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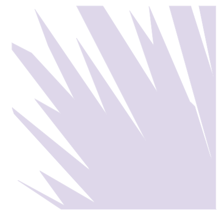
Constance K. Robinson



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FITTING A SQUARE PEG INTO A ROUND HOLE? COMPETITIVE BIDDING & PRICE DISCRIMINATION

THE CASE OF *VOLVO TRUCKS NORTH AMERICA, INC. V. REEDER-SIMCO GMC, INC.*[1]

Constance K. Robinson[2]
Kilpatrick Stockton LLP
Washington, DC

INTRODUCTION

For the first time in almost a decade, the Supreme Court will decide a Robinson-Patman Act ("RPA") case. At the same time, the Antitrust Modernization Commission ("AMC"), created by Congress, is studying a number of RPA issues, including whether the almost 70-year Act should be repealed, as well as what competitive injury means in the RPA context, an issue at the heart of the *Volvo* case. The confluence of these two events suggests that the future may hold some interesting legal and policy developments in price discrimination law.

The Supreme Court will consider a 2-1 decision by the Eighth Circuit in which a majority held that the "two purchaser" requirement was satisfied where Reeder, a Volvo dealer, purchased trucks from Volvo when bidding against *other* manufacturers' dealers, and other Volvo dealers in the same region (not involved in the Reeder transactions) purchased trucks from Volvo for their customers. The majority also found that Volvo had discriminated between its dealers where they competed generally in the same area, even though there were only two times where Reeder and another Volvo dealer bid for the same customer on a particular transaction. Thus, the case squarely raises the issues of the meaning under the RPA of "two purchasers," "competition," "competitive injury," and whether a plaintiff can recover damages for sales or profits lost to another manufacturer's dealer, rather than favored Volvo dealers.

The dissent took a more limited view, arguing that the focus must be upon the transaction and that only where "'purchaser' status is inextricably intertwined with the existence of actual competition" in the same transaction can a violation occur, something which did not happen in this case. *Reeder-Simco*, 374 F.3d at 718. It believed the majority mixed and matched elements from different transactions to cobble together a violation.

Does the case, as Volvo argues, expand the rule that in a competitive bidding situation the statutory requirement of "two purchasers" cannot be met because there is only one purchaser in such a transaction? Or does that interpretation, as Reeder argues, create a broad exemption for certain industries unintended by Congress? Is "competition" limited to a particular bidding situation, or is competition something broader, encompassing the many ways dealers seek to attract and gain business within the same geographic area? Does the case effectively transform price discrimination into a *per se* violation, as the government argues, by construing the Act to protect Reeder's ability to compete against other manufacturers' dealers, not just against the favored Volvo dealers? Is this case just a disguised dealer termination case undercutting the principle that a manufacturer can generally deal with whomever it chooses, reaffirmed last year by the Supreme Court in *Trinko*?[3] Or did the

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1 374 F.3d 701 (8th Cir. 2004).
2 The author thanks Saadeh Al-Jurf, an antitrust associate, and Kranthi Palreddy, a legal assistant, in the Washington, D.C. office of Kilpatrick Stockton LLP for their assistance with this article.
3 *Verizon Communications, Inc. v. Law Offices of Curtis V. Trinko*, LLP, 540 U.S. 398, 408 (2004).

termination flow from illegal price discrimination targeting smaller dealers? Should the Supreme Court clarify that in secondary-line price discrimination cases, the plaintiff must show, at a minimum, that the discrimination impaired its ability to compete with a favored purchaser? Or would such a clarification be an inappropriate judicial modification of the Act? *Volvo* implicates all of these questions and others and the ways in which the Supreme Court deals with them could have important ramifications in industries that rely heavily on bidding markets and auctions.

FACTUAL BACKGROUND

Reeder sells new and used trucks, including heavy-duty trucks, at its Fort Smith, Arkansas dealership. Reeder sold heavy-duty trucks for Volvo's predecessor companies, receiving the "second-to-none" award for top dealers in 1992 and exceeding its sales objectives by almost 50% in 1994. After that time, Volvo ended its joint venture with GM and assumed sole control of the business. In 1995, Reeder signed a franchise agreement with Volvo to be an authorized dealer for five years, expiring on March 31, 2000, but renewable automatically for one-year extensions if it met sales objectives established by Volvo. Volvo could only terminate Reeder for cause.

Reeder's assigned territory consisted of ten counties in Western Arkansas and two in Eastern Oklahoma, and was known as District 62 of Volvo's Southwest Region. Although it was assigned that area, it could sell anywhere in the United States; Volvo claims Reeder seldom did; Reeder claims its evidence showed many such sales.

In 1995 and 1996 Volvo placed Reeder on probationary status for failing to meet its sales objectives. When it also failed to meet those objectives in 1997 and 1998, Volvo notified Reeder that unless it was successful in 1999, the franchise would be terminated at the end of the initial period. During this time period, Volvo was operating at capacity and the truck business was booming, the favored dealers' sales and overall market sales remained strong. In stark contrast, Reeder's business was disintegrating. During the five years Reeder claimed discrimination, it submitted bids to sell 5,000 trucks. Yet its sales decreased and its profits fell from $165,499 in 1996 to $26,327 in 2000.

