NADC
National Association of Dealer Counsel®

# DEFENDER

The National Association of Dealer Counsel Newsletter FEBRUARY 2017

In this Issue:

Feature Article .....1, 5
President's Message .....7
New Members .....8
Advertising Opportunity .....13
Board of Directors.....14


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## Price Discrimination Challenges to Factory Incentive Programs: Recent Cases Demonstrate Obstacles and Opportunities

By Paul R. Norman and Eric A. Baker, *Boardman & Clark LLP*


Norman


Baker

As several commentators have noted in recent years, the Robinson-Patman Act ("RPA"), originally enacted in 1936,[1] and similar state laws have seen a revival in response to increasing prominence of automobile manufacturer incentive programs, especially volume discount incentives.[2] In the past five years, at least a half dozen such challenges have been brought against manufacturers including General Motors,[3] Chrysler,[4] Volvo,[5] Kia,[6] and Nissan.[7] Despite persistent criticism by economists that the RPA is anticompetitive[8] and legal commentary suggesting that the U.S. Supreme Court decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*[9] severely narrowed application of the RPA,[10] several of these dealership price discrimination challenges have recently survived dismissal challenges,[11] including summary judgment.[12] These decisions demonstrate that dealers can succeed on price discrimination claims if they can marshal sufficient evidence to show that they were foreclosed from favored pricing and that they lost sales to favored competitors as a result. Dealerships concerned about losing sales to intra-brand competitors due to lower prices subsidized by factory incentives should consider steps to collect and preserve evidence that will be helpful in supporting a potential claim.

### The RPA and Recent Dealership Challenges

In the context of manufacturer-dealer relations, the RPA prohibits what is known as "secondary-line price discrimination"—where a seller (*i.e.*, manufacturer) gives one reseller (*i.e.*, dealer) a more favorable price than another dealer for the same goods. In order to establish a *prima facie* violation of the price discrimination provision of the RPA, the disfavored dealer must show: (1) a difference in price; (2) in reasonably contemporaneous sales; (3) to two different purchasers by the same seller; (4) involving vehicles of like grade and quality; and (5) that the price difference may substantially lessen competition ("competitive injury").[13] As to the first element, even though two dealers paid different prices, there is no price discrimination

if the lower price was "functionally available" to the disfavored dealer.[14] In addition, if the disfavored dealer is seeking damages, it must show "antitrust injury" in addition to the elements of a *prima facie* violation.[15] The "functional availability," "competitive injury," and "antitrust injury" are the most hotly contested issues in RPA litigation as illustrated by recent litigation *Mathew Enterprise v. FCA US LLC* (Chrysler), 2016 WL 4269998 (N.D. Cal. Aug. 2, 2016).[16] In *Mathew Enterprise*, plaintiff's RPA claim derived from Chrysler's introduction of a new Chrysler dealer in close proximity to plaintiff's Stevens Creek Chrysler Jeep Dodge Ram ("CJDR") dealership. During the twelve months following entry of the new competitor, Fremont CJDR, Fremont received volume incentives each month, while other dealers surrounding Stevens Creek received volume incentives in certain months but not all months.[17] Chrysler continued to base Stevens Creek's monthly objectives on its sales from the year prior to Fremont's entry, and Stevens Creek received no incentive payments from August 2012 to June 2013, even though it had regularly achieved its incentive targets prior to Fremont's entry.[18] The issues of "functional availability," "competitive injury," and "antitrust injury" were the main points of contention in this case.

