SUPREME COURT PREVIEW

VOLVO TRUCKS NORTH AMERICA, INC. V. REEDER-SIMCO GMC, INC.:

When Do Competitive Bidding Assistance Programs Violate the Robinson-Patman Act?

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ON MARCH 7, 2005, THE U.S. Supreme Court granted a petition for a writ of certiorari in the case of *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*,[1] to review whether a truck manufacturer's offering of unequal price concessions to dealers engaged in bidding on different resale contracts constituted unlawful price discrimination in violation of Section 2(a) of the Robinson-Patman Act.[2] The Court will review an Eighth Circuit panel's 2–1 ruling affirming a $4 million judgment against Volvo Trucks and in favor of Reeder-Simco GMC, a former Volvo dealer that alleged that Volvo's discounting practices over time diverted business from it to favored competing dealers, causing it lost sales and profits.[3]

Reeder-Simco presents two central issues for the Supreme Court's review. First, it invites clarification of the nature of a "purchaser" under the RP Act—in particular, whether a losing bidder in a competitive bidding situation may bring a claim under the Act as a disadvantaged purchaser. Second, the case raises an issue as to the scope of the harm to "competition" necessary to demonstrate a violation of—and to recover damages under—the RP Act. Specifically, in a competitive bidding situation, must the disfavored bidder show direct competition on particular bids between itself and the favored bidder, or is it enough to establish some general competition between those firms in the same geographic market?

How the Court ultimately rules in this case has obvious importance to truck manufacturers and dealers alike. But its significance extends well beyond this one industry because it offers the rare opportunity for the Court to weigh in on the scope of the RP Act—an Act that, anecdotal evidence suggests, may raise even greater compliance concerns for businesses than the Sherman or Clayton Acts, which are far more frequently the subject of Supreme Court adjudication.[4] The Court's most recent RP opinion, *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*[5] (establishing the parameters of "primary line" discrimination claims under the Act),[6] is now twelve years old; the next most recent decision was *Texaco Inc. v. Hasbrouck*[7] (involving "functional discounts" for "secondary line" RP claims), decided three years earlier. In view of the scarcity of high court RP authority, and the demand for RP guidance, the Supreme Court's *Reeder-Simco* decision is likely to bear a significance far outweighing the deceptive narrowness of the issues to be reviewed by the Court.

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Volvo v. Reeder-Simco in the Lower Courts

Competitive Bidding in the Medium and Heavy Truck Industry. Competitive bidding is a reality in the medium-duty and heavy-duty truck industry. Unlike automobiles, medium-duty and heavy-duty trucks are not mass-produced, but instead are most commonly custom-built by manufacturers to meet the specifications of end-users. Components in these trucks can vary dramatically depending on the needs of the end-user. In a common scenario, once a customer (particularly a fleet customer intent upon using its volume purchase power to command the best available pricing package in the market) determines the specifications of the trucks it intends to purchase, it initiates what is essentially a "reverse auction": the customer requests bids from multiple dealers for one or more manufacturers and then uses those bids to force the dealers into competition with one another, driving down the final retail price.

To address this ubiquitous practice, many of the major medium- and heavy-duty truck manufacturers have implemented some form of competitive pricing assistance, allow-

ing dealers to request wholesale price concessions from the manufacturer in order to respond to competitive pressure from other dealers pursuing a particular deal. Those manufacturers, such as Volvo, purport to attempt to ensure that their dealers who are competing head-to-head for a particular contract with a prospective customer are "equalized," meaning that those dealers receive the same price concession. At the same time, many manufacturers, including Volvo, have taken the position that they are not obligated to equalize dealers on pricing concessions in other circumstances (i.e., where dealers are bidding on different contracts).

Reeder-Simco and Volvo. Reeder is an Arkansas-based dealer of heavy-duty Volvo trucks. In December 1997, Volvo announced a new program called "Volvo Vision," which identified the company's key challenges as "too many dealers" and "under performing dealers."[8] From 1996–1998, Reeder noticed that Volvo increased its sales objectives while decreasing its price concessions. Reeder's knowledge of the "Volvo Vision" program, together with its receipt of faxes meant for other dealers (apparently misdirected by Volvo), showing that those dealers were offered higher price concessions than Reeder was offered, caused it to suspect it was one of the dealers Volvo sought to eliminate.