Volvo manufactures a broad line of heavy-duty trucks used for hauling freight, transporting chemicals or petroleum, mixing and delivering concrete, construction, and many other uses. Classified as Class 8 trucks (weighing over 33,000 pounds), these trucks include tractor-trailers and vocational trucks, such as mixing and dump trucks. The truck market is highly competitive, and Volvo's principal competitors are Freightliner, International, Peterbilt, and Kenworth. In 1997, after identifying one of its challenges as having "too many" and "under performing" dealers, "Volvo Vision" was initiated to decrease the number of dealers from 146 to 75, and to increase the size of the remaining dealers' territories. Reeder argues that Volvo increased Reeder's sales objectives and decreased its discounts in order to terminate it.

Heavy-duty trucks are typically made to order for a particular retail customer that usually purchases a fleet. Customers can choose from several basic models of trucks, which can be built to meet the customer's requirements with packages of specific kinds of engines, transmissions, and axles, and other specified components. Customers solicit bids from several dealers representing several manufacturers. In what is an industry-wide solicitation process, dealers seek discounts known as "concessions" from manufacturers like Volvo for prices below the initial wholesale price (which for Volvo is 80% of published retail prices). This allows the dealers to offer lower prices to customers, and affects dealers' profitability. Volvo decides on a case-by-case basis what concessions to make considering the circumstances of a particular bidder's situation. Whenever two of its dealers are competing for the same customer, it has a policy to offer the same concession to each of them.

During the solicitation period, the dealer works with the customer to determine its specific requirements. At the end of the process, customers pick the most attractive bid. Most trucks are manufactured after the customer has contracted to buy the trucks with the dealer. A dealer purchases the trucks from Volvo only after the customer accepts the dealer's bid, largely because it would be prohibitively expensive to maintain a full product line in inventory.

At trial, evidence was presented that dealers in the Southwest Region competed for customers who were mobile; that there was no physical or trade barrier to selling in each other's areas, and that dealers sold throughout the region. This competition between dealers included developing relationships, maintaining dealerships in attractive, accessible locations, developing reputations for service, cold calling and other marketing strategies. This competition resulted in obtaining an opportunity to quote for a bid. There was also evidence about three specific types of bidding situations. The first bidding situation involved instances where Reeder and Volvo dealers competed head-to-head for the same customer. Only two such instances were presented, although Reeder indicates that Volvo did not have a computerized system to check if concession requests from different dealers related to the same customers until 2000.

One direct competition incident involved the sale of trucks to Hiland Dairy where Volvo argues it offered both Reeder and the other Volvo dealer the same concession. In this instance, Volvo first offered the other dealer a 7.5% concession, but the customer did not accept the bid at that time. Later, Hiland Dairy asked Reeder for a quote. Reeder asked Volvo for a concession of 12%, but received one of 7.5%. Thus, both Reeder and the other Volvo dealer were given the same percentage concession. Between the time the other dealer asked for the concession and the time Reeder asked for one, however, Volvo had raised the underlying price of its trucks. Thus, the dealer net price to Reeder was actually higher than the price to the other Volvo dealer. The customer then chose the other dealer, which asked for and received an additional price concession, so that the customer could obtain the price first offered it. The additional discount was not offered to (and may not have been requested by) Reeder. There is a dispute between the parties as to whether the customer preferred the other dealer due to a prior relationship or whether the price difference affected its decision. Although direct competition with a Volvo dealer was involved, Reeder did not purchase a truck from Volvo in this transaction. Reeder claimed lost profits of $30,000 for the lost sales opportunity. In the second instance of direct competition, neither Reeder nor the other Volvo dealer won the sale, but both were ultimately offered the same 18.9% concession. Reeder argued, however, that the fact that it was initially granted a concession that was much lower than the other dealer was evidence that Volvo's policy of equal concessions in head-to-head instances was not followed.

The second type of bidding situation ("sales-to-sales comparisons") occurred on four occasions and involved sales of 102 trucks. In each of these cases, Reeder bid for sales against other manufacturers' dealers (not against competing Volvo dealers). It sought price concessions from Volvo and was granted less than it requested. At about the same time, other Volvo dealers in the Southwest Region were bidding for sales to different customers for which they received higher price concessions than Reeder obtained. Reeder won its bids (and purchased the trucks for resale), but claims it lost profits amounting to $281,965 on these sales, as compared to the other sales made by Volvo dealers to different customers but within the same region.

In the final type of bid situation ("the offers-to-sales comparisons"), on twelve occasions, Reeder failed to win bids where it was competing against non-Volvo dealers because Volvo would not grant it the price concessions it sought, so Reeder was unable to purchase any trucks. For these occasions, Reeder claimed damages for its lost sales, comparing the price concessions Volvo offered it with those given to Volvo dealers in their successful bids in different transactions for different customers in the Southwest Region.

Reeder sued Volvo alleging that it had engaged in price discrimination between it and "favored" dealers in violation of the Robinson-Patman Act, 15 U.S.C. Section 2(a), and for a violation of a state franchise statute. Reeder claimed that the price discrimination was part of a larger scheme to drive it and other small dealers out of business. The district court granted Volvo's motion for summary judgment as to allegations that it had engaged in primary-line price discrimination, and on tortious interference with contracts, and the case went to trial on allegations of secondary-line price discrimination[4] and the state franchise statute. The jury granted a verdict for Reeder on both claims and awarded it $1,358,000 for the RPA violation, which the court trebled under 15 U.S.C. Section 15(a). Volvo appealed the district court's denial of its motion for judgment as a matter of law.