"Functional availability" looks at whether incentives were practicably, rather than just theoretically, available to the disfavored dealer.[19] It goes to both element 1, because, if the incentives were "functionally available," there was no price discrimination, and element 5, because the "functional availability" of the incentives negates any showing of competitive injury.[20] There is an unresolved debate whether "functional availability" is an affirmative defense or an element of the plaintiff's prima facie case.[21] There also is an open issue of whether functional availability requires even-handed treatment of competing purchasers in setting the objectives required to obtain incentives in addition to the objectives being attainable through reasonable commercial efforts by the disfavored dealer.[22]

Chrysler asserted in *Mathew Enterprise*, that its volume growth incentives were "functionally available" because "Chrysler simply applied standard practices and policies during the allegedly discriminatory period and Stevens Creek [plaintiff's subject dealership] chose not to meet the objectives."[23] The district court denied summary judgment, finding that plaintiff's evidence that Chrysler's sales objectives for Stevens Creek were 121% of its expected sales while Fremont's objectives were 87% of its expected sales, and the undisputed evidence that "Stevens Creek tried but failed to meet its objectives" during the first month of the alleged discriminatory period, created a dispute of fact whether the discounts were functionally available to Stevens Creek.[24] In its summary judgment decision, the court also discussed the evidence of unequal treatment of the plaintiff and the competing dealer;[25] however, at the trial, the court rejected a proposed instruction that would have required the jury to find both equal treatment and practicable attainability, and also imposed the burden of proving "functional unavailability" on the plaintiff. Because the jury in *Mathew Enterprise* ultimately found that plaintiff failed to prove that the incentives "were not functionally available to Stevens Creek,"[26] these instructions are now the subject of post-verdict motions and a possible appeal.

The element of "competitive injury" may be shown either by direct evidence of sales diverted to the favored competitor as a result of the price discrimination or by indirect evidence that a favored competitor received a substantial price reduction over a substantial period of time.[27] This indirect method of proving competitive injury is commonly referred to as the *Morton Salt* presumption. In *Mathew Enterprise,* the district court rejected Chrysler's summary judgment challenge based on lack of "competitive injury" because the Court determined that there was sufficient evidence supporting the *Morton Salt* presumption of "competitive injury" where plaintiff offered evidence of a $700 per vehicle price difference (2% difference) over eleven months in a "a price-sensitive market with low profits."[28]

An unresolved issue in RPA cases is whether the *Morton Salt* presumption of "competitive injury"—a rebuttable presumption—may be rebutted by proof that there was no harm to competition generally, as opposed to evidence that the disfavored competitor was not competitively harmed. Relying on Ninth Circuit precedent,[29] the district court in *Mathew Enterprise* rejected Chrysler's proffered jury instruction that the presumption of competitive injury could be rebutted by showing the lack of harm to competition generally. Other circuits, including the D.C. Circuit, have held otherwise.[30] This is an issue that ultimately will be decided by the U.S. Supreme Court, and its ruling will significantly affect the future viability of secondary-line price discrimination claims in the automotive industry.

Unlike "competitive injury," which can be proved without direct evidence of diverted sales or profits, a showing of "antitrust injury" (actual injury and causation), as well as proof of damages, requires a showing of actual diversion of sales or profits from the disfavored purchaser to a favored purchase.[31] In *Mathew Enterprise,* the court also denied Chrysler's summary judgment motion based on lack of "antitrust injury" after determining that if competitive injury were shown, a finding of diverted sales could be supported by plaintiff's evidence "that (1) the CJDR market is competitive and price-sensitive; (2) the Surrounding Dealers were favored; (3) they used incentive payments to lower their prices relative to Stevens Creek; and (4) Stevens Creek's sales fell during the alleged price discrimination period while those of the Surrounding Dealers rose and the reverse happened after the price discrimination period ended."[32]

Decisions this past October from Ohio and Illinois federal district courts denying motions to dismiss RPA claims echo the *Mathew Enterprise* court's acknowledgment that factory incentive programs are vulnerable to attack when manufacturers ignore the RPA's requirements that such incentives be made reasonably available to all of their competing dealers on proportionally equal terms. In *Napleton's Arlington Heights Motors, Inc. v FCA USA LLC*, the Northern District of Illinois determined that the *Morton Salt* presumption could apply where the plaintiff dealership alleged that a $1,600 per vehicle price

difference existed over the course of "at least a year."[33] The *Bedford Nissan, Inc. v. Nissan N.A.* court likewise acknowledged that *Morton Salt* could apply where Nissan was alleged to have entered into a series of secret agreements with a favored Nissan dealer, allowing the favored dealer to "significantly undercut a competing non-preferred dealer's retail prices with no negative impact on its bottom line."[34]

