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Robinson-Patman and Its Implications: An Empirical Analysis

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Abstract

Due the complexities of the Robinson-Patman Act (RP) and the various courtroom interpretations, it is often difficult for marketing managers to effectively grasp the implications of this law. The intent of this manuscript, therefore, is to provide managers the basics of RP in plain terms and to summarize empirical courtroom regularities from federal RP cases since 1995. Our findings indicate wide misperceptions about what practices constitute violations of RP. To this end, we clarify the terms of RP by discussing what RP forbids and what types of allegations occur most often in actual cases. Perhaps even more useful, we convey what pricing practices are *not* forbidden by RP. Using recent federal RP cases, we then empirically assess the factors that affect the courts' decisions. Given the timeliness of our data, these analyses characterize the current judicial climate surrounding this controversial law and give marketing managers guidelines about the legal implications of RP.

Introduction

Segmentation is a fundamental concept in pricing strategy. Marketing managers are ever conceiving ways to charge customized prices depending on buyers' individual characteristics. However, a manufacturer or a wholesaler setting different prices to retailers may violate the law according to the Robinson-Patman Act of 1936. This Act forbids certain forms of price discrimination by suppliers who sell to competing retailers or wholesalers. For example, Wal-Mart and its supplier, Procter & Gamble, may both be held in violation of the law if Wal-Mart knowingly obtains a lower wholesale price for Crest toothpaste than a grocery store that competes with Wal-Mart.

The modern retail climate, characterized by the presence of national "big box" retailers who buy in large quantities, has resurrected discussion of wholesale price discrimination. The size of these large retailers can give them a bargaining advantage, due to scale economies for example, vis-à-vis their suppliers relative to their smaller retail competitors (Dukes, Gal-Or, and Srinivasan, 2006). If such bargaining leverage leads to lower unit wholesale prices to the big retailer, then both the retailer *and* the supplier are subject to legal risk under the Robinson-Patman Act (hereafter "RP"). Therefore, it is essential for all members of the supply chain to understand when the law is relevant and the level of risk they face.

Since the early 1970's, RP has seldom been enforced by antitrust authorities. In fact, the Federal Trade Commission (FTC) in 1977 publicly advocated repeal of RP and has done little to enforce RP since then. Despite the current *laissez faire* attitude of antitrust officials on RP, *private party suits still ensue*. Specifically, according to current antitrust law,[1] a private individual or firm may bring suit under RP if it feels that it has been injured by wholesale price

[1] The Clayton Act of 1914.

discrimination. If the defendant is found guilty, it is liable for up to three times the damages to the injured party. An examination of recent data shows that approximately 14 private party suits have been heard[2] in federal District, Appeals and Supreme courts annually since 1995. See Table 1.

(Insert Table 1 about here)

Some of these rulings have resulted in large payments to the plaintiff for damages incurred by the defendant's role in the discriminatory practice. For example, in a 1998 trial,[3] the jury's verdict awarded the plaintiff the amount of $2,486,138 for damages caused by the defendant, Sun Oil Co., for selling retail gasoline at higher prices to the Sunoco franchise than to independents. Regardless of court rulings, these legal cases involve costly lawyer fees, not to mention potential damage to public image for the defendant. Furthermore, the fact that private parties consistently pursue RP suits means that all members of the supply chain are at risk if they engage in price segmentation. Therefore, supply chain managers need to be aware of RP and its legal implications.

The purpose of this manuscript is to give marketing managers a better understanding of RP. Using our analysis of recent federal RP cases, we determine what factors lead to legal suits and which arguments are likely to be successful in court. In addition, we place our findings in a complete, yet simply expressed, survey of RP and its various legal interpretations.

Our investigation reveals wide misperceptions about the practices that constitute violations of RP. To this end, we first clarify the terms of RP by presenting, in plain terms, what RP forbids and what allegations are pursued most often in court. Perhaps even more useful, we discuss what pricing practices are *not* forbidden by RP. Next we categorize the common

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[2] The number of cases actually pursued maybe considerably higher than 14 per year since many initiated cases are settled out of court.

[3] See *Schwartz v. Sun Oil Co.*, 276 F.3d 900 (6th Cir 2002).

arguments used by defendants and determine the success rates. Given the timeliness of our data, this analysis characterizes the current judicial climate surrounding this controversial law and gives marketing managers insights for deciding whether to pursue or how to defend an RP case. The defense analysis is then followed by a description of factors (e.g. size of business, type of allegations) that are related to the courts' decisions. For example, we find that firms with small amounts of revenues fare worse as plaintiffs. Such knowledge can help marketing managers assess their chances of success in court.

Our analysis is based on a legal database of federal court cases (District, Appeals, and Supreme) falling under RP. It was collected from Lexis-Nexis information service for the ten-year period from 1995 to 2004. With these collected data we are able to categorize the ten most commonly used defense arguments and determine their rate of success (or lack thereof). In addition, a logit analysis of court decisions reveals how certain factors, including defense argument used, industry, firm size, type of allegation, and channel position are related to the court's decision. The analysis shows that, if justified, the use of the "no harm to competition" defense results in a higher probability of a ruling for the defendant. This result reflects the heavy burden of proof on the plaintiff who has to establish competitive injury. Moreover, according to our results, smaller plaintiffs are less successful compared to larger ones, implying the importance of resources that a firm has to expend on litigation. The results also show that the current judicial environment is more favorable for retailer plaintiffs than for manufacturer plaintiffs. A deeper reading of these cases reveals significant widespread misperceptions of RP. In 33 instances (24% of all the RP cases) over the ten-year period, the case was thrown out because the alleged acts did not constitute deeds that could be remedied by RP. The fact that so many cases fell into this category reinforces the need for clarification of RP.

