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Reading Too Much into *Reeder-Simco*?

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NOTE

READING TOO MUCH INTO *REEDER-SIMCO*?

*Jeremy M. Suhr**

This Note argues that a careful analysis of the Supreme Court's opinion in Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. demonstrates that, despite the expansive dicta appearing in part IV of that opinion, the Court did not intend to reshape the course of its Robinson-Patman Act jurisprudence in any significant way. The Court's opinion operated well within the confines of established Robinson-Patman Act doctrine, even if its searching review of the evidence presented at trial represented a rare foray into the arena of factual error correction. After Reeder-Simco, however, many commentators emphasized the dicta in part IV of the opinion and argued that Reeder-Simco portended the end of a pillar of Robinson-Patman Act doctrine, the Morton Salt Inference. In light of the expansive interpretations that many commentators adopted after Reeder-Simco, this Note surveys citations to the opinion to determine whether such broad readings of the case have taken hold in the lower courts as well. The results show that courts have generally read the opinion narrowly and continue to apply the Morton Salt Inference in secondary-line Robinson-Patman Act cases.

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INTRODUCTION

The Robinson-Patman Price Discrimination Act of 1936 ("RPA")¹ has long stood out awkwardly among the collection of statutes generally referred to as the Antitrust laws.² Passed amid the turmoil of the Great Depression, the RPA reflects different values than those embodied in the rest of antitrust law.³ The Supreme Court has repeatedly stated that "[t]he antitrust laws . . . were enacted for 'the protection of *competition*, not *competitors*'"⁴ and that "[i]nterbrand competition . . . is the primary concern of antitrust law."⁵ In discussing the RPA, however, the Court has long noted that it has a "prophylactic purpose"⁶ and that "in enacting the Robinson-Patman Act, Congress was especially concerned with protecting small businesses."⁷ To achieve this end, Congress drafted the RPA⁸ to broaden and redefine the Clayton Act's "injury to competition" language to permit "a finding of injury to competition by a showing of '*injury to the competitor* victimized by the discrimination.'"⁹

1. 15 U.S.C. § 13 (2000).

2. John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?*, 30 SEATTLE U. L. REV. 349, 349 (2007) ("The Robinson-Patman Act is the black sheep of antitrust."). See generally The Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1-7 (2000); Clayton Act of 1914, 15 U.S.C. §§ 12-27, 29 U.S.C. §§ 52-53 (2000). The RPA itself is technically an amendment to section 2 of the Clayton Act. See *Boise Cascade Corp. v. Fed. Trade Comm'n*, 837 F.2d 1127, 1138 (D.C. Cir. 1988).

3. See *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528-29 (1st Cir. 1989) (Breyer, J.) ("Unlike the Sherman Act, which protects '*competition*, not *competitors*,' the Robinson-Patman Act extends its protection to competitors. . . . [T]he Act protects *those who compete* with a favored seller, not just the overall competitive process.") (citation omitted).

4. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

5. *Cont'l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977).

6. *Falls City Indus. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983).

7. *Fed. Trade Comm'n v. Morton Salt Co.*, 334 U.S. 37, 49 (1948). The Court has also observed that the RPA "was passed in response to the problem perceived in the increased market power and coercive practices of chainstores and other big buyers that threatened the existence of small independent retailers." *Great Atl. & Pac. Tea Co. v. Fed. Trade Comm'n*, 440 U.S. 69, 75-76 (1979).

8. In relevant part, the RPA provides as follows:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered

15 U.S.C. § 13(a) (2000).

9. *Morton Salt*, 334 U.S. at 49 (emphasis added) (quoting S. REP. NO. 74-1502, at 4 (1936)).

The RPA provides a cause of action against essentially two major kinds of competitive injury that might result from acts of price-discrimination: (1) claims alleging injury at the primary-line, and (2) those alleging injury at the secondary-line.¹⁰ Primary-line cases involve conduct, generally predatory pricing, that injures competition at the level of the discriminating seller and its direct competitors.¹¹ Secondary-line cases, the majority of RPA claims and the central concern of the act,¹² “involve price discrimination that injures competition among the discriminating seller’s customers . . . [and] cases in this category typically refer to ‘favored’ and ‘disfavored’ purchasers.”¹³ Such secondary-line discrimination occurs when a seller favors some of its customers over others. For example, a small “disfavored” grocery store would have a garden variety secondary-line claim when a supplier grants larger discounts to a giant “favored” national grocery store than it grants to the smaller store.¹⁴

In 1948 the Court set forth a relatively plaintiff-friendly test for finding the required injury to competition in the secondary-line context. In *Federal Trade Commission v. Morton Salt Co.*,¹⁵ the Court announced the principle, since known as the “*Morton Salt Inference*,” that “an injury to competition may be inferred from evidence that some purchasers had to pay their supplier ‘substantially more for their goods than their competitors had to pay.’”¹⁶ Under the *Morton Salt Inference*, therefore, secondary-line plaintiffs may satisfy the “injury to competition” requirement of every RPA claim¹⁷ simply by showing that the defendant-seller had given substantially lower prices to a “favored” rival purchaser over a substantial period of time. Thus, while antitrust law generally protects “*competition, not competitors*,”¹⁸

10. The RPA provides a cause of action against a third kind of injury as well. These “[i]ertiary-line cases involve injury to competition at the level of the purchaser’s customers.” *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006).

11. *Id.*

12. *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997) (“Congress’ concern for the fate of individual competitors . . . focussed [sic] on secondary-line, not primary-line competition. Since the original Clayton Act addressed only primary-line injury, Congress passed the Robinson-Patman Act to add protection against secondary-line injury, more specifically against injury to small retailers.”) (citations omitted); see also Thomas E. Kauper, *The Report of the Attorney General’s National Committee to Study the Antitrust Laws: A Retrospective*, 100 MICH. L. REV. 1867, 1883 (2002) (“The primary concern of the Robinson-Patman Act is with injury at the level of the favored and disfavored buyers.”).

13. *Reeder-Simco*, 546 U.S. at 176.

14. *E.g.*, *United States v. Borden Co.*, 370 U.S. 460 (1962).

15. 334 U.S. 37 (1948).

16. *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990) (quoting *Morton Salt Co.*, 334 U.S. at 46–47).

17. RPA plaintiffs must also show that (1) the relevant sales were made in interstate commerce; (2) the goods were of “‘like grade and quality’”; and (3) the seller discriminated in price between the plaintiff and another purchaser. *Reeder-Simco*, 546 U.S. at 176 (quoting 15 U.S.C. § 13(a) (2000)).

18. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

courts have long noted that the RPA's "statutory language and the legislative history both show that Congress" in this instance adopted a "policy of protecting individual merchants as a means of protecting competition."¹⁹ Indeed, in 1983 the Court reaffirmed the *Morton Salt* Inference of injury to competition via evidence of injury to a competitor, although it also held that defendants may "overcome" that presumption by introducing "evidence breaking the causal connection between a price differential and lost sales or profits."²⁰

While acknowledging the uniqueness of the RPA, the Supreme Court and lower courts have nonetheless struggled with how to treat the RPA in light of the policies underlying the rest of antitrust law. Indeed, the Court has described one prior case as suggesting "that as a general rule the Robinson-Patman Act should be construed so as to insure its coherence with 'the broader antitrust policies that have been laid down by Congress.'"²¹ More recently, in considering a primary-line predatory pricing claim in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*,²² the Court explicitly adopted a construction of the RPA that synthesized the standard used for such primary-line RPA claims with that used for similar predatory pricing claims under section 2 of the Sherman Act.²³ The Court held that below-cost pricing was an element to recovery for predatory pricing claims under both section 2 and the RPA because low prices are "in general a boon to consumers" and plaintiffs must therefore show that a defendant's below-cost pricing "would likely injure competition in the relevant market."²⁴ Finally, the Court again declared that "'the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws.'"²⁵

Despite such expansive language in *Brooke Group* about construing the RPA consistently with broader antitrust policies, lower courts have generally continued to treat secondary-line cases differently and have applied the *Morton Salt* Inference. Even though the *Morton Salt* Inference—by treating injury to a competitor as sufficient to presume injury to competition—runs contrary to the general thrust of antitrust law, at least four circuits have af-

19. *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 656 (9th Cir. 1997); see also *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989) (Breyer, J.).

20. *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983).

21. *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 458 (1978) (quoting *Automatic Canteen Co. of Am. v. Fed. Trade Comm'n.*, 346 U.S. 61, 74 (1953)).

22. 509 U.S. 209 (1993).

23. *Brooke Group*, 509 U.S. at 222 ("[W]hether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the [RPA], two prerequisites to recovery remain the same."). First, the Court stated that § 2 or RPA claims "seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs." *Id.* Second, such claims must "demonstrat[e] that the competitor had a reasonable prospect, or, under § 2 of the Sherman Act, a dangerous probability, of recouping its investment in below-cost prices." *Id.* at 224.

24. *Id.* at 224, 225 (emphasis added).

25. *Id.* at 220 (quoting *Great Atl. & Pac. Tea Co. v. Fed. Trade Comm'n.*, 440 U.S. 69, 80 n.13 (1979)).

firmed its continued viability post-*Brooke Group*.²⁶ Likewise, at least two district courts have continued to apply the *Morton Salt* Inference in secondary-line RPA cases after *Brooke Group*.²⁷

Against this backdrop, the Supreme Court's grant of certiorari in March 2005²⁸ in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.* ("*Reeder-Simco*")²⁹ reasonably raised questions as to whether the Court intended to eliminate the *Morton Salt* Inference, as some commentators had suggested.³⁰ After all, the secondary-line RPA plaintiff in *Reeder-Simco* had prevailed in a jury trial, with the jury instructed on the *Morton Salt* Inference.³¹

When the Court overturned the plaintiff's judgment in *Reeder-Simco*, commentators already hostile to the RPA and *Morton Salt* greeted the

26. *George Haug Co. v. Rolls Royce Motor Cars, Inc.*, 148 F.3d 136, 144 (2d Cir. 1998) (noting that "'the holding of the *Brooke Group* opinion on its face applies only to primary-line cases, not secondary-line cases'" and that "'given the legislative history and statutory language distinctions, we will not presume, without more guidance, that the Supreme Court intended in *Brooke Group* to alter the well-established rule that it adopted in *Morton Salt*'" (quoting *Coastal Fuels of P.R., Inc. v. Caribbean Petrol. Corp.*, 79 F.3d 182, 193 (1st Cir. 1996))); *Chroma Lighting v. GTE Prods. Corp.*, 111 F.3d 653, 658 (9th Cir. 1997) ("We decline to extend the reasoning of *Brooke Group* to secondary-line cases because of the significant differences between primary- and secondary-line claims."); *Coastal Fuels of P.R.*, 79 F.3d at 193 ("[W]e hold that the *Morton Salt* rule continues to apply to secondary-line injury cases such as the present one."); *Stelwagon Mfg. Co. v. Tarmac Roofing Sys.*, 63 F.3d 1267, 1272-73 (3d Cir. 1995) (continuing to apply the *Morton Salt* Inference in a secondary-line price discrimination case under the RPA after *Brooke Group*). For a case prior to *Brooke Group* that nonetheless adopted a very restrictive view of the effect of the *Morton Salt* Inference, see *Boise Cascade Corp. v. Fed. Trade Comm'n*, 837 F.2d 1127, 1144 (D.C. Cir. 1988) (holding that the *Morton Salt* Inference can be overcome by "evidence showing an absence of competitive injury" (emphasis omitted)).

27. *Indus. Burner Sys., Inc. v. Maxon Corp.*, 275 F. Supp. 2d 878, 887 n.21 (E.D. Mich. 2003) ("[T]his court . . . concludes that the Sixth Circuit would not extend the reach of *Brooke Group* beyond primary-line cases."); *Chawla v. Shell Oil Co.*, 75 F. Supp. 2d 626, 652 (S.D. Tex. 1999) (concluding that the Fifth Circuit would follow the First, Second, Third, and Ninth Circuits in retaining the *Morton Salt* inference in secondary-line cases and limiting *Brooke Group* to primary-line cases).

28. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701 (8th Cir. 2004), cert. granted, 544 U.S. 903 (2005).

29. 546 U.S. 164 (2006).

30. E.g., Paul H. LaRue, *Robinson-Patman Act in the Twenty-First Century: Will the Morton Salt Rule be Retired?*, 48 SMU L. REV. 1917 (1995). This prospect seemed increasingly likely given the Court's nearly contemporaneous grant of certiorari, in June 2005, in another antitrust case, *Independent Ink, Inc. v. Illinois Tool Works, Inc.*, 396 F.3d 1342 (Fed. Cir. 2005), cert. granted, 545 U.S. 1127 (2005). In the opinion below in *Illinois Tool*, the Court of Appeals for the Federal Circuit had grudgingly applied an unrelated but similarly long-standing doctrine while noting that "[t]he time may have come to abandon the doctrine, but it is up to the Congress or the Supreme Court to make this judgment." *Id.* at 1351 (discussing the doctrine announced in *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947), that, in assessing the legality of tying arrangements that involve patented or copyrighted tying products, courts should presume that a defendant enjoys market power). The Supreme Court duly accepted this invitation in its opinion in *Illinois Tool*, issued just weeks after its decision in *Reeder-Simco*. See *Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 46 (2006) (rejecting the *International Salt* presumption and "hold[ing] that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product").