## Dealer Vigilance Is Key to Keeping Factory Incentives Reasonably in Check

Although each of these cases can be seen as an outlier circumstance, commentators have acknowledged that factory incentive programs "remain an ongoing litigation risk" and "[o]ther such lawsuits are bound to follow."[35] In order for manufacturers to find refuge under functional availability, they will need to demonstrate that each dealer "is economically feasible of qualifying for the lower price, even if they would prefer not to do so."[36] Dealers can attack such defenses with evidence that "sales targets or other [manufacturer-established] goals are not feasibly obtained."[37]

Recent cases demonstrate that circumstantial evidence of a favored competitor receiving a substantial price reduction over a substantial period of time can be sufficient to demonstrate an RPA claim. Dealers can buttress their RPA claims by more closely documenting their lost sales and other attempts to meet competition by favored dealers, including: documenting prices offered to specific retail customers who may later be determined to have bought from favored dealers; preserving advertisements of lower prices or other evidence of attempts to compete on price directly against favored dealers; and collecting evidence from customers of lower-price offers by favored dealers; collecting identifying information on customers visiting the dealership, its website, or other social media sites. Such dealer vigilance might have a two-pronged effect. First, heightened dealer focus on documenting lost sales may keep manufacturers more cognizant of the potentially unfair elements of their incentive programs and "potentially disruptive events" such as the introduction of new same-line dealers or improper influence of the factory or individual factory representatives on intra-brand competition. Second, better documentation of lost sales and efforts to compete against favored same-line dealers will arm such disfavored dealers with additional evidence to bolster their chances of succeeding on RPA claims in the event litigation is warranted. ■

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5. *Brentlinger Enters. v. Volvo Cars N.A., LLC*, No. 2:14-CV-360 (S.D. Ohio, Complaint filed Apr. 18, 2014).
6. *Giuffre Motor Car Co., LLC v. KIA Motors Am., Inc.*, No. 15-CV-4514 (MKB) (E.D.N.Y., Complaint filed Mar. 12, 2015).
7. *Bedford Nissan, Inc. v. Nissan N.A.*, No. 1:16 CV 423 (N.D. Ohio, Complaint filed Feb. 23, 2016).
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10. Barbara O. Bruckman, *Volvo Seven Years Later: Williams v. Duke Energy International, Inc.*, The Antitrust Source, www.antitrustsource.com (Feb. 2013) at 2-3.
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12. *Mathew Enter.*, 2016 WL 4269998 (N.D. Cal. Aug. 2, 2016) (Order Granting in Part and Denying in Part Defendant's Motion for Summary Judgment).
13. *E.g., Volvo Trucks*, 546 U.S. at 176-77; *Hasbrouck v. Texaco, Inc.*, 842 F.2d 1034, 1040-42 (9th Cir. 1988).
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15. *Hasbrouck*, 842 F.2d at 1041-42.
16. *Mathew Enter.*, 2016 WL 4269998, at *3-*13.
17. *Id.* at *2.
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19. *Smith Wholesale*, 477 F.3d at 867.
20. *Id.* at 866. ("Where a purchaser does not take advantage of a lower price or discount which is functionally available on an equal basis, it has been held that either no price discrimination has occurred, or that the discrimination is not the proximate cause of the injury." (Internal quotation omitted)).
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22. *E.g.*, *Smith Wholesale*, 477 F.3d at 866 (requiring that both elements of even-handed treatment and practical attainability must exist before functional availability may be found).
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30. *Boise Cascade Corp. v. FTC*, 837 F.2d 1127, 1143-1144 (D.C. Cir. 1988) (cited by Chrysler in *Mathew Enter.*).
31. *Alan's of Atlanta, Inc. v. Minolta Corp.*, 903 F.2d 1414, 1427-28 (11th Cir. 1990).
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33. *Napleton's*, 2016 WL 5792402, at *6.
34. *Bedford*, 2016 WL 6395799, at *5.
35. Hudes and Medlock, *Auto Dealer Robinson-Patman Act Cases After Stevens Creek*.
36. *Id.*
37. *Id.*

