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Comment

A Unified Approach to Predatory Pricing Analysis Under the Sherman and Robinson-Patman Acts: *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, A Case Against the Tide

Claire Taylor-Sherman

Alleging competitive injury from price discrimination, A.A. Poultry Farms sued its competitor Rose Acre Farms¹ under the Clayton Act, as amended by the Robinson-Patman Act.² A.A. Poultry Farms and the other plaintiffs contended that Rose Acre's lower-priced "specials"³ constituted price discrimination.⁴ Further, the plaintiffs alleged that Rose Acre priced its specials below its cost of production, which they claimed constituted predatory pricing.⁵ The jury returned a verdict for the

1. *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 683 F. Supp. 680 (S.D. Ind. 1988), *aff'd*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). The defendant Rose Acre Farms was a vertically integrated egg producer and processor located near Indianapolis. *Rose Acre*, 881 F.2d at 1397-98. An egg producer owns the chickens which lay the eggs, while an egg processor packages and resells the eggs. *Id.* at 1397. The first named plaintiff, A.A. Poultry Farms, and the six other plaintiff owners, however, were egg processors only. *Id.* at 1398. An unintegrated processor purchases eggs from farmers and then packages them for resale. *Id.* at 1397.

2. 15 U.S.C. § 13(a) (1988). Although the plaintiffs did not initially bring suit under the Sherman Act, 15 U.S.C. § 2 (1988), they litigated the case as though they had done so. *Rose Acre*, 881 F.2d at 1399. The court acknowledged that the federal system of notice pleading allowed this. *Id.* Counsel then briefed the appeal using both acts, and the Seventh Circuit analyzed the allegations under both acts. *Id.* at 1400.

3. Specials in the egg market arise due to particular market characteristics. For example, buyers seek to buy eggs of a certain size, yet chickens lay eggs of many sizes, not all of which meet customers' desires. Because eggs are perishable, suppliers must sell them quickly. To dispose of eggs of the "wrong size," firms either sell them to companies that use the eggs as raw material for their finished products ("breakers") or to supermarkets at concessionary prices ("specials"). *Rose Acre*, 881 F.2d at 1397. Rose Acre sold its surplus eggs to supermarkets as specials at prices lower than its other eggs. *Id.*

4. *Id.*

5. *Id.* The *Rose Acre* court defined predatory pricing as "the sequence

plaintiffs, with treble damages amounting to \$27.9 million.⁶ The federal district court, however, granted Rose Acre's motion for judgment notwithstanding the verdict and the plaintiffs appealed.⁷ The Seventh Circuit affirmed.⁸

The Seventh Circuit stated that Supreme Court precedent mandates a different analysis of predatory pricing claims under the Sherman Act than it does under the Robinson-Patman Act.⁹ This dual approach under the two Acts stands in stark contrast to a wave of judicial support for using a unified approach to analyze predatory pricing claims under the Sherman and Robinson-Patman Acts.¹⁰ Unless antitrust law or precedent mandates different analyses for these claims, a unified approach not only simplifies the analysis, but also provides a rational framework for applying the antitrust laws.¹¹

This Comment argues that the *Rose Acre* court needlessly complicated predatory pricing analysis under the antitrust laws by following a dual approach. Part I is two-fold. First, it reviews the statutory background of antitrust law, including the notion of reconciling the various laws. Second, it outlines the courts' interpretation and application of these laws, including the impact of economic analysis in more recent predatory pricing cases. Part II details the holding in *Rose Acre*, concentrating on the Seventh Circuit's dual approach to predatory pricing analysis under the Sherman and Robinson-Patman Acts. Part III questions the Seventh Circuit's use of precedent in reaching its decision. This Comment advocates the use of a unified approach to predatory pricing analysis under the Sherman and Robinson-Patman Acts.¹²

low-price-now-high-price-later." *Id.* at 1400; see *infra* part I.A. (discussing the concept of predatory pricing).

6. *Rose Acre*, 881 F.2d at 1397.

7. *Id.*

8. *Id.* at 1408.

9. *Id.* at 1404 (stating that despite widespread criticism, *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), which defined the proper method of analysis for Robinson-Patman Act claims, had not been overruled, and was thus binding precedent on federal appellate courts).

10. See *infra* part I.C.3.

11. See *infra* notes 28-33. The Supreme Court has admonished the lower courts to interpret Robinson-Patman Act standards to conform with other antitrust laws. See *Automatic Canteen Co. v. Federal Trade Comm'n*, 346 U.S. 61, 63 (1953).

12. In the area of predatory pricing, it is as important to outline what an article will *not* cover as what it will cover because of the controversy over a proper test or methodology to discern predatory pricing. See *Rose Acre*, 881 F.2d at 1400 (citing cases and articles referring to "recent cases in and out of

I. PREDATORY PRICING UNDER THE ANTITRUST LAWS

A. PREDATORY PRICING

Courts and commentators use the phrase "predatory pricing" to describe pricing behavior that injures competition.¹³ A "predatory" firm prices its products uneconomically low for a variety of noncompetitive reasons, including a desire to "drive rivals from the marketplace, force them to sell out on favorable terms, or discipline them for failure to conform to the wishes of the firm practicing such pricing."¹⁴ A firm practicing predatory pricing will sacrifice current revenues and profits in order to create a monopoly, then recoup its losses at monopoly prices in the absence of competition.¹⁵ The Sherman and Robinson-Patman Acts prohibit the practice of predatory pricing.¹⁶

B. THE STATUTES

Plaintiffs can and do allege injury from predatory pricing under both the Sherman Act¹⁷ and the Robinson-Patman Act.¹⁸

this circuit struggl[ing] with the appropriate price-cost relation"); *see also infra* notes 68-70 and accompanying text (outlining three distinct tests courts use to discern predatory pricing). While this Comment addresses whether courts should apply different tests to discern predatory pricing under the Sherman and Robinson-Patman Acts, it does *not* address which of the various tests is the "best" test to apply.

