ANTITRUST: PREDATORY PRICING—Intent Cannot Serve as the Basis of Liability in a Predatory Pricing Case Under the Sherman Act—*A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326 (1990).

Rose Acre Farms is an egg producer and processor that is vertically integrated.[1] Rose Acre Farms sells its surplus eggs to supermarkets at concessionary prices.[2] Other processors, and other integrated firms less mechanized than Rose Acre, sell their surplus eggs to "breakers," which are firms that use the eggs to make finished products.[3] Because Rose Acre sells its surplus eggs to supermarkets, these specials compete with the eggs offered by other processors.[4] Several of Rose Acre Farm's competitors[5] alleged Rose Acre's low prices violated the Robinson-Patman amendments to section 2(a) of the Clayton Act.[6] The plaintiffs alleged Rose Acre's pricing of "specials" constituted price discrimination because the "specials" sold

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1. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1397 (7th Cir. 1989), *cert. denied*, 110 S. Ct. 1326 (1990). A vertically integrated firm is involved in different stages of production in a given business. Rose Acre produces its own eggs which it then processes at the same location. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. 680, 684 (S.D. Ind. 1988). The operation is highly mechanized; eggs are laid, graded, sorted by size, and crated in a continuous operation. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1397. An integrated producer and processor can operate more efficiently than processors who must purchase eggs elsewhere for processing. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 684.

2. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1397. The court characterizes eggs sold at these concessionary prices as "specials." *Id.*

3. *Id.* Because eggs are a perishable commodity with an indefinite shelf life, the age of the egg affects its price. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 685. Processors sell the surplus eggs at lesser prices or to "breakers" to move them before they are too old. *Id.*

4. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1397.

5. The seven plaintiffs, A.A. Poultry Farms, Inc.; Boomsma Produce, Inc.; Gressel Produce Co.; Hemmelgarn & Sons, Inc.; Mendelson Egg Co.; Peter Produce, Inc.; and Boomsma Produce of Missouri, Inc.; are egg processors who sell eggs to retailers, wholesalers, and market facilitators in the Midwest. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 684. Egg processors purchase eggs from producers and then clean, carton, and grade the eggs. *Id.* The plaintiffs compete with each other and with Rose Acre Farms in selling eggs to customers in a large geographic area. *Id.*

6. *Id.* at 683. Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act states:

> 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 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.

15 U.S.C. § 13(a) (1988).

for a lower price than Rose Acre's other eggs.[7] The plaintiffs claimed Rose Acre identified customers of the plaintiffs and induced them to purchase eggs from Rose Acre rather than the plaintiffs by offering special prices.[8] They also complained Rose Acre sold the "specials" below the cost of production.[9] This, the plaintiffs alleged, constituted predatory pricing.[10] In support of their predatory pricing claim, the plaintiffs offered evidence of Rose Acre's predatory intent.[11]

After trial the jury returned a verdict of $9.3 million, or $27.9 million after trebling, for the plaintiffs.[12] The district court, however, granted Rose Acre's motion for judgment notwithstanding the verdict.[13] According to the district court, liability for illegal price discrimination under section 2(a) is imposed only if the plaintiffs can show a competitive injury resulted from the differences in price.[14] Such competitive injury can be established by showing either: (1) market analysis showing actual competitive injury; or (2) predatory intent from which an inference of competitive injury could be drawn.[15] The plaintiff failed to show a competitive injury under either requirement.[16]

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7. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1397. Due to daily price fluctuations, pricing in the egg industry, as in many agricultural industries, is done by formula pricing. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 685. Formula pricing involves setting the price based off some standard. *Id.* In the egg industry the standard is the Urner Barry scale. *Id.* A price for eggs is set for every day of the week by Urner Barry. *Id.* Eggs are then sold at a price "off" Urner Barry. *Id.* For example, a supermarket might agree to buy small eggs from a processor at three cents off Urner Barry ("three back") for a set period of time. *Id.* The supermarket may then purchase small eggs at three cents off the current Urner Barry price per dozen until their agreement ends. *Id.* The plaintiffs' allegations of price discrimination focused on Rose Acre's pricing practices from 1977 to 1983. *Id.*

8. *Id.*

9. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1397.