Much has been written about RP since its passage in 1936. Economists and antitrust lawyers have long debated the merits of and problems with RP. For example, early discussions address whether RP is pro- (Posner 1976) or anti-competitive (Bork 1978; 376-410). Economists have also examined the implications of RP for welfare distribution and market efficiency. Ross (1984), for example, empirically argues that RP may have harmed grocery chains without any benefit to other firms. Katz (1987) and O'Brien and Shaffer (1994) theoretically measure the welfare effects of prohibiting price discrimination in intermediate goods markets, such as wholesale. These writings have focused on RP from the perspective of antitrust economics. As such, they attempt to resolve, in a broad sense, whether RP is good for economic efficiency. The current work is, instead, managerial. It takes the law as a given reality marketing managers must face.

The marketing literature has previously examined the implications of antitrust law for channel management. In particular, the discriminate use of slotting allowances has been a subject of debate (Bloom, Gundlach, & Cannon, 2000 and Sudhir & Rao, 2006). Similar in motivation to RP, prohibiting retailers from charging slotting allowances has been viewed as a means of leveling the playing field for smaller competitors (Gundlach & Bloom, 1998).[4] Unlike RP, however, the debate over slotting fees is generally concerned with supplier competition rather than competition at the retail level.

While marketing practitioners and academics are somewhat aware of RP, little work in marketing has been done. Stevens (1937), in an early *Journal of Marketing* article, offers support for RP from the perspective of fair competition, which he limits to how efficiently a firm produces. Under this definition, he argues that obtaining lower input prices by negotiating with suppliers is, therefore, unfair competition. Tarpey (1972) examines several FTC cases to assess

[4] Sullivan (1997) suggests, in contrast, that the use of slotting fees is not anticompetitive.

the legal liability of buyers who bargain for preferential prices under RP. Marks and Inlow (1988) study U.S. District Court actions under RP from 1961 to 1986 to discern patterns in the practice of price discrimination with a focus on the impact on small business. Spriggs and Nevin (1994) analyze functional discounts and suggest that authorities should be conscious of their pro-competitive effects.

In this manuscript we attempt to add to the understanding of RP in two ways. First, we analyze RP from an empirical point of view. In doing this, we use current cases (1995-2004) over a broad set of federal court decisions (U.S. District, U.S. Appeals, and Supreme). Given that 24 out of 139 (17%) cases had rulings from the U.S. Appeals or Supreme Court, analyzing all levels of decisions is important. Second, by employing a logistic regression analysis of case outcome, we are able to formally assess factors related to the likelihood of success in court with particular attention to defense arguments.

Empirical Findings from Recent RP Case History

As indicated in the previous section, we examine RP from an empirical perspective. In doing so, we hope to characterize the current legal environment and observe trends in the types of cases brought to federal court. Our analysis covers four areas, including what the Act forbids, what the Act does not forbid, common defense arguments used in RP cases, and a logistic regression analysis of factors that affect court rulings. This analysis covers all RP cases from the Lexis-Nexis legal database for the ten-year period of 1995-2004.

What the Act Forbids

RP has been criticized for its lack of focus, obscure language and excessive discretion to the FTC without guidelines for enforcement (Edwards 1959). As a result, a simple reading of the statement of the Act does not provide a sharp description of what practices are forbidden.

The first major section of the Act is section 2(a) which prohibits sellers from engaging in price discrimination when the buyers are competitors themselves. A typical case under 2(a) involves a supplier offering discounts to a price sensitive intermediary that is not available to other competitors. Franchisors who sell to independents as well as to franchisees may have a strong incentive to discriminate in this way, for example. Because independents are not as contractually bound to their supplier, they are free to shop for the cheapest price, a privilege not available to the franchisee. An examination of the case history showed that the majority (77.9%) of the cases had allegations falling under section 2(a).[5] This is because section 2(a) represents the core of the Act; whenever an action is brought under any section of the Act, it also typically involves section 2(a).

The second major section of the Act is section 2(f) which states that it is unlawful for a person in commerce to *knowingly* induce or receive discrimination in price. In this case, the buyer will violate section 2(f) only if she knew that the seller was offering terms that violate section 2 (a) (Pinkerton and Kemp 1996). For example, Wal-Mart has been accused of knowingly inducing its suppliers to offer discounts which are not available to smaller retailers.[6] Interestingly, only 8.3% of the cases contained allegations under section 2(f). This low percentage may reflect the difficulty to prosecute section 2(f) cases, because to be liable under this section, the requirements for a section 2(a) violation must also be established.

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[5] A given case may involve multiple sections.
[6] See *Tires Inc. of Broward v. Goodyear Tire & Rubber Co.*, 295 F. Supp. 2d 1349 (S.D. Fla. 2003).

