Volvo Trucks v. Reeder-Simco: Judicial Activism at the Supreme Court?

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The Supreme Court’s recent opinion in Volvo Trucks North America v. Reeder-Simco GMC, Inc. has been almost universally praised by the defense bar as an important step in harmonizing the Robinson-Patman Act with the goals of the antitrust laws. The Court held that the plaintiff truck dealer, who complained that Volvo provided discounts to other Volvo dealers but not to itself, had not established any injury to competition from Volvo’s discriminatory practices. The Court explicitly rejected an interpretation of the Robinson-Patman Act that would be “geared more to the protection of individual competitors than to the stimulation of competition.” Thus, the Court’s opinion produced applause from those who take the position that the Robinson-Patman Act provides antitrust plaintiffs with too great a weapon.

It is surprising that the Court was able to limit the reach of the Robinson-Patman Act through the vehicle of Reeder’s case. Reeder did not urge the Court to adopt an interpretation of the Robinson-Patman Act that was at odds with existing law, or an extension of it. Rather, Reeder asked the Court to affirm its jury verdict, as the court of appeals had done, on the ground that it had introduced sufficient probative evidence of a violation to support its antitrust claim. The Supreme Court declined to do so, and instead, reversed the jury verdict. The Court held that the evidence that Reeder had presented to the jury did not prove that Volvo’s discrimination had injured competition.

To say the least, it is highly unusual for the Supreme Court to dig into the evidence in a case and reach a conclusion, one way or another, that is based upon the result of its examination. Whatever the merits of its decision, the question presented by Reeder-Simco is whether the Court engaged in judicial activism in the interests of limiting the reach of the Robinson Patman Act. An examination of the trial evidence, and the court of appeals’ decision in the case, reveals the answer. The Court overturned Reeder’s victory at trial by violating almost every tenet of appellate review of a jury verdict, and, essentially, by voting as a jury instead of an appellate court. This article examines the basis for the Court’s willingness and ability to erode the Robinson-Patman Act’s reach through judicial fiat.

The Evidence

The Supreme Court’s opinion is heavily fact laden, and it extensively recites facts that both parties did not dispute. Volvo manufactures made-to-order heavy-duty trucks, and sells its trucks to dealers, who resell to customers in a competitive bidding process. The mechanics of the transaction are as follows. A retail customer invites several dealers to enter bids for trucks made to the customer’s specifications. The dealers then ask Volvo for a customer-specific discount (or “price concession”), Volvo decides whether to offer a concession on a case-by-case basis, but its stated policy is to provide dealers that are bidding directly against each other with the same discount. Reeder alleged that Volvo violated its policy, and the Robinson-Patman Act, by offering other dealers better concessions than Reeder received and thereby putting Reeder at a competitive disadvantage. As a result, Reeder lost sales and profits, and, ultimately, fell below the minimum volume requirements that Volvo required of its dealers. Volvo announced its intention to terminate Reeder’s dealership, and Reeder filed a complaint against Volvo.

The complaint asserted a claim under the Arkansas Franchise Practices Act and the Robinson-Patman Act, but not under the Sherman Act. The jury returned a verdict for Reeder on both counts. Volvo moved for judgment as a matter of law, principally on the ground that the evidence was not sufficient to support the jury verdict. The trial court reversed the motion, and the Eighth Circuit affirmed. The Supreme Court’s opinion reversed the Eighth Circuit’s judgment.

The Legal Landscape

We can certainly understand why the Supreme Court reached the result that it did, as a matter of substantive antitrust policy. The Supreme Court long ago held that antitrust law is for the benefit of competition, not competitors. Healthy competition results in lower prices and enhances consumer welfare; inefficient competitors may be casualties of competitive markets. In the thirty years since GTE Sylvania, the Court has increasingly incorporated economic principles into its analysis of antitrust problems. It has recognized the benefits of low pricing, calling into question any claim that discount...
competition, even by a dominant firm, can have anticompetitive consequences.\(^7\)

