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The Continuing Marginalization of the Robinson Patman Act

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The Supreme Court's decision in Volvo Trucks

Robinson Patman Act (RPA) cases decided since the Supreme Court's 2006 opinion in *Volvo Trucks*[1] *are* illustrative in showing how the Court's language has provided further impetus to the pre-existing general hostility to RPA claims. *Volvo Trucks* involved a winner-take-all bidding situation in the market for heavy duty, customized trucks. The plaintiff, Reeder-Simco, alleged it was losing profitable business because it was unable to get the deep discounts that other Volvo dealers were getting from the manufacturer. Reeder-Simco claimed it needed the lower prices in order to compete effectively in bidding to get the business of purchasers.

Thus, the Court was asked to determine the applicability of the RPA to blind-bidding situations involving custom-made, heavy trucks in which the winner gets all of the sales, and the losers get none. The Court examined specific bids that Reeder-Simco alleged to have lost due to the defendant's discriminatory discounting. The Supreme Court held that as to two of the bids, Reeder-Simco had lost to a non-Volvo manufacturer so that any discrimination between two losing Volvo dealers could not result in antitrust injury, let alone damages, and therefore was irrelevant. In one of the two remaining bids, Reeder-Simco lost to another Volvo dealer, but Volvo had provided them with equal prices for use in making this bid. *After* Reeder-Simco's rival had won the bid, Volvo

[1] *Volvo Trucks North America v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 126 S.Ct.860 (2006) *("Volvo Trucks").*

gave it additional authority to lower the price. And, in the remaining bid Reeder-Simco lost, it received equal discount levels compared to its Volvo dealer competitors.

Finally, and significantly, the Supreme Court drove one last nail into Reeder-Simco's tires by declaring that even if the facts were as Reeder-Simco alleged, the magnitude of the discrimination involved was not sufficient to have an adverse impact on competition. 126 S. Ct. at 872.

Volvo Trucks is important as a statement of the Court's views of, and its attitude toward the RPA, perhaps even more so than it is for its holding.[2] The Court's explicitly stated that RPA claims must always be viewed against the broad background of general competition policy. Antitrust law protects the competitive process, not competitors, and even RPA cases are to be decided consistently with that policy. Throughout *Volvo Trucks,* the Supreme Court emphasizes the importance of the impact of the allegedly discriminatory pricing upon *interbrand competition*. *Volvo Trucks* is cited and quoted by courts for the following description of the function of the RPA:

> Interbrand competition, our opinions affirm, is the "primary concern of antitrust law". The Robinson Patman Act signals no large departure from that main concern. Even if the Act's text could be construed in the manner urged by Reeder . . . we would resist interpretation geared more to the protection of existing *competitors* than to the stimulation of *competition*. In the case before us, there is

[2] Indeed, the Court could have disposed of *Volvo Trucks* in a much simpler fashion. For example, it could have held that in winner-take-all bidding situations, the RPA simply does not apply because the "disfavored" bidder will never make a purchase at all, and the basic element of every RP claim – two discriminatory sales – would never be satisfied. Several courts have held to this position in bidding situations. Indeed, there is even a circuit split on the question whether RP cases require plaintiff show two completed sales transaction. See *Data Capture Solutions v. Symbol Tech., Inc.*, 520 F. Supp. 2d 343, 348-349 (D. Conn. 2007) (listing cases, and adopting "two sales" rule). The Court could also have noted that the transactions involved bidding on specifications for as-yet unbuilt custom made vehicles, not fungible commodities taken off the shelf for sale to purchasers, such as salt, for example, and that these transactions were not the concern of the Congress when it enacted the RPA. The Court could have noted the extent to which the prices being bid included a hefty component related to the bidder's skill in building custom heavy trucks, and as to that component at least, the case involved bidding on contracts for specialized truck building services and is of attenuated relevance to the RPA, which does not apply to services.

> no evidence that any favored purchaser possesses market power, the allegedly favored purchasers are dealers with little resemblance to large independent department stores or chain operations, and the supplier's selective price discounting fosters competition among suppliers of different brands. . . .By declining to extend Robinson Patman's governance to such cases, we continue to construe the Act "consistently with broader policies of the antitrust laws." *Volvo Trucks,* 126 S.Ct. at 872-73 (emphasis in original) (citations omitted).[3]

RECENT CASES

There is reason for optimism in RP counseling, and a look at some cases decided in the period since *Volvo Trucks* is instructive of the impact of the Supreme Court's approach on RP cases having nothing to do with winner take all bidding situations.[4] The cases are *Water Craft Management LLC v. Mercury Marine* Company, 457 F.3d 484 (5th Cir. 2006), a meeting competition[5] case, and *General Auto Parts Co. v. Genuine Parts Co.,* 2007 WL 704121 (D. Idaho) (decided March 5, 2007) and *Smith Wholesale Company, Inc., et al. v. R.J. Reynolds Tobacco Company*, 477 F.3d 854 (6th Cir. 2007) (decided February 27, 2007), two "functional availability" cases.