Sections 2(c), 2(d), and 2(e) prohibit sellers and buyers from using brokerage, allowances, and services to accomplish indirectly what sections 2(a) and 2(f) directly prohibit (Clark 1995). Section 2(c) prohibits a seller from paying to or receiving from a buyer anything of value as a commission, brokerage fee or other compensation, or any allowance or discount in lieu thereof, except for services rendered. Sections 2(d) and 2(e) prohibit a seller from granting advertising and promotional allowances or services to a buyer unless these allowances or services are made available to all buyers. Sections 2(c), (d) and (e) were present in 17.1, 13.1 and 16.6 percent of the cases, respectively.

What the Act does Not Forbid

An analysis of recent case law suggests that there are many misconceptions about what is, in fact, acceptable under RP. Having knowledge of what the Act does not forbid might prevent complainants from bringing cases which are sure to lose, resulting in savings in legal fees for both parties.

The Act does not forbid mere offers to sell at discriminatory prices. The plaintiff must show that actual sales occurred. Specifically, the Act applies to only two or more *consummated* sales that are reasonably close in time. For example, in *Cancall PCS, LLC v. Omnipoint Corp.,* 2000-1 Trade Cas. (CCH) 72,855 (S.D.N.Y. 2000), Cancall alleges that the defendant sold cellular handsets to Omnipoint but refused to sell handsets to them. Ultimately, the judge dismissed the plaintiff's claim because the plaintiff did not allege two contemporaneous sales. Rather, they only complained that the defendant refused to sell to them. According to our case analysis, 9% of the cases were found for the defendants because there were no contemporaneous sales (see Table 2).

(Insert Table 2 about here)

The Act does not forbid a company from charging lower prices to its wholly-owned subsidiaries than to other purchasers of its product. In *Keller's Radiator Warehouse v. Go/Dan Indus.*, 1996-1 Trade Cas. (CCH) 71,318 (D. Kan. 1996), the judge dismissed the RP claim because transfers between two divisions of the same company are not considered sales in antitrust law. A common misperception identified from the case histories was that franchisees could seek relief under RP for price discrimination by the franchisor between franchisees and company owned stores. However, RP does not apply to cases where the competing outlet is a wholly owned subsidiary of the parent company. Thus, in order to successfully bring an RP case against a franchisor, the franchisee must allege either discrimination among competing franchises or discrimination between franchises and independent stores. According to our case analysis, 2% of the cases were ruled for the defendants because transfers to their wholly-owned subsidiaries were not considered sales.

The Act does not forbid price discrimination for services. The Act applies to tangible goods, not to discrimination in services. When a transaction involves the sale of goods bundled with services, the Act applies only if the dominant nature of the transaction is a sale of goods. See *Metro Communications v. Ameritech Mobile Communications*, 984 F.2d 739 (6th Cir 1993) where the judge ruled for the defendant because "cellular telephone service… cannot be produced, felt, or stored, even in small quantities. The plaintiffs do not buy a quantity of it, store it, and resell it to their customers. They simply provide customers with access to the service." In the last 10 years, 11% of decisions were found for the defendants because the price discrimination did not involve a commodity.

The Act does not forbid price discrimination for products of different grade and quality. Products of different materials, workmanship or design are considered to have different grade and quality. However, the treatment of more intangible differences is less clear. For example, when the products are physically identical but differ in terms of labeling (i.e. private labels versus branded products) judgment ambiguities could potentially arise. Moreover, simply alleging that private label and branded products are equivalent may not be sufficient to establish like grade and quality. In *Tires Inc. of Broward v. Goodyear Tire & Rubber Co.*, 295 F. Supp. 2d 1349 (S.D. Fla. 2003), the judge dismissed the plaintiff's case because no facts supporting the allegation that branded and private brand tires were equivalent in quality were included in the plaintiff's filing. In the ten years of our data, 1% of the cases were dismissed because they involved products that were not of like grade and quality.

The Act does not forbid price discrimination when the parties involved are not engaged in interstate commerce. Because the Act is a federal statute, one of its prerequisites is that the complainant must show that the defendant is engaged in commerce across state borders.[7] Just Over 2% of the RP cases in the ten years of our data were ruled for the defendants because the plaintiffs failed to show that the defendants were engaged in interstate commerce.

Common Defense Arguments

As the previous section illustrates, price discrimination, *per se,* is not a violation of the act. Beyond the fact that price discrimination may not fulfill the jurisdictional requirements of RP, there are various defenses to price discrimination charges. While the availability of a given defense is subject to the facts of the case, a discussion of possible defenses and their relative success may help marketing managers decide whether a given pricing tactic is defensible under the act. The following are the most frequently used defenses in the RP cases of the last decade.[8]

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[7] While some states have their own price discrimination law, which have similar provisions for intrastate commerce, these laws are beyond the scope of this manuscript.
[8] Multiple defenses are possible for a given case.