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## Updated Member Contact Information


Please make sure to notify NADC Staff (info@dealercounsel.com) if your contact information has changed so that your records can be updated accordingly. We will begin to list updated contact information in *The Defender* so all members can be aware of the change.

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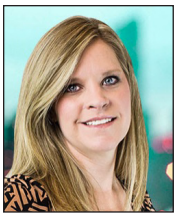
Farris


Shadid

# .Auto, .Car, and .Cars – Dot Boom or Dot Bust?

By Jami Farris, *Parker Poe Adams & Bernstein LLP* and Todd Shadid, *Klenda Austerman LLC*

A little more than a year has passed since domain names with the endings .auto, .car, and .cars became generally available. This article examines the short history and use of these automotive generic top level domains ("gTLDs") in the Internet marketplace.

On January 2012 Internet Corporation for Assigned Names and Numbers (ICANN) began accepting applications for registries for hundreds of new gTLDs. Although commentators had varying views as to whether the gTLDs would gain any traction with businesses and consumers, Google actively pursued 101, including .auto, .car, and .cars.[1] Google paid $185,000 for each gTLD it was awarded, including the automotive gTLDs.[2] In an apparent about face in spring 2015, Google bolstered pessimistic opinions when it "dumped" its rights to the automotive gTLDs, despite being actively engaged in developing the self-driving Google Car at the same time.[3]

Cars Registry Limited, a joint venture between established registrars XYZ and Uniregistry, purchased the automotive gTLDs from Google.[4] In accordance with ICANN policies, Cars Registry began selling domains with these suffixes to entities which owned matching trademarks from December 9, 2015 to January 12, 2016.[5] It then offered early bird or Landrush registration for a premium between January 12 and January 20, 2016.[6] The domains were generally available for purchase beginning on January 20, 2016, with an annual registration cost between $2,500-$3,000 per domain.[7] Although this price is certainly more than the registration fees for most domains ending in .com or .net, which start as low as $0.99, Cars Registry justifies the higher fees as insurance that purchasers are manufacturers, dealers, or automotive-related vendors who intend to use the domains legitimately, rather than cybersquatters looking to hijack the names for large returns.[8]

Despite the higher cost, Cars Registry says when registration opened, manufacturers quickly reserved names containing their trademarks and products.[9] Cars Registry also claims dealers comprise more than half of the daily registrations of domains with these endings.[10] The actual numbers, however, are much smaller than these statistics imply. At the time this article was drafted, 479 active domains and 319 parked domains have the .auto suffix [11]; 453 active domains and 325 parked domains have the .car suffix [12]; and 420 active domains and 294 parked domains have the .cars suffix.[13] According to Web Technology Surveys, these automotive gTLDs each constitute less than 0.1% of all websites. In comparison, 48.1% of all websites end in .com and 0.3% of all websites end in .xyz, which is the fastest growing gTLD with more than 6.5 million registrations and which was made available at the same time as the automotive gTLDs.[14]

Despite these low numbers, Cars Registry is optimistic about the future of these domains, encouraging dealers to get them while they are still available. In a November 2016 interview, Shayan Rostam, Global Director of Registration Operations for .Cars Domains, explained the benefits to dealers include being able to obtain shorter one and two letter domain names, domain names consisting of dealers' more common nicknames, or domain names containing geographic terms.[15] He explained these new domains upgrade the dealers' existing online presences and are mobile friendly.[16] These domains can also provide a portal site where dealer groups can list all of their locations.[17] For an additional fee of $10,000, Cars Registry will migrate data from dealers' current websites to their new .auto, .car, or .cars websites, without losing established Google rankings and with no business interruption.[18]