4 RPA cases characterize the relationship between the seller and the party alleging harm. Primary-line refers to injury to a seller's competitor, secondary-line refers to injury to a seller's customer, and third-line refers to injury to a customer of the customer of the seller.

THE ROBINSON PATMAN ACT

The Clayton Act of 1914 prohibited price discrimination where its effect was to "substantially . . . lessen competition or tend to create a monopoly." The Depression coincided with the development of chain stores, and concerns arose about small, local retailers and their ability to survive when competing against chain stores, like the Great Atlantic and Pacific Tea Co. ("A&P"), which were injuring the smaller stores by forcing suppliers to sell to the large chains at lower prices. The Federal Trade Commission ("FTC") studied the situation and some of its findings showed discriminatory practices, although those practices tended to derive from efficiencies which benefited consumers by lowering costs.[5] By 1936, the Clayton Act standard was seen as "too restrictive" because it required a showing of general injury to competition. *FTC v. Morton Salt Co.*, 334 U.S. 37, 49 (1948) (quoting S. Rep. No. 74-1502, at 4 (1936)); *FTC v. Fred Meyer, Inc.*, 390 U.S. 341, 350 (1968) (Clayton Act was "an inadequate deterrent against outright price discrimination"). Congress decided to strengthen the Clayton Act by enacting the Robinson-Patman Act, largely in response to special interest concerns. Section 2(a) of the RPA makes it unlawful:

> [T]o 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.

"The new provision . . . was intended to justify a finding of injury to competition by a showing of 'injury to the competitor victimized by the discrimination.'" *Morton Salt*, 334 U.S. at 49 (quoting S. Rep. No. 74-1502, at 4.)

Merely having different prices is not in and of itself illegal; to establish a claim under 2(a), a plaintiff must show:

- A difference in prices;
- To two purchasers;
- In contemporaneous sales;
- In interstate commerce;
- By a single seller;
- Of commodities;
- Of like grade and quality; and
- That the discrimination may substantially injure competition.

See Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556 (1990). If these elements have been met, there is a violation unless a defendant establishes a defense. Under the Act, there are two affirmative defenses which the defendant has the burden of proving. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983). One of the statutory defenses is the "meeting competition" defense. Under the defense a company can offer different prices to different customers so long as the seller is acting "in good faith to meet the equally low price of a competitor." RPA Section 2(b). As a practical matter, this requires keeping records of offers and making a reasonable inquiry about such offers to customers. The second statutory defense is the "cost justification defense," which authorizes price differences that reflect differences in a seller's costs. RPA Section 2(a). If the price difference "make[s] only due allowance" for the seller's manufacturing, sales or delivery costs resulting from "differing methods or

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5 *FTC, Chain Stores: Final Report on the Chain Store Investigation* (1934) (S. Doc. No. 4) 74th Cong., 1st Sess. (1935).

quantities" of production or delivery," it is lawful. As a practical matter, this defense requires highly precise financial support and is very difficult to establish so that defendants are often unsuccessful at meeting its requirements.[6]

In addition to these two statutory defenses, the "functionally available" defense has been developed under case law. If a lower price or discount is functionally available to all purchasers, there is no RPA liability.[7] Liability is also somewhat limited by the requirement that the plaintiff suffer "competitive injury," although this requirement is less difficult to satisfy than the Sherman Act requirement of antitrust injury requiring a showing that competition (not a competitor) has been harmed. Rather, under 2(a) of the RPA, plaintiffs must show a "reasonable possibility" or "probability" of substantial competitive injury, which can be made by showing competition between favored and disfavored purchasers. In addition, plaintiffs must show actual injury - that they lost customers or profits because the favored dealer used the discount to lower its resale prices or otherwise solicit business.[8]

The statute has been quite controversial and creates a tension between two policy goals - protecting small business and protecting consumer welfare.[9] Those who support it believe the Act is necessary to ensure equal competitive opportunities to small firms, to control predatory pricing practices, and to prevent encroaching monopoly in distribution, which in many situations benefit consumers. By preventing non-cost based discrimination, consumers receive enhanced choices, and lower prices in the long run. Even those who support the RPA believe it creates significant compliance costs (legal costs, systems costs to track competing offers and training costs), and tends to reduce pricing flexibility and increase price rigidity to the detriment of competitive vigor.[10]

The Act has received widespread opposition from numerous and varied sources, including the Department of Justice ("DOJ"), which in 1977 published a report on the Act with recommendations to reform or repeal it.[11] Opponents believe the Act conflicts with basic competition policy to preserve consumer welfare, prevents manufacturers from achieving efficiencies in distribution by requiring the protection of smaller, less efficient dealers, and fails to account for marketplace realities. It may encourage oligopoly behavior and facilitate collusion by prohibiting the type of single-customer price discounting that can undercut cartels and oligopolies. With its focus on intrabrand competition, rather than interbrand competition, it may also have the perverse effect of motivating a manufacturer not to sell through independent dealers, but rather to use manufacturer-owned outlets. Another perverse effect is the frequency with which relatively small sellers have become the targets of the statute.[12] Illustrative of the scorn with which some regard the Act, Judge Bork, concluded:

> The attempt to counter the supposed threat to competition posed by price discrimination constitutes what is surely antitrust's least glorious hour. The instrument fashioned for the task was the Robinson-Patman Act, the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory. One often hears of the baseball player who, although a weak hitter, was also a poor fielder. Robinson-Patman is a little like that. Although it does not prevent much price discrimination, at least it has stifled a great deal of competition.