In February 2000 Reeder filed suit against Volvo, alleging price discrimination in violation of the RP Act, and failure to deal in good faith and in a commercially reasonable manner in violation of the Arkansas Franchise Practices Act (AFPA). Reeder claimed that Volvo gave other dealers better price concessions than it gave to Reeder, which in turn reduced Reeder's profits on successful bids and caused Reeder to be unsuccessful on a greater number of bids. Reeder's secondary-line RP and AFPA claims were permitted to go to a jury.[9]

At trial Reeder presented evidence of a number of distinct bidding fact patterns, including two situations in which it competed "head-to-head" with another Volvo dealer for the same customer. In one of those situations, both it and the allegedly favored dealer lost to another manufacturer's dealer. In the other situation, the other Volvo dealer successfully obtained the contract after Volvo granted it an 8.5 percent concession, where Reeder had only been offered a 7.5 percent concession.[10] Reeder also presented evidence of four instances of "sales-to-sales" comparisons, in which it actually won bid jobs but was provided lower concessions than Volvo provided to other Volvo dealers who sold to *different* customers in unrelated bidding contests. Finally, Reeder offered evidence of a number of "offers-to-sales" comparisons, or situations in which it lost bids to *non*-Volvo dealers after Volvo refused to grant it requested price concessions, while in the same time frame other Volvo dealers were able to close sales, albeit to different retail customers, after Volvo granted them more favorable concessions.

At the close of the trial, the jury found in favor of Reeder on both the RP Act and AFPA claims, awarding damages in the amount of $1,358,000 on the RP Act claim, which the trial court trebled pursuant to 15 U.S.C. § 15(a).

The Eighth Circuit Opinion. Volvo made a range of arguments on appeal. It argued, first, that because Reeder was only an unsuccessful bidder, not a purchaser, in those instances where Reeder lost sales due to price discrimination (i.e., both the "head-to-head" and "offers-to-sales" comparisons), Reeder had not satisfied the "purchaser" requirement of an RP Act claim.[11] The majority agreed that in situations in which Reeder failed to win contracts because Volvo's price concessions were not favorable enough, Reeder did not actually purchase trucks, "but merely went into the market-place for the purpose of purchasing," and that "mere offers to sell do not violate the Robinson-Patman Act."[12] However, the court concluded that the situations in which Reeder actually purchased trucks from Volvo after successfully bidding on contracts "clearly gave Reeder 'purchaser' status."[13]

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Volvo also argued that reversal was appropriate because Reeder had not shown that it was in actual competition with the favored dealers, as required under the Act. The majority determined that the test for actual competition is whether "as of the time the price differential was imposed, the favored and disfavored purchasers competed at the same functional level, i.e., all wholesalers or all retailers, and within the same geographic market."[14] While there was no dispute that all the dealers competed at the same functional level, Volvo argued that Reeder did not compete in the same geographic market as the favored dealers. The majority disagreed with Volvo, finding that, although Reeder had an assigned geographic area, it "was free to sell outside that area, and did so."[15]

The majority likewise rejected Volvo's argument that Reeder "failed to demonstrate a reasonable possibility of competitive injury because Reeder did not prove the lower concessions Volvo granted to other dealers drew sales away from Reeder."[16] The court concluded that the jury could reasonably "infer that Volvo's intent to reduce the number of its dealers manifested itself in the discriminatory concession practices."[17] Reeder also presented evidence showing that its sales were solid prior to the period of Volvo's discrimination, and dropped during that period, while at the same time favored dealers' sales and the overall market stayed strong; that Volvo's pricing practices extended for a substantial period of time; and that dealer profit margins were narrow during this period. Thus, "the jury could reasonably conclude even small differences in price concessions had a substantial impact on competition."[18] Finally, the majority found that a jury could infer that as a result of the discriminatory con-

cessions favored dealers were able to undercut Reeder's prices (presumably even on deals on which the favored dealers were not competing directly against Reeder), thereby harming Reeder's sales and profits and establishing actual injury.[19]

In the view of the dissenting Judge Hansen, Reeder had not proven a violation of the RP Act because the facts did not show injury or likelihood of injury to actual competition between Reeder and the allegedly "favored" dealers. According to Judge Hansen, the majority "properly recognize[d] that a competitive bidding situation will never involve two 'purchasers,' and thus will always fall outside of the purview of the RP Act." Its "piggybacking" of Reeder's non-purchaser transactions onto purchaser transactions, however, was improper, as purchaser status under the RP Act is "inextricably intertwined with the existence of actual competition and the possible threat thereto."[20] Judge Hansen explained that the comparison of a sale by Reeder to one end user with a sale by a favored dealer to another end user failed to establish an RP Act violation because there was no actual competition between Reeder and the favored dealer at the time of the sales, and without proof of actual competition, Reeder could not show a reasonable possibility of competitive injury. Judge Hansen further explained his view that, while "Reeder may have established that it lost sales and profits to other non-Volvo competitors, there can be no inference of actual injury for the purpose of the RP Act without some evidence (and there is none in this record) that the discriminatory pricing caused those sales and profits to be diverted from Reeder to another Volvo dealer who received more favorable terms from Volvo."[21]