31. Respondent's Brief on the Merits at 18, *Reeder-Simco* 546 U.S. 164 (No. 04-905), 2005 WL 1801037.

opinion with glee,³² with one article describing it as “[p]lac[ing the] Robinson-Putman Act on Life Support.”³³ Commentators expressed such sentiment even though Justice Ginsburg’s opinion for the Court in *Reeder-Simco* did not reject or even criticize the *Morton Salt* Inference. Indeed, Justice Ginsburg even cited *Morton Salt* in reiterating that the Court has “recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.”³⁴ Certainly, the Court provided commentators with some cause to read the opinion as sharply curtailing the reach of the RPA: *Reeder-Simco* added another line to the refrain, already voiced in *Brooke Group* and prior cases, that the Court would “continue to construe the [RPA] ‘consistently with broader policies of the antitrust laws.’”³⁵ The Court also quoted the landmark case of *Continental T.V., Inc. v. GTE Sylvania, Inc.* in asserting that “[i]nterbrand competition, our opinions affirm, is the ‘primary concern of antitrust law.’”³⁶

While the appearance of such language in a secondary-line RPA case might seem significant,³⁷ these passages were plainly dicta. The language quoted above, and seized upon by opponents of the RPA, appeared only *after* the Court had already reexamined the evidence presented at trial.³⁸ The Court concluded that the plaintiff had failed to show that “Volvo sold at a lower price to Reeder’s ‘competitors’” given the customer-specific competitive-bidding situation at issue.³⁹ On balance, one would not expect the Court to reject in dicta a doctrine central to the RPA, first adopted in 1948 and affirmed repeatedly since then. Rather, the Court would be far more likely to confront the doctrine head-on and offer a clear and reasoned articulation for its rejection.⁴⁰

This Note argues that *Reeder-Simco* effected relatively little change to RPA doctrine, contrary to the broad interpretations adopted by many commentators. Part I closely analyzes the Court’s opinion in *Reeder-Simco* and argues that the best reading of the opinion is a narrow one. Part II then surveys the commentary and cases that have appeared since *Reeder-Simco*,

32. *E.g.*, Neal R. Stoll & Shepard Goldfein, *Supreme Court Places Robinson-Patman Act on Life Support*, N.Y. L.J., Feb. 21, 2006, at 3.

33. *Id.*

34. *Reeder-Simco*, 546 U.S. at 177.

35. *Id.* at 181 (quoting *Brooke Group Ltd. v. Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).

36. *Id.* at 180 (quoting *Cont’l T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 52 n.19 (1977)).

37. *See* Richard M. Steuer, *Volvo Trucks v. Reeder-Simco: Bidding for a Rational Robinson-Patman Act*, ANTITRUST, Spring 2006, at 61, 66 (describing the Court as “adopt[ing] *Brooke Group* in the context of a secondary line case”).

38. *See Reeder-Simco*, 546 U.S. at 178–81.

39. *Id.* at 179; *see also infra* Part I.A.

40. *Cf. Ill. Tool Works Inc. v. Indep. Ink, Inc.*, 547 U.S. 28, 33–46 (2006) (rejecting the *International Salt* presumption that patents confer market power in a tying arrangement after “undertak[ing] a fresh examination of the history of both the judicial and legislative appraisals of tying arrangements”).

finding that courts have generally interpreted *Reeder-Simco* narrowly, despite the defense bar's initial predictions that *Reeder-Simco* had all but sounded the death knell of the *Morton Salt* Inference and the RPA more generally. The Note concludes that the results of this survey further support the narrow interpretation of *Reeder-Simco* advocated in Part I.

I. THE SUPREME COURT'S OPINION IN *REEDER-SIMCO* DID NOT REJECT THE *MORTON SALT* INFERENCE AND SHOULD BE READ NARROWLY

This Part analyzes the Court's opinion in *Reeder-Simco* and argues that it should be read narrowly, despite dicta in Part IV of the opinion echoing *Brooke Group*. Section I.A details the unique market situation at issue in *Reeder-Simco* and the plaintiff's allegations. Section I.B then scrutinizes the Court's opinion and argues that several factors—among them the limited nature of the Court's holding, the citation to *Morton Salt*, and the absence of any substantial debate regarding the viability of the Inference in the secondary-line context in both the Court's opinion and the parties' briefing—all suggest that *Reeder-Simco* should be read narrowly.

A. *Just the Facts: What Reeder-Simco Is Actually About*

To understand the circumscribed nature of the Court's holding in *Reeder-Simco* requires a careful appreciation of its facts and how the market at issue in *Reeder-Simco* differed from the market structure of a prototypical secondary-line RPA case. Such a typical case might involve a disfavored small retailer complaining that a seller has granted lower prices to a favored rival of the small retailer. In such situations, the favored and disfavored retailers have already purchased the defendant-seller's goods, which they then compete against one another to *resell*. As demonstrated below, the market in *Reeder-Simco* operated differently and involved minimal or no direct competition among a manufacturer's dealers, which explains why the Court found that *Reeder-Simco*'s claim failed.

The market for specially ordered heavy-duty trucks—the product at issue in *Reeder-Simco*—uses a competitive bidding process driven by customer specifications.⁴¹ In this market, retail customers—generally businesses such as trucking firms or dairies purchasing fleets of trucks⁴²—provide specifications, invite competitive bids from dealers associated with truck manufacturers, and then purchase the trucks from the dealer offering the best bid.⁴³ Upon receiving the customer's specifications, Volvo dealers such as *Reeder-Simco* approach Volvo to request discounts, or “concessions,” off the wholesale price of Volvo's trucks.⁴⁴ The “common practice” in the industry is for a truck manufacturer such as Volvo to offer

41. *Reeder-Simco*, 546 U.S. at 170.

42. *See id.* at 171–172.

43. *Id.* at 170–71; *see also* Kirkwood, *supra* note 2, at 352.

44. *Reeder-Simco*, 546 U.S. at 170.

customer-specific discounts to their dealers, deciding on a case-by-case basis whether to offer a discount and, if so, at what rate.⁴⁵ In setting the discount rate, Volvo considers “such factors as industry-wide demand and whether the retail customer has, historically, purchased a different brand of trucks.”⁴⁶ Once Volvo determines how great a discount, if any, it is prepared to offer to a given dealer, the dealer uses that information in submitting its bid to the customer.⁴⁷ A dealer then purchases “trucks from Volvo only if and when the retail customer accepts its bid.”⁴⁸

During the period relevant to the case, Volvo had approximately 150 dealers, each assigned to a geographic territory.⁴⁹ Reeder-Simco was one such dealer, and its territory consisted of ten counties in Arkansas and two in Oklahoma.⁵⁰ Although Volvo did not prohibit its dealers from bidding against one another or from bidding outside their territories, Reeder-Simco “rarely bid against another Volvo dealer.”⁵¹ On those rare occasions when a retail customer solicited a bid from more than one Volvo dealer, “Volvo’s stated policy was to provide the same price concession to each dealer competing head to head for the same sale.”⁵²

In 1997, Volvo announced a program called “Volvo Vision,” which set forth a new strategy to confront its problems in the market, including its assessment that it had too many dealers.⁵³ Volvo projected reducing the number of its dealers from 146 to seventy-five and increasing the size of the remaining dealers’ territories.⁵⁴ Around this time, Reeder-Simco learned that Volvo had granted another of its dealers a price concession greater than those that Reeder-Simco typically received, leading Reeder-Simco to suspect that it was one of the dealers Volvo was seeking to eliminate.⁵⁵ In February 2000, Reeder-Simco filed suit against Volvo, claiming losses resulting from Volvo’s alleged violations of the Arkansas Franchise Practices Act and the RPA.⁵⁶ The gravamen of Reeder-Simco’s RPA complaint was that Volvo had violated the RPA by offering its other dealers better concessions than it gave Reeder-Simco, putting it at a competitive disadvantage.⁵⁷

45. *Id.*

46. *Id.*

47. *Id.* at 170–71.

48. *Id.* at 171.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. See Margaret M. Zwisler, *Volvo Trucks v. Reeder-Simco: Judicial Activism at the Supreme Court?*, ANTITRUST, Summer 2006, at 40, 40.