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[3] The Court's admonition that the laws are for the protection of the competition process and not individual rivals may seem unnecessary after all these years since the Supreme Court pronounced this policy in the Brunswick decision, *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc*., 429 US 477, 489 (1977). But, in the RPA context many courts have taken the position that, unlike the Sherman Act, in the RPA Congress intended to protect some competitors (smaller ones) from the buyer power of other competitors (usually large chains). See, e.g., *Alan's of Atlanta, Inc. v. Minolta Corp*., 903 F.2d 1414, 1422 (11th Cir. 1990); *J.F. Feeser, Inc. v. Serv-a-Portion, Inc*., 909 F.2d 1524, 1533 (3rd Cir. 1990); *Coastal Fuels of Puerto Rico., Inc., v. Caribbean Petroleum Corp*., 175 F.3d 18, 23 (1st Cir. 1999).

[4] The cases described do not represent an exhaustive review of the decisions issued in the time since *Volvo Trucks* was decided. They were chosen for their illustrative value in showing the ways that *Volvo Trucks* has influenced RP cases and decisions.

[5] See 15 U.S.C.A. § 13(b). This section provides that once a *prima facie* case of discrimination in price, services of facilities, and the burden is shifted to the seller. The seller can rebut the prima-facie case "by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor."

In *Water Craft,* the Court of Appeals for the Fifth Circuit held that a firm seeking to avail itself of the RPA's meeting competition defense to price discrimination need not lower its prices to meet but not beat what it reasonably believes to be the competitor's lower price. The discounting firm is required only to lower its price to the level necessary to get the business; it has no legal obligation to match the price, even if it knows with certainty what the lower price is. In the meeting competition context, the RPA inherently acknowledges the significance of the negotiation process that is usually involved in competitive pricing and the Act does not require the seller knowingly to leave money on the table. 457 F. 3d at 491.

Water Craft Management LLC, a dealer in outboard motors sued its supplier, Mercury Marine, alleging that Mercury had violated the RPA by providing greater discounts to Water Craft's competitor, Travis Boating Center, than it offered to Water Craft. Mercury had been losing market share to its major competitor, Outboard Marine Corporation ("OMC"). According to Mercury, its discount prices were good faith attempts to meet but not beat competitive pricing being offered by OMC, then manufacturer of Johnson and Evinrude outboard motors. After a bench trial, judgment was entered in favor of Mercury.

On appeal to the Fifth Circuit, Water Craft made two assertions of error on the part of the trial court judge: 1) the trial court erred in its factual finding that Mercury had acted in good faith in its response to OMC's discounting, and 2) in an argument not raised below, Water Craft claimed that the trial court erred as a matter of law in its determination that the good faith requirement of the meeting competition defense applied in light the fact that Mercury knew its prices "fell short" of matching OMC's discount

prices. *Id*. at 488. The Fifth Circuit applied standards of "clear error" as to review of factual findings and reviewed the legal issues *de novo*. *Id*.

First, the court reviewed the history of Supreme Court cases on the meeting competition defense and found that Mercury had reasonably investigated the competitive pricing of OMC in good faith. In fact, Mercury relied on several sources, including individuals with personal knowledge of OMC's pricing, and it concluded that it had sufficient corroborative evidence of the actual pricing being offered by OMC. *Id*. at 490-91. The Fifth Circuit ruled that Water Craft had acted in good faith in offering its discount and that "Mercury's decision to offer especially low prices to Travis [Water Craft's competitor] was driven entirely by price negotiations in which Travis, like any savvy buyer, used its OMC price schedule to extract deep discounts from Mercury." *Id*. at 491

Water Craft's second argument regarding the appropriate circumstances for invoking the defense was reviewed next. The argument goes like this: The Supreme Court has repeatedly held that a competitor seeking to avail itself of the meeting competition defense must match the competing price in order to prevail. Citing the Supreme Court in *Falls City Industries v. Vanco Beverage Inc*., 460 U.S. 428, 103 S. Ct. 1282, 1294 (1983), Water Craft argued that because Mercury's discount price was not as low as the pricing being offered by OMC, the meeting competition defense could not apply to the situation *as a matter of law*. In addition, even though the "good faith" defense was designed to rebut price discrimination allegations under circumstances when the discounter beats the price offered by it competitor, in this situation, Mercury knew what price was available from OMC and knowingly did not meet it. Water Craft, 477

