CARLTON FIELDS

Justice Ginsburg and the Taming of Antitrust's Most Notorious Branch

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For such a prolific jurist, Justice Ginsburg leaves behind a sparse antitrust legacy, serving as lead author on just one opinion grounded in substantive antitrust law, and filing none of her famous, stinging dissents on any antitrust-specific issue. That may be because her tenure on the Court largely coincided with three jurists with deep interest in or experience practicing or teaching antitrust law: Justices Stevens, Scalia, and Breyer, who tended to attract the opinion writing assignments in this area. Or it may simply be, as she testified at her confirmation hearings, "Antitrust … is not my strong suit." Justice Ginsburg will nonetheless go down in the antitrust annals as the Supreme Court justice who attempted to tame antitrust's most notorious, controversial, and arcane branch of law: price discrimination under the Robinson-Patman Act (RPA), and largely succeeded.

To call the RPA antitrust law's "ugly duckling" is to risk the wrath of ducklings everywhere. Described by Ginsburg's one-time colleague on the D.C. Circuit, Robert Bork, as the "misshapen progeny of intolerable draftsmanship coupled to wholly mistaken economy," and by the scholar Robert Wald as "bogged in a dense undergrowth of confusion, ambiguity, controversy and babel," the RPA theoretically bars a manufacturer from charging similarly situated customers different prices for goods intended for resale, or "price discriminating." It arose during a different time in American life, 1936, when the first wave of big-box "chain stores" (like Sears and A&P) began their slow creep across the American retail landscape, strangling smaller, local suppliers with lower prices and greater selection. The RPA earned its place as antitrust's punching bag by being at once: (i) inconsistent with evolving interpretations of the goals of antitrust law, with their focus on *consumer* welfare (with lower prices the lodestar), and not on the welfare of smaller *competitors*; and (ii) especially poorly drafted, overlong, and overloaded with caveats, loopholes, exceptions, and carve-outs.

Over time, the RPA fell into disuse, led by the Federal Trade Commission's and Department of Justice's abandonment of RPA enforcement activities. Courts struggled to parse its thicket of

provisions and reconcile its protectionist intent with modern antitrust's narrowing focus on consumer prices. Very few RPA cases reached the Supreme Court, or even the courts of appeal. Technically, though, the Robinson-Patman Act is a duly-enacted federal statute just the same as the Sherman Act (antitrust's primary statute) or any other federal statute, and the occasional cases brought under it suffered from judicial and regulatory neglect.

That changed in 2006 with the Court's opinion, by Justice Ginsburg, in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, easily the most significant RPA opinion since the Supreme Court's 1948 decision in *FTC v. Morton Salt*.*Volvo* arose in the market for heavy-duty trucks in which authorized dealers, like the plaintiff Reeder, collect truck specifications from Volvo's commercial customers, and then negotiate with Volvo to fill those specifications at favorable prices. The dealer then competes with other dealers (affiliated with Volvo, or otherwise) for the customer's acceptance of the bid. This placed Volvo in a theoretically powerful position in which the magnitude of a price break given any competing dealer could dictate which one won the business. Reeder complained that Volvo picked winners and losers by providing greater discounts to Redder's rivals than to Reeder. Volvo defended by arguing primarily that where other dealers received higher concessions than Reeder for any given purchase, there was no evidence that the favored dealer and Reeder were in head-to-head competition for the same sale at the same time, and no evidence that "favored" dealers won the business from Reeder because of differential pricing.

Ginsburg's nifty and ingenious opinion, which garnered six additional votes, brushed past the RPA's checkered and confused history, boiled the statute and facts down to their necessary, component parts, applied the law to those facts to resolve the dispute (clearly correctly) *and* provided a reasonable and comprehensible framework for resolving future questions under the Act. Still not satisfied, Justice Ginsburg's opinion rose to the challenge presented by any modern-era RPA case - can the Act be applied consistently with the arc of all other antitrust jurisprudence, which has bent narrowly toward a focus on consumer, not competitor, welfare in the decades since its enactment?

Volvo begins by acknowledging the RPA's protectionist purpose. Other antitrust policies are not "geared ... to the protection of existing ***competitors***," but to "the stimulation of ***competition***." To bring the two together, Justice Ginsburg enforced a strict definition of the relevant, competitive market - the market for sales to the ***same customer***, during the same bidding contest - and identified the "hallmark" of the required "competitive injury" in that market as "the diversion of sales or profits from a disfavored purchaser to a favored purchaser." Diversion and its effects could be proved directly, with evidence of diverted sales (like the testimony of a diverted customer, or expert study) or indirectly, through evidence of a "significant price reduction over a substantial period of time."

Reeder's RPA claim floundered under both standards, as it could not produce evidence of a difference in price concessions when it and another Volvo authorized dealer competed head-for-

head for the same customer. It could not, therefore, satisfy the RPA's competitive injury element as articulated by Justice Ginsburg or its requirement that the disfavored dealer be a "competing purchaser" with the favored dealer.

Having wrapped the case in a neat little bow, Justice Ginsburg could not resist a final reach-out to antitrust's prodigal child. Vibrant head-to-head competition between competing sellers, she noted, is the "primary concern of antitrust law" and the RPA - as just interpreted by Justice Ginsburg - "signals no large departure from that main concern." Honoring both the RPA's text and the evolution of antitrust policy meant limiting RPA claims to demonstrable restraints on head-to-head competition - for the same sale at the same time - and otherwise resisting interpretation "geared more to the protection of existing *competitors* than to the stimulation of *competition*."

In so doing, in an arcane area of antitrust law - a body of law that was not her "strong suit" - Justice Ginsburg eradicated ***70 years*** of confused and inconsistent application of a law that, whether well-intended but misguided, intolerably written, or otherwise, commands the attention of countless buyers and sellers across the full sweep of the current American retail landscape. Just another day in the life of our late jewel of a Justice.

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