10. *Id.* The plaintiffs alleged this below-cost pricing harmed competition in the egg market. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 686.

11. *Id.* at 688. The president of Rose Acre had at one point told one of the plaintiffs that he would run him out of business. *Id.*

12. *Id.* at 683. Damages were trebled pursuant to section 4 of the Clayton Act, which provides in part:

> [A]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1988).

13. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 684.

14. *Id.* at 687.

15. *Id.*

16. *Id.* at 687, 689-90.

In the court's view, the evidence indicated a healthy, competitive market.[17] This was shown by the growth of the plaintiffs' business and by entry and growth of other egg processors in the area.[18] While Rose Acre Farms expanded its production capacity from about 1.5 million layers to 3.4 million layers and realized an increase in gross revenues from 15.6 million dollars to 42.5 million dollars during the relevant period, the plaintiffs also grew.[19] The court further noted that one of the plaintiffs grew almost as fast as Rose Acre during this period and, as a group, the plaintiffs' gross revenues increased from 60 million dollars in 1977 to over 92 million dollars in 1983.[20] Therefore, no actual competitive injury could be shown.[21]

The court then addressed the predatory intent issue and said that evidence of Rose Acre's predatory intent could be shown by express evidence of predatory intent or by pricing below cost from which an inference of predatory intent could be drawn.[22] The court held the plaintiffs failed to produce sufficient evidence to establish predatory intent.[23] The court held that "evidence of bad intent could not support a verdict that was not otherwise justified by objective economic indicators."[24] The United States Court of Appeals for the Seventh Circuit *held*, affirmed.[25] Intent cannot serve as the basis of liability in a predatory pricing case under the Sherman Act.[26] The court held that evidence of intent was too vague a standard.[27]

At the outset, the court of appeals held the case had been litigated as though the plaintiffs had named section 2 of the Sherman Act in addition to section 2(a) of the Clayton Act as a basis for their claims.[28] Under either of these statutes, the essence of the claim is that the defendant sold goods at too low a price, hoping to injure its competitors so that it might later sell its goods at a monopoly price.[29] The monopoly price would allow the aggressor to recoup the losses incurred from selling at too low a price, and adding a sizeable profit.[30] Because a party may prevail by establishing that its rights have been violated, whether or not the right statute has been named, the court applied its analysis of the plaintiffs' claims under both statutes.[31]

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17. *Id.* at 687.
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.* at 688.
23. *Id.* at 689-90.
24. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1399 (citing A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. at 691).
25. *Id.*
26. *Id.* at 1399.
27. *Id.* at 1401.
28. *Id.* at 1399.
29. *Id.*
30. *Id.*
31. *Id.*

I. ANALYSIS OF PLAINTIFFS' CLAIM UNDER THE SHERMAN ACT

The court explained predatory pricing involves a sequence of low-price-now-high-price-later[32] and, because antitrust laws are designed to benefit consumers,[33] charges of predatory pricing create complex problems for the courts.[34] The problem is particularly difficult when a rival sues during the "low price" period. It is difficult to tell if a firm lowers its price because it has reduced its costs, or because it seeks to undercut its competitors in the hope of realizing a higher price later.[35]

The first issue was whether low prices are the result of predatory pricing practices or merely the result of aggressive competition.[36] The court considered three possible tests.[37] The first test questions whether the defendant's prices exceed its costs.[38] The second test focuses on the defendant's intent.[39] Finally, the third test focuses on whether the market would allow the defendant to recoup his losses during the "high-price-later" segment of the predatory pricing sequence.[40]

Under the first test, if the price exceeds its cost, then the price reflects beneficial aggressive competition rather than predatory pricing.[41] If the price is less than cost, then the price may indicate a willingness to forego a reasonable return with the hope of realizing a monopoly profit later.[42]

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32. *Id.* at 1400.