F.3d at 491. Mercury was able to win the business of the customer. The court described Water Craft's position as follows:

> Water Craft would require that the discriminating manufacturer offer an even lower price than that necessary to meet the competition of the rival manufacturer – here, that Mercury, in order to avail itself of the defense, must have offered Travis an even lower price than was necessary to get its business from OMC. In other words, that if Mercury discriminated *more* against Water Craft, and had harmed it *more*, Water Craft would have no recovery. But, because Mercury was able to get the Travis business from OMC offering Travis a special low price that was not quite as low as OMC's price, Mercury according to Water Craft, would have no defense. Id. at 492 (emphases in original).[6]

Although Water Craft's position seems irrational in the ordinary context of price competition between rival sellers, each trying to get the sale and maximize its margin in a discounting situation, one must remember that this is the RPA, and the fact that an argument seems irrational is frequently an unreliable indicator of its validity. The Fifth Circuit failed to cite a single case in which a discounter successfully used the meeting competition defense while knowing that its discount price was actually higher than its competitor's price. Ultimately, the court rested upon institutional concerns that emphasize the need for construing the RPA, in general, and the meeting competition defense in particular, in a way that is consistent, or at least not contradictory, to the

[6] The court observed that *Water Craft* failed to explain how the offering of a price lower than necessary could be deemed to be in "good faith." *Id.* at 495. As an aside, the Fifth Circuit implies that a deeper and deeper discount would have inflicted more and more harm on the plaintiff. In fact, the size of the discount is not relevant to the measure of damages at all. If an illegal one cent differential had been enough to win the business away from the plaintiff, the measure of damages would be plaintiff's lost profits on the transaction; similarly if the differential had been $100,000.00, the damages would still be lost profits on the transaction. The crucial point here is that in the one cent discrimination, *Volvo Trucks* strongly suggests that the differential is not substantial enough to support a finding of injury and discrimination.

"broader policies of the antitrust laws." The court cited, among other cases, *Volvo Trucks,* 126 S. Ct. 860, 872-73 (2006), a case that urged the application of broader pro-competition policies of the antitrust laws, and in which the Supreme Court expressed concern for the potentially dampening effect of a finding of discrimination on *inter-brand competition*. The significance of the Fifth Circuit's holding *in Water Craft* may be that *it could have endorsed the appellant's argument as a matter of law without deviating from the plain language of the statute*, and it chose instead to interpret the defense in a way that is more solidly grounded in actual market competition between brands, and consistent with *Volvo Trucks*.

Water Craft has much to commend it. The decision relies upon recent Supreme Court jurisprudence to clarify the meeting competition defense, and applies a distinctly practical, real-world judgment to price competition. It recognizes that the RPA must be interpreted in the context of competitive interbrand product markets as they actually exist, and the court attempts to redress the abstraction and rigidity that has often characterized RPA analysis. In the past, defendants like Mercury might have tried to justify their discounts by invoking the antitrust injury requirement, and arguing that plaintiff could not have been harmed by its pricing when lower pricing was available to it from OMC. (Indeed, in light of *Volvo Trucks*, this argument should be received more favorably by RP courts.) By ruling as a matter of law that the concept of "good faith" does not mandate that seller match the competitor's price, even when seller knows that price, the court recognizes business reality, prices result from a competitive *negotiation process*. The RPA does not require that a seller leave money on the table because its investigation of the competition's pricing has been especially accurate and rigorous.

Rather, the Fifth Circuit opted for the flexible and pragmatic evaluation of the facts and the applicable law so as to limit the effect to which the defense distorts competition by compelling irrational pricing that would never be available in the absence of the statute.

From a practical perspective, *Water Craft* reaffirms the importance of counseling clients to document the competitive pricing information they learn in the market in order to more accurately determine a competitive price. Included in that documentation, clients should be advised to describe their qualitative impressions of the specific negotiation process involved.[7] For inside counsel, the decision is positive evidence that federal courts continue to harmonize RPA decisions with the overall objective of the antitrust law: protecting the process of competition.

