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BRIEFING

Supreme Court clarifies secondary line price discrimination

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.

Summary

This briefing examines the recent U.S. Supreme Court ruling in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, which considered potential liability under the Robinson-Patman Act in a case where a manufacturer offers different wholesale prices to dealers in competitive bid situations.

On January 10, 2006, the U.S. Supreme Court reversed the lower court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, ruling that the Robinson-Patman Act (RPA) was not violated. The 7-2-majority decision found that the plaintiff had not proven competitive harm as required by the RPA in a secondary line price discrimination action (i.e. discrimination by a manufacturer that harms competition at the buyer level). The Court established that liability only attaches in instances where the manufacturer discriminated between resellers competing to sell the product to the same retail customer.

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.

Volvo Trucks North America, Inc. (Volvo) manufactures heavy-duty trucks, which are sold to end-use customers through a network of dealers across the U.S. Since 1995, Reeder-Simco GMC, Inc. (Reeder) has been an authorized Volvo dealer in Fort Smith, Arkansas. Typically, customers looking to purchase heavy-duty trucks solicit bids from multiple dealers representing one or more manufacturers based on a range of factors, including existing relationships, reputation, and geography. Once a Volvo dealer receives a bid request and customer specifications, the dealer seeks "concessions" off the wholesale price from Volvo. The dealer then submits its bid to the customer and only upon winning the bid will it purchase the truck(s) from Volvo at the discounted price. While Volvo dealers tend to operate regionally, they do not have exclusive territories. It is unusual, but not unheard of, for a Volvo dealer to bid against another Volvo dealer for a particular end-use customer.

In 1997, Volvo announced plans to reduce the number of Volvo dealers nationwide. Reeder then discovered that other Volvo dealers had been given greater price concessions than those it typically received, and concluded that it was among the dealers that Volvo was aiming to eliminate. Reeder sued under Section 2 of the Clayton Act, as amended by the RPA, alleging that Volvo's practice of granting favorable price concessions to other dealers discriminated against Reeder and harmed competition.

The RPA makes it unlawful for sellers 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)). According to precedent, an inference of competitive injury arises from evidence of significant price discrimination over a substantial period (*FTC v. Morton Salt Co.,* 334 U.S. 37 (1948)).

Reeder argued that its history of purchasing Volvo trucks made it a qualified Volvo "purchaser" and its operation in the same relevant retail market and occasional direct competition with other Volvo dealers constituted the

requisite competition. Reeder alleged that Volvo engaged in harmful price discrimination by failing to grant it the same concessions that it gave to other dealers over time.

Reeder presented evidence that Volvo offered it less favorable price discounts during its bidding against non-Volvo purchasers as compared with discounts given to successful Volvo dealers on sales won through bids on which Reeder did not compete ("offer-to-purchase comparisons"). It also told of occasions where it won bids but did not receive discounts as great as those given to other successful Volvo dealers on unrelated bids on which it did not compete ("purchase-to-purchase comparisons"). In addition, Reeder recounted two instances where it bid against another Volvo dealer for a sale ("head-to-head comparisons"): once where Volvo matched concessions between the dealers, and the other where Volvo offered a greater concession to the dealer that won the bid after that dealer was selected by the customer.

Based on the evidence, the jury found a reasonable probability that Volvo's discriminatory pricing injured Reeder and may have harmed competition. The district court entered judgment for Reeder for over $3.9 million (trebling the RPA damage claim of approximately $1.3 million).

On appeal, a divided panel of the U.S. Court of Appeals for the Eighth Circuit affirmed the lower court's decision, holding that the RPA's "purchaser" requirement was satisfied even though most of Reeder's damage was derived from lost bids where Reeder had not in fact purchased trucks from Volvo. Volvo argued that the RPA only prohibits discrimination between "purchasers", and solely where discrimination will divert sales or profits from disfavored to favored purchasers. It maintained the position that its concessions were merely offers, not sales. The Eighth Circuit held that Reeder's success on some bids (where it purchased Volvo trucks) sufficed to give it "purchaser" status, even though much of the alleged harm arose from occasions when it lost a bid and therefore did not make a purchase. The Eighth Circuit also ruled that there was sufficient evidence to support a finding that there was actual competition between Reeder and the "favored" Volvo dealers.