Robert H. Bork, The Antitrust Paradox at 382 (1993). Professor William F. Baxter observed during his tenure as Assistant Attorney General of the Antitrust Division that "the purpose of the statute is to put lead weights in the saddle bags of the fastest riders." Despite heated and long-continuing criticism, proposals for legislative change of the statute have failed to date.

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6 *See, generally,* Antitrust Law Developments, Vol. 1 (2002 ed.) at 493-4.
7 *See* Antitrust Law Developments, Vol. 1 (2002 ed.) at 473-4.
8 *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) (rejecting "automatic damages" based simply on the size of differential).
9 *See, generally,* American Bar Association Monograph 4; The Robinson-Patman Act: Policy and Law (1980).
10 *See, e.g.,* Testimony of Harvey I. Saferstein before the Antitrust Modernization Commission, July 28, 2005.
11 U.S. Dep't of Justice Report on the Robinson-Patman Act (1977). *See also* the "Neal Report," President Johnson's White House Task Report on Antitrust Policy submitted July 5, 1968, released May 21, 1969, and The Stigler Report, President Nixon's Task Force Report on Productivity and Competition, submitted March 1969.
12 *See*, Scherer, Industrial Market Structure and Economic Performance (1980 ed.) at 581.

The federal agencies rarely enforce the RPA. The DOJ has not enforced it criminally since the 1960s and has ceded all civil enforcement to the Federal Trade Commission ("FTC").[13] For the first three decades of the Act's existence, the FTC devoted significant resources to its enforcement. From 1972 to 1974, only eight complaints issued. After that, the FTC brought between one to six cases a year.[14] Between 1980 and 2000, the FTC instituted one case in 1988 which it dismissed in 1996 and in 2000 it entered into a consent decree in another. A number of FTC officials have indicated that enforcement will be limited to cases where injury to competition occurred.[15] There are no pending RPA cases. Thus, about once every ten years, the FTC initiates an RPA enforcement action.

While there is very little agency enforcement, there has been significant private litigation, and treble damages are available to a successful plaintiff. Juries often sympathize with the "little guy" fighting against a large company. In a secondary-line case, proof of anticompetitive price discrimination is easier than in a typical antitrust case under other statutes. Moreover, antitrust practitioners devote a great amount of time to counseling their clients on the statute, and clients incur significant costs developing systems to enable them to document they can meet one of the Act's defenses.

THE EIGHTH CIRCUIT'S OPINION

According to the majority in *Volvo*, to prevail in a RPA claim, Reeder had to demonstrate: 1) that there were two purchasers; 2) that there was discrimination in the purchase price between Reeder and another Volvo dealer; 3) that this price discrimination substantially affected competition between them; 4) that the trucks sold by Reeder and the other dealers were of like grade and quality; and 5) that the trucks were sold in interstate commerce.

The court acknowledged that the language of the statute prohibits price discrimination "between different purchasers," requiring Reeder to show there were two or more actual sales at two different prices to two different Volvo dealers.[16] The court found the "two purchaser" requirement was met because with respect to the four occasions for 102 trucks when Reeder bid against non-Volvo dealers and won the sale, it made the requisite "purchase" at a discriminatory price (the "sales-to-sales comparisons"). In those cases where it was an unsuccessful bidder, the court found Reeder could not satisfy this element, affirming the long-held view that mere *offers* to sell do not violate the Act, and that in a competitive bidding situation, because only one of the two competitive dealers makes a purchase, the RPA is not violated.[17] Thus, to find Reeder met the requirement, the court considered the bidding situations collectively rather than on a transaction-by-transaction basis.

To show that Reeder was "in actual competition with" the favored dealers, the court held that because Reeder and the favored dealers competed at the same functional level and within the same geographic market, the jury could infer Reeder competed with the favored dealers.

Although the trucks sold to Reeder had different major components (like engines and gear ratios) from those sold to other dealers, the court concluded that they were of the same model and year with comparable engines and largely similar components, so were of "like grade and quality" which does not require identical grade and quality. And as most of the sales were within one to four months of each other, they were reasonably "contemporaneous" in time. The court found that Reeder's declining sales from the lost profits from the Hiland Dairy bid, sales it lost from customers who chose not to buy Volvo trucks but bought other manufacturers' trucks, and its losses where Reeder competed against another Volvo dealer but did not win the bid were recoverable as damages under the RPA.

