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LEGAL DEVELOPMENTS

January 19, 2006

SUPREME COURT REJECTS ROBINSON-PATMAN LIABILITY FOR SPORADIC PRICE DISCRIMINATION

The U.S. Supreme Court's decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (Jan. 10, 2006), rejected application of the Robinson-Patman Price Discrimination Act to cases where the only evidence of price discrimination related to sporadic instances of head to head competition between the favored and disfavored buyer. Perhaps more importantly, the Court may have opened the door for lower courts to import the Sherman Act's requirements of market power or actual harm to competition into secondary line Robinson-Patman cases.

Facts in *Volvo*

Volvo involved a common method of distributing large equipment and other unique and expensive goods. Reeder and other authorized Volvo dealers bid for specific contracts meeting each customer's specifications, negotiated with Volvo over the price for trucks meeting the purchaser's requirements, and purchased trucks from Volvo only after winning a bid. Reeder sued Volvo under Section 2(a) of the Robinson-Patman Act and state law claiming that Volvo provided a competing Volvo dealer with lower prices on trucks. Reeder recovered $1.3 million in single damages; a divided panel of the Eighth Circuit affirmed. The Supreme Court reversed, holding that Reeder had failed to prove "competitive injury."

Plaintiff's inadequate proof of price discrimination

At trial, Reeder proved competitive injury with two types of evidence of price discrimination by Volvo. It primarily relied on comparisons of prices Volvo offered to Reeder on both successful and unsuccessful bids with prices offered to other Volvo dealers for successful bids for which Reeder did not compete. The Court found two main faults here. First, Reeder's evidence did not establish competition between Reeder and a favored dealer for resale to the same customer; second, it did not show consistent favoritism towards other Volvo dealers. Reeder's "mix-and-match" approach failed to consider counter examples and fell short of a comprehensive statistical analysis. The Court did not address the possibility that a dealer's reputation for submitting low bids might affect competition for invitations to bid because Reeder did not show that it was consistently disfavored.

Standing alone, the Court found Reeder's examples of head-to-head competition with other Volvo dealers to be insufficient. In one instance, both Reeder and the other Volvo dealer lost the

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sale to a dealer of another brand of truck. In the second, Volvo followed its policy of offering both dealers the same discount prior to the bid, but later acquiesced to the winning dealer's request for an additional discount to offset a general increase in Volvo prices. Neither example established "that [Reeder] 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." After *Volvo*, anecdotal evidence of favoritism may be found insufficient to establish competitive injury even in cases involving sales from inventory.

The majority's analysis disappointed those looking for clear guidance on the scope of Robinson-Patman beyond sales made from inventory by expressly declining to reach an argument advanced by Volvo and the United States as amicus curiae, namely that the Robinson-Patman Act does not "reach markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory."

Opening the door to importing Section 1 requirements into Robinson-Patman claims?

Though the Court's holding on the specific Robinson-Patman issue was quite narrow, its discussion in dictum of the relationship between the Robinson-Patman Act and the other antitrust laws could be interpreted by lower courts as an invitation to import Sherman Act principles into secondary line Robinson-Patman cases. Specifically, the Court stated that it "would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*." It further explained that "[i]nterbrand competition . . . is the primary concern of antitrust law," and that "[t]he Robinson-Patman Act signals no large departure from that main concern." The Court's focus on interbrand harm – a Sherman Act concept stemming from the Court's seminal decision in *Continental T. V., Inc.* v. *GTE Sylvania, Inc.*, 433 U. S. 36 (1977) – may cause lower courts to require Robinson-Patman plaintiffs to offer proof that the challenged price discrimination is likely to have a negative impact on interbrand competition. As in Sherman Act Section 1 cases, a Robinson-Patman plaintiff could seek to show either that the favored buyer possessed market power or that the price discrimination is likely to result in actual harm to interbrand competition. Such a requirement could significantly curtail the reach of the Robinson-Patman Act.

While the Court's discussion of interbrand harm surely will influence lower courts' treatment of secondary line cases, it would be premature for parties subject to the Robinson-Patman Act to significantly change their conduct until the lower courts provide more guidance.

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