The Robinson-Patman Act in important respects is inconsistent with the contemporary view of antitrust policy, and its goals have little to do with the preservation of competition as it is understood today. The Act was designed to protect independent businesses and their suppliers from extinction in the face of the growth of grocery store chains in the 1930s. The legislative history of the Act reflects a concern that the chain stores were exercising their “purchasing power” to obtain such low pricing from suppliers that they would soon achieve a monopoly.\(^8\) The Act, then, is overtly protectionist; its initial title was the “Wholesale Grocer’s Protection Act.” As Hovenkamp says, “the Robinson-Patman Act cannot be understood as designed to encourage allocative efficiency or to maximize consumer welfare. It was designed to protect small businesses from larger, more efficient businesses.”\(^9\)

Thus, the Act prohibits firms from discriminating in price among competing purchasers and, in essence, inhibited them from offering discounts to gain business from their rivals unless the discounts are also offered to inefficient customers as well as powerful ones.

The goal of the Robinson-Patman Act thus conflicts with an antitrust analysis that focuses on the preservation of competition rather than competitors. The Supreme Court has construed the Robinson-Patman Act explicitly to equate an alleged injury to a disadvantaged competitor with the type of injury that the antitrust laws are intended to ameliorate. In FTC v. Morton Salt,\(^10\) the Supreme Court held that the existence of a substantial price difference over time, in a market where competition among resellers is “keen,” creates an inference of injury to competition.\(^11\) A plaintiff invoking that inference can prove injury to competition through injury to itself, a sleight of hand that many commentators have criticized\(^12\) but that the Supreme Court has never revoked.

Given the opportunity to do so in Falls City Industries v. Vanco Beverage, Inc.,\(^13\) the Court held only that the Morton Salt inference “may be overcome by evidence breaking the causal connection between a price differential and lost sales or profits.”\(^14\)

The Court’s olive branch that the Morton Salt inference is rebuttable does not immunize suppliers that have offered discounts to important customers from attack under the Robinson-Patman Act. Plaintiffs that have not proved that a discriminatory discount injured competition, but did prove that a discriminatory discount was substantial and sustained, can benefit from the Morton Salt inference and use the Robinson-Patman Act to redress purely individual injury.\(^15\)

The enforcement agencies only very rarely consider the application of the Robinson-Patman Act to a firm’s conduct. While both agencies have jurisdiction to enforce the Act, only the FTC has done so in modern history.\(^16\) Its most recent attempt at a price discrimination prosecution ended with a whimper, not a bang, when the Commission rejected consent decrees negotiated between complaint counsel and six national booksellers, and instead, dismissed the administrative complaints without action.\(^17\) Thus, the conflict between the explicit goal of the Robinson-Patman Act to protect inefficient competitors from elimination, with the judicially articulated goal of the antitrust laws to preserve competition, is waged in the courts. The Antitrust Modernization Commission recently voted to “[r]ecommend that Congress repeal the Robinson-Patman Act in its entirety,”\(^18\) but there is as yet no legislative initiative to repeal the Act.

Reconciling the Law with the Evidence

It is against this background that the Supreme Court accepted certiorari in Reeder-Simco. The decision to do so, as a matter of policy, is not particularly surprising. The Court’s recent conservatively focused antitrust opinions,\(^19\) suggest that a majority of the Court would conclude that a plaintiff’s verdict in a Robinson-Patman Act case is the wrong result. But whether the Court should have limited the reach of the Robinson-Patman Act by reversing a jury verdict raises issues beyond the appropriate scope of the Act.

Both Reeder and Volvo made an important and courageous decision in this case when they decided to submit their business problem to a jury. It is the unusual antitrust case that is ever tried. The statistics published by the Administrative Conference of the United States Courts indicate that, in the federal system, far fewer cases go to trial, whatever the subject matter, than were tried 10 years ago.\(^20\) Antitrust cases terminated by a trial dropped from 7.1% to 4.8% between FY1997 and FY2005.\(^21\) Some commentators ascribe this decrease in part to the advances in discovery management that give both parties a complete view of their cases before trial and thus permit each side to realistically assess settlement.\(^22\) Others believe that fewer cases are tried because fewer lawyers that represent corporations have actual first chair trial experience,\(^23\) a circumstance that may influence the lawyer to counsel his or her clients toward settlement. Whatever the reasons, it is certainly the case that those antitrust lawyers who love trials do not have regular opportunities to enjoy the practice of their craft.

