

Client Alert

A report
for clients
and friends
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The Supreme Court Limits the Application of the Robinson-Patman Act

The Robinson-Patman Act ("R-P Act"), 15 U.S.C. §13, was enacted early in the twentieth century to prohibit discrimination by sellers in price and promotions and thus to reduce the ability of large customers to obtain advantages in purchasing over smaller competitors. Although the paradigm at which the R-P Act was directed was preferential pricing to supermarket chains competing with "mom-and-pop" grocery stores, the R-P Act's language is broad and potentially covers all price differentials in interstate commerce. The Supreme Court has now decided an important case, *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, No. 04-905 (January 10, 2006), that limits the application of the R-P Act in competitive bid markets. The Court's decision means that a seller can generally offer different pricing to its dealers on comparable goods where its dealers resell the goods through customer-specified competitive bids, although as we discuss below, the Court's decision contains ambiguities that may limit its application even to competitive bid markets if they differ from the market described in the opinion.

A Verdict for Plaintiff at Trial

The R-P Act prohibits a seller from discriminating in price between "purchasers" of goods "of like grade and quality" in interstate commerce if the discrimination may be harmful to competition. An unlawful discrimination is merely a difference in price, with the requisite competitive effect, that can not be justified one of several defenses or exceptions. *Reeder-Simco* deals with an alleged "secondary line" violation of the R-P Act. A secondary line violation occurs when a seller's discriminatory pricing harms competition among its customers.

Reeder-Simco was a dealer in heavy-duty trucks. As the various courts in this case found, the trucks, although custom-made to dealers' specifications, were sufficiently of "like grade and quality" as required by the R-P Act. The customers, e.g., rental fleet owners and shipping and hauling companies, typically purchase their trucks through a competitive bidding process. Dealers engage in an active rivalry in the pre-bid process to persuade the customers to invite them to bid. If a customer seeks a bid from a particular dealer, the dealer requests price concessions from manufacturers, like Volvo, on the price of the customer-specified trucks. The dealer then bids on the customer's order. Volvo had not required *Reeder-Simco* to sell within a specified geographic region, and there was evidence that the market for the sale of heavy trucks was national. In fact, *Reeder-Simco* bid against other Volvo dealers infrequently. Nevertheless, *Reeder-Simco* alleged that it received less favorable price concessions from Volvo than other Volvo dealers received, and that, as a result, its business was harmed. Although the R-P Act does not require proof of anticompetitive intent, *Reeder-Simco* alleged that Volvo had planned to reduce the size of its dealer network and had identified *Reeder-Simco* as a dealer that would be eliminated through price discrimination.

Reeder-Simco presented evidence of two types of transactions: 1) two "head-to-head" bids, in which it competed against and lost to other Volvo dealers for the same customer orders; and 2) bids in which *Reeder-Simco* did not compete against other Volvo dealers for the particular business but in which it received less favorable pricing from Volvo than did other dealers that were bidding at about the same time for *different* customers' orders in a broad geographic region in which *Reeder-Simco* argued that it competed. In four of these bids, *Reeder-Simco* won the business in competition with non-Volvo dealers and purchased Volvo trucks for resale to customers. In other such bids, *Reeder-Simco* lost and therefore did not purchase trucks from Volvo. The jury concluded that Volvo's pricing differences had

the requisite effect on competition, and awarded \$1.3 million in damages to Reeder-Simco, which the trial judge upheld and trebled as provided under the Clayton Act.

The Eighth Circuit's Affirmance and A Strong Dissent

On Volvo's appeal, the Eighth Circuit Court of Appeals first held that a losing bidder in a competitive bid is not a "purchaser" within the meaning of the R-P Act, because the bidder literally does not make a purchase. (It is notable that the Court treated this conclusion as a general rule. Despite a scarcity of case law on this question, many antitrust counselors have long adopted this analysis.) However, the Court of Appeals held that Reeder-Simco was a "purchaser" in the four transactions in which it bought trucks from Volvo after successfully bidding against non-Volvo dealers, and that those purchases were sufficiently close in time to different sales in which other Volvo dealers received more favorable price concessions to be "contemporaneous". The Court further reasoned that Reeder-Simco was in actual competition with other Volvo dealers because of the national character of the heavy truck market and the absence of significant geographic restrictions on dealers' sales, and stated that injury to a competitor, while not itself prohibited by the R-P Act, could give rise to an inference of injury to competition. Finally, the court concluded that Reeder-Simco's showing of lost profits demonstrated actual injury that would support an award of damages.

The dissent argued that the unique marketplace created by a competitive bidding process is not covered by the R-P Act. Competitive bidding cannot result in an R-P Act violation because it will never result in two purchasers; the only purchaser is the winning bidder. The four transactions on which the majority relied likewise could not result in an R-P Act violation because there Reeder-Simco was not in competition with other Volvo dealers. The dissent argued that in a competitive bidding market injury can only occur if the two purchasers and the competition between them are present in the same transaction.

The Parties' Arguments to the Supreme Court

The Supreme Court granted *certiorari* to address the question whether a manufacturer offering different prices to its dealers may be liable under the R-P Act where there is no evidence that the "favored" and "disfavored" dealers competed contemporaneously to resell the products to the same retail customers. Following the dissent below, Volvo argued that Reeder-Simco's creation of an R-P Act violation by cobbling together elements from a number of unrelated transactions did not satisfy the Act's requirements for competitive injury. "To show that it was a purchaser, it points to transactions in which it did not compete against another Volvo dealer. To show that it competed against other Volvo dealers, it points to transactions in which it did not purchase from Volvo." Brief for Petitioner at 12.