Volvo and Reeder-Simco took their dispute to trial—a rare occurrence in antitrust cases⁵⁸—where a jury “found that there was a reasonable possibility that discriminatory pricing may have harmed competition between Reeder and other Volvo truck dealers, and that Volvo’s discriminatory pricing injured Reeder.”⁵⁹ The jury found that Reeder-Simco sustained damages in excess of \$1.3 million as a result of Volvo’s RPA violation.⁶⁰ After denying Volvo’s motion for judgment as a matter of law, the District Court trebled the damages on the RPA claim and entered judgment.⁶¹

On appeal, a divided panel of the Eighth Circuit affirmed, rejecting Volvo’s argument that competitive bidding situations do not give rise to RPA claims.⁶² The Eighth Circuit further determined that a jury could reasonably have found that Reeder-Simco *did* compete with other favored Volvo dealers and that a jury could properly have found competitive injury from the evidence that Reeder-Simco presented at trial.⁶³ That evidence primarily compared the concessions that Volvo offered Reeder-Simco, when it bid against non-Volvo dealers, with the concessions that Volvo offered to other Volvo dealers similarly bidding against non-Volvo dealers for other sales.⁶⁴ Reeder-Simco presented evidence that, during the entire five-year period it was an authorized Volvo dealer, it had bid against other Volvo dealers for a particular sale *only twice*.⁶⁵ Further, in one of those instances, neither Volvo dealer won the bid.⁶⁶ In the other, Volvo offered the same concession to both Reeder-Simco and Southwest Missouri Truck Center, a rival Volvo dealer, but the customer chose Southwest Missouri based on prior dealing with them.⁶⁷ Only later, after the customer selected Reeder-Simco’s rival and insisted on a lower price, did Volvo increase the discount it gave to Southwest Missouri.⁶⁸

Judge Hansen dissented from the court of appeals’ opinion with respect to the RPA claim, reasoning that Reeder-Simco had failed to prove that it had actually competed with other Volvo dealers at the time of purchase for

58. *Id.* at 41 (citing ADMIN. OFFICE OF THE U.S. COURTS, JUDICIAL BUSINESS 2005, at 182 tbl.C-4 (2005), available at <http://www.uscourts.gov/judbus2005/appendices/c4.pdf>) (noting that only 4.8% of antitrust cases terminated by trial in fiscal year 2005).

59. *Reeder-Simco*, 546 U.S. at 173.

60. *Id.* In addition, the jury found that Volvo had violated the Arkansas Franchise Practices Act and awarded damages of \$513,750, but that portion of the judgment was not appealed. *Id.* at n.2.

61. *Id.* at 173.

62. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d 701, 708–09 (8th Cir. 2004), *rev’d sub nom. Reeder-Simco*, 546 U.S. 164.

63. *Id.* at 709.

64. *Id.* at 706–07.

65. *Id.* at 705, 708–09.

66. *Reeder-Simco*, 546 U.S. at 172.

67. *Id.*

68. *Id.*

the same customers and thus could not demonstrate competitive injury.⁶⁹ In its appeal to the Supreme Court, Volvo framed the case as presenting the question whether “a manufacturer [may] be held liable for secondary-line price discrimination under the [RPA] in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.”⁷⁰

B. Why Reeder-Simco Should Be Read Narrowly

This Section advances two primary reasons why *Reeder-Simco* should be interpreted narrowly. First, the Court’s careful consideration of the facts presented above and the precise nature of its holding demonstrate that the Court’s opinion necessarily accepted the viability of the *Morton Salt* Inference. In conducting its searching review of the evidence, the Court itself continued to credit the Inference as a “permissible” means of showing competitive injury. Second, neither the Court nor the parties engaged in any sustained analysis as to retaining or rejecting the Inference. The absence of such analysis casts great doubt on expansive readings of the case that suggest the Court did away with the Inference entirely.⁷¹

First, the intense scrutiny to which the Court subjected the evidence presented at trial amounted to an effective endorsement of the *Morton Salt* Inference. Given the facts recited in Section I.A,⁷² *Reeder-Simco* presented a question that, in some sense, related to market definition for RPA claims. The Court has traditionally understood the RPA’s statutory text⁷³ and the *Morton Salt* Inference to apply only when plaintiffs prove that a seller has carried out “substantial price discrimination between *competing purchasers* over time.”⁷⁴ *Reeder-Simco* forced the Court to answer the following question: when should courts deem that two given purchasers are *actual competitors*?

While in the typical secondary-line case this is often an easy question, under the facts in *Reeder-Simco*, the question is not nearly so clear. For instance, in a case where a small grocery store complains that a supplier has given lower prices to one of its larger rivals, both grocery stores are likely located in the same community and seek to serve roughly the same custom-

69. *Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 374 F.3d at 718–19 (Hansen, J., concurring in part and dissenting in part)).

70. *Reeder-Simco*, 546 U.S. at 175.

71. *Cf.*, e.g., Simon A. Rodell, Case Comment, *Antitrust Law: The Fall of the Morton Salt Rule in Secondary-Line Price Discrimination Cases*, 58 FLA. L. REV. 967, 975 (2006) (arguing that the Court’s language signals the end of the *Morton Salt* Inference).

72. *See supra* Section I.A.

73. 15 U.S.C. § 13(a) (2000) (“It shall be unlawful . . . to discriminate in price *between different purchasers* of commodities . . .” (emphasis added)).

74. *See Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (emphasis added).

ers.⁷⁵ In contrast, the facts in *Reeder-Simco* described a market composed of a series of discrete transactions occurring across the country, involving competitive bids submitted to individual customers, and almost never including more than one Volvo dealer.⁷⁶ Such a claim would be equivalent to a small grocery store in northern Michigan complaining that Morton Salt was offering lower prices on its salt to Super Wal-Mart grocery stores located in Arizona or Florida. Even the most fervent supporters of the RPA would likely find such a situation inappropriate for the RPA and the Inference.⁷⁷

The nature of the Court's evidentiary review thus amounted to an acceptance of the Inference itself. The Court scrutinized the evidence to determine whether Reeder-Simco in fact competed with other Volvo dealers,⁷⁸ and in concluding that Reeder-Simco's RPA claim failed, it did not reject the propriety of inferring harm to competition from harm to Reeder-Simco itself. Rather, the Court rejected its claim because Reeder-Simco had simply failed to show that it was entitled to benefit from the Inference because it had presented virtually no evidence of transactions or bids in which Volvo in fact discriminated against it in favor of one of Reeder-Simco's rival Volvo dealers.⁷⁹ As the Court observed, even "if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantially competition between Reeder and the 'favored' Volvo dealer."⁸⁰

Moreover, the Court conducted its searching evidentiary review to determine whether Reeder-Simco actually competed with other Volvo dealers only *after* approvingly quoting the Inference. In Part I of its opinion, the Court briefly sketched the facts and procedural history of the case;⁸¹ then in Part II it outlined the RPA's statutory text and the legal standards used to evaluate RPA claims;⁸² and, in Part III, it engaged in its careful scrutiny of

75. See, e.g., *United States v. Borden Co.*, 370 U.S. 460, 463 (1962) (noting, in a government enforcement action, that defendants were "major distributors of fluid milk products in metropolitan Chicago" and that they discriminated in price between independently owned grocery stores and large grocery store chains in the area); see also Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of Morton Salt: To Save It, Let It Go*, 48 EMORY L.J. 1057, 1060 (1999) (stating that the RPA was "quite clearly" addressed to "Congressional concerns about injury to disfavored purchasers occasioned by the successful efforts of *competing* power buyers to secure unjustified price concessions from a common seller" (emphasis added)).

76. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 170–73 (2006).

77. The RPA's text simply proscribes "discriminat[ing] in price between different purchasers of commodities of like grade and quality . . . 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, or with customers of either of them . . ." 15 U.S.C. § 13(a). If the two purchasers in question operate in entirely different markets and do not compete in any way with each other, then price discrimination among those two purchasers cannot "lessen competition" or "injure, destroy, or prevent" competition between them because *no* such competition even exists between them.

78. See *Reeder-Simco*, 546 U.S. at 178–80.

79. See *id.* at 180.

80. *Id.*

81. *Id.* at 170–75.

82. *Id.* at 175–77.

the evidence presented at trial.⁸³ In reviewing the legal requirements for establishing a secondary-line claim in Part II, the Court noted that of the four elements, only two were in doubt: (1) whether Volvo had discriminated in price between Reeder and another purchaser of Volvo trucks, and (2) whether that discrimination caused an injury to competition.⁸⁴ The Court concluded its review of the legal standards in Part II by observing that

[a] hallmark of the requisite competitive injury, our decisions indicate, is the diversion of sales or profits from a disfavored purchaser to a favored purchaser. We have also recognized that a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time. See *FTC v. Morton Salt Co.*, 334 U.S. 37, 49–51 (1948); *Falls City Industries*, 460 U.S., at 435. Absent actual competition with a favored Volvo dealer, however, Reeder cannot establish the competitive injury required under the Act.⁸⁵

The legal framework that the Court set forth as controlling in *Reeder-Simco* very clearly recognized and accepted that a “permissible” means of proving injury to competition included reliance on the *Morton Salt* Inference—that injury to a competitor over time equates to an injury to competition itself.

As the Court’s final sentence in Part II indicated, the primary objective of the factual inquiry that followed in Part III was, in essence, to determine whether to apply the Inference. By its own terms, the Inference applies only when a “favored competitor” receives a “significant price reduction over a substantial period of time,” and in Part III the Court thus conducted a careful review of the evidence presented at trial to determine whether Reeder-Simco had proven “actual competition with a favored Volvo dealer.”⁸⁶

The Court reversed the judgment in favor of Reeder-Simco because its review of the evidence in Part III simply showed that Reeder-Simco had failed to prove that it actually competed against other Volvo dealers in reselling the trucks it purchased from Volvo.⁸⁷ As the Court noted, “Reeder did not establish that it was *disfavored* vis-à-vis other Volvo dealers in the rare instances in which they competed for the same sale—let alone that the alleged discrimination was substantial.”⁸⁸ In denying Reeder-Simco’s claim, the Court even couched its reasoning in the language traditionally used to

83. *Id.* at 177–80.

84. *Id.* at 176–77. The other two requirements were that the relevant Volvo truck sales were made in interstate commerce and that the trucks were of “like grade and quality.” *Id.*

85. *Id.* at 177 (some citations omitted).

86. *Id.* at 177, 177–80 (emphasis added).

87. *Id.* at 177, 180; see also Zwislser, *supra* note 57, at 42 (“In reversing the Eighth Circuit, the Supreme Court did not announce any new principle of law, or construe any provisions of the [RPA], or reverse or limit *Morton Salt*. The Supreme Court simply held that Reeder’s evidence was insufficient to establish a violation of the [RPA].”).

88. *Reeder-Simco*, 546 U.S. at 180.

formulate the Inference⁸⁹ and merely concluded that Reeder-Simco's evidence failed to justify its use in this particular case.

Finding the Inference inappropriate as applied to a particular set of facts seems an unlikely method of sounding its death knell. After all, as detailed above, the custom-ordered heavy-duty truck market used a system of competitive bidding and Volvo's dealers generally operated in different geographic markets—a scenario that bears little relation to prototypical secondary-line RPA claims in which a disfavored small retail store complains that a supplier has been offering lower prices to one of its larger competitors in the area. Had the Court wished to place the viability of the Inference in doubt, surely it would have directly confronted the merits of its continued use rather than engaging in a lengthy and detailed factual inquiry that simply, and rather uncontroversially, found the Inference's application unwarranted in a particular and fairly unique market setting.

The second reason that *Reeder-Simco* should not be read as calling the existence of the Inference into doubt is that both the parties and the Court devoted very little attention to questioning the merits of the *Morton Salt* Inference. Although the parties' briefing did address the propriety of retaining the *Morton Salt* Inference, on balance they devoted far more analysis to other issues in the case and relegated the *Morton Salt* issue to concluding arguments in the alternative. Certainly, attacks on the Inference were not entirely absent in the case. The final argument included in Volvo's brief to the Court described the Inference in *Morton Salt* as mere "dicta" and suggested that the Court should use the case to harmonize secondary-line RPA claims with the rest of antitrust law, just as the Court had harmonized primary-line claims in *Brooke Group*.⁹⁰ In a similar vein, the Solicitor General's brief, filed as *amicus curiae* supporting Volvo, briefly suggested possible ways of cabining the effect of the Inference.⁹¹ The Solicitor General contended that the "*Morton Salt* inference should not be invoked blindly to permit findings of [RPA] liability where a direct causal link between price discrimination and competitive harm is lacking" and that "the inference is warranted only to the extent that it yields generally valid predictions about injury to competition."⁹²

As Respondent Reeder-Simco observed, however, Volvo had waived any arguments attacking *Morton Salt*: "Not only did Volvo not raise it in the petition for certiorari, it did not object to the *Morton Salt* instruction at trial Indeed, *Volvo actually proposed a Morton Salt instruction prior to*

89. See, e.g., *Falls City Indus., Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 435 (1983) (describing *Morton Salt* as holding that "for the purposes of [the RPA], injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time").

90. Brief of the Petitioner Volvo Trucks N. Am., Inc. at 34, 32–44, *Reeder-Simco*, 546 U.S. 164 (No. 04-905), 2005 WL 1222880.

91. Brief for the United States as Amicus Curiae Supporting Petitioner at 25–26, *Reeder-Simco*, 546 U.S. 164 (No. 04-905), available at <http://www.usdoj.gov/osg/briefs/2004/3mer/1ami/2004-0905.mer.ami.pdf>.