However, when the brave litigant does take a case to a jury, and wins, it should be reasonably certain that, barring errors of law, the verdict will hold up on appeal. Courts of appeal owe great deference to decisions reached by factfinders. Generally, a court can reverse a jury verdict only if it concludes that the trial court committed legal error in the jury instructions or rulings, or if it finds, after considering the evidence in the light most favorable to the prevailing party, that a reasonable jury could not find for the winner.\(^24\) This is a high standard for appellate review, and lawyers who try cases know that it is a difficult standard to meet. So, both parties must assess the difficulty of reversing a jury verdict as part of the necessary analysis to employ in deciding whether to risk taking an antitrust case to trial.

Whatever the calculus that influenced both Reeder and Volvo to decide to try the case, only one of them achieved the
result desired—Reeder prevailed. Given the standard for appellate review, Reeder should have been reasonably confident of preserving its verdict on appeal.

In its first foray at the appellate level, Reeder did prevail. Volvo appealed the denial of its motion for judgment as a matter of law after the jury verdict to the Eighth Circuit. That court affirmed the jury verdict.\(^{25}\) The court noted that, while its review of the denial of the JAML was de novo, “a party seeking post trial JAML based on the sufficiency of the evidence ‘faces an onerous burden [because we must] view the evidence in a light most favorable to the jury’s verdict [and reverse only] when there is a complete absence of probative facts to support the conclusion reached.’”\(^{26}\) Applying this standard, the Eighth Circuit rejected Volvo’s arguments on appeal that the evidence was not sufficient to support the jury’s verdict. The court carefully examined the evidence submitted to the jury. It found evidence that Volvo had offered favorable discounts to dealers with whom Reeder competed, that these discounts caused Reeder to lose sales and profits, and that the jury’s inference of competitive injury was thus supported by substantial evidence. The court repeatedly noted that Volvo did not object to the jury instructions, so the only issue before it was, did Reeder present evidence of what it claimed? The Eighth Circuit concluded that it had done so, and thus that the jury’s verdict was supported by sufficient evidence.

Volvo sought and achieved certiorari to the Supreme Court, and, ultimately, a complete victory when the Supreme Court reversed the judgment of the Eighth Circuit. In its endeavor to overturn the jury verdict, Volvo was supported by a number of prominent amici, including the U.S. Department of Justice. The government decried the Eighth Circuit’s decision as “expand[ing] the law’s reach in a manner foreclosed by its language and purpose and by decisions of this Court requiring (at a minimum) proof of price discrimination between competing purchasers . . . .”\(^{27}\)

Neither Volvo nor its supporters attacked the jury instructions, nor any ruling of evidence made at the trial court. Rather, they focused their briefs on a statutory construction argument: they said that competitive bidding situations are not covered by the Act. Without requesting an outright reversal of \textit{Morton Salt}, Volvo also invited the Court to limit the \textit{Morton Salt} inference (which it characterized as “dicta”),\(^{28}\) despite the fact that Volvo proposed the \textit{Morton Salt} jury instruction.\(^{29}\) Finally Volvo attacked the sufficiency of the evidence that supported the jury’s finding that Reeder actually competed with dealers favored by the discrimination.\(^{30}\)

In reversing the Eighth Circuit, the Supreme Court did not announce any new principle of law, or construe any provisions of the Robinson-Patman Act, or reverse or limit \textit{Morton Salt}. The Supreme Court simply held that Reeder's evidence was insufficient to establish a violation of the Robinson-Patman Act. The Supreme Court ducked the only truly legal issue presented by the appeal, the question whether the Robinson-Patman Act, by its terms, permitted Reeder, as an unsuccessful bidder, to invoke the statute at all. The Court did not hold, as a matter of law, that the Robinson-Patman Act does not reach competitive bidding situations. The Court specifically assumed that Reeder was a purchaser under the Act\(^{31}\) in concluding that Reeder’s case failed.

