

## Third Circuit Rejects Price Discrimination Claim and Confirms that Product Distributors Do Not Compete with Bundled Service Providers

On January 7, 2010, the United States Court of Appeals for the Third Circuit reversed a judgment for a plaintiff under §§ 2(a) and (f) of the Robinson-Patman Act (15 U.S.C. § 13(a), (f)) (“RPA”), in an opinion likely to affect future RPA claims against manufacturers that sell products both through traditional distributors and to entities that provide a bundle of services, including resale of the product. *See Feesers, Inc. v. Michael Foods, Inc.*, Nos. 09-2548, 09-2952, 09-2993, 2010 WL 27209 (3d Cir. Jan. 7, 2010).

The case involves a segment of the food service industry in which “manufacturers sell products to distributors, who resell those products to operators, including self-operators and food service management companies.” *Feesers*, 2010 WL 27209, at 3. Self-operators are institutions that perform dining services internally, and that purchase food directly from distributors. *Id.* Food service management companies provide dining services to institutions for a fee, essentially taking over the operation of their dining services, and typically purchase the food used to do so. *Id.* Some operators and food service management companies negotiate discounts, known as “deviated prices” from manufacturers. *Id.*

The plaintiff in the case, *Feesers, Inc.* (“Feesers”), is a regional distributor of food products. Defendant *Sodexo, Inc.* (“Sodexo”) is a food service management company. Defendant *Michael Foods, Inc.* (“Michael”) is a manufacturer of egg and potato products that supplied both *Feesers* and *Sodexo*. *Feesers* claimed, and established at trial, that *Michael* sold its products to *Sodexo* at lower prices than those it made available to *Feesers*. *Feesers* argued that it and *Sodexo* both sought business from self-operators — *Feesers* sought to sell food to self-operators and *Sodexo* sought to persuade self-operators to retain it to manage their food services and, in doing so, procure and supply the food used.

When *Sodexo* was successful in converting an operator, *Sodexo* would handle all aspects of the converted operator’s dining services, including procurement and distribution of food. Although *Sodexo* did not itself distribute food in direct competition with *Feesers*, it chose distributors for its customers, which would entail displacement of *Feesers* if *Feesers* previously had been distributing to the converted operator. *Id.* at 4. *Feesers* contended that the deviated prices available to *Sodexo*, but not to *Feesers*, amounted to unlawful price discrimination in violation of §§ 2(a) and (f) of the RPA, and injured competition between *Sodexo* and *Feesers* for resale of food products to operators.

After a bench trial, the district court entered judgment for *Feesers* and enjoined *Michael* from engaging in unlawful price discrimination. The Third Circuit reversed on the ground that *Feesers* did not compete with *Sodexo*.

In reaching that conclusion, the Court held that to determine whether *Feesers* competed with *Sodexo*, “the relevant question is whether [the] two companies ‘we[re] in economic reality acting on the same distribution level.’” *Id.* at 5 (citations omitted). That question, in turn, depends on whether “the parties are ‘each directly after the same dollar.’” *Id.* (citations omitted).

Relying on the U.S. Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 178-79 (2006), and the Third Circuit's previous decision in *Toledo Mack Sales & Services, Inc. v. Mack Trucks, Inc.*, 530 F.3d 204 (3d Cir. 2008), the Court held: "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." *Feesers*, 2010 WL 27209, at 3 (emphasis in original); *see id.* at 5. As the Court explained, "[t]his rule prevents the application of the RPA to markets where the 'allegedly favored purchasers [bear] little resemblance to [the] large independent department stores or chain operations' that the RPA was intended to target, and helps 'construe the [RPA] 'consistently with the broader policies of the antitrust laws.'"" *Id.* at 5 (citations omitted).

Applying those legal principles, the Court held that the "competition between Feesers and Sodexo for the institutions' business occurred *prior* to Michael's sales of food products to Feesers and Sodexo, 'when a customer consider[ed] switching from self-op[eration] to food service management, or vice versa.'" *Id.* at 10 (emphasis in original, citation omitted). Moreover, "[i]f an institution chose to self-operate, Sodexo would be eliminated from the competition, and if an institution chose to contract with a food service management company, Feesers would be eliminated from the competition." *Id.* Michael only sold food to the institution after it made that decision through the winning distributor or food service management company. *Id.* Accordingly "Feesers and Sodexo's competition at that early stage [for the operators' business] was irrelevant to the sales made by Michael after that competition was complete." *Id.*

The Court also noted that the price discrimination at issue bore "little resemblance to [the] large independent department stores and chain operations' the statute was originally intended to target" because there is a "myriad of differences between retail stores and food management companies and food distributors." *Id.* at 11 (citation omitted). In particular, the Court identified three elements that differentiated the food service industry from traditional retail competition. First, "in many respects, Sodexo and Feesers do not compete" because "Sodexo prepares and sells meals and handles all dining service functions for its customers," whereas "Feesers only distributes food." *Id.* Second, unlike traditional retail competition, "Sodexo operates in a bid market with other food service management companies, and competes with Feesers only in a preliminary stage where a prospective customer is deciding whether to self-operate or hire a food service management company." *Id.* Finally, unlike traditional retail competition, "Sodexo competes for customers with Feesers prior to purchasing food from Michael." *Id.*

In light of these factors, the Court concluded that "because any competition between Feesers and Sodexo occurred at the time an institution was deciding whether to self-operate or hire a food service management company, and any resulting sale of Michael's products would have to occur after that competition, Feesers cannot show that it was a competing purchaser of Sodexo." *Id.*

The Third Circuit's decision underscores the fact that the RPA is uniquely unsuited to complex business models, and is likely to influence cases in which parties seek to apply it to other industries in which entities that provide a bundle of services exist along with more traditional resellers. For example, in the healthcare industry, many employers, insurers or other third-party payors hire third parties, such as health maintenance organizations or other entities (Managed Care Organizations or "MCOs") to provide medical care to defined groups of covered individuals (*e.g.*, employees, students, *etc.*). In many instances, the MCO may also administer a prescription drug benefit, either by retaining the services of retail pharmacies or by distributing the drugs itself. *See e.g., Drug Mart Pharmacy Corp. v. American Home Prods. Corp.*, 472 F. Supp. 2d 385 (E.D.N.Y. 2007). The Third Circuit's holding in *Feesers* supports the conclusion that such entities — which, like Sodexo, provide a bundled service that may or may not include providing the

medicines themselves — do not compete with traditional resellers of prescription pharmaceuticals, because competition for the business of third-party payors, if any, occurs before pharmaceutical manufacturers sell prescription drugs to any customer, and bears little resemblance to the retail competition at which the RPA was targeted.

Similarly, in many manufacturing industries, some entities in the distribution chain purchase and install spare parts for customers, while others purchase and resell spare parts to customers that engage in self-service. In those situations as well, the Third Circuit's holding in *Feesers* supports the conclusion that, for purposes of the RPA, service suppliers do not compete with traditional distributors for resales of spare parts.

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