

## *Volvo v. Reeder:* Narrow Holding, Broad Implications

**Elaine Foreman and Robert Skitol**

The Supreme Court's dislike of the Robinson-Patman Act<sup>1</sup> is evident in its opinion in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*<sup>2</sup> This is the fifth time since 1979 that the Court has undertaken to construe and editorialize about this statute, each time producing interpretations that make it more difficult for Robinson-Patman plaintiffs to prevail in one or more kinds of circumstances (three by expanding affirmative defenses, two (including *Volvo*) by heightening requirements for a prima facie case).<sup>3</sup> In this instance, the holding is narrow in its application to "competitive bidding" and "special order" situations, as opposed to far more common situations of dealers reselling standardized goods from their own inventories. But much of the Court's dicta, viewed in conjunction with the dissenting Justices' spin on the result, provides fodder for future RP defendants in a variety of other cases to argue about broad implications.

### The Facts and Decisions Below

*Volvo* concerns the market for heavy-duty trucks that manufacturers like Volvo sell to fleet owners and other end-users through networks of franchised dealers. Customers do not purchase from dealers' inventories; rather, they provide their own customized truck specifications and then invite selected dealers to bid based on those specifications. A dealer invited to bid will then apply to its manufacturer/franchisor for a "concession" or special discount off the wholesale price to enable the dealer to make a competitive offer to the customer in question. Only if the dealer wins the business does the dealer purchase the specified trucks from the manufacturer at the discounted price for sale to the customer in question.

Reeder was a franchised Volvo dealer that believed Volvo had targeted it (along with some other dealers) for elimination. Among the ways Reeder believed Volvo sought to achieve that end was by giving other dealers greater price concessions than Reeder received. Its main evidence of this "discrimination" and resulting competitive injury in support of its RP claim involved situations where other Volvo dealers received higher discounts for their bids against non-Volvo dealers than Reeder received for its bids against non-Volvo dealers. Reeder did cite a few instances where it and another Volvo dealer were bidding directly against each other for the same customer but, in those cases, Volvo offered the same concession to both dealers.

Reeder framed its claim under Section 2(a) of the RP Act. This section makes it unlawful for a seller to "discriminate in price between different purchasers" of a given product where the "effect

■  
**Elaine Foreman** is Senior Counsel at Hewlett-Packard Company.  
**Robert Skitol** is a partner in the Washington, D.C. office of Drinker Biddle & Reath LLP.

---

<sup>1</sup> 15 U.S.C. § 13(a) et seq.

<sup>2</sup> 126 S. Ct. 860 (2006).

<sup>3</sup> The other four were *Great Atl. & Pac. Tea Co. v. FTC*, 440 U.S. 69 (1979); *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428 (1983); *Texaco Inc. v. Hasbrouck*, 496 U.S. 543 (1990); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

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.”<sup>4</sup> On the evidence of disfavored treatment summarized above, Reeder won a jury verdict and an ensuing treble-damage judgment for over \$3.9 million. The damages included both lost profits on bids Reeder lost to non-Volvo dealers and lost profits on bids Reeder won but at lower margins than it could have derived if it had received the higher concessions that other Volvo dealers received on other (unrelated) bids.

The Eighth Circuit Court of Appeals affirmed that result, rejecting two main Volvo arguments.<sup>5</sup> First, Volvo argued that there was no discrimination “between different purchasers”; Reeder was not a purchaser on bids it lost, and the allegedly favored dealers were not purchasers on bids Reeder won. The court of appeals held that the two-purchasers requirement was satisfied by the overall history of Reeder’s and other dealers’ purchasing Volvo trucks on bids they won even though involving different customers at different times. Second, Volvo argued that the record could not support a finding that discrimination resulted in the requisite competitive injury because there was no instance in which discrimination occurred in head-to-head competition between Reeder and another Volvo dealer. The court of appeals held there was sufficient evidence of competitive injury because Reeder and other Volvo dealers sold Volvo trucks at the same functional level in the same interstate retail market.