Focusing on competitive injury, the court held that Reeder had to show a "reasonable possibility" that the effect of the discrimination may be "to substantially lessen competition . . . or to

13 U.S. Department of Justice Antitrust Division Manual at VII-I.
14 ABA Monograph 4 at 3 and 41.
15 *See, e.g.*, Remarks by Deborah Platt Majoras, Chairman, FTC, at the ABA Administrative Conference, October 21, 2004.
16 The two-purchase rule was first discussed by the Supreme Court in 1947 holding that "no single sale can violate the Robinson-Patman Act…." *Bruce's Juices, Inc. v. American Can Co.*, 330 US 743, 775 (1947).
17 *See Terry's Floor Fashions, Inc. v. Burlington Indus., Inc.*, 763 F.2d 604 (4th Cir. 1985); *Shaw's Inc. v. Wilson-Jones Co.*, 105 F.2d 331 (3d Cir. 1939).

injure, destroy or prevent competition." The court stated that Reeder could demonstrate it in two ways: 1) by showing direct evidence that it lost sales and profits as a result of the discrimination, and 2) by inference under the *Morton Salt*[18] standard, showing a favored competitor received a substantial price reduction over a period of time. The court found that the evidence that Volvo's desire to reduce the number of dealers, Reeder's loss of the Hiland Dairy bid, Reeder's potential profit had it received the concessions other dealers received, and Reeder's declining sales were sufficient for the jury to conclude that the price discrimination injured Reeder. Rejecting Volvo's argument that Reeder did not prove that the lower concessions granted to favored dealers drew sales away from Reeder, the court also concluded that the *Morton Salt* inference was justified as the discrimination lasted several years, and, due to narrow dealer margins, small differences in price concessions had a substantial impact on competition.

With respect to actual injury, the court rejected Volvo's arguments that the Hiland example of direct competition and the four sales-to-sales comparisons could not be considered. Instead, the court found the jury could consider all the evidence that Reeder presented of lost sales because the discrimination resulted from Volvo's plan to reduce its number of dealers, stating that "this is precisely the type of injury the antitrust laws were meant to prevent." *Reeder-Simco*, 374 F.3d at 713. The court also found that there was sufficient evidence to infer causation between the pricing practices and the damages-that the jury could infer that the price advantages of the favored dealers enabled them to undercut Reeder's prices.

The dissenting judge found that Reeder failed to prove any injury to competition between Reeder and other Volvo dealers. In particular, Judge Hansen stated that the RPA does not apply "where special-order products are sold to individual, pre-identified customers only after competitive bidding" because such a situation does not involve the requisite "two purchases." *Reeder-Simco*, 374 F.3d at 718. The dissent also found there was no actual competition as there was no competition for any particular end user, and absent such competition there could be no antitrust injury.

SUPREME COURT ARGUMENTS

Volvo has raised two issues for the Supreme Court: 1) "[w]hether there is a violation of the Act - permitting recovery of damages - when a disfavored purchaser does lose sales or profits to a competitor that does *not* purchase from the defendant, but does not lose sales or profits to any purchaser that 'knowingly receives the benefit of' the defendant's price discrimination," and 2) "[w]hether an unaccepted offer that does not lead to a purchase - so that there is not 'discriminat[ion] * * * between different purchasers' as the statutory language contemplates - may be the basis for liability under the Act."[19]

Relying on statutory construction, Volvo urges the Court to reverse the decision at least on the narrow basis that the RPA is not violated unless the plaintiff shows a diminution in its ability to compete with a person who "receive[d] the benefit of [price] discrimination," a clause in the statute Volvo believes the Eighth Circuit ignored. Unlike *Morton Salt*, which involved competing purchasers engaged in head-to-head competition with each other, Volvo argues that here there was no significant evidence of head-to-head competition between the purchasers. Volvo also argues that injury to competition with favored purchasers cannot be inferred from its strategy to reduce the number of its dealers, due to the fact the RPA deals with specific sales transactions, and the general rule that a manufacturer can deal with whom it chooses. According to Volvo, Reeder must show actual injury and a causal connection between the discrimination and the competitive effect, which it has not done.

In addition, Volvo asks the Court to take the opportunity to recognize that in secondary-line cases, the RPA protects competition not competitors, an argument that Section 2(a) should generally be construed to prevent only discrimination favoring the very powerful buyer or dealer who is able to force a manufacturer to behave contrary to its independent best interest.

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18 *FTC v. Morton Salt*, 334 U.S. 37 (1948). Under the *Morton Salt* test, the existence of a substantial price difference over a substantial time period in an otherwise competitive market creates a rebuttable inference of injury to competition.

19 Volvo's position is supported by *amicus curiae* briefs from the American Petroleum Institute, the Washington Legal Foundation, the Truck Manufacturers Association, et al., and the United States. The manufacturer representatives argue that upholding the opinion will blur the lines of legality and illegality, creating uncertainty among sellers as to the prices they may charge.

Reeder has framed the issues as: (1) "[w]hether under the Robinson-Patman Act a jury may infer the reasonable possibility of competitive injury from massive price discrimination in favor of competitors in the same market on more than half of the disfavored purchaser's purchases for resale in the period, and in amounts far exceeding such purchaser's total gross annual profits," and (2) "[w]hether there was sufficient evidence to establish antitrust injury under section 4 of the Clayton Act."[20]

Reeder's position is that in order to eliminate smaller dealers, Volvo engaged in extraordinary price discrimination amounting to more than $280,000 on the purchase for resale of 102 trucks between 1992 to 1998 - affecting 55% of Reeder's total purchases of heavy truck sales, and that such discrimination created a "reasonable possibility of injury." Moreover, Volvo failed to show it met one of the affirmative defenses of the statute.

Relying on numerous Court precedents, Reeder urges the Court to affirm the decision because "competition" under the RPA is defined by whether rivals serve the same market, not on the "novel" transactional basis proposed by Volvo. Drawing from cases defining relevant markets and competition within those markets, Reeder argues that the favored dealers competed against it to serve customers in the same relevant market, resulting in a "probable future effect" of injury to "individualized" competition, which the Act was intended to cover. Reeder asserts it would be wrong to create a blanket exemption from the RPA based upon the timing of wholesale purchases because industries ought not be able to avoid the RPA by changing their inventory practices.

