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ANTITRUST LAW: THE FALL OF THE *MORTON SALT* RULE IN SECONDARY-LINE PRICE DISCRIMINATION CASES

Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc. 126 S. Ct. 860 (2006)

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Petitioner manufactures and sells custom-made heavy-duty trucks.[1] Respondent and other Volvo dealers bid on sales to specific retail customers.[2] In preparing bids, Respondent and other dealers routinely ask Petitioner for wholesale price concessions, which Petitioner grants selectively.[3] Respondent sued in district court under § 2 of the Clayton Act,[4] as amended by the Robinson-Patman Price Discrimination Act (RPA),[5] claiming Petitioner gave competing dealers better wholesale price concessions than it gave Respondent.[6] The jury awarded Respondent

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1. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 866 (2006).

2. *Id.* Retail customers decide which dealers to request bids from based on "an existing relationship, geography, reputation, cold calling, and other marketing strategies" implemented by specific dealers. *Id.*

3. *Id.* at 866-67.

4. Clayton Act, 15 U.S.C. §§ 12-27 (2000).

5. Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a) (2000). The relevant text of the statute reads:

> 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, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, 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 . . . .

Id.

6. Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701, 704-05 (8th Cir. 2004). Petitioner's expressed policy was "to provide the same price concession to each dealer competing for . . . the same sale." *Volvo Trucks*, 126 S. Ct. at 867. However, Respondent claimed that this policy "was not executed." *Id.*

damages of more than $1.3 million,[7] trebled under the RPA,[8] and Petitioner appealed[9] unsuccessfully.[10] The United States Supreme Court reversed and HELD that a dealer may recover under the RPA only after proof of lost sales to a "favored" dealer competing to resell products to the same retail customer.[11]

In a capitalist society, competitive markets foster efficiency.[12] In the early twentieth century, however, unregulated industries became extremely inefficient as large corporations exploited their market power to undercut their competitors and create monopolies and trusts.[13] Congress passed the Clayton Act[14] in 1914 to curb predatory pricing by these market-dominant corporations.[15] The primary goals of the Clayton Act and other antitrust laws were to limit inefficiencies caused by monopolistic businesses,[16] promote inter-brand competition,[17] and protect consumers from unreasonably high prices.[18] To further these goals, Congress passed the RPA in 1936[19] to curtail monopolistic practices by powerful buyers, particularly large chain retailers.[20]

RPA claims are divided into three classes: primary-, secondary-, and tertiary-line competitive injury.[21] A secondary-line claim requires that:

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7. *Reeder-Simco*, 374 F.3d at 707.

8. *Id.* Private plaintiffs can recover three times their proven damages related to claims under the Clayton Act. *See id.*; *see also* 15 U.S.C. § 15(a) (2000). The Supreme Court did not review Respondent's award of $513,750 for its claim under the Arkansas Franchise Practices Act. *Volvo*, 126 S. Ct. at 868 n.2.

9. *Reeder-Simco*, 374 F.3d at 707.

10. *Id.* at 718.

11. *Volvo Trucks*, 126 S. Ct. at 868-70.

12. *See, e.g.*, J. Gregory Sidak & Daniel F. Spulber, *Deregulation and Managed Competition in Network Industries*, 15 YALE J. ON REG. 117, 119 (1998) (arguing free-market competition benefits consumers "by enhancing productive efficiency" in previously regulated industries such as telecommunications).

13. FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 543 n.6 (1960).

14. Pub. L. No. 63-212, 38 Stat. 730 (1914) (codified as amended at 15 U.S.C. §§ 12-27 (2000)).

15. *Anheuser-Busch*, 363 U.S. at 543.

16. *See* Bruce D. Abramson, *Analyzing Antitrust Analysis: The Roles of Fact and Economic Theory in Summary Judgment Adjudication*, 69 ANTITRUST L.J. 303, 308 (2001).

17. Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 872 (2006).

