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The Antitrust Legacy of Justice Ruth Bader Ginsburg

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By Carl W. Hittinger and Jeanne-Michele Mariani

Ruth Bader Ginsburg was a trailblazer on so many fronts. Her well-earned nickname "notorious RBG" is usually synonymous with gender equality, civil rights and equal justice under the law. Her mark on the law is certainly indelible, and what she stood for as the second female Justice on the court, (one who was deemed unworthy of any law firm job despite graduating first in her class from Columbia Law School) maybe even more so. But one area of the law in which her opinions in a most prolific career are rare, is that of antitrust. It could be that Ginsburg, who joined a U.S. Supreme Court already heavy with two antitrust jurists—Justices Stephen Breyer and Justice John Paul Stevens, and more recently Justice Neil Gorsuch—felt the viewpoints of her better-versed colleagues more compelling than her own thoughts on the matter. Perhaps, as she said stated in her Senate confirmation hearing, "antitrust … is not my strong suit" and that she could address antitrust questions only as they arose in the certain facts of a case. But even in her willingness to shy away from her blistering dissents in the antitrust arena, she did move the needle when it came to the court's jurisprudence on the subject. In some of the most prominent antitrust cases that the court has had, Ginsburg, while not writing for the court, did join her dissenting colleagues in such cases as *Leegin Creative Leather Products v. PSKS*; *Ohio v. American Express* and *Twombly* and *Iqbal*. In *Twombly,* she joined a dissent that argued that antitrust allegations should have been given more weight at the pleadings stage, siding with Stevens when he wrote "'Defendants entered into a contract' is no more a legal conclusion than 'defendant negligently drove,' … Indeed it is less of one."

And while the above represent some instances of dissent, many times she usually voted with the majority in the most significant antitrust decisions by the Supreme Court during her 27-year tenure. Such major cases included *Weyerhaeuser v. Ross-Simmons Hardwood Lumber; FTC v. Actavis; Texaco v. Dagher; Verizon Communications v. Law Offices of Curtis V. Trinko; Illinois Tool Works v. Independent Ink; North Carolina State Board of Dental Examiners v. Federal Trade Commission; F. Hoffmann-La Roche v. Empagran* and most recently *Apple v. Pepper*. This was also true during her years on the U.S. Court of Appeals for the D.C. Circuit. In fact, within the nearly 200 majority opinions she wrote during her tenure on the Supreme Court, only four were antitrust cases, and three of them really only touched upon the subject of antitrust, being more jurisdictional or procedural within the ambit of an antitrust case. However, the sole antitrust opinion she did author for the majority of the court tackled a difficult and complex issue in antitrust law: price discrimination under the Robinson-Patman Act. Perhaps since the underlying issue was that of discrimination, she felt more comfortable writing in that sphere.

In *Volvo Trucks North American v. Reeder-Simco GMC*, the court, led by Ginsburg, reversed an Eighth Circuit ruling that a truck manufacturer had violated the Robinson-Patman Act when it gave smaller discounts on custom-made trucks to the plaintiff retailer than it had given to other retailers of custom-made trucks. Writing for the court, Ginsburg held that because the alleged price discrimination did not concern direct competition between the retailers, that the plaintiff retailer had failed to show competitive injury as required by the Robinson-Patman Act. The court held that although Reeder-Simco may have competed with other Volvo dealers for the *opportunity* to submit a bid for a sale of trucks, the court found that this sort of preliminary competition was not affected by the alleged price discrimination being complained of, because a dealer does not seek a price discount from Volvo until *after* it has been selected to submit a bid. Once a retailer is selected to bid, the relevant market for the transaction becomes limited to the particular needs of the customer; unless the customer selects more than one dealer to bid, dealers are not in direct competition with one another.

In *Volvo*, we saw RBG who often reserved her cutting edge takes for civil rights or constitutional issues, from her quiet antitrust corner and gave effect to the law as written, noting that the Robinson-Patman Act does not "ban all price differences charged to different purchasers of commodities of like grade and quality." Instead, the Robinson-Patman Act was aimed at a particular class of harms that Congress believed existed when large chain stores were able to exert something like monopsony buying power. Ginsburg noted that "Interbrand [not intrabrand] competition, is the primary concern of antitrust law … .The Robinson-Patman Act signals no large departure from that main concern. Even if the act's text could be construed in the manner urged by [plaintiffs], we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition."

The reason this case remains so influential is its affirmance of the idea that antitrust law is meant to protect competition *not* competitors, a type of thinking that has been attacked more recently by those who are considered antitrust populists, and prefer to see more competitors in a market even if that might mean a smaller benefit to the consumer. The populist movement became a major topic of discussion when Columbia Law professor Lina Kahn, wrote an article while attending Yale Law School, arguing that the current American antitrust law framework, which usually focuses on keeping consumer prices down, cannot account for the anticompetitive effects of large platform-based business models that have become extremely popular since the *Volvo* decision. In reimagining antitrust law, Kahn argues that the type of pricing seen in *Volvo* could be seen as predatory as it could reward certain competitors over others, thereby driving competition out of the market, even if consumers remain unharmed. In the long run Kahn argues that this type of pricing could have adverse effects on the economy.

Despite these newer trends, Ginsburg's interpretation of the Robinson-Patman Act has continued to be law of the land due to its strong roots in a textualist interpretation of the statute, which gives spirit to the words of the law itself, not an overarching interpretation of the law that wishes to do more with it than contemplated by its drafters. In concluding her *Volvo* opinion, which was joined by six other justices of the court, Ginsburg wrote: "head-to-head competition between competing sellers … is the primary concern of antitrust law … [and the Robinson Patman Act] … signals no large departure from that main concern." For Ginsburg, remaining loyal to the text of the Robinson-Patman Act meant limiting RPA claims to demonstrable restraints on head-to-head competition otherwise resisting interpretation "geared more to the protection of existing competitors than to the stimulation of competition."

While *Volvo* was written nearly 15 years ago, and the way in which Americans buy and sell goods has changed in dramatic ways, it will be interesting to see how antitrust law evolves to keep up with our changing world, although one thing is certain: like so many other areas of the law, Ginsburg's jurisprudence will once again be right in the middle of that discussion and her indelible legacy will remain. Stayed tuned.

Carl W. Hittinger is a senior partner and serves as BakerHostetler's antitrust and competition practice team leader and is the litigation group coordinator for the firm's Philadelphia office. He concentrates his practice on complex commercial and civil rights trial and appellate litigation, with a particular emphasis on antitrust and unfair competition matters, including class actions. He can be reached at 215.564.2898 or chittinger@bakerlaw.com.

Jeanne-Michele Mariani is an associate in the firm's Philadelphia office in its litigation group. Her practice focuses on complex commercial and antitrust litigation matters. Her experience also includes a judicial clerkship with Judge Thomas I. Vanaskie of the U.S. Court of Appeals for the Third Circuit. She can be reached at 215.564.1509 or jmariani@bakerlaw.com.

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