12-4689-cv

United States Court of Appeals

FOR THE SECOND CIRCUIT

DRUG MART PHARMACY CORP., et al. v. AMERICAN HOME PRODUCTS CORP, et al.

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On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF *AMICUS CURIAE* ORGANIZATION FOR COMPETITIVE MARKETS IN SUPPORT OF APPELLANTS AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

The Organization for Competitive Markets is a 26 U.S.C. § 503 tax-exempt, national, non-profit public policy research organization headquartered in Lincoln, Nebraska. It has no parent company, and no publicly traded entity has ownership in the Organization for Competitive Markets.

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Interest of Amicus Curiae[1]

Amicus curiae seek leave of the Court to file this brief pursuant to Federal Rule of Appellate Procedure 29(a).

Amicus curiae is the Organization for Competitive Markets ("OCM"). OCM is a national, non-profit public policy research organization that advocates before the Courts, Congress, state legislatures and regulators for fair, competitive markets, particularly for those in rural areas. OCM members include hundreds of farmers, rural consumers, and advocates for rural communities throughout the United States. It advocates for free markets, the elimination of improper restrictions on competition and the active enforcement of the antitrust laws. OCM submits this brief in support of Appellants on their motion to reverse the District Court's grant of summary judgment to Appellees. If affirmed the lower court's decision would severely weaken the enforcement of the Robinson-Patman Act and harm small competitors and the consumers they serve. OCM believes that proper interpretation of the Act will preserve competition, economic opportunity, and protect consumers.

[1] Pursuant to Second Circuit Local Rule 29.1, attorney David Balto authored this brief on behalf of the Organization for Competitive Markets. Neither David Balto nor the Organization for Competitive Markets received any funding for preparing or submitting this brief.

SUMMARY OF ARGUMENT

Consumers throughout the country rely on local and independently owned community pharmacies to fill their prescriptions and provide needed healthcare services. Competition among community pharmacies benefits consumers through lower prices and better services. However, these pharmacies cannot compete on a level playing field when brand name drug manufacturers provide their competitors non-cost justified discounts for brand name prescription drugs ("BNPDs"). By discriminating on the basis of price, the Appellees in this case harm community pharmacies, threaten their viability, and harm the consumers they serve.

This type of price discrimination has been illegal under the Robinson-Patman Act ("RPA")[2] since 1936. In this case, the Appellants have appropriately alleged a price discrimination scheme in which BNPD manufacturers utilized a two-tiered pricing policy that adversely impacted Appellant retail pharmacies in violation of the RPA.[3] Congress passed the RPA with this specific type of case in mind.[4]

Amicus curiae submit this brief to illustrate several points. First, the RPA was enacted to preserve precisely the type of retail competition raised by this case. Second, the district court imposed an unnecessary burden upon Appellants by failing to recognize the Appellants' right to utilize the inference of competitive

[2] 15 U.S.C. § 13(a)-(f) (1936).
[3] *See* Appellants' Br. at 4.
[4] The RPA provides certain defenses to a price discrimination claim, but they are not at issue in this appeal.

harm in *Federal Trade Commission v. Morton Salt Co.*, 343 U.S. 37 (1948). Third, the lower court erred in its interpretation of the Supreme Court case *Volvo Truck North Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 177 (2006) and the phrase "injurers competition" by placing a burden on Appellants to demonstrate a market-wide loss of competition. Finally, the court's decision permitting this type of price discrimination will harm not only community pharmacies but the consumers they serve by having a negative impact on consumer choice, access to medication and access to necessary pharmacy services.

ARGUMENT

I. The purpose of the Robinson-Patman Act is to prevent unfairness between competitive buyers in a given marketplace.

The goal of the RPA is to protect small, independent retailers from the bargaining power and leverage of large chain entities.[5] In enacting this law, Congress focused on the "unfairness" of a firm's use of its market power to secure rebates and price discounts to the detriment of others. In particular, at the time of its passage, Congress was particularly concerned with "mom and pop" retailers' ability to compete with "high volume giants."[6] When reading the statute, liability under section 2(a) directly refers to a discrimination on the basis of price between

[5] Harvard Law Review Association, *Antitrust Law—Robinson Patman Act—Ninth Circuit Rules that Secondary-Line Price Discrimination Cannot be Rebutted by a Showing of no Anticompetitive Effect*, 111 HARV. L. REV. 615, 615 (1997).
[6] *See* DAVID M. KENNEDY, FREEDOM FROM FEAR: THE AMERICAN PEOPLE IN DEPRESSION AND WAR, 1929-1945, 372 (1999).