18. *See* Abramson, *supra* note 16, at 315.

19. Robinson-Patman Act, Pub. L. No. 74-692, 49 Stat. 1526 (1936) (codified as amended at 15 U.S.C. § 13 (2000)).

20. *Volvo Trucks*, 126 S. Ct. at 869; Great Atl. & Pac. Tea Co. v. FTC, 440 U.S. 69, 75-76 (1979); *see also infra* note 38 (discussing chain retailers as the primary scapegoats during the Great Depression).

21. *Volvo Trucks*, 126 S. Ct. at 870. This Comment focuses solely on secondary-line price discrimination. Primary-line discrimination includes predatory pricing and other conduct that injures a discriminating seller's direct competitors. *See* Brooke Group Ltd. v. Brown & Williamson

"(1) the relevant . . . sales were made in interstate commerce;"[22] (2) the goods sold were of "like grade and quality;"[23] (3) the defendant "'discriminate[d] in price'" between two purchasers of the same goods;[24] and (4) the price discrimination injured, destroyed, or prevented competition to the discriminator's advantage.[25]

The circuit courts have split over how a claimant can prove the injury-to-competition element and have adopted two distinct approaches.[26] Under the first approach, a court infers injury to competition from proof that a seller charged competing customers a substantially different price over a prolonged period.[27] Alternatively, a court may require a detailed market analysis proving injury to competition.[28]

Under the first approach, a court infers injury to competition directly from proof of prolonged price discrimination, essentially merging the last

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Tobacco Corp., 509 U.S. 209, 220-22 (1993). Secondary-line price discrimination includes conduct that injures competition between a "discriminating seller's customers." *Volvo Trucks*, 126 S. Ct. at 870. Tertiary-line price discrimination consists of conduct that injures competition between customers of a discriminating seller's direct purchasers. *Id.*

22. *Volvo Trucks*, 126 S. Ct. at 870. The "interstate commerce" element of a secondary-line claim was not at issue in this case. *Id.* However, the jurisdictional "interstate commerce" requirement is narrower under the RPA than it is under the Sherman Act. *See* Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 194-95 (1974). The *Gulf Oil* Court found that the jurisdictional requirement of the RPA was not satisfied by a showing that some behavior affected commerce. *Id.* at 195. Instead, the Court held that at least one discriminatory transaction must occur in the flow of interstate commerce to meet the requirements of the RPA. *Id.*

23. The "like grade and quality" element was also not at issue in the instant case. *Volvo Trucks*, 126 S. Ct. at 870. For a discussion of the "like grade and quality" element, see *FTC v. Borden Co.*, 383 U.S. 637, 640 (1966) (noting that different "labels do not differentiate products" under the "like grade and quality" requirement of the RPA).

24. *Volvo Trucks*, 126 S. Ct. at 870 (quoting 15 U.S.C. § 13(a) (2000)). The Supreme Court interpreted discrimination in price to mean simply a price difference between two purchasers. Texaco, Inc. v. Hasbrouck, 496 U.S. 543, 558 (1990) (citing FTC v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960)). In other words, a claimant must show "actual sales at two different prices to two different" purchasers (also known as the "two purchase requirement"). Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp., 374 F.3d 701, 707-08 (8th Cir. 2004).

25. *Volvo Trucks*, 126 S. Ct. at 870.

26. *Compare* Boise Cascade Corp. v. FTC, 837 F.2d 1127, 1143-44 (D.C. Cir. 1988) (refusing to infer injury to competition from injury to a competitor where the FTC ignored evidence that competition was not injured), *and* Am. Oil Co. v. FTC, 325 F.2d 101, 105-06 (7th Cir. 1963) (vacating an FTC order because minimal lost profits over a seventeen-day period could not substantially impact a competitor's ability to compete with its rivals), *with* Chroma Lighting v. GTE Prods. Corp., 111 F.3d 653, 655 (9th Cir. 1997) (holding that the inference of competitive injury from injury to a competitor cannot be rebutted by showing competition was not harmed), *and* J.F. Feeser, Inc. v. Serv-A-Portion, Inc., 909 F.2d 1524, 1535 (3d Cir. 1990) (holding that "evidence of injury to a competitor" established injury to competition).