Understanding the Issues Presented

There are four essential elements of a prima facie case for damages based on a violation of Section 2(a) of the RP Act: (1) two sales by defendant to different customers; (2) involving products of like grade or quality; (3) in which the defendant discriminated in price between the two customers; and (4) that such discrimination had an unlawful effect on competition.[22] The questions presented by *Reeder-Simco* focus on the specific parameters of the first and fourth of these required elements. Specifically, Volvo's petition for a writ of certiorari presents two core issues for review:

1. Whether an unaccepted offer that does not lead to a purchase—so that there is not "discriminat[ion] . . . between different purchasers" as the statutory language contemplates—may be the basis for liability under the Act [the "purchaser" issue].
2. Whether the Act permits recovery of damages by a disfavored purchaser that does lose sales or profits to a competitor that does not purchase from the defendant, but does not lose sales or profits to any purchaser that "receives the benefit of" the defendant's price discrimination [the "competition" issue].[23]

In the following sections, we address the background to both of these issues.[24]

The "Purchaser" Requirement of a Section 2(a) Claim. Early in RP jurisprudence, it was established that in order to make out a claim for price discrimination, the plaintiff must have "purchaser" status. A purchaser is a person who actually buys something, not a person who merely attempts to buy something.[25] As stated by the Third Circuit in the 1939 decision in *Shaw's Inc. v. Wilson-Jones Co.*, the RP Act "does not compel a seller of commodities to offer them to all persons who may wish to bid upon a contract to resell them to a third party."[26]

Several cases adopt a strict interpretation of the purchaser requirement of the RP Act. In *M.C. Manufacturing Co. v. Texas Foundries, Inc.*[27] and *Terry's Floor Fashions, Inc. v. Burlington Industries, Inc.*,[28] for example, the courts rejected the plaintiffs' claims under the RP Act. In both cases, the court found that the plaintiffs had not in fact made purchases from the defendant in the course of the transactions that the plaintiff alleged to be discriminatory. Therefore, the plaintiffs failed to qualify as purchasers under the statute.

Volvo argues that the Eighth Circuit's decision squarely conflicts with the Fourth Circuit's decision in *Terry's* and *M.C. Manufacturing*. In particular, it notes that, like Reeder, the plaintiff in *Terry's* had established that it had purchased the defendant's products in the past, but the Fourth Circuit declined to hold that such other sales granted it "purchaser" status under the RP Act.[29] In response, Reeder points out that in *Terry's*, the plaintiff's prior purchases were not reasonably contemporaneous with the bids challenged as discriminatory, whereas Reeder presented examples in which it actually purchased trucks from Volvo, and compared these sales to sales made by other dealers during the same period. Therefore, Reeder argues, *Terry's* is distinguishable on its facts.[30]

Reeder relies in turn on two cases that take a more lenient view of the purchaser requirement. In *American Can Co. v. Bruce's Juices, Inc.*,[31] the defendant manufacturer was selling a model of can to the plaintiff's competitors at lower prices than it sold the same model to the plaintiff. As a result of this price disadvantage, the plaintiff's customers ceased buying that model of can from the plaintiff, resulting, in turn, in losses to the plaintiff. The defendant argued that there could be no RP Act violation because the plaintiff had ceased purchasing that model of can from the defendant. The Fifth Circuit rejected defendant's argument, concluding that "plaintiff was not bound to purchase the [cans] upon such terms in order to attain the status of a competing purchaser under the Act, as its failure to do so was directly attributable to defendant's own discriminatory practices."'[32] The Eleventh Circuit reached a similar decision in *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*[33] In *DeLong*, which involved competitive bidding, the plaintiff claimed it was foreclosed from selling metal polishing equipment manufactured by the defendant to a prospective customer because the plaintiff's competitor was receiving lower prices from the defendant on that equipment and thus was able to beat

the plaintiff's bid. The court rejected the defendant's argument that the plaintiff failed to satisfy the two purchaser requirement, holding that "there is no requirement that the two sales be made at precisely the same time or place. It is sufficient if the complaining party demonstrates some sort of real competitive injury."[34] The court found such competitive injury notwithstanding the fact that DeLong did not actually make a purchase when it lost its bids, noting that it did make some sales *to the same customer* in a few situations. The court concluded that "there is no doubt but that both [the favored purchaser] and DeLong were after the same [customer] dollar."[35]