The Supreme Court granted certiorari to resolve the question of whether, under the RPA, a manufacturer may be held liable for secondary line price discrimination absent a showing that the manufacturer discriminated between dealers competing to resell to the same retail customer.

Supreme Court decision

Examining the RPA for the first time in over a decade, Justice Ginsburg wrote for the majority. The Court reiterated the precedent of *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, explaining that the RPA "does not 'ban all price differences charged to different purchasers of commodities of like grade and quality,'… rather, the Act proscribes 'price discrimination only to the extent that it threatens to injure competition.'"

While Reeder met the first two requirements for proof of an RPA violation (the sales were made in "interstate commerce" and the goods were of "like grade and quality"), Reeder failed the third and fourth requirements. Because Reeder could not show that Volvo discriminated between Reeder and other Volvo dealers in any competing sale to the same retail customer, the Court found that Volvo was not liable under the RPA.

The Court did not explicitly address the question of whether the RPA reaches markets characterized by competitive bidding and special order sales rather than sales from inventory. In stating that it did not need to decide that question, the Court relied on actual competition and head-to-head transactions between Reeder and other Volvo dealers and found that there were no transactions where Reeder was disfavored compared to another dealer competing for the same customer sale.

Faced with Reeder's evidence, including some instances in which it purchased trucks at a discount and other cases in which it did not purchase at all, along with information on bid scenarios in which Reeder was not a participant, the Court found that "in none of the discrete instances on which Reeder relied did Reeder compete with the beneficiaries of the alleged discrimination for the same customer." The Court therefore "decline[d] to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality." The Court also addressed the two occasions of head-to-head competition between Reeder and other Volvo dealers on specific bids and determined that Reeder lacked sufficient

evidence to show that competition was substantially affected by Volvo's treatment of Reeder in comparison to "favored" dealers competing for the same customer sale.

In holding that Reeder did not establish competitive harm, the Court emphasized that the RPA should be interpreted in line with broader antitrust policy. The RPA "signals no large departure" from existing antitrust theory, such as protecting competition as opposed to competitors, and the importance of inter-brand competition in antitrust law.

An unlikely duo dissented: Justices Stevens and Thomas advocated looking at a "single, interstate retail market," where the Court should defer to the jury's finding of ample evidence that Volvo charged higher prices to Reeder, as a disfavored dealer, and therefore impaired Reeder's ability to compete with the favored dealers. The dissent, which called for adherence to the text and legislative intent of the RPA, does not believe that a transaction-specific inquiry makes sense, arguing instead that competition among dealers is best seen as occurring over time through a series of bids rather than discrete events.

Implications for clients

While the Court did not go so far as to suggest that the RPA does not apply in markets characterized by competitive bidding and special order sales, a "disfavored" dealer in a competitive bidding industry will need to show both that they are a "purchaser" and that they are engaged in "head-to-head" competition with the favored dealer(s). Although the Court noted Volvo's argument that the RPA does not "reach markets characterized by competitive bidding and special order sales", it chose not to decide the question of whether, for RPA purposes, a manufacturer's price offers to two competing dealers could constitute separate "purchases." Instead, the Court analyzed the case under the assumption that the act applies to these head-to-head bidding scenarios. Therefore, the Court leaves the door open slightly to potential liability in a case where discrimination occurs between competing dealers in a competitive bid situation and results in competitive harm.

The information and opinions contained in this bulletin are not intended to be a comprehensive study, nor to provide legal advice, and should not be relied on or treated as a substitute for specific advice concerning individual situations. This document speaks as of its date and does not reflect any changes in law or practice after that date.

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www.freshfields.com

For further information please contact

Terry Calvani
T +1 202 777 4505
E terry.calvani@freshfields.com

MJ Moltenbrey
T +1 202 777 4560
E mj.moltenbrey@freshfields.com

Bob Schlossberg
T +1 202 777 4550
E robert.schlossberg@freshfields.com

Paul Yde
T +1 202 777 4530
E paul.yde@freshfields.com