No harm to competition defense. Section 2(a) of the act prohibits price discrimination that injures any level of competition in distribution. Thus, if a plaintiff fails to show that competition was harmed, the case is dismissed. While we list this as a defense, the burden of proving harm to competition is on the plaintiff. Because of this, the issue of harm to competition is salient in many cases and often defendants will make a motion to dismiss based on the fact that competition was not harmed, leaving plaintiffs with the burden of showing that it was. The most common cases are primary line and secondary line violations. In primary line violations, competition between different sellers may be injured when one of them engages in price discrimination in selling to their common customers. The judicial interpretation of primary line injury under RP is in the same manner as the injury inflicted by predatory pricing schemes actionable under section 2 of the Sherman Act. There are two prerequisites for a plaintiff seeking to establish a competitive injury. First, the plaintiff must prove that the prices complained of are below an appropriate measure of its rival's costs. Second, the plaintiff must show that the competitor has a reasonable prospect of recouping its investment (e.g. future monopoly profits) in below-cost prices.[9]

In secondary-line violations, competition between customers of a seller may be lessened if the seller differentiates between them in price. To establish a secondary line violation, the plaintiff has two lines of attack. The first requires the plaintiff to show that price discrimination caused damage to competition, not simply damage to a competitor (Glick et al, 2003). In legal terms, this means establishing *antitrust injury*. Two conditions are necessary to establish this. The first is whether the "favored" buyer and the "disfavored" buyer compete. If not, then RP is not violated. Second, the plaintiff must prove either loss of downstream sales or that the

[9] See *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, 222, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (U.S. 1993).

disfavored buyer was forced to reduce its output price to retain sales. Thus, it is not sufficient for the plaintiff to show a loss in profits because the disfavored buyer was not enjoying the same price as the favored buyer.

As an alternative to proving antitrust injury, a plaintiff can exploit the “Morton Salt” rule to establish a violation. Under this rule, injury can be inferred if the disparity in price is sufficiently large and occurred over a substantial amount of time. See Table 3 and Figure 1 for a comparison of the two ways to establish RP violation in secondary line cases.

(Insert Table 3 and Figure 1 about here)

Some suggest that the Morton Salt rule appears inconsistent with the notion of preventing unfair competition. It has been argued, in fact, that the Morton Salt rule does the opposite by punishing efficient buyers and protecting inefficient ones (Stancil 2004). Nevertheless, the precedent remains and has been used successfully. In *Flash Elecs. v. Universal Music*, 312 F. Supp. 2d 379 (E.D.N.Y 2004), the RP claim survived a motion to dismiss with the judge stating that, “a prohibited effect on competition may be inferred from evidence that an individual competitor suffered injury from ‘a substantial price difference over time.’”

Note that the “no harm to competition” provision of Section 2(b) is not a defense for discriminatory allowances and services. Prohibitions of sections 2(d) and 2(e) are absolute and not dependent on injury to competition. “No harm to competition” was the most frequently used defense in the database as it was used in 67 out of 139 cases and resulted in a ruling for the defendant 65.7% of the time (See Table 4).

(Insert Table 4 about here)

Cost justification defense. Section 2(a) of the Act permits price discrimination as long as it is justified through differences in the costs of manufacturing, sale or delivery. For example, delivery costs can differ greatly for small quantities versus items delivered by the truckload. This defense seems to be infrequently used as most defendants now argue a functional discount defense.[10] Moreover, cost justification is not a defense for discriminatory allowances and services. In the last 10 years this defense was not encountered in the cases that we examined.

Changing market conditions defense. Section 2(a) permits price differential in response to changing market conditions that affect the market for or the marketability of the goods, such as imminent deterioration, obsolescence, distress sales under court order, or sales in good faith discontinuance of business in the goods. For example in *Dyno Nobel, Inc. v. Amotech Corp*., 63 F. Supp. 2d 140 (D.P.R. 1999), the judge ruled for the defendant because, "… blasting caps put on the "blue light" list by Dyno are vastly different in quality, physical characteristics and value, compared to the new caps." This defense was used in 1 of the RP cases and was ruled for the defendant.

Meeting competition defense. Section 2(b) allows a defendant to lower its price or to grant services when it's done in good faith to meet a competitor's equally low price or the services furnished by a competitor. The defendant need only have a good faith belief that the competitor is selling with a lower price; factual proof is not required. For example in *Walker* v. *Hallmark Cards,* 992 F. Supp. 1335 (M.D. Fla. 1997), Hallmark gave better terms to a Walgreen's pharmacy than to the plaintiff's card store based on the belief that it was meeting the terms given by American Cards, Hallmark's competitor. The only evidence needed by Hallmark was an affidavit from a Walgreen's employee stating that this was true. It is important to note that meeting competition is not only a defense for discrimination in prices but also in allowances and services. Our case analysis showed us that this defense was used in only 4 of the 139 cases and was successful in 50% of the time.

[10] See *Texaco, Inc. v. Hasbrouck,* 496 U.S. 543, 558, 110 L. Ed. 2d 492, 110 S. Ct. 2535 (U.S. 1990).

Functional availability defense. According to sections 2(d) and 2(e), otherwise illegal discriminatory allowances for services is permissible if made available on proportionally equal terms to all purchasers. Section 2(a) contains no comparable language, but the functional availability defense has been extended to that section.[11] Thus, a seller can defend allegations that it has violated section 2(a) by showing that the lower prices were functionally, realistically, and practically available to a complainant buyer. For establishing functional availability, a supplier must not merely be willing, if asked, to make an equivalent deal with other customers, but must make affirmative action to inform them of the availability of the deal.[12] Additionally, the language of the Act indicates that quantity discounts must be based on cost differences. For this reason, offering a discount to all buyers at a quantity level that is not practically obtainable to small buyers may not be defensible. In the previous decade, this defense was used in 9 out of 139 cases and was successful 66.7% of the time.

