



## **Volvo Decision Offers Some Comfort, But Few Bright Lines, Concerning Price Discrimination**

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On January 10, the Supreme Court issued its first secondary-line Robinson-Patman Act decision since *Texaco v. Hasbrouck* in 1990. Its decision in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* provides encouragement to Robinson-Patman defendants but few bright lines. For more factual and legal background on the case, [please click here](#) to read “*Volvo Truck North America, Inc. v. Reeder-Simco GMC, Inc.: A Missed Opportunity.*” Here is a short summary of what the Supreme Court did:

- The case was brought by a Volvo heavy duty truck dealer, Reeder. It arose in a competitive bidding context: trucking fleet customers typically invited a selected Volvo truck dealer to bid against dealers for other truck manufacturers for those customers’ customized, special order business. Volvo would offer a price concession to its dealer to support the bid. In the rare case in which a customer invited more than one Volvo truck dealer to participate in a given auction, Volvo would offer the same price concession to all of its participating dealers. The percentage of Volvo’s price concessions could vary, however, from auction to auction.
- One issue in the case was whether Reeder could prevail in a price discrimination claim based on a comparison of the discount it received from Volvo in one auction (in which it was the only participating Volvo dealer) with larger price concessions Volvo had offered to other Volvo dealers in altogether *different* auctions (in which Reeder did not participate). The Supreme Court said no because Reeder could not prove that it had competed against a beneficiary of Volvo’s price discrimination for the business of the same customer. “Absent actual competition with a favored Volvo dealer,” the Court said, “Reeder cannot establish the competitive injury required under the Act.” The Court, however, seemed to hold open the possibility that Reeder could have prevailed with more systematic evidence that “the compared dealers were consistently favored vis-à-vis Reeder.”
- A broader issue in the case was whether the Robinson-Patman Act covers a situation in which, although multiple dealers for one manufacturer bid for the custom order business of the same customer, only one dealer can win the business and thereafter purchase the manufacturer’s product. Both Volvo and the Solicitor General’s office, arguing as amicus curiae, contended that the Act does not extend to that situation because the Act requires two *purchases* at different prices, not one purchase and one rejected offer. The Supreme Court declined to decide the issue, reasoning that Reeder had failed to offer sufficient evidence to prove there had been any price differences at all when Reeder competed head-to-head against another Volvo dealer in the same auction, much less price differences sufficient to threaten a “substantial” lessening of competition, as the Act requires.

- In a tantalizing bit of dictum, the Court stated that the Robinson-Patman Act “signals no large departure from antitrust law’s primary concern, interbrand competition,” and that it “continue[s] to construe the Act consistently with broader policies of the antitrust laws.” The Court thereby seemed to reject the holdings of several lower courts that secondary-line price discrimination could be established without proof of harm to competition generally, and instead could rest on the harm to individual competitors, i.e., the disfavored reseller.

The absence of bright lines may be frustrating to counselors, and, for those looking for some insight into the Roberts Court, it suggests a continuation of the Rehnquist Court’s “one-case-at-a-time” style of jurisprudence. The Chief Justice, if in the majority, designates the Justice who will write the opinion, and it is noteworthy that the 7-2 opinion was authored by Justice Ginsburg, who—along with Justice Stevens, who authored the dissent—seemed to ask the most probing questions about Volvo’s position during oral argument. Nonetheless, there are a few lessons to take away from the decision:

- In a competitive bidding situation involving customized goods that dealers cannot sell out of inventory, a manufacturer is generally free to tailor its dealer support to the needs of the particular auction.
- If two or more dealers for a particular manufacturer are bidding head to head against each other, the safest course for the manufacturer is to offer each the same terms. The Supreme Court avoided deciding whether different price *offers* to competing dealers are insufficient to sustain a secondary-line price discrimination claim, even when only one of those dealers ends up making an actual purchase from the manufacturer. Therefore, a split in the lower courts over the meaning of the Act’s requirement of price discrimination between different *purchasers* remains unresolved.
- If, despite the best counseling, a manufacturer finds itself a defendant in a Robinson-Patman case, the dictum about treating secondary-line price discrimination under the Robinson-Patman Act consistently with alleged violations of other antitrust laws should prove a useful tool. If the plaintiff is unable to identify a power-buying competitor whom the manufacturer consistently favors in its pricing, the manufacturer may now have some room to argue that no secondary-line violation has occurred.

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