13. *See* George A. Hay, *The Economics of Predatory Pricing*, 51 ANTI-TRUST L.J. 361, 362 (1982).

14. Daniel J. Gifford, *Primary-Line Injury Under the Robinson-Patman Act: The Development of Standards and Erosion of Enforcement*, 64 MINN. L. REV. 1, 3 n.3 (1979).

15. 3 PHILLIP AREEDA & DONALD F. TURNER, ANTI-TRUST LAW ¶ 711b (1978).

16. *See infra* notes 34-38 and accompanying text. When discussing predatory pricing claims under the Robinson-Patman Act, courts and commentators speak interchangeably of either the Clayton Act or the Robinson-Patman Act. The Robinson-Patman Act, ch. 592, 49 Stat. 1526 (1936), amended the Clayton Act, ch. 323, 38 Stat. 730 (1914). *See infra* notes 25-27 and accompanying text. As a matter of convention, however, most people use the designation "Robinson-Patman Act" even though it is the original Clayton Act which deals with predatory pricing claims. *See infra* notes 25-26 and accompanying text. The name of the act becomes important when one researches the statute's legislative history to aid interpretation and application. Although this Comment's discussion centers on predatory pricing, it will follow convention and refer to a violation of § 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, as a violation of the Robinson-Patman Act.

17. 15 U.S.C. §§ 1-11 (1988).

18. 15 U.S.C. §§ 13-13b, 21a (1988); *see* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400 (7th Cir. 1989) (litigating a predatory pricing claim under both Acts), *cert. denied*, 494 U.S. 1019 (1990).

Congress enacted the Sherman Act in 1890¹⁹ to "protect trade and commerce against unlawful restraints and monopolies."²⁰ For a variety of reasons, Congress passed a law of general principle,²¹ leaving the often formidable task of fleshing out the law to the courts.²² Reacting to the continued growth of big business²³ and seemingly "soft" judicial enforcement,²⁴ Congress

19. Sherman Act, ch. 647, 26 Stat. 209 (1890). President Benjamin Harrison signed the Sherman Act into law on July 2, 1890 1 EARL W. KINTNER, *FEDERAL ANTITRUST LAW* § 4.17, at 238 (1980).

20. This quote from the Sherman Act's formal title succinctly describes why Congress passed the bill. H.R. REP. NO. 1707, 51st Cong., 1st Sess. 1 (1890), *reprinted in* 1 EARL W. KINTNER, *THE LEGISLATIVE HISTORY OF THE FEDERAL ANTITRUST LAWS AND RELATED STATUTES* 295 (1978) ("The object of the bill is . . . [t]o protect trade and commerce among the several [s]tates . . . against unlawful restraints and monopoly."). The Supreme Court succinctly stated its own view of the Sherman Act's purpose in *Northern Pacific Railway Co. v. United States*:

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. . . . [T]he policy unequivocally laid down by the Act is competition.

356 U.S. 1, 4 (1958).

21. At the time it enacted the Sherman Act, Congress was just beginning to test its regulatory powers. See 1 KINTNER, *supra* note 19, § 4.1. This situation, plus the fact that Congress aimed the legislation at all businesses during a time of changing economic conditions, led Congress to pass a general law. *Id.*

22. In its early decisions, the Supreme Court tended to interpret the Sherman Act strictly, using the Act's language to define its parameters. For instance, the Court emphasized the statute's language in *United States v. Trans-Missouri Freight Ass'n*, declaring that Congress intended the Sherman Act to prohibit every contract, combination, or conspiracy that restrained trade without regard to whether such restraint had previously been held reasonable under common law. 166 U.S. 290, 328, 340-41 (1897). The Court soon reverted, however, to a more flexible approach of common law reasonableness as it developed the "rule of reason" to analyze many, if not most, alleged violations. At least as early as 1898, the Court realized that "[t]he act of Congress must have a reasonable construction or else there would scarcely be an agreement or contract among businessmen that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." *Hopkins v. United States*, 171 U.S. 578, 600 (1898). In *Standard Oil Co. v. United States*, the Court formally enunciated the "rule of reason," stating that Congress intended the Sherman Act to protect interstate and foreign commerce from undue restraints but did not intend to restrain the right to make and enforce contracts that did not constitute undue restraints. 221 U.S. 1, 60 (1911). Although *Standard Oil* judges the validity of a restraint under § 1 of the Sherman Act, the Supreme Court suggested that the rule of reason applied to § 2 (the anti-monopolization provision) as well. *Id.*

23. See 3 KINTNER, *supra* note 19, § 18.2, at 5 n.39 ("During the Clayton

later passed the Clayton Act.²⁵ The Clayton Act specifically proscribed certain trade practices that Congress deemed particularly inimical to free competition.²⁶ Due to an increase in price discrimination stemming from the advent of mass merchandisers, Congress amended section 2 of the Clayton Act in

Act debates, one senator compiled a list of 628 trusts, many of which, he stated, were formed between 1898 and 1908.”).