Functional discounts defense. This is a judicially created defense not derived from the statute. In *Texaco, Inc. v. Hasbrouck*, 496 U.S. 543, 110 L. Ed. 2d 493, 110 S. Ct. 2535 (U.S. 1990*)*, the Supreme Court utilized the FTC's suggested definition of a functional discount: "One given to a purchaser based on its role in the supplier's distributive system, reflecting, at least in a generalized sense, the services performed by the purchaser for the supplier." In the 10 years of our data, the defendants used this defense 7 times and were only successful 14.3% of the time.

Lack of standing defense. This defense is brought when the defendant feels that they are not the appropriate target of the antitrust suit or when plaintiffs who were not directly injured are part of the case. For example, in *G&R Moojestic Treats Inc. v. MaggieMoo's Int'l,* 2004-2 Trade Cas. (CCH) 74,485 (S.D.N.Y. 2004), the judge dismissed one of the plaintiff's RP claims

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[11] See *Delong Equipment Co. v. Washington Mills Abrasive Co.*, 887 F.2d 1499, 1516 (11th Cir 1989), cert. denied, 494 U.S. 1081, 108 L. Ed. 2d 943, 110 S. Ct. 1813 (U.S. 1990).
[12] See *Alterman Foods Inc. v. FTC*, 497 F.2D 993, 1001 (5th Cir 1974).

because that plaintiff had “failed to plead a direct injury or to show that he was a target of anticompetitive conduct, and therefore lacks standing under the antitrust laws.” The plaintiffs in this case claimed fraud by the defendant in a franchise contract with the plaintiffs. But the key to the lack of standing argument was that the plaintiffs’ claims under RP were tangential to the alleged fraud and not part of an anti-competitive act. The lack of standing argument was used 15 times in the ten-year period and was successful 66.7% of the time.

Statute of limitations defense. Like many laws, RP has a statute of limitations provision which states that cases must be brought within four years of the injury that gives rise to the cause of action. This defense is relatively straightforward meaning that if this defense is possible in a given case, it is likely to be used. In the cases that were examined, this defense was used 5 times and was ruled in favor of the defendant 80% of the time.

Fee for services rendered. A common defense for 2(c) cases is to claim that a brokerage fee is given for services rendered and is therefore not a violation of the Act. This defense is available because the Act states that no commissions or brokerage fees are allowed “except for services rendered in connection with the sale or purchase of goods.” This defense was used 14 times and was successful 78.6% of the time.

Not a discriminatory allowance or service/facility. This defense is used in 2(d) or 2(e) cases. Similar to the fee for services rendered defense for 2(c), defendants often simply refute that illegal allowances, services or facilities were provided. Essentially, the defendant argues that it did not offer any allowance or service/facility that is under the purview of the Act to begin with. For example, in *Portland 76 Auto/Truck Plaza v. Union Oil Co.*, 153 F.3d 938 (9th Cir. 1998), an appeals court judge reversed a district court ruling because remodeling leased facilities is not considered furnishing discriminatory facilities for the purpose of the Act. The judge states that, “Unocal and Portland 76 had two commercial relationships, not merely one. In their relationship as wholesaler and purchaser of fuel for resale, Unocal was prohibited by law from discriminating in the furnishing of facilities. But in their relationship as landlord and tenant, Unocal was selling something unique, a possessory interest in particular real estate, rather than something fungible, fuel”. This defense was used 8 times in the cases examined and was ruled for the defendant 75.0% of the time.

Other defenses. In addition to the common defenses listed above, there are many other possibilities to use as a defense for an RP case. However, these defenses are very context specific and no real intuition can be gained by further classifying these cases. Often the defense involves invoking some additional law that governs trade in a specific industry and renders RP useless, or simply involves arguing that the allegations are untrue. Other defenses were used 17 times in the cases examined and were successful 82.4% of the time.

Factors That Affect Rulings

Given that 73.4% of the cases in the period studied were ruled for the defendant, winning an RP suit seems to be a difficult task for a plaintiff. However, there may be factors that can lead to greater success for plaintiffs as well as defendants. To better understand the outcomes observed in the RP cases, a logistic regression model was fit to the data. This model shows what case characteristics correlate with a higher probability of success for either defendants or plaintiffs.

Data. For the logistic regression model, we start with the same data as in other sections of this paper but we only use 105 of the 139 cases to calibrate the model. Thirty-three cases that fell under the “what the Act does not forbid” section of the paper were removed. This is because these cases dealt with firm behaviors that are not remedied by RP.[13] Industry and revenue data were collected from both the Lexis-Nexis database and the Business and Company Resource Center database.

The dependent variable for the model was the outcome of the court case. Cases that were classified as rulings for the defendant involved several legal outcomes including summary judgment for the defendant, dismissal of the plaintiff's claims and jury rulings for the defendant. Rulings for the plaintiff included summary judgment for the plaintiff, failure to dismiss the plaintiff's claims[14] and jury rulings for the plaintiff. It is important to note that many cases involve multiple rulings or appeal attempts. We included only the final ruling after any available appeal information as the outcome measure of the case. In this dataset 65.7% of the rulings are for the defendant.