27. *See* FTC v. Morton Salt Co., 334 U.S. 37, 50-51 (1948).

28. *See Am. Oil Co.*, 325 F.2d at 104-06 (comparing effect of price reductions on the local market).

two elements of an RPA claim.[29] In *FTC v. Morton Salt Co.*, a manufacturer granted volume-specific discounts.[30] The Federal Trade Commission (FTC)[31] found that the manufacturer's volume discounts violated the RPA and issued a cease-and-desist order.[32] On appeal, the circuit court vacated the order, holding that the FTC failed to prove the volume discounts harmed competition.[33]

The Supreme Court reversed and formulated the "*Morton Salt* inference"[34]: The requisite injury to competition could be inferred from evidence of price discrimination over time.[35] The Court's ruling relied heavily on both the text[36] and the legislative history of the RPA.[37] The Court noted that the purpose of the RPA was to prevent injury to competition before it occurred and to protect smaller businesses.[38] The Court stressed the purportedly "obvious" inference that competitors would always be injured if they were forced to pay their suppliers higher prices than their competition over a prolonged period.[39]

Alternatively, a claimant may be required to present a detailed market analysis proving a seller's price discrimination injured competition.[40] In

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29. *See Morton Salt*, 334 U.S. at 45-47.

30. *Id.* at 41.

31. The RPA is enforced by three different sources: the Federal Trade Commission, 15 U.S.C. § 21(a) (2000); the Department of Justice, *id.* § 25; and private litigants, who may seek treble damages, *id.* § 15(a), or injunctive relief, *id.* § 26.

32. *Morton Salt*, 334 U.S. at 39-40. The manufacturer in *Morton Salt* charged: $1.60 per case for less-than-carload purchases; $1.50 per case for carload purchases; $1.40 per case to anyone who bought 5,000 cases in any consecutive twelve months; and $1.35 per case to anyone who bought 50,000 cases in any consecutive twelve months. *Id.* at 41. The discounts were available to anyone; however, only five companies had ever purchased enough salt in any period to get the $1.35 price. *Id.*

33. *Id.* at 40.

34. Andrew I. Gavil, *Secondary Line Price Discrimination and the Fate of* Morton Salt*: To Save It, Let It Go*, 48 EMORY L.J. 1057, 1073 (1999).

35. *See Morton Salt*, 334 U.S. at 50-51.

36. The RPA states that price discrimination is only illegal if it substantially lessens competition or tends to create a monopoly. *See supra* note 5. For additional support, the *Morton Salt* Court cited *Corn Products Refining Co. v. FTC*, 324 U.S. 726, 742 (1945), which held that the RPA only required proof that there was a "reasonable possibility" that the price discriminations might harm competition. *Morton Salt*, 334 U.S. at 46 (citing *Corn Prods.*, 324 U.S. at 742).

37. *See id.* at 43-45.

38. *Id.* at 49-50. The RPA was passed during the nadir of the Great Depression. Hugh C. Hansen, *Robinson-Patman Law: A Review and Analysis*, 51 FORDHAM L. REV. 1113, 1120 (1983). During this period, Congress used radical measures to try and solve the country's problems. *Id.* Thus, one view of the RPA is that it was a congressional attempt to save the country (and small businesses) from a primary scapegoat of the Great Depression: the Great Atlantic and Pacific Tea Company (and other large chain stores). *Id.* at 1122-23.

39. *Morton Salt*, 334 U.S. at 46-47.

40. *See* Am. Oil Co. v. FTC, 325 F.2d 101, 104-06 (7th Cir. 1963) (analyzing the effect of price reductions on the local market).