Volvo's brief stressed that the R-P Act, like other antitrust laws, is intended to protect competition, not individual competitors. While injury to one dealer may be a sufficient basis under the Act to infer harm to competition, the failure to link Volvo's pricing with Reeder-Simco's bid losses should prevent a court from finding discrimination in contemporaneous purchases or competitive injury.

Reeder-Simco argued for a broader definition of the relevant market in the competitive bidding process. In its view, the competition protected by the Act is "the vying for customers in the same relevant market." Brief for Respondent at 18. Reeder-Simco's definition would permit courts to find the elements of an R-P violation in multiple transactions. Under this view, the four transactions in the same region in which other Volvo dealers received favorable price concessions are sufficient to show that Reeder-Simco was a "purchaser" and that other dealers made contemporaneous purchases at better prices. With respect to the head-to-head transactions, Reeder-Simco asked the Court to define the relevant market at the pre-bid stage, where potential buyers compete with each other to become bidders for the customer's business. Otherwise, Reeder-Simco argued, the Court would carve out an exception to the R-P Act for all competitive bid industries.

The Supreme Court Decides That the R-P Act Requires Competition for the Same Customer Between Favored and Disfavored Dealers

The Supreme Court (Ginsburg, J.) reversed the decision of the Eighth Circuit, holding that competition between different purchasers for resale of the purchased products generally does not occur when products subject to special order are resold through a customer-specific competitive bidding process, and thus Volvo's differential pricing was not within the scope of the R-P Act. Although this decision does not literally carve out an exception for all industries in which customers purchase from dealers in competitive bidding, it does significantly limit the application of the Act in such industries.

The Court noted that the Act prohibits discriminations whose effect may be to injure competition with a purchaser that, in the statutory language, "received[d] the benefit of such discrimination". In other words, the "hallmark of the requisite competitive injury. . . is the diversion of sales or profits from a disfavored purchaser to a favored purchaser." [Citations omitted.] Although prior decisions held that evidence of a significant price difference to a favored customer over time permits an inference of competitive injury, the Court affirmed that proof of competitive injury requires that the plaintiff have been in "actual competition", *i.e.*, for the same customer(s), with the favored dealer.

The Court rejected Reeder-Simco's comparison of prices on bids where it competed with non-Volvo dealers and on bids where other Volvo dealers competed with non-Volvo dealers. This comparison failed to address the type of harm that occurs in the paradigm case of competition between a chain store and small retailers and thus blurred the question of whether there was any discrete favored purchaser. The Court was also clearly concerned that the evidence offered by Reeder-Simco was selective and easily manipulated; for example, the evidence might ignore other instances in which Reeder-Simco may have received better prices than other dealers did.

Especially in light of a dissent by Justice Stevens (a former antitrust practitioner) that painstakingly examined the evidence relating to the nature of competition in the markets for heavy duty trucks, the Court's treatment of Reeder-Simco's argument for a "pre-bid" market is notable. The Court concluded that at the stage when dealers are trying to persuade customers to include them in a bid, "competition is not affected by differential pricing" but by a variety of other factors. However, in a footnote, the Court acknowledged that pricing *might* affect that competition if a dealer had a reputation for offering favorable bid prices, but it did not examine that possibility because there was no evidence that Reeder-Simco was "consistently disfavored" while other dealers were "consistently favored".

The Court then reviewed the evidence relating to the head-to-head bids, and declined to decide whether, as the dissent in the Eighth Circuit would hold, a losing bidder is not a "purchaser" and thus the R-P Act does not "reach markets characterized by competitive bidding and special-order sales". The Court determined that even if the Act does apply to such bid markets, the plaintiff's evidence did not establish that any discrimination was significant enough to affect competition.

In conclusion, the Court reiterated the often-quoted principle that interbrand competition is the "primary concern of antitrust law" [citation omitted] and noted that the R-P Act is not an exception. The Court made clear that it will construe the Act consistently with this principle by "resist[ing] interpretation geared more to the protection of existing competitors than to the stimulation of competition", in order to avoid rigid rules that prevent sellers from using price to compete freely with other sellers.

A Favorable Decision for Sellers

The R-P Act has been heavily criticized for many years as a statute that hinders sellers' ability to respond to their competition. Interpretations of the Act, including decisions that have found competitive injury on the basis of injury to

a single purchaser, often put sellers in the position of risking a lawsuit in order to achieve a legitimate marketing goal. Firms that operate in markets where there is variety in the size and organizational structure of reselling customers are aware of the falsity of the popular notion that no one enforces the R-P Act anymore. The decision in *Volvo v. Reeder-Simco* was undoubtedly written with these concerns in mind. Outside of the importance of the decision to sellers whose customers operate in competitive bid markets, the most significant aspect of the case is undoubtedly the concluding brief essay on the need for careful interpretation of the Act.

The Court left open the question of whether the Act should apply to competitive bids at all. It is tempting to conclude that as a practical matter, the Act will not apply to such transactions because there is only one "purchaser". However, a cautious seller will offer the same pricing to dealers making contemporaneous bids for the same business. Moreover, the Court left open the possibility that another plaintiff might show that price differences affect competition at the pre-bid stage. It is clear that in a pure competitive bid market, sellers will have substantial leeway to price as they need in order to compete with other sellers. Nevertheless, sellers must be careful not to assume away the Act where their customers' business is done in both competitive bids and sales out of inventory or other "open market" transactions.

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