24. The “soft” enforcement refers to the rule of reason enunciated in *Standard Oil*. 221 U.S. at 60.

25. Ch. 323, 38 Stat. 730 (1914) (codified at 15 U.S.C. §§ 12, 13, 14-21, 22-27 (1988)). As originally enacted, § 2 of the Clayton Act read as follows: “It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities . . . where the effect of such discrimination may be substantially to *lessen competition* or tend to create a monopoly in any line of commerce . . .” Clayton Act, ch. 323, § 2, 38 Stat. 730, 730 (1914) (current version at 15 U.S.C. § 13(a) (1988)) (emphasis added). Congress hoped this law would curb liberal judicial interpretation, exemplified by *Standard Oil’s* rule of reason, see 221 U.S. at 60, and provide for more certainty in enforcement. 3 KINTNER, *supra* note 19, § 18.2, at 6. Congress also passed the Federal Trade Commission Act in 1914 to clarify regulation of abusive trade practices further. *Id.*

26. The Clayton Act forbids such practices as price discrimination, tying and exclusive dealing arrangements, mergers, and interlocking directorates. 15 U.S.C. §§ 13(a), 14, 18-20 (1988). In passing the Act, Congress was concerned about geographic price cutting by large sellers who aim to drive smaller competitors out of business. H.R. REP. NO. 627, 63d Cong., 2d Sess. 8-9 (1914), reprinted in 2 KINTNER, *supra* note 20, at 1090-91. The House Judiciary Committee stated that:

Section 2 of the [Clayton Act] is intended to prevent unfair discriminations. It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations and also certain smaller concerns which seek to secure a monopoly in trade and commerce by aping the methods of the great corporations, have heretofore endeavored to destroy competition and render unprofitable the business of competitors by selling their goods, wares, and merchandise at a [lower] price in the particular communities where their rivals are engaged in business than [in] other places throughout the country. . . . The necessity for legislation to prevent unfair discriminations in prices with a view of destroying *competition* needs little argument to sustain the wisdom of it. . . . [The report provided the specific examples of] the Standard Oil Co., and the American Tobacco Co., and others of less notoriety, but of great influence—[which] lower[ed] prices of their commodities, often times *below the cost of production* in certain communities and sections where they had competition, with the . . . ultimate purpose in view of thereby acquiring a monopoly in the particular locality or section in which the discriminating price is made.

Id. (emphasis added).

Today courts refer to price discrimination between competitors at the seller’s level as primary line discrimination or primary line injury. See *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978). This Comment addresses this type of antitrust injury.

1936 by passing the Robinson-Patman Act.²⁷

Although there are several antitrust laws, passed at different times to address certain specified needs, courts must not interpret them individually in a vacuum.²⁸ The Supreme Court admonished the lower courts in *Automatic Canteen v. Federal*

27. Act of June 19, 1936, ch. 592, 49 Stat. 1526 (current version at 15 U.S.C. §§ 13-13b, 21a (1988)). A new form of price discrimination had emerged by the 1930s with the growth of chain stores. See 3 KINTNER, *supra* note 19, § 19.1, at 44 (explaining that mass merchandisers had the power to obtain price concessions from manufacturers); FREDERICK M. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 5 (1962) ("Between 1926 and 1933 chain stores nearly tripled their share of total retail sales—from 9 to 25 per cent.") (footnote omitted). In this new form, price discrimination had moved from the seller level to the buyer level. Courts and scholars refer to price discrimination at the buyer level as secondary line discrimination. See *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 720-21 n.11 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); 3 KINTNER, *supra* note 19, § 22.1, at 249. Secondary line discrimination or injury is *not* of concern in this Comment except that its existence gave rise to the Robinson-Patman Act amendments to the Clayton Act. The Robinson-Patman Act amendments extended the original Clayton Act language, adding the phrase shown in italics below to the statute's clause concerning the effect of the price discrimination:

It shall be unlawful for any person . . . to discriminate in price between different purchasers of commodities . . . 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 . . .*

Robinson-Patman Act, ch. 592, § 1, 49 Stat. 1526, 1526 (1936) (current version at 15 U.S.C. § 13(a) (1988)).

Although this Comment does not focus on secondary line injury, it is important to understand the purpose of the Robinson-Patman Act because some courts have mistakenly drawn upon the language which these amendments added to the Clayton Act in their analysis of predatory pricing claims, even though the original Clayton Act covers this sort of injury. In his introductory remarks to the Robinson-Patman Act, Representative Wright Patman stated that "[the Robinson-Patman Act] is designed to accomplish what so far the Clayton Act has only weakly attempted, namely, to protect the independent merchant, the public whom he serves, and the manufacturer from whom he buys, from exploitation by his chain competitor." 79 CONG. REC. 9077 (1935) (statement by Rep. Wright Patman), *reprinted in* 4 KINTNER, *supra* note 20, at 2927.

The report of the Senate Committee on the Judiciary characterized the Robinson-Patman Act's purpose as "propos[ing] to amend section 2 of the Clayton Act so as to suppress more effectually discrimination *between customers of the same seller* not supported by sound economic differences in their business position or in the cost of serving them." S. REP. NO. 1502, 74th Cong., 2d Sess. (1936), *reprinted in* 4 KINTNER, *supra* note 20, at 3014 (emphasis added). These examples point to Congress's preoccupation with the ill effects of price discrimination at the secondary level, which encompasses injury to specific competitors rather than injury to competition in general.

28. See *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1338-39 (8th Cir. 1987).

*Trade Commission*²⁹ to reconcile the Robinson-Patman Act with broader antitrust policies laid down by Congress.³⁰ The *Automatic Canteen* Court also warned against interpretations of the Robinson-Patman Act which "extend beyond the prohibitions of the Act and, in doing so, help give rise to a price uniformity and rigidity in open conflict with the purposes of other antitrust legislation."³¹ In *Great Atlantic & Pacific Tea Co. v. Federal Trade Commission*,³² the Supreme Court reiterated that the Robinson-Patman Act is to "be construed consistently with broader policies of the antitrust laws."³³

Predatory pricing analysis can play a central role in claims brought under both the Sherman and Robinson-Patman Acts.³⁴ Section 2 of the Sherman Act prohibits attempts to monopolize or maintain a monopoly;³⁵ a firm can employ predatory pricing as one means to accomplish these prohibited acts.³⁶ Under the Robinson-Patman Act, proof that a competitor engaged in predatory pricing satisfies one element of a prima facie claim.³⁷

29. 346 U.S. 61 (1953).