"different purchasers of commodities of like grade and quality."[7] To make out a prima facie case under section 2(a) of the RPA, a plaintiff must simply demonstrate "that the discrimination reduced its ability to compete, even if overall competition remained vigorous."[8]

For almost 80 years the courts have applied the RPA where there has been non-cost justified price discrimination. In 1997, the Ninth Circuit stated that the RPA "shifts the focus… to protecting individual disfavored buyers from the loss of business to favored buyers."[9] Therefore, courts applying the RPA should only look to loss of competition for individual firms and not the entirety of the market. "The purpose of this passage was to relieve secondary-line plaintiffs-small retailers who are disfavored by discriminating suppliers-from having to prove harm to competition market-wide, allowing them to instead impose liability simply by proving effects to individuals."[10] In this case, individual Appellants have clearly demonstrated that Appellees' practice of price discrimination was unfair and weakened Appellants' ability to fairly compete within the marketplace.

[7] 15 U.S.C. § 13(a).
[8] John B. Kirkwood, *The Robinson-Patman Act and Consumer Welfare: Has Volvo Reconciled Them?*, 30 SEATTLE U. L. REV. 349, 349 (2007).
[9] *Chroma Lightning v. GTE Prods. Corp.*, 111 F.3d 653, 655 (9th Cir. 1997).
[10] *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1446 n. 18 (9th Cir. 1995).

II. The District Court Erred by Failing to Properly Apply the *Morton Salt* inference to this case.

As stated by the Supreme Court, the *Morton Salt* inference is that an "injury to competition is established prima facie by proof of a substantial price discrimination between competing purchasers over time."[11] The inference permits a court to find an injury in which there is a persistent and substantial discriminatory price against a disfavored purchaser leading to a loss of sales for said disfavored purchaser.[12] Courts may rely on this inference instead of requiring plaintiffs to demonstrate a "diversion of sales or profits."[13] Furthermore, the inference, if proven, allows the court forego relying upon complicated diversion data.

The District Court here erroneously dismissed the *Morton Salt* inference. It stated that the inference was rebutted because "plaintiffs have undertaken an extensive, costly, and time-consuming effort to trace the customers they claim to have lost to favored purchasers because of price discrimination, but have essentially come up empty."[14] The lower court was incorrect to require a diversion study to demonstrate competitive harm. To invoke the inference, "a plaintiff need

[11] *Morton Salt Co.*, 334 U.S. at 37, 46, 50-51.
[12] *See* E. THOMAS SULLIVAN AND JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS 30 (Lexis Nexis, 5th ed., 2008).
[13] Kirkwood, *supra* note 8 at 355.
[14] *Drug Mart Pharmacy Corp., v. Am. Home Prods. Corp.*, 2012 U.S. Dist. LEXIS 115882, at *41 (E.D.N.Y. Aug. 16, 2012).

not prove actual injury to itself."[15] Instead, the facts only must show a "significant price reduction over a substantial period of time."[16]

In this case, there is no dispute that Appellees provided substantial discounts and price reductions to favored purchasers.[17] Therefore, the lower court erred in denying the *Morton Salt* inference because, utilizing the facts from the case, Appellants have sufficiently demonstrated a price reduction over a period of time, thus creating the causal connection between sustained price differentials and lost sales or profits. As such, the Second Circuit should reverse the District Court and enable the use of the *Morton Salt* inference in this case.

III. The District Court Misinterpreted *Volvo's* holding on competitive harm for secondary-line injury.

In *Volvo*, the Supreme Court found no violation of the RPA after secondary-line plaintiffs failed to provide evidence that "favored purchaser possesses market power," failed to prove that purchasers competed with each other, and the supposedly anticompetitive conduct actually fostered competition.[18] Relying upon *Volvo's* holding, the District Court in this case reasoned that the Supreme Court now requires that RPA secondary-line plaintiffs demonstrate that an alleged discrimination caused competitive injury to the market as a whole.[19] To bolster its

[15] Kirkwood, *supra* note 8 at 355.
[16] *Volvo Trucks North Am.*, 546 U.S. at 177.
[17] *See* Appellants' Br. at 23.
[18] *Volvo Trucks North Am.*, 546 U.S. at 181.
[19] *Drug Mart Pharmacy Corp.*, 2012 U.S. Dist. LEXIS 115882, at *30.

argument, the District Court provided a quote from *Volvo*: "interpretation[s of the Act] geared more to the protection of existing *competitors* than to stimulation of *competition*."[20] The District Court then tied its interpretation of *Volvo* to a broad proposition from an earlier Supreme Court case that stated the RPA claims must "threaten to injure competition."[21] Taking these lines together, the District Court wrongly asserted that secondary-line RPA plaintiffs can no longer prove harm via individual damage.[22]