FUNCTIONAL AVAILABILITY

Another area in which trends favorable to defendants is emerging is in the standards applied under the doctrine of "functional availability." As the caselaw makes clear, the doctrine of functional availability is not an affirmative defense but rather is a test for determining whether RP plaintiffs can make a *prima facie* showing of actual price discrimination. The doctrine holds that if a lower price is made available to the plaintiff, and the plaintiff chooses not to accept it as a business decision, then there is no discrimination and the action ought to be dismissed. The issue in the cases generally focuses upon the content of the term "functionally available" and whether facts and

[7] *Documentation of the contemporaneous business rationale underlying any price action is critical in defending against anticompetitive pricing allegations,* whether the action involved is a one-off discount for a single customer or an across the board change to all prices. Years can go by before a price ever gets challenged and the original negotiators may have little or no memory of the details of past negotiations. A contemporaneous record can be an invaluable tool in showing the court the dynamic interaction of market factors that comprise a discount negotiation that results in an allegedly discriminatory price.

circumstances alleged by the plaintiff prove that a discount was not functionally available. *Shreve Equipment, Inc. v. Bayer Corp*., 199 F.3d 101, 105 (6th Cir. 1981.)

On this question, courts have held that to be functionally available to a purchaser, the best discount in the seller's pricing deal must practically and realistically be available to the buyer. *See, e.g., Bouldis v. Suzuki Motor Corp*., 711 F2d 1319, 1326 (6th Cir. 1983); *Metro Ford Truck Sales, Inc v Ford Motor Company*, 145 F.3d 320 (5th Cir. 1998) (lower price must be available in fact, not merely theoretically). The analysis focuses upon whether the seller's pricing was structured so that it was available only to its largest customers. For example, if a volume discount provides three discounts that correspond to a three-tiered purchase volumes structure, the RP question is: Is the deepest discount level functionally available to the smallest purchaser? If it is not, then the pricing structure could be considered a discriminatory volume deal designed to favor the seller's largest purchasing customers. To avoid this risk, sellers should review the customer's history of purchases, credit status, inventory, level of returned goods and other factors that would indicate whether the best discounts really were within the reach of the smallest customers as a matter of fact. If not, then a volume discount would have to be justified under the dreaded "cost justification" defense and its nearly impossible standards. *Coastal Fuels of Puerto Rico, Inc. v. Caribbean Petroleum Corp.*, 990 F.2d 25 (1st Cir. 1993).

Two recent cases have examined the doctrine of functional availability and may have effectively increased the burden carried by the plaintiff in proving that a discount price was not functionally available (i.e., proving discrimination itself). In March, 2007, the federal district court in Boise, Idaho had occasion to determine whether the doctrine

had been satisfied. In *General Auto Parts Company(General) v. Genuine Parts Company* ("GPC") *et al.,* 2007 WL704121 (D. Idaho)[8], plaintiff General alleged that GPC discount programs were not functionally available to it, but were available to General's competitor, Dyna Parts, also a named defendant. GPC offered two discount programs; one was a "drop-shipment" arrangement and the other a "master installer" program. Both programs made discounts available "depending upon the volume purchased and on the parts purchased" but as to the master installer program, the discounts were negotiated. The programs had minimum annual purchase requirements.

General claimed that it could not use the discount programs "to the extent that Dyna Parts" could because General is a single store and Dyna Parts is a small chain. General lost on its claim of discrimination despite the undisputed fact that it had less customer demand, being a single store, and therefore could not buy parts at the levels of discount that Dyna Parts, with its four stores, could purchase. GPC countered that, by making a few simple changes, General could have gotten better discounts and offered evidence that several other single store operators had done so and earned the higher discounts "*in other markets." Id.* (emphasis added). Based upon this evidence, the district court ruled that General could have made alterations to its purchasing and inventory practices and would have received higher discounts and thus, it had failed to make out a *prima facie* case of discrimination and entered summary judgment for GPC.

Notwithstanding its dismissal of the RP claims, the court took a brief foray into the doctrine of "functional discounting" when it went on to consider whether the two discount programs did, in fact, have discriminatory impacts as to those who actually did take advantage of them. It was undisputed that the programs generated different prices

[8] As of the date of submission of this paper, only the Westlaw version was available for citation.

depending upon the customer's purchase volume and the negotiation process. Relying on the Supreme Court's decision in *Hasbrouck,*[9] the court noted that volume discounts are not *per se* illegal. They violate RP only when they have an adverse impact on competition, such as terms and conditions that exclude smaller competitors. GPC claimed that its programs were functional discounts which rewarded purchasers who increased their sales by performing marketing functions, a concept explicitly endorsed by the *Hasbrouck* court. *Id*. at 571. The court went on to consider whether, as GPC claimed, the amounts of the discounts "constituted reasonable reimbursement for the purchaser's actual marketing functions." *Id*. In the words of the court, "there are questions of fact on this element which preclude summary judgment in favor of either party. However, because the court has determined that the discrimination element is lacking, GPC's motion for summary judgment is proper." It is curious that the court even discussed the functional discount theory after it had already decided that there was no discrimination and no need for a defense.[10]

