

## CLIENT ALERT

### Hidden Discount Judgment of \$2 Billion Against Ford: Implications for Pricing Systems

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An Ohio state court's recent entry of a \$2 billion judgment against Ford Motor Company has potential implications for every company that offers price concessions in the course of moving inventory through its distribution system. Our analysis looks at the "hidden discounts" that were at the heart of the *Ford* case, and then flags significant points that companies need to address to avoid being ensnared in similar class action claims.

The case, *Westgate Ford Truck Sales Inc. v. Ford Motor Co.*, No. 02-483526 (Court of Common Pleas, Cuyahoga County, OH, June 10, 2011), centered on Ford's agreements with its commercial truck dealers. Plaintiffs represented a class of over 3000 dealerships, who, together, sold over nearly half a million commercial trucks during the implicated time period. According to the dealers, Ford breached its agreements with them by inflating its published prices and failing to disclose hidden discounts that were routinely given to individual dealers.

Ford's franchise agreement required that it sell trucks to dealers "in accordance with the prices, charges, discounts and other terms of sale set forth in price schedules or other notices published by the Company to the deal from time to time ...." Although the contract allowed Ford to change the prices at any time, for any reason, it required Ford to do so via publication in a sale bulletins, and required that the published prices "shall be those in effect" at that time.

The court found that Ford "systematically violated" this requirement as a matter of law through its "scheme of unrealistically high published wholesale prices and secretive unpublished discounts." Specifically, the Court held that Ford's use of its Competitive Price Assistance ("CPA") program to secretly give individual dealers discounts in order to move inventory breached the contract. Under that program, Ford gave different discounts to different dealers (or even to the same dealer at different times), resulting in widely varying net prices paid for identical trucks. Discounts to one dealer were not known to others dealers, thereby wiping out the price transparency that the court agreed was contemplated by the contract.

The dealers claimed, and the jury found, that Ford substantially increased its published prices to make it appear that discounts being offered to dealers were significant. As their counsel explained, "The dealers who called to get these special discounts thought they were getting a deal, but they weren't. No dealer knew what any other dealer was paying." In other words, the published prices were no longer meaningful.

The jury awarded the lead plaintiff \$4.5 million. The court then entered judgment in favor of all members of the class and calculated damages for the remaining class members based on the same formula to yield a total recovery of \$2 billion. The judgment includes almost \$800 million in damages and roughly \$1.2 billion in pre-judgment interest. It is the largest award against Ford by over five fold.

Ford plans to appeal the ruling, but it may face a difficult road. The Ohio Court of Appeals already upheld the class certification ruling, and the Ohio Supreme Court denied Ford's petition for review of that ruling.

The sheer magnitude of the award should cause every business to take note of its own discounting practices to make sure that they comply with any underlying agreements. Some of the lessons learned from the Ford case include:

- Know your contractual obligations: Review not only the basic dealer agreement, but terms and conditions in pricing documents to assess what promises or representations, express or implied, have been made to distributors and dealers.
- Audit your program: Assess whether you are selling all, or almost all, of your product at the published list price and, if not, whether the use of discounts and the discount terms and conditions are universally known to dealers. Interview sales personnel to assess whether they are making oral representations as to the pricing being offered to individual dealers (e.g., "This is a one-time special offer – good for you only this week.")
- Determine Scope of Pricing Obligations: Check whether there are MFN or other terms that would require pricing concessions to be made to more than just the individual customer at issue.
- Training: Conduct training of employees who set pricing, who develop discount and rebate programs, and who communicate with customers about those programs.
- Legal review: Establish internal procedures to have programs designed to meet current market conditions vetted by legal in advance, so that they will comply with the company's contractual obligations.

While the Ford case centered on breach of contract, companies should have similar compliance procedures in place to comply with the Robinson-Patman Act, and corresponding state laws that address price discounting.

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

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