After a thorough review of the case law, it is clear that the District Court has misinterpreted the Supreme Court's jurisprudence. The Supreme Court has never held that a plaintiff alleging harm under the RPA must demonstrate harm to competition within the marketplace. While the Supreme Court in *Volvo* stated that the RPA's purpose was to protect against injuries to competition, it used the language *only* to reject an interpretation of the Act that went beyond established precedent.[23] The Supreme Court did not say that a plaintiff who brings a traditional secondary-line RPA case must show injury to market-wide competition.[24]

Moreover, the District Court failed to note that *Volvo* actually reiterated the narrower purpose of the Act and the traditional ways of showing the secondary-

[20] *Id.* at *30 (quoting *Volvo Trucks North Am.*, 546 U.S. at 181) (emphasis in original).
[21] *Id.* at *30 (quoting *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220 (1993)).
[22] *Id.* at *31.
[23] *Volvo Trucks North Am.*, 546 U.S. at 176 ("Robinson-Patman does not 'ban all price difference charged to different purchasers of like grade and quality'" quoting *Brooke Grp. Ltd.*, 509 U.S. at 220).
[24] *Id.* at 176.

line injury.[25] According to the Supreme Court, the purpose of the RPA is to protect individual firms from unfair discriminatory actions by competitors within the intrabrand market.[26] In *Volvo*, the Supreme Court held that to establish an RPA secondary-line injury, the plaintiff needed to show (1) sales in interstate commerce, (2) sales of "like grade and quality," (3) a discrimination in price between seller and competitor, and that (4) "the effect of such discrimination may be… to injure, destroy, or prevent competition to the advantage of a favored purchaser."[27] Furthermore, the Supreme Court upheld the hallmark of a secondary-line injury which is "the diversion of sales or profits from a disfavored purchaser to a favored buyer,"[28] and the Supreme Court expressly preserved the plaintiff's right to use the *Morton Salt* inference.[29] Nothing in the *Volvo* opinion suggests that a plaintiff need demonstrate anything other than competitive harm to its own firm.

A number of prominent antitrust scholars and practitioners have reviewed the *Volvo* decision, as well as its progeny, and concur that *Volvo* did not assert new burdens of proof on RPA plaintiffs. Professor John Kirkwood, one of the leading experts on the Act observed, Justice Ginsburg "did not state that a plaintiff had to show harm to market-wide competition, nor that it had to demonstrate any of the familiar components of such harm, such as market power, entry barriers, or adverse

[25] *Id.* at 176-77.
[26] *See Id.* at 175.
[27] *Id.* at 176 (internal quotations removed).
[28] *Id.* at 177.
[29] *Id.* at 177-78.

effects on consumers."[30] Kirkwood carefully parses out critical sections of the Supreme Court's opinion explaining why such a burden is unwarranted under the law.[31] He persuasively argues that the *Volvo* opinion set forth the injury standard for secondary-line RPA cases "without mentioning either a buyer power or a consumer-harm requirement."[32]

Robert Skitol, a leading antitrust practitioner noted that the *Volvo* opinion had a limited impact on courts' interpretation of the RPA.[33] In his examination of nineteen cases that interpreted *Volvo*, Skitol found that "[*Post-Volvo*] RP jurisprudence… in most cases is not much different than in previous years."[34] In fact, Skitol notes that the Third Circuit cited *Volvo* for the proposition that plaintiffs may demonstrate competitive injury through evidence of substantial price reductions over a sufficient period of time.[35]

In *Volvo*, plaintiffs failed to demonstrate a viable claim under the RPA because "if price discrimination between two purchasers existed at all, it was not of such magnitude as to affect substantial competition *between* Reeder and the 'favored' Volvo dealer."[36] However, there has been no change in standard for "injure competition" as asserted by the lower court. As seen in *Volvo*, subsequent

[30] Kirkwood, *supra* note 8 at 355.
[31] *Id.* at 355-56.
[32] *Id.* at 374.
[33] Robert A. Skitol, *Two Years After Volvo v. Reeder: The Robinson-Patman Act Is Still with Us*, 22 ANTITRUST 78, 80 (2008).
[34] *Id.* at 80.
[35] *Id.* at 81 (discussing *Feesers, Inc. v. Michael Foods, Inc.*, 498 F.3d 206, 213 (3d. Cir. 2007)).
[36] *Volvo Trucks North Am.*, 546 U.S. at 180 (emphasis added).

case opinions and scholarly articles, the Supreme Court only requires that the plaintiffs demonstrate an unfair price discrimination that adversely affects competition *between* competitors. Thus, evidence which demonstrates an injury to a single competitor is sufficient to establish a competitive injury under the RPA.

IV. Allowing drug manufacturers to discriminate against community pharmacies will not only harm competitors but will also harm vulnerable consumers.