In *Smith Wholesale Company, Inc., v. R.J. Reynolds Tobacco Company,* 477 F.3d 84 (6th cir. 2007) (*"Smith Wholesale"*), several wholesalers of tobacco products brought RP actions against RJR alleging secondary line price discrimination In RJR's market share discount programs. The wholesalers claimed that the discount programs were not "functionally available" to them. The court's quick overview of the market for cigarettes post-Master Settlement set the stage for the discussion of availability:

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[9] *Texaco, Inc. v. Hasbrouck,* 496 U.S. 543 (1990)

[10] In a recent case, the court found that a plaintiff had not satisfied its burden of proving injury because its expert had failed to show that the allegedly discriminatory prices were not offered as compensation for valuable "marketing, warehousing, and other general and administrative services" not supplied by the plaintiff. *Camarda v. Snapple Distributors, Inc.*, No. 04 CV 01273, (SDNY September 13, 2007).

> Cigarettes are divided into four price categories or tiers. The most expensive, first-tier or premium cigarettes are manufactured by defendant RJR (Camel and Winston cigarettes) as well as Philip Morris USA, Inc., Lorillard Tobacco Company, Liggett-Vector Brands, and Commonwealth Brands. Second-tier and third-tier brands are also produced by the major manufacturers, but their prices are substantially lower than first-tier cigarettes. Fourth-tier brands are produced by smaller manufacturers (including Liggett and Commonwealth) and sell at prices somewhat lower than third-tier brands. All of RJR's discounted, non-premium brands are collectively classified as "savings" brands. RJR's second-tier product is Doral; its third-tier cigarettes include Monarch, Best Choice, Citation and Cardinal. RJR does not price any of its savings brands at the fourth-tier level. . . .
>
> . . .the fourth-tier segment has grown from 0.89% of all cigarette sales in 1998 to around 15% in 2003, making it the fastest growing portion of the cigarette market. *Id*.

In light of its loss of market share, in 2000, RJR devised a discount program for wholesalers that consisted of a three-level pricing system. The Level 1 discount was available as a base discount for all participants in the program. Level 2 consisted of several sublevels of discount (A through H) and Level 3 provided the deepest discounts and "back end" monies (presumably "rebates") determined by a comparison of the wholesaler's sales of RJR's saving brands to its sales of non-RJR savings brands. The program rewarded increases in RJR market share and provided quarterly progressively higher payment for sustaining the share increases. As the district court had found, discounts were determined by the market share and thus were a measure of relative *performance* unrelated to absolute sales volume. Even the smallest wholesaler (in terms

of sales dollars) could obtain the highest discounts if its percentage market share of RJR products rose high enough. *Id*. at 857.

In the district court, the plaintiffs argued that the program was discriminatory because they were incapable of benefiting from it due to the nature of the demand characteristics in the market they served. They claimed that most of their retail customer base was in low-income areas and that there was inadequate demand for the brands in the first three tiers. The court granted summary judgment in favor of RJR on the basis that the deepest discounts could have been obtained by the plaintiffs, but they had chosen not to participate. Hence, the discounts were functionally available to the plaintiffs, and no price discrimination occurred. *Id*. at 860-61.

The Sixth Circuit began its review of the lower court decision by quoting liberally from *Volvo Trucks*, although it acknowledged that the Supreme Court decision had narrow applicability, the circuit court said that the Supreme Court's discussion of the "underpinnings of the" RPA served as a "backdrop" for its evaluation of the wholesaler plaintiffs' claims. *Id*. at 864. The court made two observations at the start of its analysis: 1) there are precious few RP cases on market share discount programs (*Id*. at 865), and 2) market share programs do not give rise to the anticompetitive, discriminatory concerns relating to "power buyers" that can afflict volume discounts programs:

> Market share discounts theoretically level the playing field by allowing competing purchases of like commodities to participate on equal terms, regardless of size, because such discounts depend not on volume purchases, but on the percentage of purchases of a particular category of products. *Id*.

The court reviewed its own prior cases on the "functionally available" doctrine and concluded that there are many reasons why a purchaser might choose not to

participate in a supplier's discount program that did not implicate the RPA at all. For example, poor credit ratings, investment decisions, management problems or business decisions to participate in the competitor's discount program do not support a discrimination claim. The court noted that the RPA "neither ensures success nor excuses purchasers from making difficult decisions about which competing brands to carry, market or promote." *Id*. at 872. More to the point, the court emphasized that the plaintiff wholesalers had "no significant control over consumer demand and cannot reduce their sales of 4th tier cigarettes . . . without losing retailer customers. . . . Given plaintiffs' customers and market for sales, the best price under RJR's [program] is impossible for them to achieve." *Id*. at 874-75.

