A Look Back at Justice Ruth Bader Ginsburg's Antitrust Opinions While on the Supreme Court

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As tributes pour in for U.S. Supreme Court Justice Ruth Bader Ginsburg following news of her passing on September 18, the jurist is being remembered for her efforts to support women's rights. This post is intended to provide a look back at Ginsburg's contributions to antitrust law during her time on the High Court from August 1993 until her death.

MAJORITY OPINIONS. It has been reported that Ginsburg wrote approximately 200 majority opinions while on the Court. Of the roughly 30 opinions issued during the last 27 years that touched on antitrust, Ginsburg wrote for the majority opinion in the following four cases.

Robinson-Patman Act. In 2006, Ginsburg, writing for the majority in *Volvo Trucks North America, Inc. v. Reeder-Simco GMC, Inc.*, explained the scope of the Robinson-Patman Act in a secondary-line price discrimination case: "The Act centrally addresses price discrimination in cases involving competition between different purchasers for resale of the purchased product. Competition of that character ordinarily is not involved when a product subject to special order is sold through a customer-specific competitive bidding process."

The Court held that heavy-duty truck manufacturer Volvo Trucks North America

was not shown to have engaged in price discrimination by providing more favorable discounts or price concessions to some of its regional dealers than to others. The complaining dealer failed to establish the competitive injury required under the Act.

A decision of the U.S. Court of Appeals in St. Louis, upholding a jury verdict in favor of a complaining dealer, was reversed. The Department of Justice and the FTC had supported reversal of the appellate court.

Ginsburg's opinion noted that interbrand competition was the "primary concern of antitrust law" and that the rejection of the complaining dealer's claim was consistent with the broader policies of the antitrust laws—protecting competition rather than competitors.

Deference owed foreign governments. Writing for a unanimous Court in *Animal Science Products, Inc. v. Hebei Welcome Pharmaceutical Co. Ltd.* in 2018, Ginsburg considered the weight that a federal court determining foreign law should give to the views presented by the foreign government in a price fixing class action brought by U.S. purchasers of vitamin C against Chinese sellers. The Court ruled that a federal court considering a case in which foreign law is relevant is not bound to defer to an official interpretation of the law offered by the foreign government. Instead, a federal court should accord respectful consideration to a foreign government's submission. It is not bound to accord conclusive effect to the foreign government's statements. Federal Rule of Civil Procedure 44.1 specifies that a court's determination of foreign law "must be treated as a ruling on a question of law," rather than as a finding of fact, according to the decision.

Appellate jurisdiction. In 2015, in another unanimous opinion by Ginsburg, the Court addressed appellate jurisdiction in a suit against banks for conspiring to manipulate the London InterBank Offered Rate (LIBOR) in *Gelboim v. Bank of America Corp*. The Court held that the dismissal of the antitrust suit in the LIBOR MDL was an appealable order. In other words, investors had a right to appeal dismissal of their antitrust suit against banks for conspiring to manipulate LIBOR on standing grounds, even though other consolidated multidistrict cases against the banks remained pending before the district court.

Discovery of documents for foreign proceedings. In a 2004 decision in *Intel Corp. v. Advanced Micro Devices, Inc.*, the Court considered federal district court

assistance in the production of evidence for use in a foreign or international tribunal under 28 U.S.C. §1782(a). Ginsburg delivered the opinion of the Court. Justice Stephen Breyer was the lone dissenter.

In the underlying dispute, Advanced Micro Devices, Inc. filed a complaint with the European Commission Directorate-General for Competition, alleging that Intel Corporation violated European competition law. AMD unsuccessfully petitioned a federal district court in California under 28 U.S.C. §1782(a) for an order directing Intel to produce documents. The Ninth Circuit reversed.

The Supreme Court affirmed, holding that: §1782(a) did not contain a foreign-discoverability requirement; §1782(a) made discovery available to complainants, even though they did not have the status of private "litigants" and were not sovereign agents; and a "proceeding" before a foreign "tribunal" had to be within reasonable contemplation, but did not have to be "pending" or "imminent" for an applicant to invoke §1782(a). The Court rejected a foreign-discoverability rule, which would have categorically barred a district court from ordering production of documents when the foreign tribunal or the "interested person" would not be able to obtain the documents if they were located in the foreign jurisdiction.

DISSENTING OPINIONS. The four opinions noted above reflect Ginsburg's ability to reach a consensus with a majority of the justices; however, she is often known for her dissenting opinions. President Trump, among others, has acknowledged Ginsburg's powerful dissents. In the antitrust area, during her time on the High Court, Ginsburg authored a dissent in *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* and co-authored a dissenting opinion in *Comcast Corp. v. Behrend*, together with Justice Breyer.

In *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.* from 2010, the Court held that a party may not be compelled under the Federal Arbitration Act (FAA) to submit to class arbitration unless there was a contractual basis for concluding that the party had agreed to do so.

AnimalFeeds brought a price fixing class action suit against shipping companies. The parties agreed that they had to arbitrate their antitrust dispute, and AnimalFeeds sought arbitration on behalf of a class of purchasers of parcel tanker transportation services. An arbitration panel determined that an arbitration clause

allowed for class arbitration. The High Court ruled that the arbitration panel imposed class arbitration despite the parties' stipulation that they had reached "no agreement" on that issue.

In her dissent, Ginsburg contended that the Court erred in addressing an issue not ripe for judicial review. She went on to say that if she would have reached the merits, she would have adhered to the strict limitations the FAA places on judicial review of arbitral awards and affirmed the Second Circuit's judgment confirming the arbitrators' clause-construction decision.

In 2013, Ginsburg, together with Justice Breyer , authored the dissenting opinion in the five-to-four decision *in Comcast Corp. v. Behrend*. Again, the dissent focused on the appropriateness of the review.

The majority ruled that a proposed class of approximately two million non-basic cable television programming services customers in the Philadelphia area alleging that their cable provider engaged in should not have been certified to pursue antitrust class action claims against cable provider Comcast because the subscribers' damages model did not allow for a calculation of damages across the class. The damages model failed to meet the Federal Rule of Civil Procedure 23 requirements.

The dissenting opinion argued that the writ of *certiorari* should have been dismissed as improvidently granted. The dissenters said that the case came to the Court "infected by our misguided reformulation of the question presented." They added that, "Incautiously entering the fray at this interlocutory stage, the Court sets forth a profoundly mistaken view of antitrust law. And in doing so, it relies on its own version of the facts, a version inconsistent with factual findings made by the District Court and affirmed by the Court of Appeals."