30. *Id.* at 63.

31. *Id.*

32. 440 U.S. 69 (1979).

33. *Id.* at 80 n.13.

34. Congress did not necessarily intend these two Acts to cover the same injury. Yet historical conditions and the courts' interpretations of the Acts, refined by an increasingly sophisticated understanding of the nature of the injuries, have led courts to condemn predatory pricing under both Acts. Since 1975, courts have utilized more economic analysis in predatory pricing analysis. James D. Hurwitz & William E. Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63, 94-96 (1982); Paul H. LaRue, *The Robinson-Patman Act: The Great Issues and Personalities*, 55 ANTITRUST L.J. 135, 146 (1986). Through the application of economic analysis to alleged Robinson-Patman Act violations, most courts recognize injury only if discriminatory pricing is predatory. See Daniel G. Gifford, *Recent Developments in Antitrust Law*, MINN. STATE BAR ASS'N, ANTITRUST SEC. NEWS, July 1991, at 1, 16-17; LaRue, *supra*, at 144.

35. 15 U.S.C. § 2 (1988) ("Every person who shall monopolize, or attempt to monopolize, . . . shall be deemed guilty of a felony . . .").

36. See Terry Calvani & James M. Lynch, *Predatory Pricing Under the Robinson-Patman and Sherman Acts: An Introduction*, 51 ANTITRUST L.J. 375, 375 (1982) (stating that proof of predation is often crucial to finding "monopolization" or "attempted monopolization" under the Sherman Act).

If a firm attempts to monopolize, it seeks to rid itself of competition by engaging in any of a variety of illegal conduct. This illegal conduct includes not only predatory pricing, but also "industrial espionage or sabotage, false advertising, threats, exclusive dealing, tying arrangements, and agreements with competitors to exclude rivals." E. THOMAS SULLIVAN & HERBERT HOVENKAMP, ANTITRUST LAW, POLICY & PROCEDURE 617 (2d ed. 1989).

37. 15 U.S.C. § 13(a) (1988). A plaintiff who brings a claim under § 2(a) of the Robinson-Patman Act must prove two essential elements: price discrimi-

Thus when a firm uses predatory pricing in a discriminatory

nation and anticompetitive or potential anticompetitive effect. *Id.* Price discrimination is merely a difference in price. Federal Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 549 (1960). Anticompetitive effect in a primary line context generally requires proof that a firm's pricing has or will hurt competition in general. See Janich Bros. v. American Distilling Co., 570 F.2d 848, 855 n.6 (9th Cir. 1977) ("It is clear that there can be no violation of the Robinson-Patman Act if the price difference has no adverse effect on competition."), *cert. denied*, 439 U.S. 829 (1978); International Air Indus. v. American Excelsior Co., 517 F.2d 714, 721 (5th Cir. 1975) ("It is settled law that a mere diversion of business from one competitor to another does not signify detriment to competition on the seller level." (footnote omitted)), *cert. denied*, 424 U.S. 943 (1976). *But see* Monahan's Marine, Inc. v. Boston Whaler, Inc., 866 F.2d 525, 528 (1st Cir. 1989) ("Unlike the Sherman Act, which protects 'competition, not competitors,' the Robinson-Patman Act extends its protection to competitors." (citation omitted)); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1404 (7th Cir. 1989) (interpreting *Utah Pie* to stand for protection of sellers' competitors, rather than protection of competition in general), *cert. denied*, 494 U.S. 1019 (1990). Use of the proper standard of anticompetitive effect—injury to competition in general or to a specific competitor—is key to an analysis of predatory pricing claims.

Proof of anticompetitive effect is the critical element of a Robinson-Patman Act claim. There are two primary modes of proving this competitive injury. First, a plaintiff can prove injury through a general market analysis. D.E. Rogers Assocs. v. Gardner-Denver Co., 718 F.2d 1431, 1439 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984). Second, courts infer competitive injury from the presence of predatory intent, which in turn courts can infer from proof of predatory conduct—a "double inference test." See *id.* (citing *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-98 (1967)); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1040-41 (9th Cir. 1981) (citing *Utah Pie*, 386 U.S. at 696-98), *cert. denied*, 459 U.S. 825 (1982); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 798 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977); *International Air*, 517 F.2d at 722-23; see also Robert R. Vawter, Jr. & Sharyn B. Zuch, *A Critical Analysis of Recent Federal Appellate Decisions on Predatory Pricing*, 51 ANTITRUST L.J. 401, 401 (1982) ("Predatory intent may be inferred from below-cost prices, and competitive harm may then be inferred from the inferred predatory intent."); see *infra* note 54 (discussing *Utah Pie's* establishment of the double inference test). If a court uses the double inference test, however, the actionable "predatory conduct" in the context of a Robinson-Patman Act claim is predatory pricing. When a court looks for the presence of predatory pricing, the court is relying on *objective* evidence of predatory intent.