From the perspective of many truck dealers, the deal-by-deal view of the purchaser requirement advanced by Volvo and implied in *Terry's* and *M.C. Manufacturing* leads to a troubling result. Because of the nature of the medium- and heavy-duty truck business, in many instances only one dealer ultimately wins the bid and makes a sale to a particular customer on a particular deal and, in turn, that winning dealer alone will purchase from the manufacturer for that particular deal. Volvo's interpretation of the RP Act's purchaser requirement would render the Act effectively inapplicable to the sale of many medium- and heavy-duty trucks, leaving dealers with substantially narrowed paths for recourse against discriminatory pricing practices by manufacturers. Reeder thus argues, in its Brief in Opposition to Volvo's Petition for a Writ of Certiorari, that the RP Act's "purchaser" requirement is satisfied by evidence that Reeder did purchase trucks from Volvo (when it won bids in which it competed against non-Volvo dealers), thereby distinguishing the case from situations involving mere offers to sell.[36]

In a market dominated by competitive bidding, must the two dealers actually compete for sales to the exact same customers on all relevant sales, or is it sufficient to demonstrate that the two dealers sell into a common geographic area and only occasionally go head-to-head?

Volvo responds, however, that the RP Act is, by its very nature, limited. Among other things, it does not apply to refusals to deal,[37] to service industries, or to leases, licenses, consignments, and other non-sales transactions[38]—including unconsummated bid quoting. These limitations are inherent in the statute itself, and are not for the courts to disregard. Thus, Volvo argues, decisions like *Bruce's Juices*, *DeLong*, and *Reeder-Simco* misapprehend and misapply the RP Act in extending it to competitive bidding or other non-purchase situations.[39] Were the Court to affirm the Eighth Circuit's application of RP Act to competitive bidding, manufacturers would likely turn to less ambiguous refusals to deal or more frequent dealer terminations, options that Volvo did not invoke here.[40]

The "Competition" Requirement.

1. Are Favored and Disfavored Dealers Selling into a Common Geographic Market, But Not Seeking to Sell to the Same Particular Customers, "in Competition"? Section 2(a) of the RP Act prohibits discriminations in price where the effect of such discrimination "may be substantially to lessen competition or . . . to injure, destroy, or prevent competition with any person who . . . knowingly receives the benefit of such discrimination."[41] To state a prima facie claim under this section, therefore, a plaintiff must show that it was in actual competition with the favored purchasers and that this competition was harmed by the alleged discrimination. At issue in *Reeder-Simco* is the question of what type of evidence is sufficient to demonstrate actual competition: In a market dominated by competitive bidding, must the two dealers actually compete for sales *to the exact same customers on all relevant sales*, or is it sufficient to demonstrate that the two dealers sell into a common geographic area and only occasionally go head-to-head? Circuit courts before *Reeder-Simco* had not directly addressed this question, though they have offered different views of the nature of "competition" under the Act.

One of the central cases addressing the competition element in the context of a bidding situation is the Fifth Circuit's decision in *M.C. Manufacturing*.[42] There, the plaintiff alleged that the defendant had violated the RP Act by quoting the plaintiff a higher price for a certain plug than it quoted one of the plaintiff's competitors, which led to the competitor winning a bid for an annual government contract.[43] The plaintiff had previously purchased equivalent products from the defendant when it prevailed in a prior bid. The Fifth Circuit, however, concluded that the plaintiff had failed to establish that it was "in competition" with the favored purchaser because the plaintiff and favored purchaser were not both purchasers under a contract with the same customer in the same year—and therefore "were not competing for the same consumer dollar."[44]

The Second Circuit reached a similar result in *Best Brands Beverage, Inc. v. Falstaff Brewing Corp.*,[45] a case that did not involve competitive bidding. The court ruled in the defendant's favor on the plaintiff's RP Act claim, finding that there was no evidence of actual competition between the plaintiff and the favored purchasers or their customers. In reaching that conclusion, the Second Circuit appeared to take a broader view than the Fifth Circuit did in *M.C. Manufacturing*, looking for any evidence that that either the plaintiff or the favored distributor, or any of their customers, competed within each other's otherwise exclusive geographic territory.[46] Because *Best Brands* did not involve competitive bidding, however, the nature of competition there was arguably quite different because the relevant com-

petition in that case was, in fact, for all potential customers within the relevant geographic areas.