Cars Registry touts Hatchett Devlin Auto Group ("HDAG") as an example of its success stories, noting that HDAG's site *witchita.cars* ranks high in Google searches for cars in the Wichita, Kansas area[19] HDAG, then known as Scholfield Auto Group, purchased the *witchita.cars* domain during the presale period. In an interview for this article, Trey Cusick, General Sales Manager for HDAG, says he was intrigued by the idea of acquiring the city's name in the .cars domain. HDAG did not abandon its .com websites, but rather used *witchita.cars* as a catch all listing the inventory of all three of its locations -- Hatchett Devlin Hyundai West, Hatchett Devlin Hyundai East, and Hatchett Devlin Buick GMC. HDAG specifically advertised the site as a place to find good used vehicles in Wichita. Cusick says while the site has had decent traffic, most people still use .com when trying to search for a vehicle. Additionally, in his experience manufacturers and retailers have yet to use or acquire .cars domains, so .com remains the consumer standard. Since growth of the *witchita.cars* site has stalled, HDAG intends to start branding the .cars site to its dealership name, but will still maintain its .com sites. Cusick feels it is still too early to tell whether .cars will gain significant traction and awareness as a domain for finding cars.

This experience seems consistent with those of Hendrick Automotive Group and Koons Ford, other dealer clients highlighted by Cars Registry. Currently, the domains *hendrick.auto* and *hendrick.cars* migrate to the *hendrickauto.com* site. The *koonsford.auto* site is parked, noting it is still under construction.

Certainly, the new gTLDS provide an alternative to new dealers whose

.com names are unavailable or dealers who are unable to control their .com names. It remains to be seen whether customers will change their established patterns of searching for .com names to search for a .auto, .car, or .cars name first so as to make the investment in a new domain or domains worthwhile. ■

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13. *See www.ntldstats.com/tld/cars.*
14. *See www.ntldstats.com/tld/xyz.*
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16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*



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## President's Message

Steve Linzer
*Tiffany & Bosco, P.A.*
*NADC President*

Happy February! I trust that everyone had a happy and safe holiday season and survived the exciting Super Bowl. From my perspective, 2017 looks like it will be an interesting year for all of us involved in the automobile industry. There certainly can be no doubt that there will be significant changes coming to the overabundance of federal, state and local laws, rules, regulations and policies that we have been struggling to have our clients comply with for the past few years. As we go through this dynamic transition, I am confident that NADC will remain a valued information source for our members and that NADC will continue to provide needed support to our practices.

With that in mind, I encourage all of you to make reservations for our 13th Annual NADC Member Conference which will be held April 23-25 at the Ritz-Carlton, Laguna Niguel in Dana Point, California. Once again, our planning committee has assured that there will be timely updates and significant substantive presentations to keep you abreast of changes and "happenings" in the automobile industry. Included topics are the always informative NADA Update; Top Legal Issues for Dealers in 2017; the Politics of Employment Law in a New Administration; Key Legal and Market Considerations in Today's Buy-Sell Market; Legal Ramifications of Vendor "Solutions" and Products Pedaled to Dealers; Next Generation Vehicle Sales; Cyber Security; Legal issues of DMS Systems; Conditional Margin, Tiered Margins, Market Stratification, and Project Pinnacle; NIADA Update and more! With respect to attending the conference, I encourage you to make reservations sooner rather than later. At each of our conferences, we seem to have more and more attendees. Unfortunately, at times we have run out of space at our primary hotel location.