92. *Id.* at 25.

trial.”⁹³ Noting that Volvo’s arguments against *Morton Salt* “would require overruling a slew of this Court’s precedents,” Reeder-Simco catalogued the numerous occasions on which the Court had repeated and affirmed the Inference.⁹⁴ Characterizing Volvo’s arguments as an attempt to amend the RPA judicially, Reeder-Simco reminded the Court that it “has long properly deferred to the expressed intent of Congress.”⁹⁵

The *Morton Salt* issue received very little attention in the oral argument as well. Counsel for Volvo omitted any mention of *Morton Salt*,⁹⁶ focusing purely on the evidentiary point that Reeder-Simco had failed to prove that Volvo discriminated against it in any head-to-head bidding situation in favor of other rival Volvo dealers. Deputy Solicitor General Thomas Hungar, appearing for the United States in support of Volvo, referenced *Morton Salt* a handful of times but almost always in the context of whether or not the plaintiff in this case or a given hypothetical case had met the elements of a typical secondary-line RPA claim. Indeed, at one point he acknowledged that “price discrimination between competing purchasers . . . is what this Court, in the *Morton Salt* case and in other cases, have [sic] indicated the [RPA] was aimed at.”⁹⁷ Rather than attacking the Inference, his argument merely contested the lower courts’ findings that Reeder-Simco was “in some sense, in competition with other Volvo dealers” because the evidence indicated that “at the point that the price discrimination occurs, they are not [actually in competition with other Volvo dealers].”⁹⁸

Counsel for Reeder-Simco did reference the questions raised in the briefing about the *Morton Salt* Inference, and the justices did not seem interested in debating the merits of overturning *Morton Salt*. Reeder-Simco’s counsel noted that the Court had reaffirmed the Inference in the 1980s and again in 1990, contending that “that principle ought to be completely settled at this stage” and that “[i]f there’s to be any fix there, it ought to be a fix that’s offered up by Congress.”⁹⁹ Several unrelated questions and responses later, Justice Breyer then broke into the conversation and mused that he could “tell a little story there that would be quite consistent with the purposes of the antitrust law. So we follow that approach in this case and say goodbye to *Morton Salt*, because *Morton Salt*, after all, was . . . quite formalistic. . . . So, what do you think of that?”¹⁰⁰ Reeder-Simco’s counsel offered the straight-forward response that he was not before the Court “as an

93. Respondent’s Brief on the Merits at 35, *Reeder-Simco*, 546 U.S. 164 (No. 04-905), 2005 WL 1801037.

94. *Id.* at 36–38.

95. *Id.* at 42.

96. See Transcript of Oral Argument, at 3–18, 53–56, *Reeder-Simco*, 546 U.S. 164 (No. 04-905), available at http://www.supremecourtus.gov/oral_arguments/argument_transcripts/04-905.pdf.

97. *Id.* at 20.

98. *Id.*

99. *Id.* at 45–46.

100. *Id.* at 51; see generally *id.* at 50–52.

advocate for overturning *Morton Salt*, for obvious reasons,”¹⁰¹ and the remainder of the argument—including Volvo’s rebuttal—contained no further mention of *Morton Salt*.¹⁰²

Had the Court intended to use *Reeder-Simco* as its vehicle for doing away with the *Morton Salt* Inference and rewriting its understanding of the RPA, surely it would have considered the question in far greater detail than the scant few references detailed above. Combined with the very limited, circumscribed nature of the Court’s holding—that evidence of only two instances of head-to-head competition between Reeder-Simco and another Volvo dealer failed to prove that Volvo had discriminated against Reeder-Simco in favor of other Volvo dealers—the limited analysis regarding the desirability of retaining the Inference suggests that the case should be interpreted narrowly. Far from revolutionizing the standard in secondary-line cases, as *Brooke Group* had in primary-line cases, the Court essentially resolved *Reeder-Simco* on sufficiency of the evidence grounds. As one commentator has noted, the Court “simply held that Reeder’s evidence was insufficient to establish a violation of the [RPA].”¹⁰³

II. A SURVEY OF CITATIONS TO *REEDER-SIMCO*: WHILE COMMENTATORS HAVE CONSTRUED IT BROADLY, LOWER COURTS HAVE INTERPRETED *REEDER-SIMCO* NARROWLY AND CONTINUE TO EMBRACE THE *MORTON SALT* INFERENCE

In the fifteen months after the Court decided *Reeder-Simco*, its opinion garnered relatively few citations.¹⁰⁴ Nonetheless, those references follow a clear trend: after surveying citations to *Reeder-Simco* by commentators and courts, this Part concludes that, while commentators have frequently hailed

101. *Id.* at 52.

102. *See id.* at 52–56.

103. Zwisler, *supra* note 57, at 42.

104. In performing this survey, I used Westlaw’s “Citing References” feature for *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, 126 S. Ct. 860 (2006). As of August 20, 2007, a total of 188 results appear, but only 16 are cases. Of these, some cite *Reeder-Simco* only in passing or for an unrelated point of law. *See, e.g.*, *B-S Steel of Kan., Inc. v. Tex. Indus., Inc.*, 439 F.3d 653, 668–69 (10th Cir. 2006) (citing the Eighth Circuit’s opinion in *Reeder-Simco* on an issue of damages calculation and simply noting that the Supreme Court had reversed the judgment on other grounds); *World Wrestling Entm’t, Inc. v. Jakks Pac., Inc.*, 425 F. Supp. 2d 484, 501, 502, 505 (S.D.N.Y. 2006) (citing *Reeder-Simco*, in a case involving claims of discriminatory licensing, twice for historical context of the RPA and once noting that the RPA relates to transactions involving goods); *PSW, Inc. v. VISA U.S.A., Inc.*, No. C.A. 04-347T, 2006 WL 519670, at *4 (D.R.I. Feb. 28, 2006) (citing *Reeder-Simco*, in a case involving an abandoned RPA claim brought by a processor of internet credit card transactions against Visa, for the proposition that the RPA applies only to discrimination committed by sellers of “commodities”). Finally, a majority of citations to *Reeder-Simco* are cursory explanatory references appearing in various encyclopedias or treatises. *See, e.g.*, 3 FREDERICK K. GRITNER & MARK A. ROTHSTEIN, WEST’S FEDERAL ADMINISTRATIVE PRACTICE § 3051 (3d ed. Supp. 2006) (“The Supreme Court, in *Volvo Trucks North America Inc. v. Reeder-Simco GMC, Inc.*, ruled that a manufacturer may not be held liable for secondary-line price discrimination in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.” (footnote omitted)); 2 W. MICHAEL GARNER, FRANCHISE AND DISTRIBUTION LAW AND PRACTICE § 11:36, at 11–89 (2006).

Reeder-Simco as significantly curtailing the RPA, courts have overwhelmingly read *Reeder-Simco* as effecting little or no change to the doctrine at all. This Part first discusses the reactions of commentators who have read the opinion broadly, and it then examines how a minority of commentators and nearly all lower courts have viewed the case more narrowly.