### The Supreme Court’s Majority Opinion

The Supreme Court reversed, but decided only Volvo’s second argument. Justice Ginsberg’s opinion for a seven-Justice majority articulated the basic question before the Court as “whether a manufacturer offering its dealers different wholesale prices may be held liable for price discrimination” under the RP Act “absent a showing that the manufacturer discriminated between dealers contemporaneously competing to resell to the same retail customer.”<sup>6</sup> The essence of the holding was that the Act “does not reach the case Reeder presents” because there was no such same-customer feature: “The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process.”<sup>7</sup>

The Court began its analysis by reference to the Act’s legislative history and, in particular, Congressional concern with “the perceived harm to competition occasioned by powerful buyers,” responding “to the advent of large chain stores . . . with the clout to obtain lower prices for goods than smaller buyers could demand.”<sup>8</sup> Mindful of that focus, the Court emphasized that the Act does not “ban all price differences charged to different purchasers”; it proscribes only discrimination “to the extent that it threatens to injure competition.”<sup>9</sup> And, most critically, a “hallmark of the requisite competitive injury . . . is the diversion of sales or profits from a disfavored purchas-

---

<sup>4</sup> 15 U.S.C. § 13(a).

<sup>5</sup> *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004).

<sup>6</sup> *Volvo*, 126 S. Ct. at 866.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.* at 869.

<sup>9</sup> *Id.* at 870 (quoting *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).

er to a favored purchaser.”<sup>10</sup> The Court acknowledged the longstanding *Morton Salt* doctrine under which there can be an inference of competitive injury “from evidence that a favored competitor received a significant price reduction over a substantial period of time.”<sup>11</sup> That doctrine, however, would not help Reeder: “Absent actual competition with a favored Volvo dealer, . . . Reeder cannot establish the competitive injury required under the Act.”<sup>12</sup>

More specifically, Reeder’s comparisons of concessions it received on its bidding opportunities versus concessions other Volvo dealers received in their bidding for other customers did not suffice to establish the requisite competitive injury because none of them involved Reeder’s competing “with beneficiaries of the alleged discrimination *for the same customer*.”<sup>13</sup> Nor, the Court noted, “did Reeder even attempt to show that the compared dealers were consistently favored vis-à-vis Reeder.”<sup>14</sup> The Court acknowledged that Reeder may have competed with other Volvo dealers for the opportunity to bid on potential sales in a broad geographic area. At that initial stage, however, competition is not affected by differential pricing. “Once a retail customer has chosen the particular dealers from which 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.’ . . . That Volvo dealers may bid for sales in the same geographic area does not import that they in fact competed for the same customer-tailored sales.”<sup>15</sup> In short, the competition between Reeder and non-Volvo dealers was irrelevant for Robinson-Patman purposes.

As noted above, Volvo’s first and most sweeping argument for reversal was that the Act cannot reach competitive bidding/special order sales at all, even when they involve head-to-head rivalry for the same customer; in these situations, only one dealer will end up being a purchaser so the two-purchasers requirement is not met. The Court said it “need not decide that question”; assuming the Act applies to head-to-head transactions, “Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial.”<sup>16</sup> Underlining the lack of substantiality, the Court pointed out that Reeder’s evidence showed loss of only one sale to another Volvo dealer involving 12 trucks that would have generated \$30,000 in gross profits.

In the final pages of the opinion, the Court reminds us that “[i]nterbrand competition . . . is the ‘primary concern of antitrust law’” and adds the comment that the RP Act “signals no large departure” from that focus; courts should thus resist interpretations “geared more to the protection of existing *competitors* than to the stimulation of *competition*.”<sup>17</sup> The Court then observes that, in this case, “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.”<sup>18</sup> And so, the Court concludes, by “declining to extend” RP liability to

---

<sup>10</sup> *Id.* (citations omitted).

<sup>11</sup> *Id.* (citations omitted).

<sup>12</sup> *Id.*

<sup>13</sup> *Id.* at 871.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 871–72 (quoting *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 719 (8th Cir. 2004)).

<sup>16</sup> *Id.* at 872.

<sup>17</sup> *Id.* (citations omitted).