How, then, did the Supreme Court reverse a jury verdict? The Supreme Court achieved its reversal by dismissing all of the evidence upon which the jury verdict was likely based as first, irrelevant, and second, of insufficient quality to sustain the jury’s verdict. To do so, the Court compartmentalized Reeder’s evidence, selected Volvo’s interpretation of it, weighed it, and, in short, acted like a jury instead of an appellate court.

The Court’s discussion of Reeder’s evidence is remarkable for its pejorative tone. The Court quoted the testimony of Reeder’s Vice President that, although it was Volvo’s policy to offer equal concessions to Volvo dealers bidding against one another for a particular contract, he “contended” that the policy “was not executed,” suggesting, perhaps, that this assertion was not true.\(^{32}\) But, in reviewing the jury’s verdict, the Court was required to accept that contention because it favored Reeder. Similarly, in discussing the Hiland Dairy incident in which Reeder presented evidence that Volvo offered a better concession to the dealer competing with Reeder for the business, the Court adopted Volvo's view of the evidence that it offered the concession after the customer had selected the competitive dealer, and not before. Again, the Court was required to accept Reeder’s version of events, which was that Volvo offered the concessions to Reeder’s competitor while both were still actively engaged in seeking the business of the customer.\(^{33}\)

Finally, the Court dismissed the statistical comparisons that Reeder had presented to the jury showing that Volvo gave lower concessions to Reeder on successful bids that it made, while giving larger discounts to other successful Volvo dealers, and also offered lower concessions to Reeder in connection with unsuccessful bids that it made, while offering larger discounts to other Volvo dealers on their successful bids. The Court characterized this evidence as “selective” and “discrete,” faulted it because it was not a “systematic study,” and rejected it because the comparisons were “separated in time by as many as seven months.”\(^{34}\) “We decline,” said the Court piously, “to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality.”\(^{35}\) In other words, the Supreme Court disagreed with the jury on the weight to accord the bulk of Reeder’s evidence. That disagreement permitted the Court to evaluate the remainder of Reeder’s evidence relating to the two sales in which Reeder competed head to head with another Volvo dealer and thus to find that Reeder’s evidence was insufficient to sustain the jury’s verdict of competitive injury.

The simple dissent, by the former antitrust practitioner Justice Stevens, is based solidly on the concept that the Court owed more deference to the jury’s verdict. Justice Stevens rightly points out that Volvo did not challenge the jury instructions below\(^{36}\) (nor is it apparent from the opinions
that Volvo objected to Reeder’s statistical evidence on the
grounds of relevance or otherwise). He concludes, indeed,
that the jury was properly instructed on competitive injury,
quoting the instruction itself.37 Thus, he reviews the evi-
dence in the light most favorable to Reeder, and follows
another tenet of appellate review: he gives Reeder the ben-
fit of the evidence taken as a whole.

Thus emerges the story that Reeder presented and that
the jury obviously credited. Volvo wanted to reduce its deal-
er population. But Volvo’s evergreen contracts with its dealers,
and the limitations of state franchise termination laws, made
it difficult for Volvo to achieve its objective outright. So,
Volvo offered larger concessions to some dealers than it offered
to others. This price discrimination inhibited dealers like
Reeder from obtaining bids against non-Volvo dealers, made
them weak competitors, and ultimately permitted Volvo to
terminate them for their failure to achieve volume objectives.

As Justice Stevens says, this is a “rather ordinary” Robinson-
Patman Act suit.38 He explicitly criticizes the majority for its
“selective discussion of the extensive evidentiary record.”39

Ultimately, while agreeing with Judge Bork’s eminent criti-
cism of the Robinson-Patman Act as antithetical to the prin-
ciples of competition that the antitrust laws espouse, Justice
Stevens grounds his dissent on the simple conclusion that
“the jury credited evidence that discriminatory prices were
employed as a means of escaping contractual commitments
and eliminating specifically targeted firms from a competitive
market.”40 Thus, he believes that the Act as written prohibits
the conduct in which Volvo engaged, and, given the “excep-
tional quality” of Reeder’s evidence, the jury was entitled to
find competitive injury.41