Commentators have almost universally argued that *Reeder-Simco* radically reshaped the law of secondary-line RPA claims, much as *Brooke Group* changed primary-line claims. For instance, after noting that lower courts have continued to rely on *Morton Salt* as good law in the secondary-line context after *Brooke Group*, one commentator observed that “[d]icta in the Supreme Court’s 2006 *Volvo Trucks* decision may reopen the question whether injury to a competitor, without more, is sufficient to satisfy the act’s competitive injury requirement.”¹⁰⁵ Another commentator declared that “the Court’s emphatic language establishing inter-brand competition as the primary concern of the RPA portends the end of the *Morton Salt* inference,” concluding that in *Reeder-Simco* the Court had “retir[ed] the *Morton Salt* rule.”¹⁰⁶ Yet another pronounced that “although the majority gave a nod to the *Morton Salt* inference,” the Court’s opinion in *Reeder-Simco* had “adopt[ed] . . . *Brooke Group* in the context of a secondary line case.”¹⁰⁷ As a result, that commentator contended that “the Robinson-Patman Act . . . plainly is a shadow of what it was before *Volvo*, when courts in six circuits refused to apply *Brooke Group*’s injury to competition standard beyond primary line cases.”¹⁰⁸

A minority of commentators shared these general sentiments but also offered slightly more nuanced interpretations. For instance, while contending that the Court had placed the RPA on “life support,” the authors of one short article nonetheless recognized that the Court continued to credit the *Morton Salt* Inference and characterized the Court’s opinion as “explain[ing] that Reeder did not meet the *Morton Salt* presumption based on the evidence presented.”¹⁰⁹ Others observed that while the Court’s “holding is narrow in its application to ‘competitive bidding’ and ‘special order’ situations, as opposed to far more common situations of dealers reselling standardized goods from their own inventories,” the Court’s dicta and quotations from

105. CHRISTOPHER J. MACAVOY, LEGAL ASPECTS OF SELLING AND BUYING § 3.15 (Philip F. Zeidman ed., 3d ed. Supp. 2006); see also Daniel A. Crane, *Antitrust Modesty*, 105 MICH. L. REV. 1193, 1208 & n.66 (2007) (reviewing HERBERT HOVENKAMP, THE ANTITRUST ENTERPRISE: PRINCIPLE AND EXECUTION (2005)) (suggesting that in *Reeder-Simco* the Court “arguably followed” a prominent antitrust commentator’s “recommendation that the courts read a competitive injury requirement into the statute”).

106. Rodell, *supra* note 71, at 975.

107. Steuer, *supra* note 37, at 64, 66.

108. *Id.* at 67.

109. Stoll & Goldfein, *supra* note 32, at 3.

GTE Sylvania and *Brooke Group* would provide “fodder for future RP defendants in a variety of other cases to argue about broad implications.”¹¹⁰

Two final commentators, however, interpreted *Reeder-Simco* far more narrowly. Whereas the commentators quoted above adopted relatively expansive interpretations of *Reeder-Simco* and generally emphasized the dicta in Part IV of the opinion,¹¹¹ the “narrow view” commentators reached their conclusions after examining and highlighting the substance of the Court’s evidentiary analysis earlier in the opinion. Thus, while Margaret Zwisler expressed a generally pessimistic outlook regarding the likely fallout from the decision,¹¹² her review of the Court’s evidentiary inquiry led her to understand the opinion itself as “simply h[olding] that Reeder’s evidence was insufficient” to establish an RPA violation and to describe the opinion as “not announc[ing] any new principle of law” or “revers[ing] or limit[ing] *Morton Salt*.”¹¹³

Professor John Kirkwood likewise adopted a narrow interpretation after carefully analyzing the body of the Court’s opinion in *Reeder-Simco*.¹¹⁴ He attempted to explain the expansive dicta in Part IV by suggesting that the Court merely meant to express that where some ambiguity exists in the RPA—for instance, in its application to a competitive bidding scenario—it would resolve those ambiguities “in ways that promote competition.”¹¹⁵ Ultimately, he concluded that *Reeder-Simco* did not work a “radical shift in [RPA] law”; instead, his view is that the Court’s opinion “seems to convey a more modest message” of resolving ambiguities in favor of procompetitive interpretations of the Act and that “the Court does not appear willing to disregard the fundamental features of the Act Congress passed in 1936.”¹¹⁶

In contrast to the majority of commentators, lower courts have treated *Reeder-Simco* as leaving the status of RPA doctrine largely unchanged. For instance, four lower court cases—*Danvers Motor Co., Inc. v. Ford Motor Co.*¹¹⁷ *Toledo Mack Sales & Service, Inc. v. Mack Trucks, Inc.*,¹¹⁸ *Video*

110. Elaine Foreman & Robert Skitol, *Volvo v. Reeder: Narrow Holding, Broad Implications*, THE ANTITRUST SOURCE, Mar. 2006, at 1, <http://www.abanet.org/antitrust/at-source/06/03/Mar06-Skitol3=22f.pdf>.

111. For another example of this phenomenon, see Motion for Leave to File Brief as *Amicus Curiae* and Brief of CTIA – The Wireless Association as *Amicus Curiae* Supporting Petitioner at 10, 16, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 127 S. Ct. 2705 (2007) (No. 06-480), 2007 WL 160782 (citing *Reeder-Simco* twice, on one occasion following a quotation from *GTE Sylvania* and on the other following a quotation from *Brooke Group*).

112. Zwisler, *supra* note 57, at 43 (stating that “[t]he Court’s somewhat tortured path to preclude Reeder’s suit will, no doubt, have the effect of limiting the reach of the [RPA] in many circumstances).

113. *Id.* at 42 (emphasis added).

114. Kirkwood, *supra* note 2, at 368–74.

115. *Id.* at 374.

116. *Id.*

117. No. 02-2197 (DMC), 2007 WL 419285 (D.N.J. Jan. 31, 2007).

118. No. 02-4373, 2006 WL 2385519 (E.D. Pa. Aug. 16, 2006).

Services Of America, Inc. v. Maxell Corp. of America,¹¹⁹ and *Feesers Inc. v. Michael Foods Inc.*¹²⁰—have quoted *Reeder-Simco* itself in formulating the *Morton Salt* Inference.¹²¹ Indeed, *Danvers* even described the Court as having “recently reiterated” that the *Morton Salt* Inference may show the required “competitive injury.”¹²² Although *Toledo Mack* ultimately dismissed the plaintiff’s RPA claim, it did so because the plaintiff, like *Reeder-Simco* itself, brought its claim in the context of another market characterized by competitive bidding.¹²³ The *Toledo Mack* plaintiff similarly failed to offer—and perhaps lacked any—proof of head-to-head bids between itself and any other allegedly favored Mack Truck dealer.¹²⁴ In *Wiegand Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, however, Judge Buckwalter, the same Judge who dismissed the RPA claim in *Toledo Mack*, denied Mack Truck’s motion for summary judgment against another RPA plaintiff because its claim *did* rely upon “direct evidence of price discrimination involving head-to-head competition between Plaintiffs and a favored Mack dealer.”¹²⁵ Furthermore, after noting that “[c]ompetitive injury can be shown in two ways,” Judge Buckwalter formulated the *Morton Salt* Inference by quoting from *J.F. Feeser, Inc. v. Serv-a-Portion, Inc.*, a Third Circuit case that strongly endorsed the *Morton Salt* Court’s view of the RPA and its legislative history.¹²⁶

Other lower courts have also cited *Reeder-Simco* while continuing to find the *Morton Salt* Inference viable. For example, the district court in *Monsieur Touton Selection v. Future Brands, LLC*¹²⁷ cited *Reeder-Simco* twice for general propositions of RPA law and formulated the *Morton Salt* Inference by citing to *George Haug Co. v. Rolls Royce Motor Cars, Inc.*,¹²⁸ a Second Circuit case that reaffirmed the Inference and explicitly limited the effect of *Brooke Group* to primary-line cases.¹²⁹ Further, two recent cases decided by the Sixth Circuit that cited to *Reeder-Simco*—*Smith Wholesale*

119. No. 04-2594 (KSH), 2007 WL 2156359 (D.N.J. July 26, 2007).

120. No. 06-2661, 2007 WL 2302286 (3d Cir. Aug. 14, 2007).

121. *Danvers Motor Co.*, 2007 WL 419285, at *11 (“[A]s the Supreme Court recently reiterated, ‘a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time.’” (quoting *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 176 (2006))); *Toledo Mack*, 2006 WL 2385519, at *2 (quoting same language from *Reeder-Simco*); *Maxell Corp.*, 2007 WL 2156359, at *7 (quoting same language from *Reeder-Simco*); *Feesers*, 2007 WL 2302286, at *5 n.8 (quoting same language from *Reeder-Simco*).