Reeder submits that Volvo's argument that the jury was not entitled to draw the *Morton Salt* inference absent a finding of market power is waived as it was not raised in the petition for *certiorari* and as Volvo failed to object to the relevant jury instruction. Reeder also argues that Volvo's position that the last clause of 2(a)[21] be interpreted to require buyer power (or injury to intrabrand competition as a whole, rather than individualized competition with a rival) would overrule numerous Court precedents, and would amount to judicial modification of the statute. Similarly, Reeder urges the Court to reject arguments that competitive injury under the RPA be interpreted consistently with other antitrust laws when the statute was intended to address additional harm. Finally, Reeder argues that the jury was entitled to infer actual injury from the evidence of lost profits and sales as both pricing advantages and profit impairment from price discrimination may result in harming competition between Reeder and favored Volvo dealers. Thus showing limited price competition with Volvo dealers is irrelevant where significant profit impairment was shown. The jury could also consider injury where Volvo did not purchase trucks, so long as it was a "purchaser" of Volvo trucks for other bids.

DISCUSSION

A. The Volvo Case

Historically, when the Supreme Court hears an RPA case, it has narrowly interpreted the Act.[22] Then, too, statistics show that when the Supreme Court decides to hear a case, more often than not it reverses.[23] If past is prologue, we can expect not only a reversal, but also some trimming back of the RPA. Common wisdom may not apply here, however, as one of the justices voting for *certiorari* is no longer on the court, there is a new Chief Justice, and there may be a second new justice before the case is decided. Arguments are scheduled for October 31, 2005.

Volvo argues for the narrowest reading of "two purchases" requirement, which would require linking both purchases to a single transaction. Reeder takes a broader view - that the meaning

20 Reeder's position is supported by *amicus curiae* briefs from the National Automobile Dealer's Association and the North American Equipment Dealer's Association, et al. The dealers argue that the Court should affirm the decision as the RPA is meant to be read broadly and is an important supplement to franchise laws.

21 The end of the statute reads: "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."

22 *See, e.g., Brook Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993) holding that primary line discrimination requires proof of below-cost pricing and recoupment for RPA liability, and that primary-line cases must promote consumer welfare.

23 *U.S. Law Week*, No. 4 at 3078 (for 2004 term, 52 decisions of lower court reversed or vacated, 21 decisions affirmed). Stern, et al., Supreme Court Practice (2002) at 60 fn. 128 (1987 to 1998 reversal rate of 50-68%).

must encompass two purchases between dealers who compete functionally or geographically even if they do not compete for a specific customer's bid. On its face, the statute makes it illegal "to discriminate in price between different purchasers" but does not expressly limit its application to any single transaction nor does it define what is meant by competition. If the Court decides the correct interpretation is whether there were two purchases by two purchasers in the same geographic market, Reeder may prevail. Carried to its logical extreme, that interpretation might mean that in a nationwide franchise operation, all franchisees must be charged the same price, creating essentially a per se rule for differences in prices in a system - even if those differences do not harm competition between dealers. But if "two purchasers" means two purchasers in competition with each other on a particular bid to the same customer, Volvo may prevail.

What may turn out to be the determinative issue is the definition of "competitive injury." Volvo takes a narrow view, arguing that it is the competition for a particular bid that is covered by the statute. While the words of the statute do not contain a transactional limitation, the statute does require a direct link between the discrimination and competition between the favored and disfavored purchaser: "[w]here the effect of discrimination may be to injure . . . competition with any person who receives the benefit of such discrimination." Thus, Volvo argues the effect on competition must be linked to the benefit received by the favored buyer. Reeder takes a broader view of competition that includes the competition between dealers to grow and be profitable so that they can continue in operation. Reeder's more generalized competition argument appears to require the Court to find that indirect evidence of generalized competition is sufficient proof of injury, an argument which may not be successful given the Court's hostility to broad interpretations of the RPA. Had Reeder shown that it competed head-to-head with favored dealers in some substantial way, it may have satisfied the statutory requirement of showing a benefit to the other dealers that harmed competition, given the intent of the statute to protect smaller dealers. But the record of actual competition between favored dealers and Reeder may be too thin to persuade the Court that there was significant actual competition between them. Additionally, Volvo's argument that the Court should define competitive injury as it is defined in the Sherman Act will depend on whether the Court concludes that the RPA was enacted to address conduct that Congress believed the Sherman Act did not address. Given the Court's trend towards judicial restraint, if it views this proposed change as amending the RPA, it may decline this opportunity to harmonize the RPA with other antitrust laws.

On the issue of damages, Volvo's view is that the RPA only permits recovery where the disfavored purchaser loses sales or profits to a favored purchaser in head-to-head competition for a specific transaction. Reeder argues that if the discrimination caused it to lose sales and profits so that it could not compete against favored Volvo dealers, it is entitled to recover damages from all of the discrimination. Which position prevails will likely depend on how the Court interprets the standard for competitive injury. If it finds that the discrimination causes competitive injury, it will likely find that damages are recoverable for that injury. Without the necessary causation, damages will not be an issue.

