



THE ONLINE MAGAZINE FOR GLOBAL COMPETITION POLICY

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Although government challenges to alleged price discrimination under the Robinson-Patman Act (“RPA”) have been all but extinct for over two decades,¹ and the RPA itself has suffered calls for repeal from various quarters and by successive generations of antitrust lawyers,² the Act has not only endured but also, from time to time, provoked interesting commentary from the Supreme Court. Perhaps most notably, the landmark *Brooke Group* standard that has sounded the death knell to so many predatory pricing cases over the last 15 years had the relatively humble origin of a primary-line (competition among sellers) RPA lawsuit.³ The Court’s latest foray into the RPA, the 7-2 *Volvo*⁴ decision authored by Justice Ginsburg (with the intriguing tandem of Justices Stevens and Thomas in dissent), and particularly its reflective coda in Part IV of the

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¹The Federal Trade Commission issued six administrative complaints against book publishers in 1988—and dismissed them in 1996 (noting, *inter alia*, the pendency of private litigation). The other government activity in recent times is, frankly, of note more for its treatment of slotting allowances than as any indication of RPA enforcement interest. See *McCormick & Co.*, 2000 WL 521714 (FTC March 8, 2000) (consent order).

²Most recently, the Antitrust Modernization Commission, in the section of its report to the President and Congress entitled “Government Exceptions to Free-Market Competition,” commented that “[i]t is not possible to reconcile the provisions of the Act with the purpose of antitrust law; repeal of the entire Robinson-Patman Act is the best solution.” Antitrust Modernization Commission: Report and Recommendations, at 312 (April 2007).

³See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 222-23 (1993) (holding that “[a] plaintiff seeking to establish competitive injury from a rival’s low prices must prove that the prices complained of are below an appropriate measure of [the defendant’s] costs” and that the defendant had a “reasonable prospect” (for RPA purposes, or a “dangerous probability” under Section 2 of the Sherman Act) of “recouping its investment in below-cost prices”).

⁴*Volvo Trucks N.A., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164 (2006).

opinion, is one from which RPA defendants might justifiably draw comfort when arguing that antitrust injury is absent in a price discrimination lawsuit.

As a threshold matter, price discrimination may be unlawful under the RPA only “where the effect of such discrimination *may be substantially to lessen competition . . . 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”⁵ Not only does that language reflect an incipency standard, by which a plaintiff need only show a “reasonable possibility” of competitive harm⁶ as opposed to *actual* injury to competition,⁷ but also it has contributed to a conflict among the Circuit Courts as to whether, *e.g.*, injury to a single buyer may be sufficient for antitrust injury under Section 2(a) of the RPA. Hence, contrary to a touchstone principle of the federal antitrust laws, namely that they were “enacted for the ‘protection of competition, not competitors,’”⁸ the RPA has been viewed by numerous courts prior to the *Volvo* decision as protecting individual *competitors* (at least, in terms of competing buyers in a secondary-line case).⁹

In the critical Part IV of the *Volvo* opinion, however, the Supreme Court not only emphasized that the RPA should be construed “consistently with broader policies of the

⁵15 U.S.C. § 13(a) (emphasis added).

⁶*See Brooke Group*, 509 U.S. at 222.

⁷In order to recover treble damages under the RPA, a private plaintiff must satisfy the actual injury requirement of Section 4 of the Clayton Act, 15 U.S.C. § 15.

⁸*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. U.S.*, 370 U.S. 294, 320 (1962)).

⁹*See, e.g., Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653 (9th Cir.), *cert. denied*, 522 U.S. 943 (1997) (Section 2(a) “expresses Congressional intent to protect individual competitors, not just market competition, from the effects of price discrimination”); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1533 (3d Cir. 1990), *cert. denied*, 499 U.S. 921 (1991) (Congress intended “to outlaw price discrimination that tends to injure competitors, rather than competition in general”).

antitrust laws”¹⁰ but pointedly declared that it “would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*”¹¹—the end of the road, so it would seem, for those Circuits that have relied on finding injury to a single competitor to be sufficient. And throughout its analysis of the case, from various angles, the Court’s language implied a stricter test of competitive injury in the RPA context.

Briefly, the *Volvo* case involved claims by Reeder-Simco (“Reeder”), a dealer of Volvo heavy-duty trucks with an assigned territory (but the ability to sell elsewhere), that Volvo granted other dealers greater price concessions. Heavy-duty trucks are sold by dealers through competitive bidding to customers who select a few dealers (usually of different manufacturers) to bid for multiple-truck sales contracts. When a Volvo dealer is invited by a prospective customer to bid, it gives the dealer the specifications for the trucks it wants, and the dealer requests a discount from Volvo off the wholesale list price for that specific contract. Volvo decides on a case-by-case basis whether to offer a discount and, if so, what the discount rate will be—which varies depending on competitive factors, including whether the retail customer historically has purchased other brands of trucks. The Volvo dealer in turn uses any discount offered by Volvo in preparing its bid, purchasing the trucks only if and when the retail customer accepts its bid. Reeder asserted claims with respect to three types of competitive bidding situations: (i) purchase-to-purchase comparisons of concessions (discounts) Reeder received for four successful bids against non-Volvo dealers versus more favorable concessions other

¹⁰*Volvo*, 546 U.S. at 181 (citations omitted).

¹¹*Id.* (emphasis in original).

successful Volvo dealers received for different sales on which Reeder did not bid; (ii) offer-to-purchase comparisons of concessions offered to Reeder in connection with unsuccessful bids against non-Volvo dealers versus more favorable concessions to other Volvo dealers who competed successfully for different sales on which Reeder did not bid; and (iii) head-to-head comparisons in two instances in which Reeder bid against another Volvo dealer.