I am also excited to announce that at this conference we are initiating a new program– which we are currently referring to as "Dealer Counsel 101." This two hour program, which is designed to be a general introduction to the operations of a typical retail automobile dealership, will be held on the Sunday afternoon at the start of the conference (before our initial reception). There will be no additional cost to members to attend and CLE credit will be made available upon request. Responses to an informal survey, taken to assess possible attendance at this program, indicated a great deal of member interest. As an aside, I received several emails asking what precipitated this program. The answer goes back to an informative discussion I had with several new members of NADC at the recent Chicago meeting. While I marveled at

their enthusiasm and interest in our practice area, I soon realized that as lawyers new to our industry (or as lawyers supporting more skilled auto lawyers) they were thrown into situations with little or no auto industry background. I also sensed that this might limit the usefulness of some portions of our presentations on sophisticated topics. Our practice area is unusually broad and rarely can one person master it all. As a result, we had a robust discussion at our board meeting regarding the need for some introductory or overview industry background information. This program was the result. This will be a trial program so I encourage everyone to attend. Please note that registration is required.

Again, please make your conference registration soon. I look forward to seeing you in April in always sunny California (well almost always). Travel safely. ■



## NADC Welcomes New Members

### Full Members

**Anthony Bento**
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**Jeffrey Hamilton**
Sewell Automotive Companies
*Dallas, TX*

**Thomas Jardim**
Jardim, Meisner & Susser, P.C.
*Florham Park, NJ*

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APRIL 23–25

# 2017

## 13TH ANNUAL NADC MEMBER CONFERENCE

THE RITZ-CARLTON
LAGUNA NIGUEL
DANA POINT, CA

**Please visit www.dealercounsel.com to register.**

**REGISTER NOW!**

## PRELIMINARY AGENDA TOPICS INCLUDE:

**Session topics include:**

- NADA Update
- Key Legal & Market Considerations in Today's Buy-Sell Market
- Legal Issues of DMS Systems
- Cyber Security
- Legal Ramifications of Vendor "Solutions" and Products Peddled to Dealers
- Next Generation Vehicle Sales: Legal Hurdles of On-Line and Mobile App Platforms
- NIADA Update
- Top Legal Issues for Dealers in 2017
- Conditional Margin, Tiered Margins, Market Stratification, and Project Pinnacle
- The Politics of Employment Law: Understanding L&E in a New Administration

*Agenda topics subject to change.*

**Hotel Reservations**

NADC has secured a block of rooms available at the discounted rate of $325/night plus tax. Reservations can be booked online here or by calling (949)-240-2000. Reference the *2017 NADC Annual Member Conference* to receive the discounted rate. Ocean view rooms may be available at a higher rate. Group rates will be available three (3) days pre and post the event dates based upon hotel availability.

WE RECOMMEND YOU BOOK YOUR HOTEL EARLY!

**The roomblock deadline for hotel reservations is March 29, 2017.** Please make your reservation early to avoid the room block selling out.

## *NEW THIS YEAR!*

**NADC Dealer Counsel 101: Basic Introduction to a Typical Retail Automotive Dealership**

Jim Neustadt will provide the audience with a general introduction and 30,000 ft view of a typical retail automotive dealership. Jim will discuss the various departments of a dealership, how they are organized and some of the unique challenges they face. The audience will learn how the various departments operate with a focus on regulatory compliance issues. Jim offers great insight into the day-to-day operations, having managed all aspects of several different dealerships. This session will serve as an introductory level course for those attorneys who are new to practicing auto dealer law or those attorneys who want a refresher on dealership operations.

**This session is free for all members. Registration is required.**

Date: Sunday, April 23, 2017
Time: 1:00PM - 3:00PM
Location: The Ritz-Carlton Laguna Niguel
Plaza Room
1 Ritz Carlton Drive
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NADC
NATIONAL ASSOCIATION OF DEALER COUNSEL®

**Volume XIII, Number 2**
**FEBRUARY 2017**

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*Defender, The NADC Newsletter is published by the National Association of Dealer Counsel*
1800 M Street, NW, Suite 400 South, Washington, DC 20036
Phone: 202-293-1454 • Fax: 202-530-0659 • www.dealercounsel.com