The Eleventh Circuit addressed the question of competition in a competitive bidding context in *DeLong*. While citing the Fifth Circuit's decision in *M.C. Manufacturing*, the court appeared to reach the directly contradictory conclusion. The court held that the plaintiff and the favored purchaser were in actual competition because there was "no doubt" that they were "after the same [customer's] dollar" because the favored purchaser's sales to that customer "directly competed" with "potential sales" to that customer by the plaintiff.[47] But again, the facts of *DeLong* were arguably unique in that, unlike *M.C. Manufacturing* and *Reeder-Simco*, the plaintiff in *DeLong* did, in fact, sell some product to the same customer to whom the favored distributor was selling at a significantly higher profit.

In its petition for certiorari, Volvo argued that the Eighth Circuit's decision conflicts with the holding in *M.C. Manufacturing* that the price differences did not violate the RP Act "because the lower price[s] [to dealers bidding on different bid jobs] could not have diverted sales to the favored purchaser."[48] Reeder counters that the Eighth Circuit cited *M.C. Manufacturing* with approval, and argues that that decision is factually distinguishable because there the plaintiff made no contemporaneous purchases of the product in question, whereas Reeder did make contemporaneous purchases of trucks at higher prices than Volvo charged other Volvo dealers for similarly equipped trucks.[49] In other words, even if they did not compete for the same particular customers, Reeder generally competed in the same geographic market as those Volvo dealers who received more favorable pricing assistance than did Reeder—evidence lacking in *M.C. Manufacturing* and *Best Brands*.[50]

One view of the evidence in *Reeder-Simco* (proffered by Volvo and the United States in its amicus brief) is that, other than the single instance of head-to-head competition in which it actually lost a bid to a favored Volvo distributor, Reeder did not present evidence that it competed with favored dealers such that any discrimination in price concessions could "divert" sales or profits from it to such dealers—under *M.C. Manufacturing* and the Supreme Court's holdings outside the competitive bidding context,[51] a *sine qua non* of an RP Act claim. Another view of this same evidence (proffered by Reeder and the Eighth Circuit) is that discriminatory pricing could divert sales and profits from disfavored dealers to favored dealers who compete in the same geographic market even where favored and disfavored dealers do not compete head-to-head on most, or even more than a few, deals. For example, in an industry like the medium- and heavy-duty truck business, where the pool of consumers is relatively small and information spreads quickly by word of mouth, the prices charged by favored dealers receiving higher discounts from the manufacturer could become generally known to consumers in the marketplace, including the customers of the disfavored dealer, thereby creating a de facto price ceiling for the product in the market. Facing such a circumstance, the disfavored dealer would not be free to charge its customers higher prices to make up for its higher cost of good sold and would, as a result, likely reap lower profits on its sales, even on deals where it was not facing head to head competition from a favored dealer. Manufacturers and dealers alike will be waiting to see if the Court offers clarification as to whether this kind of indirect competitive effect, even if demonstrable, and even if, as in the above example, beneficial to consumers, is within the scope of the RP Act.

2. Can a Plaintiff Recover Damages for Sales/Profits Lost to Someone Other than a Favored Dealer? Closely tied to the issue of proving competition between the favored and disfavored purchasers is the question of whether an RP Act plaintiff can recover damages for sales or profits lost to a different manufacturer's dealer, rather than to the allegedly favored purchaser. According to Volvo, damages may be recovered under the RP Act only where the disfavored purchaser loses a sale (or profits) to a favored purchaser in head-to-head competition. Volvo cites *J. Truett Payne Co. v. Chrysler Moteors Corp.*[52] for the proposition that damages cannot be recovered for a violation of the RP Act where there is no evidence that the price discrimination harmed the plaintiff's ability to compete against favored purchasers. According to Volvo, sales lost by Reeder to dealers of other truck linemakes cannot be said to result from price discrimination.