The defendant claimed that the reason that the plaintiffs could not hit the highest tier discounts had nothing to do with the structure of the program, but was due to their claim that they service retailers whose sell to poor customers and that unlike other customers, they made no attempt to influence product selection. The evidence failed to support plaintiffs' claims, and there was evidence of other wholesalers who also sold in counties with poor populations (some with lower per capita incomes than the plaintiffs' customer bases) who were able to participate in the RJR market share discount program. Plaintiffs' expert did not analyze any demographic issues, nor could he explain how it was that some of the plaintiffs claiming damages did not serve lower income areas at all.

Finally, in language devoid of any sympathy to the wholesaler plaintiffs, the Sixth Circuit quoted approvingly from the lower court decision, and found that RJR had treated its wholesalers "equally" because "each had the same opportunity to achieve higher discount levels. From the fact that unpleasant, even draconian, business decisions might

be required, it does not follow that the discount scheme is *discriminatory*." *Id*. at 880 (original emphasis). The court rejected the plaintiff's notion that the reasonableness of a market share discount program should be determined on a customer by customer basis. "Any given distributor could claim that it could not meet a market share goal because it would be required to alter its business in some fashion which the distributor subjectively determines to be unreasonable. No seller could ever know if its program was legal." And finally, the court endorsed the lower court's view that "Defendant's program is designed to promote its financial welfare at the expense of that of the wholesalers. *Perhaps it is unfair, but it is not illegal*." *Id*. at 880. (emphasis added).

The Third Circuit's Opinion in *Feesers*.

Only a few months after *Volvo Trucks* had been issued by the Supreme Court, Judge Sylvia Rambo of the U.S. District Court for the Middle District of Pennsylvania granted summary judgment in an RP case on what seemed to be straightforward, pre-*Volvo Trucks* RP analysis. *Feesers, Inc., v. Michael Foods, Inc., and Sodexho, Inc.,* Slip Op., 2006 WL 1274088 (M.D. Pa.) *rev'd and remanded,* 498 F.3d 206 (3d Cir. 2007).[11] The facts before the district court involved the business of *food distribution* (according to plaintiff, Feesers) or the business of food *service management* (according to the defendants Michael Foods and Sodexho).[12] Feesers was, and is, a distributor of food to institutions that operate their own in-house food preparation and service functions. Feesers purchased egg and potato products from a manufacturer; Michael Foods at prices

[11] As of the time of the submission of this paper, the district court's decision was available at only the Westlaw cite.
[12] Feesers sought only injunctive relief under Section 16 of the Clayton Act, no damages were claimed. The Third Circuit repeatedly cites damages actions in reversing the district court without ever addressing the question whether Feesers' evidence could have entitled it to injunctive relief under the equity standard in Section 16.

that Feesers claimed were higher than Michael Foods charged Sodexho, a full service facilities management company. In other words, the two companies operated according to completely different business models.[13]

A few minutes reviewing their respective websites will show that Sodexho provides its customers with full service food preparation operation, grounds keeping, security services, and other services unrelated to the food service / distribution business. Feesers provides regional food distribution to self-operated kitchens and cafeterias in institutional facilities like nursing homes and schools. Feesers and Sodexho did seek the business of some of the same customers. But, the district court noted that Sodexho's business strategy was to convince the customer to purchase the entire foodservice and facilities management operation that Sodexho offered.[14] Notwithstanding the obvious differences in their operations, Feesers argued that the lower pricing offered to Sodexho by Michael Foods enabled Sodexho to convince institutional customers to switch from operating their own food service or cafeteria and instead to outsource the entire food operation (including purchasing, distribution, and preparation) to Sodexho. Feesers claimed to be in competition with Sodexho, and alleged that the favorable pricing Sodexho was receiving was in violation of the RPA.

The district court found that there was no competitive relationship between Sodexho and Feesers because each operated on a "functionally different level" from the

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[13] Feesers alleged that Michael Foods violated Section 2(a) of RPA by discounting to Sodexho, and that Sodexho violated Section 2(f) of the RPA by knowingly inducing illegal price reductions.

[14] Sodexho sales strategy was to show potential customers the benefits of outsourcing the functions it was currently performing for itself. *Sodexho was not interested simply in selling food to the customer's cafeteria, which was Feesers' business model; Sodexho wanted to become the customer's cafeteria.* The customer was doing a "make or buy" analysis when it negotiated with Sodexho: Could the organization achieve its financial objectives by "making" an internal foodservice operation or was it better off if it outsourced the function to a vendor? When it dealt with Feesers, it was simply buying food products from a distributor at a mark-up.

other. Feesers was unable to show a single instance in which a customer switched to Sodexho due to food pricing. Logically, the court rejected Feesers claim to the *Morton Salt* inference[15], given that the inference only arises when there is competition between the parties and substantial price discrimination over time.