33. *Id.*

34. *Id.*

35. *Id.* The court noted "a price too low for an inefficient rival may be just right from the consumers' perspective, showing only that the defendant's costs of production are lower than those of the plaintiff." *Id.* For this, the court pointedly noted, the defendant should receive "a reward in the market rather than a penalty in the courthouse." *Id.*

36. *Id.*

37. *Id.*

38. *Id.* Much debate exists in academic writing and in court decisions as to what is the appropriate price-cost relationship. Professors Areeda and Turner argue prices equal to or greater than marginal cost should be presumed to be nonpredatory. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 733 (1975). Marginal costs are defined as the increase in total cost that results from producing an additional unit of output. *Id.* at 700. Professors Areeda and Turner also believe average variable costs can serve as a substitute for marginal costs. *Id.* at 733. From this it follows, according to Areeda and Turner, that "[a] price at or above reasonably anticipated average variable costs (even if below average costs) should be conclusively presumed lawful," and further that "[a] price below reasonably anticipated average variable cost should be conclusively presumed unlawful." *Id.*; *see also* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976); Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).

39. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1400.

40. *Id.* at 1401.

41. *Id.* at 1400.

42. *Id.* The court took this approach in Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980). In that case, a small producer of road gravel sued a large

The court identified problems with this first test. The court reiterated that trying to infer predatory conduct from the relation between price and cost is a difficult proposition.[43] In the court's view, a price below cost could often reflect a sacrifice necessary to becoming established in a competitive market.[44] A price below cost could also reflect obsolescence of a product or the fact that a firm planning to leave the market might not try to completely cover its costs.[45] Finally, the court acknowledged the difficulty in measuring costs accurately and in determining which costs to use in the analysis.[46]

Under the second test for determining whether low prices are predatory or aggressive competition, the court focuses on the defendant's intent.[47] If the court finds the seller intends to drive out the competition by unfair means, "then the court infers that its price is unlawfully low now and will be too high later."[48]

The Court of Appeals for the Eleventh Circuit recently addressed predatory intent.[49] According to that court, the predatory intent of a defen-

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competitor, alleging predatory pricing practices in violation of the Sherman Act. *Id.* at 429. The court held the defendant's price level was not predatory when it was shown the defendant's prices were above its average variable costs. *Id.* at 432.

43. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1400.

44. *Id.*

45. *Id.* The trial court noted judgment notwithstanding the verdict was also warranted under the "perishability defense" contained in the Robinson-Patman Act. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 683 F. Supp. 680, 691 (S.D. Ind. 1988). The "perishability defense" excludes from liability sales made in response to changing market conditions. *Id.* The fourth proviso of section 2(a) of the Robinson-Patman Act states:

> *And provided further,* [t]hat nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonable goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

15 U.S.C. § 13(a) (1988).

46. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1400. The court noted problems in determining which costs are expensed versus capitalized, and problems with allocating expenses to joint products. *Id.* Even if given an ability to properly measure costs, the court pointed out that different cost measurements, such as short-run variable cost, long-run variable cost, or average total cost, might be applicable to different cases. *Id.*

47. *Id.*

48. *Id.*

49. McGahee v. Northern Propane Gas Co., 858 F.2d 1487 (11th Cir. 1988). In *McGahee*, a distributor of propane gas brought an antitrust claim against a competitor. *Id.* at 1491. The district court granted the defendant's motion for summary judgment and entered judgment against the plaintiff. *Id.* The Court of Appeals for the Eleventh Circuit reversed, holding that when defendant's prices are below average total cost and above short run marginal cost, circumstantial evidence of predatory intent exists. *Id.* at 1503. To withstand judgment as a matter of law, this inference of predatory intent must be supported by other evidence of predatory intent, whether objective or subjective. *Id.* The court found such evidence in the defendant's policies that took advantage of the plaintiff's weak financial position and in the defendant's

dant to achieve a monopoly could be inferred from price-cost data.[50] The court of appeals assumed that "bad intent is unlawful and use[d] the price-cost data to infer it."[51] Other courts, however, have held intent to be irrelevant in predatory pricing cases.[52] The United States Court of Appeals for the Seventh Circuit was one of those courts. It focused on a recoupment approach.[53]