The Court disposed rather quickly of the first two comparisons, noting that in none of the instances did Reeder compete with beneficiaries of the alleged discrimination *for the same customer*, and that there was no systematic study showing that the compared dealers were consistently favored vis-à-vis Reeder: the Court therefore “decline[d] to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality.”¹² In so doing, the Court noted that a “hallmark of the requisite competitive injury” under the RPA “is the diversion of sales or profits from a disfavored purchaser to a favored purchaser,”¹³ which was not demonstrated by Reeder, and that the so-called “*Morton Salt* inference” of competitive injury from evidence of the existence of a significant price discrimination over a substantial period of time¹⁴ was not applicable due to the absence of *actual competition* between Reeder and the allegedly favored dealer for the *same retail customers*. Comparisons based on generalized competition within a

¹²*Id* at 178.

¹³*Id.* At 177 (citations omitted).

¹⁴See *FTC v. Morton Salt Co.*, 334 U.S. 37, 49-51 (1948).

geographic market for the opportunity to bid on potential sales are not sufficient to demonstrate competitive injury.¹⁵

With respect to the third group of claims (the two instances of head-to-head comparisons), the Court declined to decide the issue of whether an unsuccessful bidder in a competitive bidding market involving special orders (in which there is ultimately only one purchaser, it was argued, because dealers are bidding for the business of the same retail customer) should be considered a competing “purchaser.” However, even assuming that the Act applied, the Court found that Reeder did not establish that it was disfavored vis-à-vis other Volvo dealers, “let alone that the alleged discrimination was *substantial*”¹⁶—potentially raising an RPA plaintiff’s burden of proof further, to show a “substantial” injury. Here, an alleged 1.9 percent differential in discounts “was not of such magnitude as to affect substantially competition between Reeder and the ‘favored’ Volvo dealer.”¹⁷

With the RPA issues in the case thus decided, the Court’s coda in Part IV begins—by all appearances solely for the Court to put the Act in proper perspective—with the words “[i]nterbrand competition, our opinions affirm, is the ‘primary concern of antitrust law.’ The Robinson-Patman Act signals no large departure from that main concern.”¹⁸ Harking back to the historical origins of the Act in the rise of chain stores and

¹⁵Interestingly, the *Volvo* Court also noted that price discrimination was proscribed only to the extent that it “threatens to injure competition,” 546 U.S. at 176 (citing *Brooke Group*), seemingly discarding the less daunting “reasonable possibility” of injury to competition standard discussed above.

¹⁶*Volvo*, 546 U.S. at 180 (emphasis added).

¹⁷*Id.*

¹⁸*Id.* (citation omitted).

concerns over power buyers,¹⁹ the Court noted that “there is no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier’s selective price discounting fosters competition among suppliers of different brands. By declining to extend Robinson-Patman’s governance to such cases, we continue to construe the Act ‘consistently with broader policies of the antitrust laws.’”²⁰

Interbrand competition, to be sure, is the focus of the Sherman Act, but secondary-line RPA claims, as in the *Volvo* case, are concerned with *intra*brand competition between allegedly favored and disfavored customers. Throwing open the door for courts to consider increases in interbrand competition in RPA cases—beyond the basic “meeting competition” defense that a seller may in good faith meet an equally low price of a competitor²¹—brings added power to defendants’ arguments concerning the requisite competitive injury, *e.g.*, in all bidding situations (meeting competition to a great extent), and instances in which suppliers are helping customers meet *their* competition. Indeed, the fact that the *Volvo* Court did not expressly address the meeting competition defense itself tends to indicate that meeting the formalities of that defense may not be required when it is clear from the facts that a supplier is competing for business against other suppliers, or that a customer needs funding to meet its competitors. Suppliers can be expected to argue in such cases in the future that any reduction in intra-brand competition

¹⁹The Court emphasizes several times that the RPA was directed at allegedly favored power buyers, though it does not go so far as to limit its application or the *Morton Salt* inference to such purchasers.

²⁰*Id.* At 181 (internal citation and parenthetical omitted).

²¹15 U.S.C. § 2(b).

from a distribution practice is offset, or more than offset, by a stimulation of interbrand competition.²²

RPA law evolves slowly, and *Volvo*'s ultimate impact on antitrust injury issues remains to be seen. In a 2007 decision, for example, the Third Circuit emphasized the "reasonable possibility" of competitive injury standard that is absent from the *Volvo* opinion, and also carefully distinguished *Volvo* in noting that the *Morton Salt* inference might have been argued by the plaintiff in the case before it.²³ Nevertheless, an expectation of enhanced deference generally by courts in RPA lawsuits to suppliers' decision-making is not an unwise bet. As the Sixth Circuit noted post-*Volvo*, even though the RPA should not be limited to power buyers, the Act "proscribes price discrimination only to the extent that it threatens to injure competition, and, in the absence of such a showing, we will not intercede so as to micromanage the [defendant's] distribution system."²⁴

²²The Supreme Court also quoted in *Volvo* what it has said three times previously, and what RPA defendants can be expected to say in discussing the impact of an alleged discrimination in the future: the Act should not be construed in a manner that "help[s] give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation." *Volvo*, 546 U.S. at 181 (citations omitted).

²³See *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 & n.8 (3d Cir. 2007).

²⁴*Smith Wholesale Co. v. R.J. Reynolds Tobacco Co.*, 477 F.3d 854, 865, 880 (6th Cir. 2007).