122. *Danvers Motor Co.*, 2007 WL 419285, at *11.

123. *Toledo Mack*, 2006 WL 2385519, at *3–4.

124. *Id.*

125. *Wiegand Mack Sales & Service, Inc. v. Mack Trucks, Inc.*, No. Civ. A. 03-5451, 2006 WL 847557, at *2 (E.D. Pa. Mar. 26, 2006).

126. *Id.* at *1 (citing *J.F. Feeser v. Serve-a-Portion, Inc.*, 909 F.2d 1524, 1535 (3d Cir. 1990)).

127. No. 06 Civ. 1124(SAS), 2006 WL 2192790 (S.D.N.Y. Aug. 1, 2006).

128. 148 F.3d 136 (2d Cir. 1998).

129. *Monsieur Touton*, 2006 WL 2192790, at *4 (citing *George Haug*, 148 F.3d at 142–44); see also *supra* note 26 and accompanying text.

*Co. v. R.J. Reynolds Tobacco Co.*¹³⁰ and *Smith Wholesale Co. v. Philip Morris USA*¹³¹—also continued to accept the Inference. In *R.J. Reynolds*, the court accepted the Inference in noting that “it is well established, in the context of quantity discounts, that an inference of competitive injury arises from ‘evidence that some purchasers had to pay their supplier ‘substantially more for their goods than their competitors had to pay.’”¹³²

While the Sixth Circuit affirmed the entry of summary judgment for the defendant in both cases, its opinions did not expansively interpret *Reeder-Simco*’s dicta about “interbrand competition” and the need to construe the RPA consistently with broader antitrust policies—though, to be sure, both opinions did cite that language.¹³³ Instead, the court denied the RPA claims because the plaintiffs had attacked large cigarette manufacturers’ incentive-based discount programs that calculated its wholesalers’ discount price by using market share—not quantity of product ordered, as in *Morton Salt*.¹³⁴ As the court explained, “market-share discount pricing structures present different concerns than volume-based discounts” because such programs “theoretically level the playing field by allowing competing purchasers 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.”¹³⁵ Citing evidence demonstrating that the defendants’ programs frequently allowed small dealers to qualify for the highest discount rate based upon their own purchase percentages,¹³⁶ the court concluded that, under the longstanding “functional[] availab[ility]” doctrine, the defendants’ programs were “offered to all wholesalers using a non-discriminatory formula.”¹³⁷ Therefore, the plaintiffs’ claims failed because they had not established price discrimination at all.¹³⁸

In sum, a majority of commentators greeted *Reeder-Simco* as signaling a major shift in the Court’s RPA jurisprudence. However, no such shift has occurred. Instead, lower courts have agreed with this Note and a minority of commentators that the substance of Justice Ginsburg’s opinion for the Court in *Reeder-Simco* recognizes the continued vitality of the *Morton Salt* Inference, despite somewhat narrowing the RPA’s application in one particular market setting.

130. 477 F.3d 854 (6th Cir. 2007).

131. 219 F. App’x 398 (6th Cir. 2007).

132. *R.J. Reynolds*, 477 F.3d at 864 (quoting *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 559 (1990) (quoting *Fed. Trade Comm’n v. Morton Salt Co.*, 334 U.S. 37, 46–47 (1948))); see also *Philip Morris*, 219 F. App’x at 404 (“We adopt and incorporate by reference the standard of review, legal analysis, and authorities discussed in *Reynolds*.”).

133. See *R.J. Reynolds*, 477 F.3d at 864; *Philip Morris*, 219 F. App’x at 405, 409–10.

134. See *R.J. Reynolds*, 477 F.3d at 863–65; *Philip Morris*, 219 F. App’x at 405–06.

135. *R.J. Reynolds*, 477 F.3d at 864–65.

136. See *Philip Morris*, 219 F. App’x at 406 n.9, 406–09.

137. *R.J. Reynolds*, 477 F.3d at 880.

138. *Id.*

CONCLUSION

This Note argues that carefully analyzing the Court's opinion in *Reeder-Simco* demonstrates that, despite the expansive dicta appearing in Part IV, the Court did not intend to re-shape the course of its RPA jurisprudence in any significant way. The Court's opinion operated well within the confines of established RPA doctrine, even if its searching review of the evidence presented at trial represented a rare foray into the arena of factual error correction. In light of the expansive interpretations that many commentators adopted after *Reeder-Simco*, this Note surveyed citations to the opinion to determine whether such broad readings of the case had taken hold in the lower courts as well. The results show that courts have generally read the opinion narrowly and continue to apply the *Morton Salt* Inference in secondary-line RPA cases.

Although the critics of the RPA may well be correct that it reflects "wholly mistaken economic theory,"¹³⁹ Congress clearly may choose to enact statutes reflecting values other than economic efficiency.¹⁴⁰ As counsel to *Reeder-Simco* noted at oral argument, the Court adopted the *Morton Salt* Inference as a gloss on the RPA's statutory text in 1948 and has repeatedly affirmed its validity.¹⁴¹ Significant evidence in the RPA's legislative history and the principle of *stare decisis* support retaining that interpretation until Congress amends the statute.¹⁴² In the meantime, this Note's survey shows that lower courts have interpreted *Reeder-Simco* narrowly, resisting the impulse to rewrite the RPA, as many commentators seem to wish.

139. *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 187 (2006) (Stevens, J., dissenting) (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 382 (The Free Press 1993) (1978)).

140. Laws regulating workplace safety, the minimum wage, or the environment offer several examples. See, e.g., *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 437, 471 (2001) ("The text of § 109(b), interpreted in its statutory and historical context and with appreciation for its importance to the [Clean Air Act] as a whole, unambiguously bars cost considerations from the [National Ambient Air Quality Standards]-setting process.").

141. See *supra* note 99 and accompanying text.

142. Indeed, the Antitrust Modernization Commission, a body created by Congress in 2002, recently published its final report and recommendations, which included an exhortation that "Congress should repeal the Robinson-Patman Act in its entirety." ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 312, 317 (2007), available at http://www.amc.gov/report_recommendation/amc_final_report.pdf. As it has done numerous times in the past, however, Congress will likely ignore this recommendation. See Respondent's Brief on the Merits at 38 n.13, *Reeder-Simco*, 546 U.S. 164 (No. 04-905), 2005 WL 1801037 (citing several similar, prior recommendations that ultimately went unheeded).