Under this third test the court focuses on whether the market would allow the defendant to recoup during the "high price later" segment of the predatory price sequence.[54] If a market analysis shows it would not be possible for the defendant to charge a monopoly price later, then the low price now is not predatory.[55] As the court explained, predatory prices are an investment in a future monopoly.[56] If the monopoly price cannot be realized later, then the low-price-now-high-price-later sequence is unprofitable and it may be inferred that the present low price is not predatory.[57] "Making likelihood of recoupment the initial hurdle avoids not only questions of intent, for if a price below cost is lawful when it cannot lead to monopoly, then the defendant's state of mind is irrelevant."[58] According to the Seventh Circuit, the third approach is the favored approach in contemporary cases.[59]

Authority from the United States Supreme Court provides support for a market structure analysis type of test. In *Cargill, Inc. v. Monfort of Colorado, Inc.*,[60] the country's fifth largest beef packer, Monfort, sued under section 16 of the Clayton Act to enjoin a proposed merger between the third largest packer, Spencer Beef, and the second largest, Excel Corporation, a wholly owned subsidiary of Cargill.[61] Monfort alleged the merger would

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internal memorandum which stated the defendant's intent to contribute to the plaintiff's financial problems. *Id.* The court noted the test advocated by Areeda and Turner that would make evidence of a defendant's subjective intent irrelevant. *Id.* at 1494. In declining to adopt the test, the court stated, "The Areeda and Turner test is like Venus de Milo: it is much admired and often discussed, but rarely embraced." *Id.* at 1495.

50. *Id.* at 1503.

51. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1400 (citing McGahee v. Northern Propane Gas, Co., 858 F.2d at 1496).

52. *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983).

53. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1401.

54. *Id.*

55. *Id.*

56. *Id.* Predatory prices are "a sacrifice, of today's profits for tomorrow's." *Id.*

57. *Id.*

58. *Id.*

59. *Id.* (citing Cargill, Inc. v. Monfort of Colo., Inc., 761 F.2d 570 (10th Cir. 1985), *rev'd*, 479 U.S. 104 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 723 F.2d 238 (3d Cir. 1983), *rev'd*, 475 U.S. 574 (1986); Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989)). *See also* Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979) (recommending the use of this test).

60. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104 (1986).

61. *Id.* at 106-07. Under section 16 of the Clayton Act, private parties threatened with loss or damage by a violation of the antitrust laws may seek injunctive relief. 15 U.S.C. § 26 (1976).

violate section 7 of the Clayton Act.[62] Monfort also alleged that after the merger, Excel would attempt to increase its market share by bidding up the price it would pay for cattle, while at the same time, reducing its price for boxed beef.[63] According to Monfort, this "cost-price squeeze" would eventually enable Excel to drive smaller firms from the market allowing Excel to raise its prices and more than recoup the profits lost earlier.[64]

The Court reversed the court of appeals because the plaintiff did not show more than a threat of loss or damage due merely to increased competition.[65] The Court warned that "[c]ourts should not find allegations of predatory pricing credible when the alleged predator is incapable of successfully pursuing a predatory scheme."[66] Addressing Monfort's claim of potential injury stemming from the possibility that after the merger Excel would lower its prices to increase its market share, the Court stated:

> The kind of competition that Monfort alleges here, competition for increased market share, is not activity forbidden by the antitrust laws. It is simply, as petitioners claim, vigorous competition. To hold that the antitrust laws protect competitors from the loss of profits due to such price competition would, in effect, render illegal any decision by a firm to cut prices in order to increase market share. The antitrust laws require no such perverse result, for '[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition.'[67]

Similarly, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,[68] the Supreme Court held an antitrust inquiry could not be justified when recoupment is unlikely.[69] In that case, the Court examined a claim by American competitors that their Japanese counterparts agreed to fix prices for electronic equipment at low levels in the United States.[70] The Court found the evidence indicated a conspiracy that actually tended to benefit the

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62. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. at 107. Section 7 of the Clayton Act prohibits mergers when "the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." 15 U.S.C. § 18 (1976).

63. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. at 108.

64. *Id.* at 114.

65. *Id.* at 122. In discussing predatory pricing, the Court defined predatory pricing as "pricing below an appropriate measure of costs for the purpose of eliminating competitors in the short run and reducing competition in the long run." *Id.* at 117. Though the Court recognized the debate among various courts and academics concerning what measure of cost might be appropriate in predatory pricing cases, the Court did not indicate what measure of cost it felt was appropriate. *Id.* at n.12.

66. *Id.* at 119 n.15.

67. *Id.* at 116 (quoting Arthur S. Langenderfer, Inc. v. S.E. Johnson Co., 729 F.2d 1050, 1057 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984)).

68. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

69. *Id.* at 597.

70. *Id.* at 578.

plaintiffs rather than a predatory pricing conspiracy injuring the plaintiffs.[71] The Court held that "if the factual context renders respondent's claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary."[72]

The Court of Appeals for the Seventh Circuit in *Rose Acre* embraced this market analysis test,[73] stating:

> It is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent). Market structure offers a way to cut the inquiry off at the pass, to avoid the imponderable questions that have made antitrust cases among the most drawn out and expensive types of litigation. Only if market structure makes recoupment feasible need a court inquire into the relation between price and cost.[74]

According to the court it would not have been possible for Rose Acre to recoup "a predatory investment in the egg business."[75] Rose Acre merely beat its competitors to the punch in becoming more efficient and used the resulting lower costs to take business from them.[76] The court held intent is not a basis of liability, or a ground for inferring the existence of such a basis, in a predatory pricing case under the Sherman Act.[77] A market analysis showing the actual possibility of monopoly power rather than the defendant's intent to gain monopoly power should control the issue.

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71. *Id.* at 583.

72. *Id.* at 587. The court followed the approach of the third test in Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227 (1st Cir. 1983). In *Barry Wright*, the court held when the defendant manufacturer's price exceeded both average cost and incremental cost, the price could not be found to be in violation of the Sherman Act. *Id.* at 236.

73. An earlier Seventh Circuit case also endorsed this approach. Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409 (7th Cir. 1989). In that case, a grocery store chain filed a complaint against competitors alleging antitrust violations. *Id.* at 1412. The plaintiffs claimed the defendants engaged in predatory pricing in violation of section 2 of the Sherman Act by pricing below average variable costs. *Id.* In affirming the lower court's grant of summary judgment for the defendants, the court held a decrease in prices was not an attempt to monopolize when there was no evidence to suggest the losses could be recovered in subsequent years by raising prices. *Id.* at 1416.

74. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1401.

75. *Id.* at 1403.

76. *Id.* at 1404.

77. *Id.* at 1402.

II. ANALYSIS OF PLAINTIFF'S CLAIM UNDER THE ROBINSON-PATMAN ACT

The court's analysis did not stop with the conclusion the defendant was not guilty of predatory pricing under the Sherman Act. A conclusion that Rose Acre did not engage in predatory pricing under the Sherman Act would not necessarily absolve it of liability under the Robinson-Patman Act.[78] The statute indicates primary-line discrimination will be penalized "where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly."[79] Despite this statutory language, the Supreme Court in *Utah Pie Co. v. Continental Baking Co.*,[80] held price discrimination in a relevant market contributing to the erosion of price levels could violate the statute.[81] The Court stated " 'predatory intent' coupled with 'unreasonably low prices' may be the basis of liability."[82]

