coerced – *e.g.,* "threatened" – the seller in some demonstrative fashion during its price negotiation activities.[67] Simply stated, the dominant buyer's *"clout"* – and the seller's recognition or fear of that *"clout"* – is not sufficient to infer that the dominant buyer was not an *unsuspecting recipient* of prohibited discriminations. And, importantly, in the Ninth Circuit at least, these Section 2(f) claims will, more probably than not, be dismissed either at the pleading stage or on a motion for summary judgment.

***Gorlick's* Sherman Act Claim.** Car Sound also implemented a shipping policy that favored Allied over Gorlick. Under this policy, Car Sound shipped product to Allied's facilities in the Pacific Northwest, but refused to ship any product to Gorlick outside of California.[68] This meant that Gorlick – but not Allied – incurred additional costs in transporting the Car Sound goods from its California warehouse to the Pacific Northwest.

Gorlick claimed that Car Sound's discriminatory shipping policy constituted a conspiracy between Allied and Car Sound to restrain trade in violation of Section 1 of the Sherman Act.[69]

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66 *Id.* (stating that the Court in *Fred Meyer* predicated the favored buyer's duty to inquire upon the fact that "there the buyer induced the preferential prices ***and*** insisted that none of its competitors be offered the same deal.") (emphasis supplied).

67 *Id.* (The Court made this clear when it stated: "[h]olding 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.")

68 *Id. at *13.*

69 *Id.*

Allied moved for summary judgment, arguing that Gorlick had not made a sufficient showing that Allied and Car Sound had entered into a "contract combination or conspiracy." The district court agreed, and granted Allied's motion.[70] Gorlick thereafter appealed to the Ninth Circuit.

The Ninth Circuit affirmed the district court's decision, but unilaterally chose to focus on a completely different issue: whether Gorlick had – or could – show that the discriminatory shipping policy actually injured competition.[71] The parties had discussed the anticompetitive effect of this vertical restraint in supplemental briefs before the district court, but neither antitrust injury nor antitrust standing was raised by the parties on appeal.[72] The Ninth Circuit, on its own following oral argument before the Court, raised the issue and requested supplemental briefing by the parties.[73]

After considering the supplemental briefs, the Court – in a 2-1 decision on this issue – assumed the existence of an agreement between Allied and Car Sound, but affirmed the district court's grant of Allied's motion for summary judgment.[74] The Court found that Gorlick had failed to provide "a plausible explanation for how the alleged agreement between a manufacturer and a distributor, concerning a product line without market dominance, causes harm to competition in the entire automotive exhaust [relevant] product market."[75]

The Court's decision makes perfect sense. In order to state a claim under Section 1 of the Sherman Act, plaintiffs must show facts which prove that the unlawful agreement "actually injures competition," and that the plaintiffs were harmed by anticompetitive conduct which flowed from an "anti-competitive aspect of the practice under scrutiny."[76] In *Gorlick*, where Car

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70 *Id.* at *13-14.

71 *Id.* at 14.

72 *Id.* at *20. The issue of antitrust injury was raised by the Ninth Circuit itself during oral argument before the Court. On appeal, the parties did not address this issue at all until the Court asked for supplemental briefing following oral argument.

73 *Id.*

74 *Id.* at 20.

75 *Id.*

76 *See Brantley v. NBC Universal, Inc.*, 675 F.3d 1192, 1197 (9th Cir. 2012).

Sound did not have market power in the relevant product market – consisting of automotive exhaust products as a whole (not Car Sound products alone) – there could not exist an injury to competition in that interbrand market. The only injury was to Gorlick – *i.e.,* an injury only to intra-brand competition among Car Sound distributors. That, however, is not "antitrust injury." Interbrand competition – not intra-brand competition – is "the primary concern of antitrust law."[77]

Conclusion

Large and dominant buyers often have a natural advantage in their price negotiations with vendors. As the Supreme Court said in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.,* the RPA was enacted "to target the perceived harm to competition occasioned by *powerful buyers* . . . with the *clout* to obtain lower prices for goods than smaller buyers could demand."[78] And, as the Court in *Fred Meyer* noted,[79] the legislative history of the RPA suggests that "it is the manufacturer's recognition" of the dominant buyer's tacit or covert price bargaining *"clout"* that may constitute the real inducement for – or "threat" to – a seller, which results in the provision of differential prices that can be substantially lower than the competition.

Nevertheless, in the Ninth Circuit, unless the plaintiff (disfavored buyer) can produce evidence of actual or "trade experience" knowledge on the part of the defendant (favored buyer), the defendant (favored buyer) is free to negotiate prices that it knows are lower than its competition, without any corresponding duty to inquire whether those prices are justified by savings to the manufacturer or seller. And, where the defendant (favored buyer) is a large and exclusive distributor of the supplier's products, but the plaintiff (disfavored buyer) is a smaller multi–brand distributor, it will be exceedingly difficult for the plaintiff to make a *prima facie* showing that the defendant was not an *unsuspecting recipient* of prohibited discriminations.

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77 *See Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 52 n. 19 (1977).

78 *See* fn. 14; 546 U.S. 164, 175 (2006).

79 *See* fn. 53.