The independent variables used in the logistic regression model can be thought of as coming from five blocks of variables including defense arguments, type of allegation, industry, channel position of parties, and size of parties.[15]

We used the defenses that were included in the *Common Defense Arguments* section of this paper. There are three defenses, "no harm to competition", "lack of standing" and "statute of limitations" which place the burden of proof on the plaintiff or require little proof by the

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[13] Also one case was removed from the dataset because it was the only case that included the, "changing market conditions" defense. Because only one case had this defense, the probability of winning with this defense is one, which in turn caused the regression coefficient associated with this variable to be infinite.

[14] We recognize that there is a censoring issue in these types of cases because additional rulings may occur after this. However we do not have data on the status of the case as to whether it was subsequently settled out of court or if future motions are pending in front of Federal Court. As more time passes from this ruling we become more confident that no future rulings are pending. We do two things to mitigate this issue. First, we update the database with rulings from existing cases through 11/27/06. Second, we test whether the "failure to dismiss the plaintiff's claims" ruling is more common in the first five years of our data vs. the second five years of the data and find no significant difference (p-value>0.25). Thus, we have some evidence suggesting that future rulings are not forthcoming.

[15] All of the variables are categorical variables and were thus coded as dummy variables using a one, zero coding scheme.

defendant, which leads us to believe that these defenses would be relatively more successful, leading to higher probability of ruling for the defendant.

Since the Act has multiple sections which prohibit different behaviors, the cases were grouped by the section under which the allegations were made. This variable is included in the model because each section of the Act has different requirements necessary to prove a violation. Thus, we feel that these differences across sections would lead to differences in overall probability of rulings for the plaintiff or defendant. Because the three indirect discrimination sections of the Act are often referred to together, this variable is grouped into three types of allegations. Specifically, cases involving only 2(a) were classified as direct discrimination, cases involving 2(c), 2(d) or 2(e) were indirect discrimination and cases involving 2(f) were buyer induced discrimination. Legal precedent indicates that cases involving section 2(f) first need to prove a 2(a) case for a supplier before proving a 2(f) violation from a buyer. Based on this contingent relationship, we predict that cases having a 2(f) allegation will be more likely to be ruled for the defendant relative to cases only involving section 2(a).

For the analysis, companies were grouped into two broad industries: consumer goods or industrial goods. Industry was used in the model because characteristics of the industry may lead to greater success in pursuing an RP case. Because the Act was originally targeted against retail chain stores, which sell consumer goods, the judicial interpretation of the Act may lead to an environment where companies in the consumer goods industry have an advantage when pursuing RP cases. Additionally, antitrust law in general is intended to protect consumers. Thus, we predicted that cases in the consumer goods industry will have a greater probability of being ruled for the plaintiff.

Both plaintiffs and defendants were classified as manufacturers, wholesalers or retailers based on their respective SIC codes. Similar to industry, we believe that channel position may have some bearing on the outcome of the case based upon the judicial history of the Act. Because the Act was originally written to protect small, independent retailers and wholesalers, we believe that judges will have used this knowledge in their interpretation of the Act and made rulings in a way that would lead to a more favorable environment for retail or wholesale plaintiffs as compared to plaintiffs who are manufacturers.

Involvement in an RP case is most likely a costly endeavor. In order to successfully win a case as a plaintiff, one first needs to present a *prima facie* case to Federal District Court. This may involve multiple motions and briefs to the court. If a prima facie case is proven, a jury trial may be held where expert testimony may be required. This suggests that receiving relief under RP is a resource intensive process. Thus, we expect that the amount of resources that a firm has to expend on litigation may have some bearing on the ultimate outcome of the cases. On the other hand, the Act is written and interpreted in a way to protect small companies. An example of this is the aforementioned Morton Salt rule, which is recognized as a way to remove the burden of proving market-wide competitive injury for small retailers.[16] Thus, being smaller may in fact lead to greater success as a plaintiff. Given this, the way size affects rulings is an open empirical issue that we investigate with our model. The model includes a measure of size of each of the parties to examine this. An appropriate measure of size is company revenue which was obtained from both the Lexis-Nexis database and the Business and Company Resource Center database.[17]

[16] See *American Booksellers v. Barnes and Nobel*, 135 F. Supp. 2d 1031 (2001 N.D. Cal.).
[17] Data from these sources is often given as a range therefore sales could not be included as a continuous variable. Size was operationalized by grouping both plaintiffs and defendants as greater than 500 million dollars annual

Results. We assessed the effect of including nine different defenses in our model.[18] Confirming our expectations, the inclusion of the "No Harm to Competition Defense" results in a greater probability of the case being ruled for the defendant. (See Table 5 for the estimation results.) This is likely the result of the burden of proof for this defense being placed on the plaintiff. We also expected that the "Lack of Standing" and "Statute of Limitations" defenses would result in greater probability of being ruled for the defendant. We find support for the lack of standing defense being relatively successful. However, the expectation that the statue of limitations defense would be a relatively good defense is not supported as the coefficient has the correct sign but is not statistically significant. Our inability to detect this effect may be due to the small sample size of cases for this defense.