Although the district court did not rely upon the Supreme Court's decision and analysis in *Volvo Trucks,* its approach to the facts and its analysis of competition were quite consistent with the Supreme Court's decision. Because the plaintiff had failed to demonstrate that it was in competition with the defendant and had failed to connect the "favorable" pricing with any losses it had incurred, the court granted summary judgment in favor of Sodexho and Michael Foods and against Feesers. Feesers appealed the decision to the Third Circuit.

And, then, the wheels came off. The Third Circuit reversed and remanded the case to the district court, primarily because the lower court had applied the wrong standard in erroneously deciding that Feesers and Sodexho were not competitors. Thus the district court failed even to consider allowing Feesers the benefit of the *Morton Salt* inference of antitrust injury.[16] In a 2-1 decision, and notwithstanding the fact that the two firms sold different products, the circuit court held that viewing the evidence favorably to the plaintiff, there was enough evidence to create a question of fact as to whether Feesers and Sodexho were in competition. 498 F.3d at 212. It went on to hold, based upon this conclusion, that there was sufficient evidence to create a fact question as to whether there

[15] Under the Supreme Court's 1948 injunction decision, in *FTC v. Morton Salt Co*., 334 US 37, 46-47, RP plaintiffs are entitled to an inference of injury to competition if they can show substantial price discrimination between competing purchasers over time. In *Falls City Industries, Inc. v. Vanco Beverage*, Inc.,460 U.S. 428, (1983), a damages case, the Supreme Court held that the inference could be rebutted "by evidence breaking the causal connection between the price differential" and a plaintiff's lost sales or lost profits. *Id.* at 434-435

[16] See footnote 15 above.

was substantial price discrimination over time, thus giving rise to the *Morton Salt* inference of competitive injury, and shifting the burden of disproving competitive injury to the defendants. *Id*. at 213. The district court had not discussed the issue of burden-shifting, because it had held that there was no factual basis for concluding that Feesers competed with Sodexho.

Remarkably, the Third Circuit's decision, dated August 14, 2007, acknowledged *Volvo Trucks* decision only once in a mere footnote, notwithstanding the fact that the Supreme Court's sweeping discussion of the RPA had a clear role to play in the analysis of the facts relating to findings of actual competition that were of such great concern to the appeals court. 498 F.3d at 213 n. 8. In *Volvo Trucks*, the court held that as to two transactions, plaintiff had failed to show that actual competition with the so-called favored bidders. 126 S. Ct. at 871. There was no talk of burdens shifting or inferences arising.

However, Judge Jordan's dissent did not fail to emphasize the latest Supreme Court RPA decision, stressing that an "interpretation of the Act that protects individual distributors rather than competition between brands ignores the 'primary concern' of the antitrust laws with interbrand, rather than intrabrand, competition. … We should be following the Supreme Court's lead in resisting such an interpretation. Instead, the decision today goes beyond even the protection of competitors to the protection of non-competitors." 498 F.3d at 219-20.

OK, *Feesers* is not the end of the world. It will probably be distinguished or rejected in other circuits like the Third Circuit's last foray into the world of bundling, *LePage's Inc. v. 3M,* 324 F.2d 141 (3rd Cir.2003). And, make no mistake; *Feesers* is a

RP case about *bundling*. This point was not altogether lost on the Third Circuit, though it did not use the "B" word. The appeals court quoted directly from a Sodexho sales proposal, as follows:

> Our food and supply prices are exceptional, as are the quality and systems used to support the purchasing function. In addition to those savings, you enjoy discounts on many other items you buy, such as food service equipment, laboratory sinks, uniforms for front desk or security personnel, light bulbs, carpet, etc. 498 F.3d at 215.

The district court explicitly recognized this when it commented that Sodexho's competitive strategy, reflected in its promotional materials and its responses to requests for proposal, (in addition to its website content) was repeatedly to "emphasize the value in its bundle of services."

The circuit court simply could not see the case from the perspective of the customer faced with a decision to "make or buy" any function it operated in its business. The decision to outsource is qualitatively different from the decision to buy raw materials and perform the function internally. Judge Jordan's dissent described the different ways in which Sodexho contracted with its customers:

> For some of its clients, Sodexho operates the food service and assumes all responsibility for either making a profit or losing money. If sales are less than costs at those accounts, Sodexho bears the loss. For other clients, Sodexho is reimbursed for operating costs and retains a management fee, with the remaining profit or loss either going to the client or being shared between the client and Sodexho. In those cases, Sodexho invoices the client for specified operating expenses, including software, information systems, decorations, delivery services, unprepared foodstuffs and salaries for Sodexho employees. Id. at 217-18. (citations to record on appeal omitted).

