



GENERAL COUNSEL CORNER

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ANOTHER LESSON FROM THE SUPREME COURT

The Supreme Court very recently gave another lesson to franchisees, as if one was needed, of how narrowly it will interpret federal price discrimination law in the context of supplier-franchisee relations.

On its face, the Robinson-Patman Act, which has been the law of the land for almost 70 years, appears to furnish broad protection to franchisees against price discrimination by their suppliers. It provides:

It shall be unlawful for any person engaged in commerce ... to discriminate in price between different purchasers ... 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

Further, the Act appears to have real teeth, providing for the award of triple damages and a successful complainant's attorneys fees.

In *Volvo Trucks North America v. Reeder-Simco GMC*, decided by the Supreme Court on January 10, 2006, a Volvo dealer complained that Volvo consistently had provided other of its dealers with whom the dealer competed

significantly more favorable price concessions. The dealer contended that this was part of a scheme to force it out of business.

At first, the dealer's litigation met with success. A federal court jury in Arkansas found that the dealer did indeed compete with the favored dealers, and had suffered significant injury through price discrimination, and awarded the dealer approximately \$4,000,000 in damages plus attorney's fees.

On appeal, a divided three-judge panel affirmed judgment for the dealer. The appeals court found that the jury had a reasonable basis for deciding that the dealer was "in actual competition" with Volvo's favored dealers, and had submitted sufficient proof to demonstrate that it had suffered substantial injury as a result of Volvo's discriminatory practices.

Unfortunately for the dealer, the Supreme Court disagreed. In a 7-to-2 decision, the Supreme Court ruled that the dealer's claim fell outside the Act because the dealer could not identify specific sales that it had lost to more-favored Volvo dealers.

The dealer's failure of proof, the Supreme Court found, was attributable to the way the dealer's market operated. Generally, a prospective truck customer would identify specific dealers to bid for its business, only one of whom ordinarily

would be a Volvo dealer. Thus, although the complaining dealer systematically received less price assistance than its competitors, it could not point to specific customers that it had lost to its favored competitors. This, according to Justice Ginsburg's majority opinion, was fatal to the dealer's price discrimination claim.

Writing in dissent, Justice Stevens, joined by Justice Thomas, complained that the majority's opinion eliminated the Act's protection "in all but those rare situations in which a prospective purchaser" is simultaneously negotiating with two competing intra-brand dealers. The majority's interpretation of the Act, Justice Stevens complained, denied the franchisee its statutory protection even though the Supreme Court could not, and did not, reverse the jury's finding that Volvo deliberately had sought to drive its dealer out of business by offering it worse prices than it offered competing dealers.

Finding that the majority's requirement that the dealer identify specific customers lost to competing Volvo dealers made "little sense," Justice Stevens emphasized that the Court's interpretation of the Act "requires us to ignore the fact the competition among truck dealers is a continuing war waged over time rather than a series of wholly discrete events."

The only solace to the dealer was that the Supreme Court did not disturb a lesser judgment that the dealer had obtained under Arkansas' state franchise protection law. In a footnote the Court emphasized that, if Volvo did not honor its obligations to its dealer, the dealer's only remedy "lies in state laws addressing unfair competition and the rights of

franchisees, not in the Robinson-Patman Act."

The Court's opinion again makes clear the need to seek franchisee protection from state legislatures.

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