(Insert Table 5 about here)

"Functional Availability" and "Other" are relatively good defenses. The fact that the "Other" defenses category is a good defense is not that surprising given the fact that cases in this category generally have some idiosyncratic characteristic that leads to an easy ruling for the defendant. A statistically significant finding for the "Functional Availability" defense is surprising in light of the fact that it places the burden of proof on the defendant and requires detailed information showing that a discount was available to the plaintiff but they did not take advantage of it.

A deeper reading of the cases involving the "Functional Availability" defense shows that it was often successful because of the idiosyncratic conditions faced by the plaintiff that makes the discount unavailable. For example, when there are two buyer of similar size and one plaintiff

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revenue or less than 500 million dollars annual revenue. We also ran a model with 50 million dollars as the cutoff for small parties and the results are substantively unchanged.

[18] The overall model results indicate that our model specification is significant (p-value = 0.008) using a likelihood ratio test. Further, the model correctly classifies 82.8% of the cases in the dataset.

cannot take advantage of the discount due to unavailability of credit, the Act's prohibitions do not apply[19].

Because 2(f) cases involve first proving a 2(a) case, then showing that the buyer knowingly induced discrimination, we felt that buyer induced cases would favor the defendant. Interestingly, after accounting for the effects of the other variables, "buyer induced" had a negative coefficient that, while not significant, was directionally counter to our expectation (p-value=0.058).

Industry was included in the model to see if the historical basis for RP affects the way that the Act was interpreted throughout its history. The results from the analysis of industry variables support our expectation and show that, relative to the industrial goods industry, cases involving the consumer goods industry were more likely to be ruled for the plaintiff.

As mentioned previously, the Act was originally written to protect retailers. Therefore, we predicted that judicial interpretations of the Act favor retail plaintiffs. Our data supports this argument, as we find, relative to manufacturers, cases involving retail plaintiffs are more likely to be ruled for the plaintiff. The results for wholesale plaintiffs fall in the middle, as the coefficient is negative but not significant (p-value=0.098).

Congruent with the argument that smaller parties will have fewer resources to devote to RP cases, cases that had small plaintiffs were more likely to be ruled for the defendant. This result is important for several reasons. First, while the original intent of the Act was to protect smaller buyers, it appears that larger companies are better able to take advantage of the relief offered by the Act. This suggests that the Act may not be effective for one of its intended purposes. Second, this result highlights the importance of resources in pursuing legal action. While strong counsel will not assure a victory in the case, the lack of resources to obtain good

[19] See *Precision Printing v. Unisource Worldwide*, 993 F. Supp. 338 (W.D. Pa 1998).

legal representation points to failure. Interestingly, we did not observe the same pattern for small defendants. This result suggests resources are not as important for defending RP cases. This may be due to the fact the burden for stating the prima facie case is on the plaintiff and many cases fail at this point rather than making it to a jury trial.

Discussion

RP has been and remains a controversial law. Its proponents state that RP ensures competitors' protection from rivals whose only advantage is size. Others, including the FTC, counter that RP punishes efficient players in the market. And while the FTC seldomly enforces RP, private party suits persist at a steady rate.

The implication is that RP continues to be a weapon against large competitors, such as big-box retailers, who negotiate favorable terms with a common supplier. On the other hand, for manufacturers, wholesalers, and downstream buyers receiving favorable treatment, RP remains a significant legal liability. And, because all members of the supply chain are affected by RP, marketing managers should have a practical understanding of the Act. This manuscript has sought to provide this understanding, not only in terms of scholarly or legal interpretations, but also from an empirical analysis of actual courtroom outcomes.

Our database shows that while a majority of cases are ruled for the defendant, it is possible to win as a plaintiff. However, to better assess the decision to pursue an RP case, potential plaintiffs should know the amount at stake should a case be won. By law, in cases brought by private parties, the plaintiff is entitled to treble damages in a favorable ruling, which means that the defendant must pay three times the determined amount in damages caused by the defendant. The damage amount is the plaintiff's loss in profits due to unlawful price discrimination. Specifically, that means comparing the plaintiff's profits from the real-world outcome in which price discrimination occurred, with the profits from a hypothetical outcome in which there was no price discrimination. Conceptually, this is a straightforward computation.

However, since the ruling in *J. Truett Payne*[20], courts no longer accept the automatic theory[21] of damage calculations. The problem with the automatic theory is that if one assumes that both buyers were to obtain the favored price, then subsequent prices set by the buyers, and therefore the number of sales, would be different in the hypothetical outcome, known in legal terms as the *but for* world (Glick et al. 2003). Hence, the automatic theory misappropriates damage estimates because it counts sales that would have occurred even if price discrimination had not occurred. The implication for managers is that they should be prepared for potential haggling over damage award amounts.

Our results also suggest that there is considerable misperception about what is actionable under RP. We find that 24% of cases in federal court from 1995-2004 were ruled for the defendant because plaintiffs did not allege violations that were actionable under RP. This suggests that a better understanding of the jurisdictional requirements of RP is needed. Marketing professionals could use this information in two ways. First, they could avoid litigation that had no chance of recouping the investment in attorney fees by knowing that the price discrimination they face is legal. Second, managers who understand what is not forbidden by RP can be more aggressive in their pricing policies because they will not fear litigation when they know their pricing schedule is not actionable under RP.