Every time a business decides to outsource, there necessarily must be winners and losers among its vendors and service providers. Some will have offered lower prices on input products and encourage the company to maintain the status quo; others will encourage it to outsource the work to experts in the function, allowing the customer to "focus on its core business."

Further differentiating Feesers from Sodexho is the fact that Sodexho was willing to take on some financial risk and share profits with its customers. No such offers were made by Feesers. Moreover, the decision to outsource foodservices is unlikely to pivot on a minor savings on a single input product included in the package offered by the outsourcing firm. Even if it does, that does not mean that the two firms are in competition, and the loser gets a pass on the element of antitrust injury. In dissent, Judge Jordan likened "…the majority's more expansive view [of competition] to concluding that grocery stores are in competition with restaurants because both types of businesses sell food."[17] Id. at 221.

CONCLUSION

On balance, and notwithstanding the Third Circuit's unfortunate decision in *Feesers,* the trend of most recent RP decisions continues to emphasize protection of the competitive process in RP cases and harmonizing the outcomes in a way that is flexible,

[17] Judge Jordan's dissent contains an astute, brief and somewhat irreverent history of the RPA that I heartily recommend to all RP lawyers. *Id*. at 218-220. I cannot resist the temptation to share the following quote from the dissent: ". . . I do not suggest that this Court should attempt to repeal the Act by construing it into the oblivion it so richly deserves. But, given the threat that . . . the Act poses to desirable competition, this Court certainly should not read the Act to cover situations to cover factual situations where only a tenuous argument can support its application." *Id*. at 219.

pragmatic and consistent with real-world pricing contexts. *Volvo Trucks* should teach litigants and courts at least the following lessons:

- Plaintiff's claims that a discount program is not "functionally available" to them will be scrutinized more closely. The RPA does not guarantee success or even access to discounts. Defendants should argue that requiring the purchaser to stretch a little in its attempt to qualify for a discount is procompetitive, enhances the competitive process and rewards purchasers who have adopted more efficient practices.
- Courts and litigants assess meeting competition in the real-world context of high pressure pricing negotiations, in addition to the "good faith meet but not beat" standards. Small differences in prices could reflect differences in negotiation skills and tactics, not the evil residue of a price discrimination scheme.
- RPA cases are not about leveling the playing field or economic equality or fundamental fairness. They are about the same thing that all antitrust law is about: the impact of the challenged conduct on interbrand competition. Even if pricing is arguably discriminatory, if the price differences had the effect of stimulating interbrand competition, *Volvo Trucks* should be read as suggesting a finding of no injury to competition, even if the elements of a meeting competition defense cannot be satisfied.
- Defendants asserting the functional discount doctrine must be prepared to defend the amount of discount on the basis of the fair market value of marketing services performed by the "favored" purchaser, showing that the

amount is reasonable reimbursement for those services.[18] This defense should be documented by business people in detail prior to the offering of the discounts.

- In the absence of a case rebutting it, *Feesers* should be limited to its legal context, a private injunction action. Litigants should not hesitate to point out the extent to which it utterly fails to conform to the Supreme Court's dicta in *Volvo Trucks,* and fails even to acknowledge a fundamental issue facing American businesses: whether or not to outsource internal operations. Section 16 of the Clayton Act allows issuance of injunctive relief only to the extent that equity courts would allow it. The *Feesers* court never got to the issue, but the plaintiff's desired form of equitable relief in that case, and any other RPA case is likely to require a court to monitor the defendant's market pricing. Plaintiffs are unlikely to be satisfied with an injunction "to go forth and commit RPA sins no more." But, federal antitrust courts have consistently refused the invitation to play price administrator for the benefit of a prevailing RP plaintiff. And, in Feesers, the only relief that would truly have addressed its fundamental argument would have required Sodexho to change its business model, an unlikely outcome.

With one exception, the Supreme Court's interpretation and guidance seem to be resulting in judicial application of more pressure on plaintiffs to show that the defendant

[18] For prescription pharmaceutical companies, this fair market value analysis should not be unfamiliar. The same sort of analysis is necessary to show that compensation to a customer is not a violation of the federal fraud and abuse laws but reasonable compensation for services of value provided by the customer to the seller.

did more than simply charge different prices to different buyers, rather they must show that those differential pricing practices substantially impaired the competitive process – the concern of all antitrust law.

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