In response, Reeder argues that competitive injury and causation may be established by proof that, as a result of discriminatory concession practices, sales and profits were "diverted" from Reeder, thus making it difficult for Reeder to compete in the marketplace in the presence of favored Volvo dealers who, as a result of the better prices they received from Volvo, were making more sales and earning better profits on those sales than was Reeder on its own sales.[53] Reeder points out that the language of the RP Act allows for liability upon a showing that the effect of the price discrimination "may"—not "must"—substantially injure competition, and that nothing in the RP Act requires that a plaintiff present direct evidence of competitive injury. Citing the Supreme Court's 1948 decision in *FTC v. Morton Salt Co.*,[54] Reeder argues that competitive injury can be inferred from evidence of a substantial price difference over time without further evidence that the price difference resulted in lost sales or profits to the favored dealers. Volvo and the United States respond, however, that in order to recover damages, a disfavored purchaser must still demonstrate that the injury suffered flowed from—i.e., was *caused* by—the difference in price between the favored and disfavored purchaser.[55]

Thus, a fundamental question to be addressed by the Supreme Court is whether the RP Act requires a showing that the price discrimination injured the plaintiff's ability to compete with the favored purchaser on a specific transaction or whether a plaintiff can satisfy the competitive injury requirement of an RP Act case by showing that the price discrimination generally injured the plaintiff's ability to compete in

the marketplace, whether or not it competed directly against the favored purchaser on every (or even any) specific deal involving a price difference. How the Court comes down on this issue is likely to have significant consequences for RP Act claims in the competitive bidding context and, in particular, with respect to the damages recoverable by a plaintiff for an RP Act violation.

More broadly, a ruling in Reeder-Simco's favor would arguably support an award of damages for price differences that had no effect on competition at all—for example, differentials between dealers who sell in the same general territory but to distinct types of customers. As the United States argues in its amicus curiae brief in support of Volvo, an affirmance "threatens to convert the [RP Act] into a guarantee of equitable treatment to franchisees, rather than a targeted protection against price discrimination between purchasers in actual competition, and [would] extend[ ] the Act in a manner that would compel a level of price rigidity contrary to the goals of the antitrust laws."[56] On the other hand, reversal on the grounds that Reeder failed to prove competitive injury could, depending on the Court's approach, represent a significant narrowing of the *Morton Salt* presumption of competitive injury—an outcome that would have ramifications for all secondary-line RP Act claims.

Conclusion

Truck dealers have skirmished with truck manufacturers over pricing issues for decades, both in and out of court. *Reeder-Simco* is merely the latest legal episode in this long-running saga. For many truck dealers facing dealer consolidation plans like "Volvo Vision," the questions presented by the case are matters of corporate life or death. Perhaps sensing this, the Eighth Circuit majority in *Reeder-Simco* appeared to focus on Volvo's apparent determination to drive the plaintiff out of business, in part through differential bid quoting. While this component of the case may be unique and render it potentially distinguishable in future challenges to bidding assistance programs, if the Supreme Court chooses to take the opportunity to reach the broader questions at issue here, the decision could have significant implications for the future of competitive bidding itself.

If affirmed by the Supreme Court, *Reeder-Simco* could be argued to require that identical wholesale price concessions must be offered to all dealers across the entire territory in which the manufacturer sells. Manufacturers, not surprisingly, fear that such a restriction could make it more difficult for them to compete in markets that demand deal-specific competitive bidding and would thereby have the effect of raising prices overall. Dealers respond by suggesting that the statutory "meeting competition" and "cost-justification" defenses[57] offer sufficient flexibility to manufacturers to address such concerns, and that the ends of the RP Act are best served by protecting dealers from discrimination that threatens to drive them from the marketplace.

Regardless of how it is ultimately resolved by the Supreme Court, the *Reeder-Simco* case puts into sharp relief the oft-noted tension between the Robinson-Patman Act, which seeks to protect competition by protecting individual competitors, and federal antitrust law more broadly, which protects competition—and in particular interbrand, rather than intrabrand, competition—not individual competitors. Antitrust aficionados will watch closely to see whether the Supreme Court extends contemporary economics' general rejection of the notion of protecting individual competitors to this statute, which arguably has, at its core, the goal of doing just that.[58] ■

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[1] 125 S. Ct. 1596 (2005).

[2] 15 U.S.C. § 13(a). Section 2(a) of the RP Act prohibits sellers from discriminating in price between "different purchasers of commodities of like grade and quality," when such discrimination may adversely affect competition. Specifically, Section 2(a) provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, 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.

[3] Reeder-Simco GMC, Inc. v. Volvo Trucks N. Am., Inc., 374 F.3d 701, 704–05 (8th Cir. 2004).

