

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.: **A Missed Opportunity**

Customer-Specific Competitive Bidding at Issue

Reeder-Simco GMC, Inc. (Reeder) was an authorized dealer of heavy-duty trucks manufactured by Volvo Trucks North America, Inc. (Volvo). Reeder sold Volvo trucks through a competitive bidding process whereby retail customers would invite bids based on specific product requirements. Once a Volvo dealer received a customer's requirements it would request a price concession from Volvo and then use that concession to calculate its bid to the retail customer. Volvo would decide on a case-by-case basis whether to offer a concession to any of its dealers and would base its decision on a number of factors, including industry-wide demand and the retail customer's purchase history. Ultimately, Reeder would purchase trucks from Volvo only if and when the retail customer accepted its bid.

Reeder's Claim

Following Volvo's announcement that it would enlarge the size of its dealers' markets and reduce the number of its authorized dealers, Reeder learned that Volvo had given another dealer a price concession greater than the concessions Reeder typically received, albeit in instances in which Reeder was not one of the dealers invited to bid by the customer. Reeder believed it was one of the targets of the downsizing and filed suit claiming that its sales and profits had suffered because Volvo had offered other dealers more favorable price concessions. Reeder based its claim on Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, which grants relief to plaintiffs that can establish so-called secondary-line price discrimination. To establish the violation, Reeder had to prove four elements:

- (1) The relevant Volvo truck sales were made in interstate commerce;
- (2) The trucks involved in the comparable sales were of "like grade and quality";
- (3) Volvo discriminated in price between Reeder and another Volvo truck dealer; and
- (4) The effect of such discrimination may be to injure competition to the advantage of the favored Volvo dealer.

Evidence of Secondary-line Injury

At trial, Reeder tried to establish competitive injury by using three types of comparisons:

- (1) A comparison of concessions Reeder received from Volvo for four successful bids against non-Volvo dealers, with larger concessions other successful Volvo dealers received for different sales on which Reeder did not bid ("purchase-to-purchase comparisons");
- (2) A comparison of concessions Volvo offered to Reeder in connection with several unsuccessful bids against non-Volvo dealers, with greater concessions Volvo gave to other Volvo dealers who were successful in bids in which Reeder did not participate ("offer-to-purchase comparisons"); and

- (3) Evidence of two occasions on which Reeder bid against another Volvo dealer head to head (“head-to-head comparisons”).

The Lower Court Decisions

In the district court, the jury found that (i) there was a “reasonable possibility” that discriminatory pricing may have harmed competition between Reeder and other Volvo dealers; (ii) Volvo's discriminatory pricing injured Reeder; and (iii) Reeder's damages exceeded \$1.3 million.

In a split decision, the Eighth Circuit affirmed the district court’s ruling, holding that Reeder had established the essential elements of a Robinson-Patman claim. It found that Reeder (i) could be considered a “purchaser” because the competitive bidding process had involved “actual sales at two different prices[,]...a sale to [Reeder] and a sale to another Volvo dealer,” albeit in entirely separate auctions; (ii) was in actual competition with favored dealers because “the favored and disfavored purchasers competed at the same functional level...and within the same geographic market”; and (iii) had established competitive injury because, among other things, Volvo intended to reduce the number of its dealers, and Reeder had lost a bid to another dealer that was subsequently granted additional concessions by Volvo after the competitive bidding had ended.

The Supreme Court Reverses

The Supreme Court reversed the Eighth Circuit's decision. It held that, in a secondary-line price discrimination case involving specialized goods sold after a bidding process, a manufacturer could not be held liable in the absence of a showing that it had discriminated between two or more of its dealers who were competing against one another to resell its product to the same retail customer. The Supreme Court found that, while Reeder had established certain elements of a secondary-line claim, there was insufficient evidence to establish either a price discrimination between Reeder and another, actual competitor or “the injury to competition targeted by the Robinson-Patman Act.” The Court was unimpressed with Reeder's evidentiary comparisons and declined to permit any “inference of competitive injury from evidence of such a mix-and-match, manipulable quality.” In neither the purchase-to-purchase nor the offer-to-purchase comparisons did Reeder compete with the alleged favored Volvo dealers for the same customers. According to the Court, “Reeder simply paired occasions on which it competed with non-Volvo dealers for a sale to Customer A with instances in which other Volvo dealers competed with non-Volvo dealers for a sale to Customer B.” Nor was the Court convinced by the head-to-head comparisons, declaring that, if there was any price discrimination at all between dealers, it “was not of such magnitude” as to “substantially” affect competition between Reeder and other Volvo dealers.

The Court clarified that, in the context of customer-specific competitive bidding, the relevant market becomes limited to the needs and demands of the particular end-user once the customer has chosen the particular dealers from which it will solicit bids. In this case, Reeder's mere bidding for sales in the same geographic area as other Volvo dealers did not mean that it competed against those other dealers for the same customer-tailored sales.

The Implications of the *Volvo* Decision

The Eighth Circuit's decision in *Volvo* raised concerns among manufacturers and other suppliers that they would lose the flexibility to respond to individual market circumstances by offering different price concessions to dealers that were not actually competing against one another in the bid context. Reversal of the Eighth Circuit's decision makes it easier for a manufacturer to price its goods competitively against those of other manufacturers when an end-user is soliciting bids from a single dealer for each manufacturer.

The *Volvo* decision offers considerable guidance that should reassure manufacturers. First, it clarifies the contours of Robinson-Patman secondary-line liability by requiring that a dealer claiming a violation in the context of bid business for specialized goods provide evidence of its head-to-head competition with another favored dealer of the manufacturer. Absent such competition between favored and disfavored dealers, the requisite threat of harm to competition from the price discrimination does not exist. Second, it can be argued that the Court's analysis of Reeder's head-to-head comparisons, by finding that those comparisons did not "affect substantially competition," has endorsed the notion, articulated in some lower court cases, that de minimis price discrimination cannot amount to a secondary-line violation. That aspect of the *Volvo* decision seems faithful to the language of the Robinson-Patman Act, which states that a threatened lessening of competition must be "substantial" in order to give rise to a secondary-line violation. Third, the Court said that the Robinson-Patman Act "signals no large departure from antitrust law's primary concern, interbrand competition," and declared that it continues to construe the Act consistently with antitrust law's broader policies. That dictum indicates that, absent harm to competition generally, secondary-line price discrimination might not arise. That view is inconsistent with the one taken by most lower courts that have addressed the issue. The Court suggested that such liability may exist only when the manufacturer is systematically favoring a power-buying dealer over smaller rivals, a circumstance not present in the *Volvo* case.

On the other hand, the Court declined to decide the broader question of whether the Robinson-Patman Act reaches "markets characterized by competitive bidding and special-order sales, as opposed to sales from inventory." By avoiding that question, the Court missed an opportunity to provide manufacturers with some bright-line guidance by declaring bid business effectively off-limits to the Robinson-Patman Act. Instead, it appears that the lower courts will continue to have to grapple with the uncomfortable fit between the Act and bid business in various circumstances.