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Litigation Alert

New Price Discrimination Case from the Supreme Court

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Despite academic criticism and increasingly rare government enforcement, reports of the death of the Robinson-Patman Act are premature, and price discrimination continues to be a potential source of private litigation for many companies. The Supreme Court's 7 – 2 decision on January 10, 2006, in *Volvo Trucks of North America, Inc. v. Reeder-Simco GMC, Inc.*, reversed a treble damage judgment under the Robinson-Patman for almost \$4 million in favor of Reeder, a Volvo truck dealer. The decision provides some comfort to companies like Volvo that sell to non-stocking resellers, and provides important insight into how the Court views the Robinson-Patman Act today. However, the Court left the door open for continued disputes in this area.

The case involved the claim of “secondary line” (*i.e.*, buyer level) price discrimination in the sale of specialized heavy-duty trucks. These trucks are sold through a competitive bidding process that starts with the customer's invitation to particular dealers to bid on supplying trucks with the customer's preferred specifications. In the Volvo system, the chosen dealer (or, occasionally, dealers) then requests a discount off of the wholesale price. Volvo decides on a case-by-case basis whether to give an additional discount. Based on the discount from Volvo, the dealer then submits its bid to the customer. The dealer purchases the trucks only if the customer accepts its bid. This is important because the Robinson-Patman Act is usually construed to apply only to sales, not mere offers.

Reeder based its claim primarily on the fact that, on a number of occasions, the discounts offered to it when it was competing against dealers of **non-Volvo** trucks were smaller than those offered to other Volvo dealers when they were competing with dealers of non-Volvo trucks for **different customers**. In some of these situations, Reeder had won the bid in which it participated; in others it did not. In a decision by Justice Ginsburg, the Court refused to infer competitive injury from “such a mix-and-match, manipulative quality,” finding that Reeder's pairings of discounts offered by Volvo

were insufficient to show a “favored” dealer comparable to the large chain stores at which the Act was originally directed. As the Court noted, it was possible that Reeder sometimes got better deals than the dealers in its comparisons.

The Court's analysis turned on an artificial notion of the relevant market. The Court held that Reeder failed to support the inference of competitive injury required under the Act because it failed to show that Volvo sold at a lower price to Reeder's “competitors.” The Court supported this conclusion by shrinking the “relevant market” based on the nature of the bidding process. Although Reeder and the other Volvo dealers had defined territories, they were not limited to them, and the evidence was apparently clear that they operated in a larger regional market in which multiple Volvo dealers competed. However, quoting Judge Hanson's dissent in the Eighth Circuit, the Court held that “[o]nce a retail customer has chosen the particular dealers from whom it will solicit bids, ‘the relevant market becomes limited to the needs and demands of a particular end user, with only a handful of dealers competing for the ultimate sale.’” Since each bid was a separate “market,” therefore, Reeder and the other Volvo dealers were not “competitors” because they were not competing in the same market in the bids where only one Volvo dealer participated.

This view of competition does not comport with the economic standards usually applied to define relevant markets in cases not involving the Robinson-Patman Act. In all but the most extreme situations, market definition is a question of fact for the fact finder. In this case, however, the Court appeared to rule as a matter of law, rather than on the basis of economic evidence. Somewhat inconsistently, however, the Court specifically recognized that Reeder competed with other Volvo dealers **for the opportunity to bid** in a broad geographic area. The Court avoided this aspect of competition by asserting that the competition to be chosen by customers to submit a bid was not based on differential pricing, but rather by prior relationships, reputation, location, and other factors. Despite that assertion, the Court noted in a footnote

the obvious fact that a reputation for securing favorable discounts from the manufacturer could increase the number of invitations to bid from potential customers. The Court held that this argument did not apply in this case because Reeder had failed to submit proof that Volvo had consistently disfavored it while consistently favoring other dealers. It is not clear how the Court's opinion would have differed if Reeder had introduced such evidence.

Reeder also provided evidence of direct competition between it and other Volvo dealers, pointing to two specific instances in which it competed head-to-head with another Volvo dealer for the same customer. Volvo and the United States (as amicus) argued that the Robinson-Patman Act requires discrimination between two purchasers. Since only one company won each bid and therefore purchased the trucks, Volvo and the United States argued that, based on various lower court decisions, the Act does not reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory. Although one might have thought that the Court took the case to resolve this question, the Court expressly declined to address it, finding instead that Reeder's examples—of which only one resulted in a sale that went to the favored dealer—were factually insufficient to support a claim. In the one situation where Reeder lost a head-to-head deal, Volvo granted the extra discount to the other dealer only after the other dealer had already been given the sale by the customer. Based on this evidence, the Court concluded that “[i]n short, if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the ‘favored’ Volvo dealer.”

In refusing to infer competitive injury absent **substantial** discrimination between **directly competing** dealers, the Court also made clear that it intends to construe the Robinson-Patman Act narrowly to reflect the broader policies of the antitrust laws aimed at stimulating competition rather than protecting existing competitors. While this is undoubtedly good antitrust policy, the dissent argued with some force that it is bad antitrust history. Over the years, many antitrust commentators have criticized the Robinson-Patman Act for being out of step with antitrust economic thinking. Nevertheless, this aspect of **Volvo Trucks** may be a powerful tool for defendants in subsequent cases.

While the Court relied on Reeder's failure to provide more specific economic evidence of Volvo's pricing, it also chose to ignore other evidence. During the period covered by Reeder's claims, Volvo was considering a plan to reduce the number of its dealers. Reeder claimed, not implausibly, that Volvo disfavored the retailers it hoped to eliminate. This argument was persuasive to the dissenters, but not to the majority of the Court.

In the end, *Volvo Trucks of North America* is a curious Supreme Court decision. It resolved few legal questions and opened the door for subsequent plaintiffs to establish a claim consistent with the opinion by offering more and better economic evidence—for example of systematically favoring one dealer or group of dealers over another. While the Court clearly signaled its intention to read the Robinson-Patman Act consistently with other antitrust laws, it applied an artificial standard for competitive harm that seems to depart from the “demonstrable economic effect” standard demanded under *Continental TV v. GTE Sylvania*, which the Court cited with approval. Although Reeder lost its case, the decision leaves ample room for further litigation in this area.

If you have questions about Robinson-Patman issues in particular or antitrust in general, please contact:

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