Other courts have shortened this chain of inference and allow direct subjective evidence of predatory intent. For example, courts interpret memoranda or comments containing subjective phrases such as "we are going to run you out of business," or similar threats, as direct evidence of predatory intent. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1500 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989). Courts and scholars have discussed at length the proper role and possible dangers of subjective intent in predatory pricing claims. See *id.* at 1500 ("Congress intended for subjective evidence of a defendant's intent to be relevant. Predatory pricing provides only objective, circumstantial evidence of predatory intent."). *Contra* *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983) (stating that subjective intent is irrelevant to a predatory pricing claim); RICHARD A. POSNER, ANTI-

manner in an attempt to monopolize, a plaintiff can prevail under both Acts if jurisdictional requirements are satisfied.³⁸

C. THE CASE LAW

1. *Utah Pie*

*Utah Pie Co. v. Continental Baking Co.*³⁹ represents the nadir of the Supreme Court's analysis of predatory pricing under the Robinson-Patman Act.⁴⁰ Much to the surprise and dismay of subsequent courts and commentators,⁴¹ the Court found that the defendants, which had priced their products below "cost" as their industry experienced a "drastically declining price structure," had violated the Robinson-Patman Act.⁴² With the benefit of today's more sophisticated economic analysis, it has become clear that this situation more likely reflected a market experiencing increased competition rather than a market in which a defendant had hurt competition.⁴³

TRUST LAW, AN ECONOMIC PERSPECTIVE 188-90 (1976) ("What juries (and many judges) do not understand is that the availability of evidence of improper intent is often a function of luck and of the defendant's legal sophistication, not of the underlying reality."); Michael C. Quinn, *Predatory Pricing Strategies: The Relevance of Intent Under Antitrust, Unfair Competition and Tort Law*, 64 ST. JOHN'S L. REV. 607, 621 (1990) ("It appears that some plaintiffs, through clever lawyering, attempt to cajole juries into awarding treble damages under the Sherman Act and [Robinson-Patman Act] where, in fact, there is no real antitrust injury.").

38. Courts and commentators identify these jurisdictional requirements as follows:

1. There must be a certain involvement with interstate commerce;
2. There must be a "discrimination" in "price";
3. The discrimination must be "between different purchasers," i.e., it must involve more than one purchase from the same seller;
4. The sale must be of "commodities";
5. The commodities sold must be "of like grade and quality"; and
6. The commodities must be sold "for use, consumption, or resale within the United States" or any territory or the District of Columbia.

3 KINTNER, *supra* note 19, § 21.1, at 144 (citations omitted).

39. 386 U.S. 685 (1967).

40. LaRue, *supra* note 34, at 144.

41. *See id.* at 144-45 (discussing the *Utah Pie* analysis); *see also* A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1404 (7th Cir. 1989) ("Nary a voice has been heard in support of *Utah Pie* in years. [There is] universal academic disdain for that case."), *cert. denied*, 494 U.S. 1019 (1990).

42. *Utah Pie*, 386 U.S. at 690, 696 n.12, 698, 701.

43. *See* LaRue, *supra* note 34, at 144 ("In the older cases, . . . [m]arket analyses made to determine the effect of a price discrimination upon competition were notably unsophisticated from an economics standpoint."); *see also* *Rose Acre*, 881 F.2d at 1404 ("Scholars have cogently argued that *Utah Pie* employed the Robinson-Patman Act to condemn the process by which competi-

The plaintiff in *Utah Pie*, a small, local pie baker in business in Salt Lake City for thirty years, entered the frozen pie market in late 1957.⁴⁴ The company was immediately successful and by the end of 1958 it controlled two-thirds of the Salt Lake City market.⁴⁵ Responding to this successful market entrant, several national competitors⁴⁶ fought back with the most effective competitive weapon in the frozen pie market—price.⁴⁷ The national firms lowered their prices in Utah, but not elsewhere, to keep and attract business.⁴⁸

Responding to this situation, Utah Pie charged the national competitors with conspiracy under the Sherman Act and price discrimination under the Robinson-Patman Act.⁴⁹ A jury found for the defendants on the Sherman Act conspiracy charge, but for Utah Pie on the Robinson-Patman claim.⁵⁰ Although the Tenth Circuit Court of Appeals reversed,⁵¹ the Supreme Court found sufficient evidence to support a finding of competitive injury, thereby allowing the plaintiff to recover under the Robinson-Patman Act.⁵²

The Supreme Court's analysis of the requisite competitive injury lacks clarity and precision. Although an enunciation of the proper competitive injury standard is key to the analysis, the Court failed to clarify which standard it used: injury to competition in general, or the lesser standard of injury to a specific competitor.⁵³ Regarding pricing, the Court stated that the

tion creeps into oligopolistic markets and undercuts excessive prices." Even at the time of *Utah Pie*, however, the dissent recognized that the market had become more, not less, competitive. *Utah Pie*, 386 U.S. at 705 (Stewart, J., dissenting).

44. *Utah Pie*, 386 U.S. at 689.

45. *Id.* at 689, 705.

46. The competitors were: Continental Baking Co., Carnation Co., and Pet Milk Co. *Id.* at 687.

47. *Id.* at 690, 692.

48. *Id.*

49. *Id.* at 687.

50. *Id.* at 687-88.

51. The Tenth Circuit found insufficient evidence to support a finding of injury to competition. *Id.* at 693, 699, 701-02. Among other considerations, the court "placed heavy emphasis on the fact that Utah Pie constantly increased its sales volume and continued to make a profit." *Id.* at 702.

52. *Id.* at 702-03.

53. *Id.* at 695, 698, 700, 701-03 (speaking of the need to show injury to competition). *But see id.* at 696, 699, 700 (speaking in terms of injury to Utah Pie or simply, a specific competitor). Perhaps the most telling indication of lack of clarity appears in the opinion's conclusion. The Court stated:

Section 2(a) does not forbid price competition which will probably injure or lessen competition by eliminating competitors, But Con-

defendants had sold below cost, but apparently only below average total cost.⁵⁴ Looking at the effect of all market participants' pricing, the Supreme Court emphasized that the market's price structure had "deteriorated rapidly"⁵⁵ or was "drastically declining."⁵⁶ Concurrently, the Court disingenu-

gress has established some ground rules for the game. Sellers may not sell like goods to different purchasers at different prices if the result may be to injure competition in . . . the sellers' . . . market

Id. at 702. Under this language, a court can find injury to a specific competitor, as a result of being forced out of business, without finding an injury to competition in general and absent the latter finding, there is no liability. See Gifford, *supra* note 14, at 46 (stating that "the Court was unclear as to the exact nature of competitive injury").