American Oil Co. v. FTC, an oil company gave greater price concessions to retailers in a town where competing brands began a price war, but kept concessions in neighboring towns constant.[41] As a result, dealers in the town affected by the price war paid lower prices for gas than dealers in the neighboring town over a seventeen-day period.[42] The FTC found that the oil company had engaged in price discrimination in violation of the RPA and issued a cease-and-desist order.[43]

The Court of Appeals for the Seventh Circuit vacated the FTC's order, asserting that, although the oil company's prices during the seventeen-day period were discriminatory, there was no evidence the discrimination actually harmed competition.[44] The court emphasized that the RPA's primary concern was the preservation of competition and that the statute's concern for individual competitors was "incidental."[45] The court analyzed the relevant market and lost profits of the disadvantaged retailers and determined that their actual economic losses were slight.[46]

Minimal economic losses, the court emphasized, could not substantially impact any rival's ability to compete.[47] Further, the Seventh Circuit distinguished *Morton Salt*, asserting that the inference of competitive injury from evidence of price discrimination applies only when a favored buyer enjoys a routine and permanent price advantage over its rivals.[48] Because the retailer's advantage in *American Oil* lasted for only seventeen days and caused minimal lost profits, the court refused to invoke the *Morton Salt* inference and reversed the FTC's ruling.[49]

In the instant case, the Supreme Court used a transaction-specific market analysis approach to evaluate whether Petitioner's pricing strategies injured competition between Respondent and its rivals.[50] Respondent presented three types of evidence to prove competitive injury.[51] First, Respondent compared concessions it received on four successful bids with larger concessions granted to other Volvo dealers who won bids on different sales (purchase-to-purchase comparisons).[52] Second,

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41. *Id.* at 103.
42. *Id.*
43. *Id.* at 102.
44. *Id.* at 106.
45. *Id.* at 104.
46. *Id.* at 104-05.
47. *Id.* at 105. The court also stated that there was no evidence that the lost profits were attributable to the oil company's pricing strategy and not to the lower prices charged by other brands in the neighboring area. *Id.* at 106.
48. *Id.*
49. *Id.*
50. *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 871 (2006).
51. *Id.* at 870.
52. *Id.* at 870-71.

Respondent compared concessions received from Petitioner in connection with unsuccessful bids against non-Volvo dealers to greater concessions offered to other Volvo dealers who successfully bid on different sales (offer-to-purchase comparisons).[53] Finally, Respondent presented two comparisons where Respondent and another dealer bid on the same sale and Respondent lost the bid (head-to-head comparisons).[54]

First, the instant Court dismissed both the purchase-to-purchase and offer-to-purchase comparisons as too "manipulable" to invoke the *Morton Salt* inference.[55] The instant Court noted that Respondent and other dealers were not in actual competition even though they competed for the same customers in a broad geographic area.[56] The Court stated that competition was unaffected by price differences at this stage because dealers approached Petitioner for price concessions only after the customer decided which dealers should submit bids.[57] Because the dealers were not in actual competition, the Court refused to infer competitive injury from either the purchase-to-purchase or the offer-to-purchase comparisons.[58]

Next, the instant Court rejected the evidence of Respondent's two head-to-head comparisons.[59] The Court refused to use the *Morton Salt* inference because Respondent's evidence failed to prove a substantial injury.[60] Instead, the Court used the market analysis approach, and asserted that the relevant market for each transaction was limited to the dealers that submitted bids on each specific sale.[61] The Court analyzed each head-to-head transaction and noted that Respondent lost only one sale to a competing dealer, resulting in a lost profit of $30,000.[62] The Court stated that the loss of one sale could not have significantly affected competition between Respondent and its rivals.[63] Accordingly, the Supreme Court