<sup>18</sup> *Id.* at 873 (citations omitted).

such situations, “we continue to construe the Act ‘consistently with broader policies of the antitrust laws.’”<sup>19</sup>

### The Dissenting Opinion

In a combination that proves the RP Act creates strange bedfellows, Justice Stevens dissented in an opinion joined by Justice Thomas. It charges the majority with abandoning longstanding and mainstream RP jurisprudence. Until today, the dissent asserts, the Act has protected dealers in many competitive bidding situations, treating as competitors those “who sell ‘in a single, interstate retail market.’”<sup>20</sup> “[B]y adopting a novel, transaction-specific concept of competition, the Court eliminates that statutory protection in all but those rare situations in which a prospective purchaser is negotiating with two Volvo dealers at the same time.”<sup>21</sup> More fundamentally, the dissent suggests that the Court has departed from, and thus undercuts continued reliance upon, (a) the *Morton Salt* inference of competitive injury from sales “to one retailer at a higher price than to its competitors”;<sup>22</sup> and (b) the whole incipency doctrine under which the statute does not require actual harm to competition, only “a reasonable possibility . . . that [discrimination] ‘may’ have such an effect.”<sup>23</sup>

*Volvo does not fore-*  
*close altogether*  
*application of the RP*  
*Act to competitive*  
*bidding and special-*  
*order situations.*

Unlike the majority, Justice Stevens sees this case as within the original intent of the RP Act “to protect small retailers from the vigorous competition afforded by chainstores and other large volume purchasers.”<sup>24</sup> He notes Judge Bork’s critique of the Act as resting upon a “wholly mistaken economic theory” and suggests that that view influenced (though not in a “conscious” way) the majority’s “unprecedented” decision.<sup>25</sup> He concludes by accusing the majority of “refusing to adhere to the text of the Act,” a cardinal sin for true believers in judicial restraint, textualism, originalism, etc.<sup>26</sup>

### Bottom Lines

*Volvo* does not foreclose altogether application of the RP Act to competitive bidding and special-order situations. The Solicitor General’s amicus brief on behalf of the Department of Justice and Federal Trade Commission had joined *Volvo* in seeking that result based on RP’s two-purchaser requirement. Instead, the opinion leaves open to RP claims two fact patterns involving competitive bidding/special-order situations: where a seller discriminates in its concessions or other competitive assistance between dealers that are contemporaneously competing to resell to the same retail customer; and where a seller consistently favors some dealers over others in the implementation of a competitive assistance program, an overall pattern of discriminatory treatment.

<sup>19</sup> *Id.* (quoting *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).

<sup>20</sup> *Id.* at 873, 875 (quoting *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 436 (1983)).

<sup>21</sup> *Id.* at 873.

<sup>22</sup> *Id.* at 875 (quoting *FTC v. Morton Salt Co.*, 334 U.S. 37 (1948)).

<sup>23</sup> *Id.* (quoting *Corn Prods. Co. v. FTC*, 324 U.S. 726, 742 (1945)).

<sup>24</sup> *Id.* at 876.

<sup>25</sup> *Id.* (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 382 (1978)).

<sup>26</sup> *Id.* That accusation may be considered particularly unfair in light of eight words preceding the Judge Bork quote that Justice Stevens features. The full Bork statement was that the RP Act is “the misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economic theory.” ROBERT H. BORK, *THE ANTITRUST PARADOX* 382 (1978). See also Robert L. Wald, Book Review, *The Price Discrimination Law: A Review of Experience*, 55 Nw. U. L. REV. 653 (1960), describing RP law as “bogged in a dense undergrowth of confusion, ambiguity, controversy and babel.”

In either circumstance, however, *Volvo* appears to require some evidence of actual “diversion of sales or profits from a disfavored purchaser to a favored purchaser” as a result of the discrimination to satisfy the competitive injury element of a Section 2(a) violation. Thus, after *Volvo*, an RP plaintiff pursuing a claim based on these kinds of bidding situations cannot expect to rely on the *Morton Salt* inference of injury merely by showing price differences between “competing” dealers over a substantial period of time.

The Court’s sharp distinction between competitive bidding/special order situations and “the chain-store paradigm,” under which competing dealers resell goods from inventory, suggests the opinion offers no comfort for discriminatory pricing in the latter garden-variety circumstances under which most RP cases have arisen over the course of the past 70 years and will continue to arise in many industries over the years ahead. On the other hand, and as suggested above, parts of the opinion as well as the dissent’s interpretation of it provide considerable ammunition for defendants’ summary judgment motions and requested jury instructions in RP cases of all kinds. Defendants, for example, may now credibly argue from *Volvo* that the competitive injury requirement in 2(a) cases of all (or many) kinds requires proof of meaningful and direct customer-specific competition between disfavored and favored dealers as well as “substantial” diversion of sales or profits from one to the other.