54. *Utah Pie*, 386 U.S. at 698, 701; see AREEDA & TURNER, *supra* note 15, ¶ 720(c), at 189 n.6 ("The Court was unclear on which cost measurement it used to find 'below-cost' pricing.").

The Court discussed at length the actions of the three national competitors which could result in liability. In its discussion of Pet Milk's predatory intent, the Court established the "double inference" test. *Utah Pie*, 386 U.S. at 696 n.12 (stating that predatory or buccaneering pricing activity infers a reasonable probability of "willful misconduct [that] may substantially lessen, injure, destroy or prevent competition" (citation omitted)).

This footnote suggests subjective intent may have a place in the analysis but also stresses that one can find anticompetitive effect in predatory pricing and other similar objective measures of wrongdoing. Thus, it does not appear that the Supreme Court mandates use of subjective intent to find liability under the Robinson-Patman Act.

55. *Utah Pie*, 386 U.S. at 701.

56. *Id.* at 703. The *Utah Pie* Court's emphasis on the drastically declining price structure also appears in the Court's statements that the cases on which the defendants were relying lacked declining price structures. *Id.* at 703-04 n.15; see also *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317, 1322 (7th Cir. 1991) (finding no violation of the Robinson-Patman Act because the "evidence to which the Supreme Court attached great importance . . . a drastically declining price structure . . . is missing from this case").

In *Utah Pie*, all parties were cutting prices. *Utah Pie*'s price dropped 34%, from \$7.75 to \$4.15. The defendants' prices dropped 30% (Pet Milk), 32% (Carnation), and 75% (Continental Baking). See *Utah Pie*, 386 U.S. at 690-91.

In discussing how a rapidly declining price structure could harm competition, the Court noted that "a competitor who is forced to reduce his price to a new all-time low in a market of declining prices will in time feel the financial pinch and will be a less effective competitive force." *Id.* at 699-700. Although this language refers to the impact on a competitor, the Court evidences its concern about the rapidly declining price structure's impact on competition in its use of the phrase "less effective competitive force." Further, the Court continued its analysis by noting that even if the impact on *Utah Pie* was negligible, "there remain the consequences to others in the market who had to compete not only with Continental's [low price] . . . but [also] with Utah's even lower price . . ." *Id.* Within a short space the Court pointed to injury to both a competitor and competition as the requisite competitive injury for a Robinson-Patman Act violation. *Id.* Possibly at this relatively early juncture, the Court did not realize the significance of the difference between the two. The dissent, however, realized that the majority's interpretation focused on harm to a spe-

ously suggested that market concentration had increased.⁵⁷ Based on this evidence, the Court stated that a jury could infer that the national pie companies' behavior inflicted competitive injury.⁵⁸

2. Response to *Utah Pie*

Utah Pie became the focus of intense academic criticism.⁵⁹ Critics predicted that the *Utah Pie* decision would chill vigorous price competition, an important ingredient in a healthy, competitive economy.⁶⁰ Commentators believed that suppressing competition with an overly strict standard would pit *Utah Pie* against recognized antitrust goals of protection and promotion of competition.⁶¹

In 1975, two critics of *Utah Pie*, Harvard law professors Phillip Areeda and Donald Turner, wrote a seminal article on

cific competitor rather than on harm to competition in general. See *id.* at 705 (Stewart, J., dissenting).

57. See *Utah Pie*, 386 U.S. at 691-92 n.7, 700. The Court cited evidence that Utah Pie's and the defendants' control of the market increased from 81% (1959) to 87% (1960) to 92% (1961). *Id.* at 691-92 n.7. The Court also considered that the number of other competitors dropped from nine to eight between 1960 and 1961. *Id.* at 700. Although increasing concentration and fewer sellers are indicative of a less competitive market, the Court's interpretation and subsequent use of this "evidence" is misleading. The combined concentration of the parties' market share did increase between 1960 and 1961, but the single figure obscures the fact that the price competition broke Utah Pie's stranglehold on the market; Utah Pie's share dropped from a monopolistic 66% to 45%. *Id.* Even the dissent in *Utah Pie* recognized that Salt Lake City's frozen pie market had become more competitive. *Id.* at 705 (Stewart, J., dissenting). Commentators support Justice Stewart's view. See, e.g., Gifford, *supra* note 14, at 46 ("An examination of the effects of the price rivalry upon market structure alone would lead to the superficial conclusion that the market had become more, rather than less, competitive.").

58. *Utah Pie*, 386 U.S. at 702-03.

59. LaRue, *supra* note 34, at 144; see Ward S. Bowman, *Restraint of Trade by the Supreme Court: The Utah Pie Case*, 77 YALE L.J. 70, 84 (1967) (stating that *Utah Pie* prohibits innocent competitive behavior).

60. Bowman, *supra* note 59, at 70. Courts also recognize that price plays an important role in the competitive process. See *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 475 U.S. 574, 594 (1986) (stating that "cutting prices in order to increase business often is the very essence of competition"); *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 721 (5th Cir. 1975) (stating that the court's "goal in applying the Robinson-Patman Act is to maintain active competition—including price rivalry—among members of the business community"), *cert. denied*, 424 U.S. 943 (1976).