[4] In its petition for certiorari, Volvo references the observation by then-Chair of the ABA Section of Antitrust Law, Robert T. Joseph, that "[a]rguably more business decisions are affected by the Robinson-Patman Act than by any other antitrust law because so many interstate sales and dealer-oriented promotions of commodities are subject to its terms." Robert T. Joseph, *From the Section Chair*, ANTITRUST, Summer 2003, at 3.

[5] 509 U.S. 209 (1993).

[6] A "primary line" RP Act claim is one brought by a competing manufacturer alleging that another manufacturer's discriminatory pricing policy harmed its competitor. Under *Brooke Group*, only facts supporting a traditional predatory pricing claim can support a primary line discrimination claim. A "secondary line" RP Act claim is the claim that a distributor's ability to compete with another firm also reselling the same manufacturer's products was injured because it received less favorable pricing or terms than the other firm.

[7] 496 U.S. 543, 556 (1990).

[8] *Reeder-Simco*, 374 F.3d at 705.

[9] *Id.* at 705.

[10] *Id.* at 704.

[11] The "purchaser requirement" is also sometimes known as the "two sales rule," the "two sales" being the sale to the favored buyer and the sale to the disfavored buyer.

[12] 374 F.3d at 707.

[13] *Id.* at 709.

[14] *Id.*

[15] *Id.*

[16] *Id.* at 711.

[17] *Id.* at 712.

[18] *Id.*

[19] *Id.* at 713.

[20] *Id.* at 718.

[21] *Id.* at 720.

[22] *See* Texaco Inc. v. Hasbrouck, 496 U.S. 543, 556 (1990); Infusion Res. v. Minimed, Inc., 351 F.3d 688, 692–93 (5th Cir. 2003).

[23] Petition for a Writ of Certiorari, (No. 04-905) Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 2005 WL 23254 at *i (U.S. Jan. 4, 2005) [hereinafter Cert. Petition].

[24] The U.S. Department of Justice and Federal Trade Commission filed an amicus brief in support of Volvo's position. Brief for the United States as Amicus Curiae Supporting Petitioner, (No. 04-905), Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc. (May 2005) [hereinafter U.S. Amicus Brief] The U.S. Amicus Brief focuses primarily on the "competition" issue but also supports Volvo's claim that there is only one "purchaser" in the context of a competitive bid. See id. at 20 n.11 (noting that "[i]n this case, purchases were made as a result of special-order bidding such that, for every completed sale, there was only one successful bidder and hence only one purchaser from Volvo").

[25] Shaw's, Inc. v. Wilson-Jones Co., 105 F.2d 331, 333 (3d Cir. 1939).

[26] *Id.* at 334.

[27] 517 F.2d 1059 (5th Cir. 1975).

[28] 763 F.2d 604 (4th Cir. 1985).

[29] Cert. Petition, *supra* note 23, at 13–14.

[30] Brief in Opposition to Petition for a Writ of Certiorari, (No. 04-905), Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 2005 WL 282153 at 10 (U.S. Feb. 2, 2005) [hereinafter Cert. Opp.].

[31] 187 F.2d 919 (5th Cir. 1951).

[32] *Id.* at 924.

[33] 990 F.2d 1186 (11th Cir. 1993).

[34] *Id.* at 1202.

[35] *Id.*

[36] *See* Cert. Opp., *supra* note 30, at 9–12.

[37] *See, e.g.*, Black Gold, Ltd. v. Rockwool Indus., Inc., 729 F.2d 676, 682–83 (10th Cir. 1984); *see also* L&L Oil Co. v. Murphy Oil Corp., 674 F.2d 1113 (5th Cir. 1982) (noting that "[e]ach court which has considered an alleged refusal to deal in the context of § 2(a) has held unequivocally that a refusal to deal, standing alone, is not actionable under § 2(a)"); Industrial Burner Sys., Inc. v. Maxon Corp., 275 F. Supp. 2d 878, 893 (E.D. Mich. 2003) ("[n]othing in the Robinson-Patman Act imposes upon a supplier an affirmative duty to sell to all potential customers . . . [and] absent monopolistic power, a seller may refuse to deal with anyone") (quoting Ben B. Schwartz & Sons, Inc. v. Sunkist Growers, Inc., 203 F. Supp. 92, 99 (E.D. Mich. 1962)); Ralph Kearney & Sons v. Emerson Elec. Co., 1996 U.S. Dist. LEXIS 12600, at *5 (E.D. Pa. 1996) ("A refusal to deal, whatever else it may be, is not price discrimination under the [RP Act]"); S&W Constr. & Materials Co. v. Dravo Basic Materials Co., 813 F. Supp. 1214, 1223 (S.D. Miss. 1992) ("alleged refusals to deal or supply are not actionable, even if such refusals are discriminatory").