Some defendants might even argue that *Volvo* suggests a competitive injury finding cannot be made if (a) the favored dealer lacks market power or (b) “the supplier’s selective price discounting fosters competition among suppliers of different brands.”<sup>27</sup> The Court in *Volvo* highlighted the relevance of these considerations within the context of admonitions that “interbrand competition” is antitrust’s primary concern, the RP Act is “no large departure from” that focus, and courts must resist interpretations of the RP Act that may result in “protection of . . . competitors” instead of “stimulation of competition.”<sup>28</sup>

### Counseling Implications

Apart from arguments made for litigation, what can RP counselors take away from *Volvo* that may bear on advice to clients about competitive bidding/special order market contexts? We offer the following general observation along with three qualifications to it. For most sellers, little has changed from a counseling perspective. Sellers can and should retain discretion to offer different kinds or amounts of competitive bidding assistance to different requesting dealers at different times or under different competitive circumstances. The qualifications are as follows:

(a) Offer the same assistance to two or more dealers who will be competing for the same customer opportunity.

Surely few if any RP Act advisors have routinely counseled their clients that it is permissible to offer different assistance to competing dealers in competitive bidding contexts. But the risks in offering different assistance may not often have been thoughtfully assessed. Advisors will now add competitive bidding situations to the list of areas where a seller should “ordinarily” treat similarly situated dealers in a like manner. In practice, sellers will be advised that they should consider a

---

<sup>27</sup> *Volvo*, 126 S. Ct. at 873.

<sup>28</sup> *Id.* at 872 (emphasis in original). Since competitive injury is not an element of a Section 2(d) or Section 2(e) violation, *see* 15 U.S.C. §§ 13(d), (e), these arguments would not apply—and *Volvo* in general would be of little or no help—in situations involving discrimination in the provision of payments, services, or facilities within the scope of these parts of the RP Act. Of course, any claim for damages under these parts of the Act would still require a showing of “antitrust injury” which may, in turn, require connecting discrimination to diverted business.

wide band of potentially competitive circumstances in setting up their assistance programs. This may be overwhelming for some sellers and could thus ironically lead to the very conduct that led to Reeder's suit against Volvo: a determination to reduce the number of authorized dealers. Many sellers believe that the RP Act unduly burdens their sales and pricing strategies. If there is no way around the burden (because the Court did not take the opportunity to limit the Act in the way Volvo and amici urged), sellers may decide that it is time to jettison their less productive dealers.

(b) Avoid implementing the policy in a manner that could appear to be "consistently" treating some dealers less favorably than other dealers.

As with the previous point, this is likely something that most sellers already do—as counselors we generally urge consistency across different groups of resellers and hope our clients follow that advice. Again, the Court leaves us with a conundrum: business people are always looking to treat their "best" dealers in a way commensurate with their performance, commitment to the brand, etc. How do we now allow them to do so in light of the fact that the Court has, in effect, admonished against consistently favoring some dealers over others? The answer comes down to a company's own tolerance for risk with respect to the RP Act. Less risk-averse sellers may conclude that they need to worry about better treatment of some dealers than of others only if there is a substantial amount of actual competition among them. The more conservative approach will be to avoid any favoritism at all costs. Where your clients fit in the risk spectrum will decide your advice.

(c) Let all dealers know about the policy and the manner in which it will be followed (some reasonable degree of transparency about it).

This has long been a hallmark of RP Act counseling. In short, it is always prudent to ensure the policy is communicated to and understood by all affected dealers. More specifically, sellers should want their policies about when differing types of assistance are available to be sufficiently visible that the "complainers" will know where to go when concerned that they are being treated unjustly. After all, the goals of counseling are first and foremost to avoid lawsuits altogether and to win if one nonetheless ensues. Being able to demonstrate that the seller had a fair, reasonable, and transparent written explanation for when it offers different types or amounts of assistance will go a long way to meeting these goals. Again, encouraging clients to have an "objective basis" for treating dealers differently ought not to be much of a change for most advisors. ●

*Avoid implementing  
the policy in a manner  
that could appear to  
be "consistently"  
treating some dealers  
less favorably than  
other dealers.*