In *Utah Pie*, the evidence at trial showed the defendants, three large national companies, sold pies in the Salt Lake City area for over three years at prices below their cost and below the prices they charged in other markets closer to their plants.[83] The Court held this evidence was sufficient to support a finding of injury to competition even though the plaintiff's sales volume was increasing and the plaintiff, a local company, was continuing to make a profit.[84] The Court held "there was some evidence of predatory intent with respect to each of these respondents."[85] It then relied on this predatory intent to show injury to competition.[86]

Scholars have argued that *Utah Pie* used the Robinson-Patman Act to discourage the competitive process that undercuts excessive prices.[87] Although there has been little support for *Utah Pie* in recent years, there have been no cases questioning its holding.[88] The lack of recent reaffirmation by the Supreme Court has led some courts to conclude the standard of

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78. *Id.* at 1404; *see supra* note 6 for the applicable statute.

79. *Id.* Primary-line discrimination exists when a seller charges different prices to different purchasers of the same commodity and these actions substantially lessen competition, tend to create a monopoly, or injure competition with the *seller*. *See* 15 U.S.C. § 13(a) (1988) (emphasis added).

80. Utah Pie Co. v. Continental Baking Co., 386 U.S. 685 (1967).

81. *Id.* at 703.

82. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1406 (quoting Utah Pie Co. v. Continental Baking, Co., 386 U.S. at 696, n.12).

83. *Id.* at 691.

84. *Id.* at 702-03.

85. *Id.* at 702.

86. *Id.* at 696-98.

87. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1404.

88. *Id.* at 1405.

primary-line liability under the Robinson-Patman Act should be the same as that under section 2 of the Sherman Act.[89]

The Seventh Circuit Court of Appeals disagreed.[90] The court stated, "[I]nferior federal courts, in order to provide equal justice under law, must apply the holdings of cases still on the books."[91] This, the court opined, meant Sherman Act cases should be decided under the market-analysis approach explained earlier, and Robinson-Patman cases should follow the approach of *Utah Pie*.[92]

According to the *Utah Pie* holding, some primary-line discrimination that would be permitted by the Sherman Act is condemned by Robinson-Patman.[93] Though the court found intent to be an insufficient basis for liability under the Sherman Act,[94] the Court in *Utah Pie* found intent was not necessarily outside the scope of Robinson-Patman litigation.[95] In *Utah Pie* the Court held the firm instigating the reduction in prices may be liable due to a "drastically declining price structure" in a "highly competitive" market.[96] The egg market is highly competitive and according to the court, a jury could have found the defendant's pricing contributed to a declining price structure, injuring its rivals as a result.[97] The court said defendant's pricing almost required reversing the district court's granting of the defendant's motion for judgment notwithstanding the verdict.[98]

However, the court found one key ingredient to be missing—"price discrimination" as the Robinson-Patman Act uses the term.[99] The court held "price discrimination" really means "price difference."[100] This is important because "[e]conomic (as opposed to legal) price discrimination occurs when a firm sells products at different price-cost ratios."[101] A seller charging all of its customers the same price is likely engaged in economic

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89. *Id.* at 1404 (citing Henry v. Chloride, Inc., 809 F.2d 1334, 1345 (8th Cir. 1987); D.E. Rogers Assocs., Inc. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983); Janich Bros. v. American Distilling Co., 570 F.2d 848, 855 (9th Cir. 1977)).

90. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1405.

91. *Id.*

92. *Id.*

93. *Id.* The Court in *Utah Pie* held "predatory intent" coupled with "unreasonably low prices" may be the basis of liability. *Id.* at 1406.

94. *Id.* at 1402.

95. *Id.* at 1406.