[20] The ruling in *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557 (1981) has set the recent precedent for damage computations but still leaves a great deal of ambiguity.

[21] We illustrate the automatic damages theory by considering a simple numerical example. Suppose the favored buyer obtains a supply price of $0.85 and buys 1500 units while the disfavored buyer, the plaintiff, obtains a supply price of $1.00 and buys 1000 units. Under the automatic damages theory, the calculated damage is the price differential, $0.15, times the number of units purchased by the disfavored buyer, 1000, which equals $150.

The fact that several defenses are associated with a higher likelihood of ruling for defendants is actionable for managers. First, because functional availability is a good defense of price discrimination, managers wishing to win RP cases, or even avoid litigation in the first place, should communicate discount programs to all buyers and maintain evidence of this communication. This is important because a discount must not simply be offered if asked to be functionally available; it needs to be communicated to buyers. Then, if buyers do not take advantage of better pricing terms, RP will not apply. Second, knowing that the "no harm to competition" defense requires proof on the part of the plaintiff and results in high likelihood of rulings for the defense suggests that this defense can be successful, if justified.

Our results show that retail plaintiffs and plaintiffs in the consumer goods industry are relatively more successful in pursuing RP cases. We believe that these results may be due to the judicial interpretation of RP. We also show that small plaintiffs are less successful than large plaintiffs, which may occur because of the extensive financial resources required to pursue RP cases. This implies that the Act is failing to deliver on one of its intended purposes: protecting small companies.

Given the FTC's stance on the RP, some may question how long this law will carry legal weight. In fact, in 2005 the FTC held hearings to assess the modern relevance of RP,[22] but the expert statements from these hearings indicate that the Robinson-Patman Act of 1936 will, in some form, be an issue for marketing managers for years to come.

[22] See the Antitrust Modernization Commission's website http://www.amc.gov for details.

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Table 1

Robinson Patman Act Cases Summarized by Year

Year	# of Cases	Ruling for Defendant %
1995	13	61.5%
1996	13	61.5%
1997	17	76.5%
1998	15	86.7%
1999	12	66.7%
2000	11	81.8%
2001	15	73.3%
2002	10	70.0%
2003	15	80.0%
2004	18	72.3%
Total	139	73.4%

Table 2

What the Act does not Forbid

Reason for Dismissal	Frequency*	% of Cases
No contemporaneous sales	13	9%
Sales to a wholly owned distributor	3	2%
Not a commodity	15	11%
Not like grade or quality	2	1%
Not interstate commerce	3	2%

* Several cases involved multiple criteria for dismissal

Table 3

Two Ways to Establish RP Violation in Secondary Line Cases

Means	Plaintiff must show that		
1. Direct: Prove an Antitrust Injury	*D* and *F* compete*	AND	1. p_F fell and *D* lost customers to *F*. OR 2. p_D was reduced to keep customers
2. *Morton Salt Rule*: Infer an Antitrust Injury	$w_D - w_F$ is "big" and favors large buyer	AND	Incurred over "long" period of time.

**D*: Disfavored Buyer, *F*: Favored Buyer

Table 4

Type of Defenses*

Defense	Frequency	% Ruling for Defendant
No Harm to Competition	67	65.7%
Cost Justification	0	N/A
Changing Market Conditions	1	100.0%
Meeting Competition	4	50.0%
Functional Availability	9	66.7%
Functional Discounts	7	14.3%
Lack of Standing	15	66.7%
Statute of Limitations	5	80.0%
Fee for Services Rendered	14	78.6%
Not a Discriminatory Allowance/Service/Facility	8	75.0%
Other	17	82.4%

*Multiple Defenses are possible for a given case.

Table 5

Logistic Regression Results: Determinants of Case Success[1]

(Positive parameter estimates indicate higher likelihood of success for defendants.)

	Parameter Estimate	Std. Error	p-value
Intercept	-2.064	1.252	0.099
Defenses			
Statute of Limitations	2.073	1.457	0.155
Functional Availability	3.809	1.459	0.009
No Harm to Competition	1.761	0.835	0.035
Lack of Standing	1.739	0.842	0.039
Fee for services rendered	2.197	1.212	0.070
Not a discriminatory allowance/service/facility	1.441	1.277	0.259
Functional Discount	-1.810	1.253	0.149
Other	3.876	1.312	0.003
Type of Allegation			
Buyer Induced	-2.424	1.279	0.058
Indirect	0.234	0.697	0.737
Industry			
Consumer Goods	-1.331	0.593	0.025
Channel Position			
Plaintiff			
Wholesaler	-1.173	0.709	0.098
Retailer	-1.467	0.669	0.028
Defendant			
Wholesaler	-0.303	1.082	0.779
Retailer	0.946	1.196	0.429
Size of Party			
Plaintiff Sales Less Than 500 M	1.910	0.954	0.045
Defendant Sales Less Than 500 M	0.203	0.562	0.718

Number of observations = 105

[1] Base case is meeting competition defense, consumer goods industry, direct discrimination, greater than 500M sales for plaintiff and defendant, and manufacturer channel position for plaintiff and defendant.

Figure 1

Channel Relationship ($w_D > w_F$)