B. Related AMC Policy Debate

Several of the questions being explored by the AMC relate to the standard for demonstrating injury. The AMC has asked the identical question as will be decided in *Volvo* - should plaintiffs be required to prove "antitrust injury" - proof of injury reflecting the anticompetitive effect of the challenged conduct? As in the *Volvo* case, the debate has focused upon whether injury that the disfavored purchaser suffered in its ability to compete with the favored purchaser would satisfy this requirement or whether the Sherman Act standard of injury to competition should be adopted, requiring a full-blown competitive effects analysis.

Another question being debated is whether the *Morton Salt* inference of harm should be modified to require plaintiffs to prove harm as in a Sherman Act case. Under *Morton Salt*, which is favorable to plaintiffs, injury to even a single competitor may constitute "competitive injury." If a plaintiff paid a significantly higher price than a competitor for the same product over time, it can usually satisfy the requirement. Thus, those who seek changing the presumption argue that *Morton Salt* is in conflict with the modern tenant of the antitrust laws - that they protect competition, not

competitors, and should be limited. Defenders of the presumption argue that such a showing would necessitate a full-blown analysis, involving economists and economic testimony, which might mean that secondary-line cases will become much more difficult.

The AMC also asks whether a buyer power screen should be adopted for secondary-line cases. This would require that plaintiffs in secondary-line cases prove either that the discriminating seller or that the favored buyer had market power (but not monopoly or monopsony power). Under circumstances where neither the discriminating seller nor the favored buyer have market power, the challenged discrimination is more likely to be cost justified because competition would prevent non-cost based discrimination so a small buyer is less likely to be injured by a seller's discrimination, since alternative, nondiscriminating suppliers are more likely to be available. This is essentially the test advocated by Volvo. If adopted, a buyer power screen may require a full-blown Sherman Act competitive effects showing, limiting secondary-line cases.

The adoption of a Sherman Act "antitrust injury" standard may not be consistent with the congressional intent of a law designed to cover different conduct than the Sherman Act. As this issue has been debated for scores of years, it is doubtful that this issue will be resolved legislatively. Adopting a buyer power screen may require legislation, but appears consistent with some of the legislative history, but may not be consistent with the statute itself. Modifying the *Morton Salt* inference, which was judicially created, could be accomplished without modifying the statute and could help limit cases where proof of injury is marginal.

C. Other AMC Issues

From repealing to bolstering the RPA, the issues under consideration by the AMC run the gamut. Those who argue for repeal believe Sections 1 and 2 of the Sherman Act are sufficient to address any harm from truly anticompetitive discrimination. Given the congressional interest in small businesses, repeal seems unlikely. But modification may occur. The criminal provision is one which commentators generally agree should be eliminated.[24] As there has been no criminal enforcement for decades and as the Act has some anticompetitive consequences, the AMC may recommend that it be eliminated, although some commentators suggest that seeking modification is risky, as it could result in opening a Pandora's box.

If the RPA is repealed, state enforcement, which has not been used often, may increase. Some states have statutes comparable to the RPA today, others do not permit claims for secondary-line injury. Repeal could, however, cause states to adopt more protectionist statutes or to interpret existing statutes in a more expensive way. Some argue this possible reaction warrants retaining the RPA to avoid a patchwork of possibly more restrictive and confusing laws.

One suggestion has been made to broaden the statute, which is limited to "commodities," to also include "services." Proponents argue that as markets move from widgets to services, which represent significant costs to businesses, the means used to discriminate in the future may become services. Opponents argue that the Act is not a model of clarity and by adding "services," line drawing would become even harder. For example, how does one determine whether legal services are "of like kind and quality?"

Another recommendation is that defendants be able to establish the cost justification defense if they can prove that the discriminatory price was reasonably related to the cost savings realized in dealing with the favored buyer. Such a test would make it easier for a defendant to meet the defense by precluding courts from denying the defense where there were minor defects in the defendant's cost evidence.

The RPA not only applies to price discrimination, but also to discrimination in promotional allowance and services (Sections 2(d) and 2(e)), which have a stricter standard since a

24 Section 3 of the RPA imposes criminal penalties for (1) territorial price discrimination "for the purpose of destroying competition, or eliminating competition;" (2) charging "unreasonably low prices for the purpose of destroying competition or eliminating a competitor;" and (3) granting discounts, rebates, or allowances that are not made available to a recipient's competitors in the sale "of goods of like grade, quality, and quantity."

disfavored buyer need not show injury to competition between the favored and disfavored buyers and the seller cannot offer a cost justification as a defense. Another reform would require a plaintiff challenging discrimination in promotional allowances or services to establish competitive injury.

CONCLUSION

Should the Supreme Court affirm Reeder, it will expand the reach of the RPA, affecting all industries in which manufacturers adjust the wholesale prices to accommodate competitive bidding by their purchasers, and thus, impacting a manufacturer's ability to compete with other manufacturers which may harm interbrand competition. Indeed, the United States argues that affirmation would "threaten to convert [the RPA] into a guarantee of equitable treatment to franchises, rather than a targeted protection against price discrimination between purchasers in actual competition and [would] extend [] the Act in a manner that would compel a level of price rigidity contrary to the goals of the antitrust laws." *U.S. Amicus Br.* at 24. Price rigidity might result if manufacturers level discounts across a territory or eliminate them to avoid an RPA violation. Whether in the face of interbrand competition they could actually eliminate discounts is doubtful, but more price rigidity would not be surprising. Additionally, a manufacturer might also change its relationships with dealers, including eliminating contracts with automatic renewals, facing terminations directly, or changing distribution systems to eliminate independent dealers in favor of manufacturer-owned dealers. Dealers will have increased protections for state and federal franchise laws.