The Appellees attempt to portray this case of one of marginal harm to a group of small competitors. They seem to suggest that consumers stand on the sidelines unaffected by any price discrimination and are indifferent to the plight of community pharmacies. They could not be more mistaken.

Non-cost justified price discrimination on brand name drugs threatens the viability of many community pharmacies by which many vulnerable consumers rely upon to receive medications and medical services. Unjustified price discrimination places community pharmacies at a significant competitive disadvantage. Already, many community pharmacies are being driven out of business.[37] For example, from 2006 to 2010, 119 sole, rural, community pharmacies closed across the United States.[38] Of those119 pharmacies, 31 were located in areas in which there were no other healthcare professionals or

[37] Andrew P. Traynor et al., *The Main Street Pharmacy: Becoming an Endangered Species*, 2 RURAL MINN. J. 83, 90 (2007).
[38] KELLI TODD ET AL., RURAL PHARMACY CLOSURE: IMPLICATIONS FOR RURAL COMMUNITIES (2013), *available at* http://cph.uiowa.edu/rupri/publications/policybriefs/2013/Pharmacist%20Loss%20Brief%20022813.pdf.

providers.[39] In those areas, without viable options, consumers are either forced to travel great distances to receive care or may simply opt to forego medical attention.

Surveys consistently demonstrate that consumers substantially value their relationship with their community pharmacist. Consumers value the competition, low prices, and broad services offered by their community pharmacy. Community pharmacists are the most trust and most accessible health care professionals, especially in underserved rural and inner city market.

The American Antitrust Institute has recognized that a non-cost justified discrimination induced by a large buyer can harm consumers. In particular, the harm can deplete the market of viable alternatives. "It can allow the favored buyer to take business or profits from disfavored buyers, reducing their number of vigor and depriving consumers of the convenient locations, distinctive services, superior selection, or other attractive features they would have offered."[40] The concern is magnified when consumers have few other options or those options are inferior.

With increasingly limited options from which to purchase pharmaceuticals, consumer welfare will suffer, particularly in underserved, rural areas. Consumers rely on their local pharmacies for more than just pharmaceuticals. Pharmacists at independent, local pharmacies are trained to help educate patients, monitor their medications, aid in the event of an adverse reaction, and provide quality

[39] *Id.*
[40] AM. ANTITRUST INST., THE ROBINSON-PATMAN ACT SHOULD BE REFORMED, NOT REPEALED (2005), *available at* http://www.antitrustinstitute.org/files/425.pdf.

assurance.[41] Without these much needed services, vulnerable consumers might go without necessary medical care. Furthermore, if a consumer seeks out a new provider of services, they are unlikely to find one. Many of these community pharmacies operate in rural or underserved areas and act as the sole provider of pharmaceuticals and like-services for their communities. 91 percent of community pharmacies are located in rural areas, 22 percent of which are consumers' sole pharmacy available within a twenty mile radius.[42] Vulnerable consumers who lack a means of transportation will like have no access to a new pharmacy in the event their local pharmacy closes.

While the RPA focuses on competitive harm between competitors, the true cost of price discrimination likely has the largest impact on thousands of vulnerable consumers.

CONCLUSION

Appellants have presented sufficient evidence of price discrimination in violation of the Robinson-Patman Act. The claims of the community pharmacies are wholly consistent with the purposes of the Act. The court below created an unprecedented and unwarranted burden on the Appellant community pharmacies

[41] Traynor, *supra* note 37 at 85; *see also* Todd, *supra* note 38 (rural pharmacists also "provide a range of clinical services, including blood pressure checks; diabetes counseling and blood glucose testing; immunizations; educational classes; screening tests for osteoporosis, asthma, hearing, and cholesterol; and tobacco cessation programs").

[42] *See* ANDREW D. RADFORD AND MICHELLE LAMPMAN, *A Profile of Sole Community Pharmacists: Their Role in Maintaining Access to Medications & Pharmacy Services in Rural Communities*, MEDICATION USE IN RURAL AMERICA CONFERENCE (2009).

by failing to apply the *Morton Salt* inference and by grafting on a showing of competitive harm inconsistent with the Supreme Court's jurisprudence. Ongoing price discrimination on brand name drugs will not only impact pharmacies, but also harms vulnerable consumers. For the forgoing reasons, the *amicus curiae* respectfully support the Appellants' appeal and reversal of the District Court's decision.

DATED: January 21, 2014

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned counsel for amicus curiae the Organization for Competitive Markets certifies that the foregoing brief complies with the type-volume limitation of Fed. R. App. 32(a)(7)(B) because it contains 2,950 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

DATED: January 21, 2014

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