[38] *E.g.*, Seaboard Supply Co. v. Congoleum Corp., 770 F.2d 367, 373 (3d Cir. 1985) (consignments); Export Liquor Sales, Inc. v. Ammex Warehouse Co., 426 F.2d 251, 252 (6th Cir. 1970); LaSalle Street Press, Inc. v. McCormick & Henderson, Inc., 293 F. Supp. 1004, 1005 (N.D. Ill. 1968), *aff'd*, 445 F.2d 84 (7th Cir. 1971) (patent license).

[39] As Volvo notes, Professor Hovenkamp explains this in direct terms:

> Clearly, an unaccepted or uncompleted offer is not a sale; nor is a price quotation that is not followed by a purchase, even if the result of the higher quote is that the plaintiff loses a bid. This is simply another way of saying that there is no "attempt" offense built into the Robinson-Patman Act. If one attempts to violate the statute by offering a prospective purchaser a higher or lower price, but no transaction occurs, the statute simply has not been violated.

14 HERBERT HOVENKAMP, ANTITRUST LAW ¶ 2312(d) (2002) (footnotes omitted). Professor Hovenkamp characterizes *Industrial Burner v. Maxon*, 275 F. Supp. 2d at 893 (E.D. Mich. 2003), in which the court found unconsummated bid quotes to be predicates for an RP Act violation, as "dubious" in light of this reading of the law. *Id.*

[40] Alternatively, manufacturers may place greater reliance on the statutorily prescribed meeting competition and cost justification defenses, to the extent that these are applicable in a particular bid situation.

[41] 15 U.S.C. § 13(a).

[42] 517 F.2d 1059 (5th Cir. 1975).

[43] *Id.* at 1061.

[44] *Id.* at 1068.

[45] 842 F.2d 578 (2d Cir. 1987).

[46] *Id.* at 584–85. The court found that there was no evidence of actual competition between plaintiff and the favored purchasers or their customers—even though the plaintiff produced evidence suggesting that there may have been instances of "transshipping" of products between their distinct geographic territories. *Id.*

[47] *DeLong*, 990 F.2d at 1202.

[48] Cert. Petition, *supra* note 23, at 19. Though not substantively discussed in the Eighth Circuit's opinion or in the certiorari papers, the *Reeder-Simco* case also could implicate the "functional availability" doctrine—the judicially created defense to a price discrimination claim that may be applicable when a discount is "functionally" (that is, readily or actually) available to all customers of the discriminating seller. At least one circuit court has applied the functional availability doctrine in the heavy-duty truck distribution context to approve a program quite similar to Volvo's. *Metro Ford Truck Sales, Inc. v. Ford Motor Co.*, 145 F.3d 320, 325–26 (5th Cir. 1998), involved an RP Act challenge by a Ford truck dealer to a Ford pricing program under which all Ford dealers bidding on the same customer received the same price concession. Finding that Ford's discounts were "functionally available" to all dealers, the Fifth Circuit ruled in Ford's favor. Volvo apparently had a similar general policy to Ford's, in most cases equalizing price concessions to dealers bidding on the same jobs to the same customers, although it is true that not all of Volvo's conduct at issue in *Reeder-Simco* can be defended under the functional availability doctrine.

[49] Cert. Opp., *supra* note 30, at 19.

[50] *Id.* at 18.

[51] *See, e.g.*, FTC v. Morton Salt Co., 334 U.S. 37 (1948) (question is whether disfavored dealer is "handicapped in competing with the more favored . . . purchasers"), Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428 (1983); FTC v. Sun Oil Co., 371 U.S. 505 (1963).

[52] 451 U.S. 557, 569–70 (1981).

[53] Cert. Opp., *supra* note 30, at 23.

[54] 334 U.S. 37 (1948).

[55] *See* J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 561–63 (1981); *see also Morton Salt*, 334 U.S. at 37; *Falls City*, 460 U.S. at 437.

[56] U.S. Amicus Br., *supra* note 24, at 24.

[57] 15 U.S.C. § 13(a), (b).

[58] The Supreme Court has already expressly applied the broader notion of competitive harm to primary-line claims under the Robinson-Patman Act, *Brooke Group*, 509 U.S. at 222 (concluding that there must "be a reasonable possibility of substantial injury to competition before [the RP Act's] protections are triggered") (citation omitted), but it has not yet extended this holding to secondary-line claims.