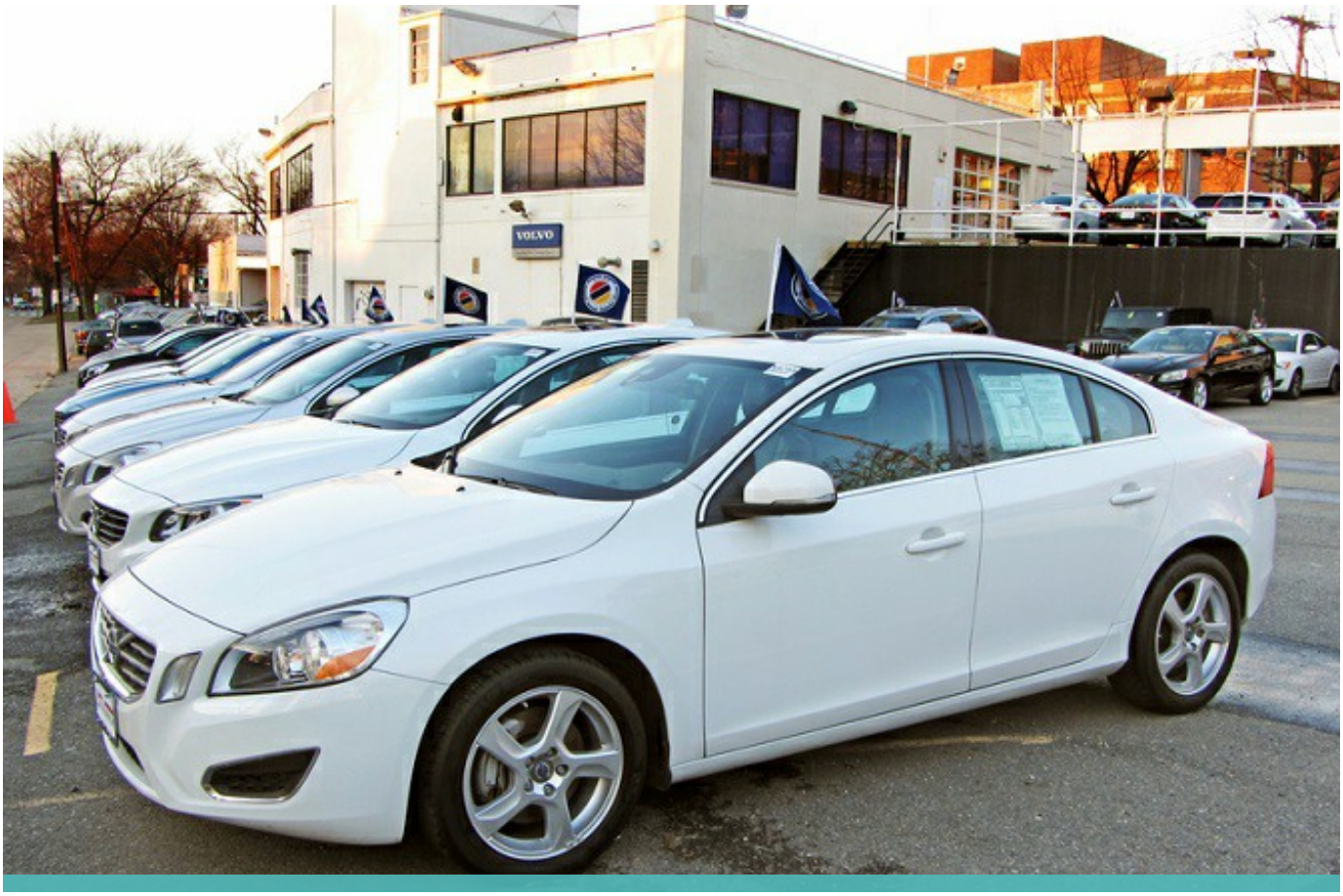
Federal court upholds Volvo's auto dealer bonus program



Scott N. Opincar | Friday, November 11, 2016

Volvo Cars of North America's auto dealer incentive program did not constitute an improper discriminatory pricing program, according to a ruling by U.S. District Judge George C. Smith of the U.S. District Court for the Southern District of Ohio, Eastern Division on August 25, 2016.