The Court’s somewhat tortured path to preclude Reeder’s
suit will, no doubt, have the effect of limiting the reach of the
Robinson-Patman Act in many circumstances. If a disad-
vantaged dealer must show that it competes with favored dealers
for the exact same customers, there will be very little
left of any cases under the Act. Will a dealer who sells from
inventory in the suburbs of Chicago, for example, have to
prove that a favored dealer in the metropolitan area attracts
customers from the same suburb? That is certainly the impli-
cation of the Supreme Court’s Reeder opinion. Perhaps, as
Judge Bork and apparently Justice Stevens believe, the elim-
ination of the Robinson-Patman Act is a good thing. But our
jury trial system, and the integrity of our constitutional con-
struct of separation of powers, are at least equally valuable. If
the Robinson-Patman Act has outlived its usefulness, it is for
Congress to dismantle it. The Act should not be rendered a
nullity by trying the case in the Supreme Court.

2 See, e.g., Richard M. Steuer, Volvo Trucks v. Reeder Simco: Bidding for a
Rational Robinson-Patman Act, ANTITRUST, Spring 2006, at 61.
3 Reeder-Simco, 126 S. Ct. at 872.
basis of economic analysis, the Court reversed its earlier decision in United
States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967), and held that agree-
ments between suppliers and customers should be judged as to their
reasonableness.
7 See, e.g., Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509
8 Statement of H. Teegarden before the House Committee on the Judiciary,
July 10, 1935; Remarks of Wright Patman, 74th Cong. 2d Sess. (Mar. 9,
1936), 80 CONG. REC. 3446.
9 HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW § 13.6 at
346 (1985).
10 334 U.S. 37 (1948).
11 Id. at 50–51.
12 See, e.g., Paul H. LaRue, Robinson-Patman Act in the Twenty-First Century:
14 Id. at 435.
15 See, e.g., Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653 (9th Cir. 1997).
16 ABA SECTION OF ANTITRUST LAW, ANTITRUST LAW DEVELOPMENTS 456
(5th ed. 2004).
Matters to Adjudication and Dismissing Complaints) (Sept. 10, 1996).
18 Summary of Antitrust Modernization Commission Hearing of May 23, 2006,
AMC-summary-5-23-06.pdf (reporting that 9 of 11 commissioners voted for
repeal).
19 See, e.g., F. Hoffmann-La Roche Ltd. v. Empagran S.A., 542 U.S. 155 (2004);
Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S.
20 The percentage of cases terminated by trial in federal courts declined from
3.0% in FY 1997 to less than half that (1.4%) in FY 2005, despite the fact
that the number of cases that are terminated each year grew 8.5%
during that period. See Statistical Reports of the Director, Administrative
21 Id. at Table C4.
22 See, e.g., John Lande, “The Vanishing Trial” Report: An Alternative View of
the Data, DISR. RESOL. MAG. No. 4, at 19 (2004).
23 See, e.g., Kevin McMunigal, The Costs of Settlement: The Impact of Scarcity
24 19 JAMES WM. MOORE ET AL., MOORE’S FEDERAL PRACTICE § 206.02 (3d ed.
1999).
25 Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701 (8th
Cir. 2004).
26 Id. at 707.
27 Brief for the United States as Amicus Curiae Supporting Petitioner at 12,
(No. 04-905), 2005 WL 1248280.
28 Brief for Petitioner Volvo Trucks North America, Inc. at 34, Volvo Trucks N.
Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860 (2006) (No. 04-905),
2005 WL 1222880 [hereinafter Petitioner’s Brief].
29 Respondent’s Brief on the Merits at 18, Volvo Trucks N. Am., Inc. v. Reeder-
[hereinafter Respondent’s Brief].
30 Petitioner’s Brief, supra note 28, at 41.
31 Reeder-Simco, 374 F.3d at 709.
32 Volvo Trucks, 126 S. Ct. at 867.
33 Respondent’s Brief, supra note 29.
34 Volvo Trucks, 126 S. Ct. at 871.
35 Id.
36 Id. at 874 (Stevens, J., dissenting).
37 Id.
38 Id.
39 Id. at 874 n.3.
40 Id. at 876.
41 Id.