53. *Id.* at 871.
54. *Id.*
55. *Id.*
56. *Id.* at 871, 872.
57. *Id.* at 871; *see also infra* note 69.
58. *See Volvo Trucks*, 126 S. Ct. at 872.
59. *Id.*
60. *Id.*
61. *See id.* at 871.
62. *Id.* at 872. The Court questioned whether Respondent's evidence proved Petitioner discriminated in price, but the Court reasoned that, even if it assumed that Petitioner discriminated in price, the minimal harm to Respondent could not have injured competition between Respondent and the other dealers. *Id.* In the first head-to-head comparison, Petitioner initially offered both dealers the same concession, although Petitioner increased the concession given to Respondent's competing dealer after the other dealer won the bid. *Id.* In the second head-to-head comparison, Petitioner increased the concession offered to Respondent to match the concession offered to the other dealer, although neither dealer won the bid. *Id.*
63. *Id.*

reversed and remanded the case back to the circuit court.[64]

The instant Court's decision impacts future secondary-line cases in two ways. First, the instant decision limits manufacturer RPA liability in competitive bidding situations by confining proof of price discrimination to head-to-head comparisons. This limitation on manufacturer risk promotes inter-brand competition while remaining true to the original aim of the RPA by treating similarly-situated resellers equally.[65] Second, and more broadly, the Court's adoption of the market analysis approach foreshadows the end of the *Morton Salt* inference by focusing on injured competition instead of injured competitors.

The instant decision significantly confines manufacturers' RPA risk in competitive bidding situations. Since competitive injury could be inferred from mere price discrimination under the *Morton Salt* rule,[66] the RPA encouraged price rigidity by requiring justification for any difference in price charged to two different resellers.[67] For manufacturers wary of RPA liability, the easiest route was to charge a single price across the board.[68] Under the Court's ruling, however, a court may infer injury to competition only if a claimant shows it received lower concessions in head-to-head competition with another reseller.[69] Thus, manufacturers' RPA risk is limited because they are required only to give the same concession to resellers competing for the same retail sale.

Further, by confining manufacturers' RPA liability to head-to-head comparisons, the Court's ruling promotes inter-brand competition. Under the instant decision, a manufacturer may legally set its price for each specific sale, allowing it to pass on more savings to consumers. Manufacturers in other industries may now use concession programs, like the one used by Petitioner, to lower retail prices to the end consumer.

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64. *Id.* at 873.

65. *See supra* notes 16-18 and accompanying text.

66. *See supra* notes 27, 34-35 and accompanying text.

67. There are three defenses to a prima facie RPA claim: cost justification, meeting competition, and changing market conditions. Robinson-Patman Price Discrimination Act, 15 U.S.C. §§ 13(a)-(b) (2000). The cost justification defense reflects the idea that it is cheaper for a manufacturer to sell to some buyers than to others and that price differentials based on cost savings are legitimate. *See* Hansen, *supra* note 38, at 1145, 1149. The meeting competition defense legalizes price differentials made to meet the equally low price of a competitor. *Id.* at 1149. Finally, the changing conditions defense allows justification of price differentials based on a change in market conditions or the marketability of a product. *Id.* at 1154.

68. *See* Hansen, *supra* note 38, at 1190-93.

69. By analyzing each transaction separately under the market analysis approach, the Court has allowed courts to determine whether competitive injury has occurred on a case-by-case basis. Analyzing each sale separately is appropriate in competitive bidding situations because dealers are not in direct competition until they have been selected to bid. *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 871 (2006). Once dealers have been selected, the relevant market becomes only those dealers competing for the specific sale. *Id.* at 871-72.

Price-conscious consumers will shop around for the lowest possible price, encouraging manufacturers to compete for each sale and bolstering inter-brand competition.

At the same time, the Court's decision remains true to the original aim of the RPA by ensuring similarly-situated resellers are treated equally.[70] Under the Court's transaction-specific analysis, a manufacturer must give the same concession to each reseller competing for the same sale.[71] However, in situations where the resellers are not competing for the same sale and are not similarly situated, manufacturers remain free to dictate their prices. Thus, the instant Court's decision promotes competition by limiting manufacturers' RPA risk but remains true to the original purpose of the RPA by treating similarly-situated resellers equally.