61. *Atlas Building Prods. Co. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 954 (10th Cir. 1959) ("Antitrust legislation is concerned primarily with the health of the competitive process, not with the individual competitor who must sink or swim in competitive enterprise."), *cert. denied*, 363 U.S. 843 (1960).

predatory pricing claims.⁶² Although Areeda and Turner focused on predatory pricing as antitrust injury under the Sherman Act, they also addressed the relevance of predatory pricing under the Robinson-Patman Act.⁶³ According to Areeda and Turner:

The basic substantive issues raised by the Robinson-Patman Act's concern with primary-line injury to competition and by the Sherman Act's concern with predatory pricing are identical. If the Sherman Act is properly interpreted to permit a monopolist to discriminate in price so long as his lower price equals or exceeds marginal cost, such discrimination is *a fortiori* permissible for firms with lesser degrees of market power, and the Robinson-Patman Act should be interpreted no differently in primary-line cases unless the statutory language or compelling legislative history dictates otherwise.⁶⁴

Although neither the courts nor academic critics have universally embraced the Areeda-Turner test,⁶⁵ post-1975 analyses of predatory pricing under both the Sherman and Robinson-Patman Acts have reacted to this hypothesis.⁶⁶ Until the *Rose Acre* decision in 1989, courts analyzing concurrent predatory

62. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). In this article, Areeda and Turner offered a cost-based test to determine whether a firm's pricing behavior is predatory. See also AREEDA & TURNER, *supra* note 15, §§ 711-722.

[Applying standard economic theory] that marginal cost pricing leads to a proper allocation of resources in the short run and claiming that the only explanation for below-marginal cost pricing is exclusionary behavior, Areeda and Turner hold that:

- a. Any price at or above 'reasonably anticipated' short-run marginal cost is nonpredatory.
- b. A price below 'reasonably anticipated' short-run marginal cost is predatory, unless at or above average total cost. But a presumptively valid price at or above average total cost is subject to rebuttal proof that the price was substantially below marginal cost, and hence predatory.
- c. Since data on marginal costs are difficult to obtain, average variable costs, which are much easier to ascertain, should be used by the courts as a surrogate for marginal costs in the above formulation, unless average variable costs fall significantly below marginal cost in the relevant range of output.

Calvani & Lynch, *supra* note 36, at 380-81 (citing AREEDA & TURNER, *supra* note 15, §§ 711(d), 715(a), (b) & (d)).

63. See AREEDA & TURNER, *supra* note 15, ¶ 720(c).

64. *Id.* ¶ 720(c), at 190.

65. See Calvani & Lynch, *supra* note 36, at 381 & n.45, for a bibliography of the literature as of 1982 discussing Areeda and Turner's analysis.

66. Hurwitz & Kovacic, *supra* note 34, at 111-12 n.83 (summarizing the approaches courts have taken toward predatory pricing). "[T]he Areeda-Turner rule 'has provided either the analytical foundation or the point of departure for most' post-1975 predatory pricing decisions." Calvani & Lynch, *supra* note 36, at 395 n.169 (quoting Hurwitz & Kovacic, *supra* note 34, at 78).

pricing claims under the Robinson-Patman and Sherman Acts advocated using a unified approach under both Acts.⁶⁷

3. Courts Applying a Unified Approach

Since Areeda and Turner published their seminal article, most courts have utilized a uniform approach when analyzing alleged predatory pricing violations, regardless of whether the plaintiff bases her complaint on the Sherman or Robinson-Patman Act. Under "uniform approach" jurisprudence, if the court finds that a defendant violated the Sherman Act, the court will also find the defendant liable under a properly claimed violation of the Robinson-Patman Act.

Although the courts have utilized a uniform approach, they have not utilized the *same* uniform approach; courts instead choose from three distinct tests for predatory pricing. Several circuits have adopted some variation of the Areeda-Turner cost-price test for categorizing pricing behavior.⁶⁸ One circuit, however, put a gloss on the test for predatory pricing by adopting a "rule of impossibility" or recoupment theory.⁶⁹ A final circuit interpreted the Acts' legislative histories to allow the use of direct, subjective evidence of predatory intent to analyze predatory pricing violations.⁷⁰

The first support for a unified approach under both statutes came from the Fifth Circuit's 1975 decision in *International Air Industries v. American Excelsior Co.*⁷¹ This court analyzed both claims with a cost-price test patterned after Areeda and Turner's recommendation.⁷² Other appellate

67. Although most courts advocate use of a unified approach to the analysis, they disagree on the best test to use to discern predatory pricing. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1400 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). The American Bar Association's Antitrust Section recognized in 1980 that:

Although some of the court decisions [discussing Areeda-Turner] involved only Sherman Act Section 2 claims, these decisions are instructive on the question of primary line injury under the Robinson-Patman Act, since the courts have agreed with Areeda and Turner that the basic substantive issues raised by Sherman Act predatory pricing cases and Robinson-Patman Act primary line cases are identical.

The Robinson-Patman Act: Policy and Law, 1 A.B.A. ANTITRUST SECTION, MONOGRAPH NO. 4, at 1, 81 (1980).

68. See *infra* notes 71-74 and accompanying text.

69. See *infra* notes 75-78 and accompanying text.

70. See *infra* notes 79-81 and accompanying text.

71. 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

72. *Id.* at 720-25. Originally, the plaintiff had filed predatory pricing claims under both Acts. After the jury found for the defendant on both

courts adopting a uniform approach, and utilizing a variant of the Areeda-Turner test, followed in rapid succession.⁷³ Most of these courts saw no conflict in analyzing Sherman Act and Robinson-Patman Act claims with a uniform approach despite the existence of *Utah Pie*.⁷⁴

claims, the plaintiff appealed, arguing that the trial court should have directed a verdict only on the Robinson-Patman Act claim. *Id.* at 720 n.10. The court, expressing its surprise at the plaintiff's decision not to appeal the Sherman Act claim, stated that it "believe[d] that the basic substantive issues raised by the two statutes . . . are identical." *Id.* The court went on to say that the plaintiff's counsel might believe that the Robinson-Patman Act's language required a lesser evidentiary burden than did the Sherman Act. *Id.* The specific language referred to in the Robinson-Patman Act states "where the effect of such discrimination *may* be substantially to lessen competition." 15 U.S.C. § 13(a) (1988) (emphasis added). The court concurred with Areeda and Turner's analysis that if pricing is not predatory, as determined by whatever test, then it becomes unnecessary to construe the "may be" language. *International Air*, 517 F.2d at 720 n.10. Without evidence of predatory pricing behavior that reduces competition in general, a defendant is not liable under either Act. *Id.*