96. *Id.* In reacting to this holding, the court dutifully stated, "[a]ntithetical as the notion of liability for vigorous competition leading to low prices is to contemporary antitrust policy, our job is application." *Id.*

97. *Id.* The injury the court was referring to would be lost sales. *Id.* The court noted that in *Utah Pie* the Court was considering average total costs rather than average variable costs or marginal costs. *Id.* The court felt the jury would have been entitled to conclude that Rose Acre sold some of its eggs, some of the time, for less than average total costs. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

101. *Id.*

price discrimination because the cost of providing the goods necessarily varies with distance.[102] Under the Robinson-Patman Act, however, a firm is allowed to charge the same price to everyone though its costs may differ.[103]

The plaintiff's expert testified that Rose Acre engaged in three kinds of price discrimination;[104] however, the expert did not address certain questions that would determine whether Rose Acre's practices were indeed price discrimination.[105] Because plaintiffs did not prove price discrimination, which would give them significant advantages under the Robinson-Patman Act, their case lacked an essential element.[106] Therefore, plaintiffs' claims also failed under the Robinson-Patman Act.

III. CONCLUSION

A market structure analysis is appropriate for at least two reasons. First, as the Supreme Court noted in *Matsushita*, predatory pricing suits "chill the very conduct [vigorous price competition] the antitrust laws are designed to protect."[107] The earlier that courts dismiss these illusory claims the better. Second, when a market structure analysis results in the early dismissal of a case, the tremendous expenses of cost-price analysis are avoided. As the court said in *Rose Acre*, "[i]t is much easier to determine from the structure of the market that recoupment is improbable than it is to find the cost a particular producer experiences in the short, middle, or long run (whichever proves pertinent)."[108]

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102. *Id.*

103. *Id.*

104. *Id.* The plaintiff's expert testified Rose Acre charged the same price to customers in different cities. *Id.* The court held this was undoubtedly economic price discrimination, but not legal price discrimination. *Id.* The expert also testified Rose Acre engaged in two other kinds of price discrimination, namely, that it gave different numbers of specials to different customers, and it charged different prices (different discounts off the Urner Barry index) to different customers. *Id.*

105. *Id.* According to the court, timing and net prices were important considerations. *Id.* at 1407. Whether Rose Acre engaged in price discrimination as the Robinson-Patman Act uses the term depends on whether Rose Acre charged the same prices to customers at the same time. *Id.* The plaintiff's expert did not address that question. *Id.* The court also noted that section 2(a) reaches only discrimination in the price of goods of "like grade and quality." *Id.* Because "specials" were not necessarily the same grade and quality as Rose Acre's other sales, plaintiffs should have calculated a mean price paid by the customers to determine if there was price discrimination. *Id.*

106. *Id.* at 1408. The court conceded Rose Acre did not maintain records in such a way that would make it easy for the plaintiffs to make the necessary calculations to show price discrimination. *Id.* However, the court explained, "given the formidable advantages a plaintiff enjoys under the Robinson-Patman Act once it shows price discrimination, we are not disposed to allow it to stint on the demonstration." *Id.*

107. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986).

108. A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d at 1401.

An analysis of predatory pricing claims that focuses on intent does not effectively distinguish aggressive competition from attempted monopolization. Furthermore, it invites juries to penalize competition and complicates litigation. The Seventh Circuit's decision in *Rose Acre* reflects a trend to use the issue of market power to eliminate, in the early stages, antitrust cases attacking conduct that could not reasonably be expected to harm consumers. Courts should adopt the market-analysis approach to predatory pricing cases. Only when market structure makes recoupment possible should a court inquire further into a price-cost relationship. Making recoupment an initial hurdle avoids questions of cost and intent, because if a price below cost is lawful when it cannot lead to monopoly, then the defendant's intent is irrelevant.

Finally, the Supreme Court should revisit *Utah Pie* and conform the standards under the Robinson-Patman Act to the standards of the Sherman Act. This would provide additional guidance to the courts, some of which continue to analyze predatory pricing claims by standards that consider evidence of cost and subjective intent. Unfortunate as it may be, it is a fact of litigation life that the standards under which a court judges a defendant's alleged predatory practices will vary greatly depending on the circuit in which the defendant is sued.

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