Consequently, the instant Court's adoption of the market analysis approach used in *American Oil* refocuses the relevant inquiry from injured competitors to injury to competition in secondary-line cases. The Court has stated that the RPA "should be interpreted as consistent with the broader policies of antitrust laws."[72] However, the RPA has long been criticized as anomalous among antitrust laws because it focuses on injured competitors instead of injured competition.[73] Commentators have pointed out that this focus yields higher prices,[74] promotes price fixing, and increases the costs of doing business.[75] Until now, the Court had ignored these critiques in secondary-line cases and allowed the *Morton Salt* inference to further the RPA's policy of protecting competitors.[76]

Although the Court's holding is limited to competitive bidding situations, the Court's statement that inter-brand competition is the primary concern of antitrust law manifests its desire to end the reign of *Morton Salt*.[77] The Court's market analysis approach undermines the

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70. *See* Gavil, *supra* note 34, at 1078-79.

71. *See Volvo Trucks*, 126 S. Ct. at 872.

72. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220 (1993); *see also* Automatic Canteen Co. of Am. v. FTC, 346 U.S. 61, 74 (1953).

73. Paul H. Larue, *Robinson-Patman Act in the Twenty-First Century: Will the* Morton Salt *Rule be Retired?*, 48 SMU L. REV. 1917, 1917 (1995).

74. *Id.*

75. *See* Hansen, *supra* note 38, at 1188-91.

76. In primary-line cases, however, the Court ruled that it is improper to infer competitive injury from injury to a competitor. *Brooke Group*, 509 U.S. at 226. The *Brooke Group* Court emphasized that antitrust laws protect competition and not competitors. *Id.* at 224. Therefore, to prove injury to competition in primary-line situations, the Court required proof that the predatory scheme would have the desired effects on its competitors *and* increase prices above a competitive level (allowing the predator to recoup its costs incurred from the predatory pricing scheme). *Id.* at 225-26.

77. *See* Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc., 126 S. Ct. 860, 872 (2006) (stating that the Court would resist any interpretation of the RPA "geared more to the protection of existing competitors than to the stimulation of competition").

Morton Salt inference because the factfinder must be convinced that the relevant price discrimination injured competition.[78] Thus, the market analysis approach "unmerges" the third and fourth elements of secondary-line RPA cases: Competitive injury may no longer be inferred directly from price discrimination over time. The instant case resolves the circuit split[79] in favor of the market analysis approach and shifts the relevant inquiry in secondary-line cases from injured competitors to injured competition.[80]

The instant decision demonstrates the Court's commitment to reconciling the RPA with the policy goals of other antitrust laws. By ensuring that the inquiry in competitive bidding situations is whether a manufacturer's price discrimination harmed competition, not a specific competitor, the instant ruling promotes inter-brand competition.[81] At the same time, the ruling remains true to the original intent of the RPA by ensuring that manufacturers keep their resellers on equal footing when competing for the same sale.[82] Most importantly, the Court's emphatic language establishing inter-brand competition as the primary concern of the RPA portends the end of the *Morton Salt* inference.[83] By retiring the *Morton Salt* rule, the instant Court has finally aligned the RPA with the policy goals of the nation's other antitrust legislation.[84]

78. *See id.* (noting that price discrimination between two purchasers must be of such magnitude as to substantially affect competition between competitors).

79. *See supra* note 26 and accompanying text.

80. *See supra* notes 55-64 and accompanying text.

81. *See Volvo Trucks*, 126 S. Ct. at 872.

82. *See supra* note 34 and accompanying text.

83. *See Volvo Trucks*, 126 S. Ct. at 872-73.

84. *See* Larue, *supra* note 73, at 1920 (asserting that elimination of the *Morton Salt* rule in favor of a market analysis approach would harmonize the RPA with other antitrust laws).