Should the Supreme Court reverse Reeder, what had been thought to be the general rule - that competitive bidding situations do not result in price discrimination because they do not satisfy the elements of "two purchasers," "competition," and "competitive injury" - will be reinstated. But a reversal may do more. It may result in an increasing emphasis on the importance of interbrand competition and a further decrease to the significance of intrabrand competition, bringing the RPA closer to other antitrust laws. It may also mean that dealers have one less course of action against manufacturers in dealer termination cases, giving manufacturers more leverage. If the court narrows the *Morton Salt* inference, secondary-line cases will be harder for plaintiffs to win. If Volvo's competitive injury standard is adopted, some will argue the statute will have been effectively repealed by judicial interpretation, but the RPA would be brought into harmony with the other antitrust laws. As noted antitrust expert Herbert Hovenkamp stated in his testimony before the AMC:[25]

> The Supreme Court will very likely return to [the issue of "antitrust injury"] next term in the *Reeder-Simco/Volvo* case. [Footnote omitted.] The proper antitrust injury showing that should be required in all antitrust cases, including Robinson-Patman Act cases, is *competitive* injury, or a showing that the conduct tends to lessen competition by reducing market output and increasing marketwide prices.

No matter which way the decision turns out, it is certain to be interesting in terms of how the Court will regard this set of facts, how it will read the statute and the intent of Congress in enacting it, and how it will parse its precedents. Hopefully, there will be more clarity as to how to proceed under the RPA. There may even be some insights into how antitrust cases might fare in the Supreme Court in the near future.

EPILOGUE: THE SUPREME COURT REVERSES

Following historic precedent by narrowly interpreting the Robinson-Patman Act (RPA) on January 10, 2006, the Supreme Court in a 7-2 opinion, reversed the Eighth Circuit's ruling in the *Volvo* case. *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905, slip op., 540 U.S. ___ (Jan. 10, 2006). The majority, in an opinion written by Justice Ruth Bader Ginsburg, held that a manufacturer who offers its dealers different wholesale prices does not violate the RPA's prohibition against price discrimination, absent some showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer. Although the Court's

25 Testimony of Herbert Hovenkamp before the AMC, July 2, 2005 at 3.

reversal curtails the Eighth Circuit's expansion of RPA, it leaves open the door that disappointed bidders may be able to bring an RPA action.

In reversing the Eighth Circuit, the Supreme Court noted that in none of the comparisons relied upon by Reeder did it "compete with beneficiaries of the alleged discrimination *for the same customer*." *Volvo*, slip op. at 11. Although intimated by earlier decisions, the Court now clearly articulates in *Volvo* that the "hallmark of the requisite competitive injury" for RPA claims "is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." Reeder's comparisons amounted to nothing more than "a mix-and-match" of occasions when it competed with non-Volvo dealers with occasions when other Volvo dealers competed with non-Volvo dealers. These comparisons failed to show a diversion of sales from Reeder to dealers favored by Volvo.

Justice Steven's dissent, joined by Justice Thomas, described the majority's analysis as "adopting a novel, transaction-specific concept of competition." *Volvo* (Steven, J., dissenting, slip. op. at 1). In the dissent's view, even if Reeder did not lose particular sales directly to a favored Volvo dealer, it still suffered a competitive injury by having to resell Volvo trucks at a lower profit margin than favored Volvo dealers who functionally competed with Reeder in the same geographic market.

The majority addressed the set of head-to-head transactions where Reeder competed directly with another Volvo dealer. Although Reeder did not technically make a "purchase" in those transactions, as is required under the RPA, the Court declined to decide the question of whether an unsuccessful bidder, who does not make a purchase for resale, could have "purchaser" status under the RPA. Rather, the Court found that if Volvo discriminated between Reeder and the favored Volvo dealer, the result of the discrimination was so *de minimis* that it did not substantially affect competition.

By reversing the Eighth Circuit's opinion, the Court effectively reinstates what has been thought to be the general rule in RPA cases: that competitive bidding situations do not result in price discrimination because they do not satisfy the elements of "two purchasers," "competition," and "competitive injury." The opinion thus protects a manufacturer's ability to compete with other manufacturers and promotes interbrand competition, bringing the RPA closer to the other antitrust laws.

Looking beyond *Volvo's* specific acts, the Court signaled that in future cases it will resist interpretations of the RPA "geared more to the protection of existing *competitors* than to the stimulation of *competition*." *Volvo*, slip op. at 14. The RPA should be construed consistently with the broader policies of antitrust law, which are primarily concerned with interbrand competition. Those policies are unlikely to be threatened by manufacturers providing price discounts to favored purchasers who lack market power.

Predicting the application of this rule, however, is made difficult by the Court leaving open the possibility that a disappointed bidder may be able to show "purchaser" status for RPA purposes. In particular, after *Volvo*, an unsuccessful bidder, who does not make a purchase from the defendant, but who can show that price discrimination between it and a favored dealer had a substantial effect on competition may still have an RPA claim.