In 2007, Plaintiff Brentlinger Enterprises, d/b/a MAG Volvo of Dublin, purchased a Volvo franchise from Segna Volvo. As part of Volvo's approval of the sale, it required Brentlinger to operate as a stand-alone Volvo dealership and required that Brentlinger comply with Volvo's design standards programs. Subsequently, Volvo agreed that Brentlinger could include its Volvo dealership as part of another building on the Brentlinger campus, but specifically required Brentlinger to comply with its Volvo Next Face facility design program.

In 2013, Volvo created an incentive program called the Volvo Performance and Growth Strategy, which awarded different bonuses to dealerships based on the dealership's classification into one of four categories. Each category was based on the type of each dealership. The highest tier was 'Exclusive/Metro," followed by "Dedicated," "Shared," and "Universal." Volvo conducted an assessment and determined that Brentlinger's only Volvo competitor in Columbus, Ohio was an "Exclusive" dealership, and further determined that Brentlinger was a "Shared" dealership.

In 2014, Volvo replaced this program with a bonus payment program for dealers called the "Facility Investment Initiative" ("FII"). FII used similar dealer classification tiers titled "VNF Exclusive," "VNF Customer Facing Dedicated," "VNF Customer Facing Shared," and "Universal/Nonbranded." Brentlinger's sole competitor in Columbus received the highest classification of VNF Exclusive and Brentlinger received a classification of VNF Customer Facing Shared. A VNF Exclusive dealer received a $500 bonus payment per qualified vehicle sale while a VNF Customer Facing Shared dealer received a $250 bonus payment per qualified vehicle sale. In addition, Volvo instituted different allocation policies for its popular XC90 model based upon a dealer's classification in the FII.

Brentlinger brought suit alleging that the XC90 allocation policy and the FII violated the Ohio Motor Vehicle Franchise Act (Ohio Revised Code 4517.59 *et seq.*), the Robinson-Patman Act (15 U.S.C. § 13 *et seq.*), and the Automobile Dealer's Day in Court Act (15 U.S.C. § 1222, *et seq.*). These statutes generally prohibit discriminatory pricing programs.

In Ohio, incentive programs or other discounts which are reasonably available to all franchisees in the state on a proportionately equal basis, and that are based on the sale of individual vehicles and not increased for meeting a performance standard unless the standard is reasonable considering all existing circumstances, are legal. O.R.C 4517.59(A)(8). In addition, Ohio makes it unlawful for a dealer to discriminate among the franchisor's dealers in any program that provides assistance to the franchisor's dealers, including internet listings, sales, leads, warranty policy adjustments, marketing programs, and dealer recognition programs. O.R.C 4517.59(B).

Similarly, the Robinson-Patman Act states that it is unlawful for any person, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them. 15 U.S.C. § 13(a). Although not codified in the statute, case law has developed a "functional availability" defense which attacks the two essential elements of a Section 13(a) claim under the Robinson-Patman Act. Those two elements are either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury. The reasoning behind the defense is that if the lower prices afforded to its competitor were equally available to the plaintiff, any discrimination and competitive advantage suffered by the plaintiff is attributable not to the defendant's program, but rather to the plaintiff's failure to take advantage of its opportunity to receive those prices.

Brentlinger argued that the "functional availability" defense under the Robinson-Patman Act is not codified in O.R.C 4517.59(A)(8), which instead uses a "reasonably available" standard. The Court declined to accept that position and instead held that the terms "reasonably available" and "functional availability" should not be viewed differently. Thus, the Court looked to case law concerning "functional availability" to determine whether Volvo's FII program violated applicable law.

Ultimately, the Court determined that:

- As Volvo alleged that the program is reasonably and functionally available to all franchisees, it is Brentlinger's burden of proof to establish proximate cause between the damages allegedly caused and the alleged violation.
- The argument that renovations would be costly is not evidence to overcome a functional availability argument.
- Brentlinger did not request a zoning variance to comply with Volvo's design requirements.
- The VNF Exclusive designation was reasonably and functionally available to Brentlinger as a matter of law.
- The FII program was available on a proportionately equal basis, based on the sale of vehicles, and was increased based on a reasonable performance standard.
- There was no evidence that Volvo was using the FII program to drive Brentlinger out of business.
- The FII program was reasonably designed to reward dealers who are fully compliant with branding because Volvo saw that branding and the quality of showrooms were holding it back in certain consumer reports.

The case is *Brentlinger Enterprises v. Volvo Cars of North America, LLC*, Case No. 2:14-CV-360, United States District Court, S.D. Ohio, Eastern Division.

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