

CLIENT ALERT

Third Circuit Clarifies Robinson-Patman Act's Competing Purchaser Requirement in Bid Situations

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In *Feesers, Inc. v. Michael Foods, Inc.*, Nos. 09-2548, 09-2952, 09-2993 (3d Cir. Jan. 7, 2010), the Third Circuit overturned a district court finding that a manufacturer of food products discriminated in the sale of products to a food service operator customer competing with a distributor. In so doing, the Third Circuit further narrowed the scope of the Robinson-Patman Act in the context of competitive bidding situations.

The litigants operated in the food service industry, which includes three levels: manufacturers, distributors and operators. Manufacturers sell products to distributors, who resell those products to operators, which include self-operators ("self-ops") and food service management companies ("FSMCs"). Self-ops are institutions that perform all dining services internally. FSMCs perform institutions' dining services for a fee. Michael Foods manufactured egg and potato products, which it sold to both Feesers (a distributor) and Sodexo (a FSMC). While Feesers and Sodexo operated at different levels of the distribution chain, they often competed, or bid, for the same customer institution, as each institution must decide whether it will procure its food inputs from a distributor and then prepare and distribute the food itself or, alternatively, contract with a FSMC to procure, prepare and distribute the food on the institution's behalf.

"Feesers claim[ed] that Sodexo was able to purchase egg and potato products from Michaels at a discounted price that was unavailable to Feesers," giving Sodexo a competitive advantage that violated the Robinson-Patman Act ("RPA"). The Third Circuit rejected that claim, however, holding that Feesers and Sodexo were not "competing purchasers, and therefore, Feesers [did not] satisfy the competitive injury requirement of a prima facie case of price discrimination under § 2(a) of the RPA." Relying on the Supreme Court's holding in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006) and the Third Circuit's decision in *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), the court held that "in a secondary-line price discrimination case, parties competing in a bid market cannot be competing purchasers where the competition for sales to prospective customers occurs *before* the sale of the product for which the RPA violation is alleged."

The Third Circuit explained that the required competitive injury is established . . . by proof of 'a substantial price discrimination between competing purchasers over time.'" While Feesers and Sodexo competed for the same business when bidding for the food service needs of an institution, such competition was settled and the contract awarded before Michael's actually completed a sale, and thus the "competing purchaser" prong failed. In so holding, the Third Circuit explained that *Toledo Mack* was not a simple application of the "two purchaser" requirement, but was instead an analysis of "the combined effect of the two purchaser and competitive injury requirements, *i.e.*, the competing purchaser requirement." It is important to note that the decision here turns on the fact that Michael's made no sale until the institution chose between self-operation (procuring food from Feesers) or contracting with a FSMC (Sodexo).

The Third Circuit's decision was bolstered by its conclusion that the "price discrimination identified by Feesers bears 'little resemblance to [the] large independent department stores and chain operations' that statute was originally intended to target"

particularly with regard to the facts that the services provided by Feesers and Sodexo are distinct, they compete in bid markets, and they do not purchase food from the manufacturer until the competition is settled.

Of additional note to practitioners, the court also flatly rejected the plaintiff's attempt to distinguish between what it considered a more informal bidding process at issue here and a formal RFP process in *Volvo Trucks* and *Toledo Mack* and its insistence that a "logical reading of *Toledo Mack* limits that decision's applicability to custom-manufactured goods." The Third Circuit explained that its reasoning applies whether the bidding process is formal or informal as well as whether the commodity at issue is a standard product or custom-manufactured.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

Robert A. Lipstein

Retired Partner – Washington, D.C.

Email: rlipstein@crowellretiredpartners.com

Ryan C. Tisch

Partner – Washington, D.C.

Phone: +1 202.624.2674

Email: rtisch@crowell.com