Kenneth D. Morris, Esq. L.L.C.
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Business Developments

Is Price Discrimination Defensible Where There Is No Evidence of Injury to Competition?

The U.S. Supreme Court's answer in January, 2006 to that question in *Volvo v. Reeder-Simco GMC* appears to be in the affirmative (126 S. Ct. 860 (2006)). Volvo sold heavy-duty trucks through authorized dealers, one of which was Reeder-Simco GMC, Inc. Volvo sells trucks through a competitive bidding process starting with the retail customer's specifications. Once a dealer receives the customer's specifications for a particular truck, the dealer then contacts Volvo for a discount off the wholesale price. As the Court noted, once the dealer receives the discounted price from Volvo, it then prepares its bid and actually buys the truck from Volvo only if the customer accepts the bid. In 1997 Volvo had announced its plans to enlarge the markets of its dealers and cut back on the number of dealers. Reeder alleged that Volvo gave smaller discounts to dealers it did not want to retain, rather than possibly run afoul of franchising laws by terminating a dealer, and believed it was one dealer Volvo wanted to eliminate. Reeder's allegation was basically that Volvo offered other dealers more favorable price concessions and thereby violated Section 2 of the Clayton Act. Reeder only demonstrated, however, two instances over a five-year period where it actually competed against another dealer on the same bid to the same customer. In the first instance, Volvo offered the same price to both and neither won the bid, and in the second Volvo offered the same discount and only after the customer insisted on an even lower price did Volvo provide an additional discount so that the dealer kept the sale. The Eighth Circuit had held that Reeder was discriminated against because it had received smaller discounts than the other dealers although the competing dealers were not competing for the same sale.

In a 7-2 decision, the Court reversed. Significantly, the Court noted that the Robinson-Patman Act "does not ban all price differences charged to different purchasers of similar commodities." Rather, what is proscribed is "price discrimination [which] threatens to injure competition." Reeder had failed to demonstrate that it was a "purchaser" competing with another "purchaser" [dealer] who received the bigger discount in competition for the same customer. Because of that, the Court agreed with Volvo that since there was no showing of actual competition, there was also no showing of the actual competitive injury that the Act requires. Pointedly, the Court noted that it "declines to permit an inference of competitive injury from evidence of such a mix-and-match, manipulative quality." Nor was a Robinson-Patman violation shown in the two cases where Reeder competed directly with another dealer. Reeder had failed to show both that it was disfavored in compared to other Volvo dealers, as well as failing to prove that the discrimination was substantial.

It is hard to fault the Court's reasoning as it concluded that this decision "continues to construe the Act consistently with antitrust law's broader policies." But the point here is that in cases where a supplier's selective price discounting actually "fosters competition among suppliers of different brands", the Court is actually broadening the doctrine of *Sylvania* which had held that restraints on *inter*-brand competition (e.g. territorial and customer restraints) may be procompetitive if they also promote *inter*-brand competition. Where the meeting competition defense (seller may lower its price to meet, but not beat, a competitive offer) was historically the key defense to a Robinson-Patman price discrimination charge, *Volvo* at least raises the plausible argument that even if the meeting competition defense does not exist, price discrimination may be defensible where there is, in fact, no injury to competition.

Kenneth D. Morris, Esq. L.L.C. Law Offices*
1320 Vale Dr.
West Chester, PA 19382
Office: 484-607-8203
Cell: 484-678-3954
Fax: 610-793-4245
E Mail: kdm@kenmorrislaw.com
Also admitted NJ and DC