The Fifth Circuit affirmed the use of a unified analysis in *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). In *Malcolm Oil*, the court stated that "[p]redatory pricing violates . . . the Sherman Act . . . when there is an attempt to monopolize, . . . the Clayton Act . . . when the predation includes price discrimination, . . . and . . . the Robinson-Patman Act . . . under any circumstances. The issues, with regard to predation are the same under all those provisions." *Id.* at 853 n.16.

73. See *D.E. Rogers Assocs. v. Gardner-Denver Co.*, 718 F.2d 1431, 1436-38 (6th Cir. 1983), *cert. denied*, 467 U.S. 1242 (1984); *O. Hommel Co. v. Ferro Corp.*, 659 F.2d 340, 346-50 (3rd Cir. 1981), *cert. denied*, 455 U.S. 1017 (1982); *Janich Bros. v. American Distilling Co.*, 570 F.2d 848, 855-56 (9th Cir. 1977), *cert. denied*, 439 U.S. 829 (1978); *Pacific Eng'g. & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790, 797 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

74. In its discussion of a unified approach, the court in *Pacific Engineering* first noted that some cases suggest that discriminatorily low prices, short of qualifying as predatory and a violation of the Sherman Act, might violate the Robinson-Patman Act. *Pacific Eng'g.*, 551 F.2d at 798 (citing *Areeda & Turner*, *supra* note 62, at 726). *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), was one of the cases cited in *Pacific Engineering*. See *Pacific Eng'g.*, 551 F.2d at 798. The reference to *Utah Pie* did not stop the *Pacific Engineering* court from applying a uniform approach in its analysis primarily for two reasons. First, the court felt bound to follow the Supreme Court's admonition to reconcile the antitrust laws. *Id.*; see *supra* notes 28-33 and accompanying text. Second, the court perceived no conflict between the laws because "primary-line decisions have consistently emphasized the element of predation." *Pacific Eng'g.*, 551 F.2d at 798. The *Pacific Engineering* court did not read *Utah Pie* as calling for anything other than a finding of predation, an element in both a Robinson-Patman and Sherman Act claim. See *id.*

The court in *Janich Brothers* used a uniform approach because both Acts "are directed at the same economic evil and have the same substantive content." 570 F.2d at 855 (citing *Areeda & Turner*, *supra* note 62, at 727). This case is also interesting in that the court used the Robinson-Patman Act's standard of injury to interpret an alleged monopolization attempt under the Sher-

man Act. *Id.* At the start of its analysis of the Sherman Act claim, the court noted that in analyzing the Robinson-Patman Act claim the jury had not found a substantial effect on competition. The court went on to conclude that "[b]ecause of the jury's decision, the section 2 [Sherman Act] claim would necessarily have been decided against Janich." *Id.*

The Ninth Circuit later affirmed the use of a uniform approach in *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1041 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982). The Ninth Circuit compared the *Inglis* facts with those in *Utah Pie*. The plaintiff in *Inglis* had relied on *Utah Pie* for the proposition that pricing below average total cost is enough to uphold a jury's verdict of injury under the Robinson-Patman Act. *Id.* at 1041 n.48. The court disagreed because it did not read *Utah Pie* to establish a per se violation of the Robinson-Patman Act if prices are found below total cost. *Id.* In support of this contention, the court cited a case addressing another section of the Robinson-Patman Act in which the Supreme Court refused to hold sales below cost to be per se illegal. *Id.* (citing *United States v. National Dairy Prods. Corp.*, 372 U.S. 29, 36-37 (1963) (stating that sales priced below cost may further legitimate commercial objectives such as liquidation of excess, obsolete, or perishable merchandise or the need to meet competition)).

The court in *Hommel* echoed the idea that the Supreme Court did not establish a per se rule of illegality for prices below cost. *Hommel*, 659 F.2d at 351 (stating that "the Supreme Court did not indicate that the competitive harm requirement could be satisfied merely by a showing of below-average cost pricing"). The court in *Hommel* based its interpretation on simple economics:

[A]n additional sale at above marginal cost will increase short run net returns. A seller faced with a choice of making a sale at above marginal cost but below total cost, or foregoing the sale, will choose to make the sale. Such a profit maximizing sale cannot be indicative of predatory intent.

Id. The *Hommel* court, however, went on to concede grudgingly that "even if *Utah Pie* would support the theory that predatory intent, and hence competitive harm, could be shown merely by below-average cost pricing, such a theory would only apply in a geographic price discrimination case." *Id.* at 352.

The *Hommel* case reached the appellate court after a jury found no violation under the Sherman Act claim but found a violation on a Robinson-Patman Act primary line injury claim. *Id.* at 342. Because the alleged Sherman Act violation was not before the court, it did not directly reach the issue of whether Sherman Act liability is identical to Robinson-Patman Act liability for price differentials threatening primary line competition. *Id.* at 348 n.9. Nonetheless, the Third Circuit reversed the lower court decision on the Robinson-Patman Act claim because it found no predatory intent, even though the plaintiff had sold its product to selected customers in one geographic market at prices below its average cost. *Id.* at 349-50. In reaching this conclusion, the court cited, with agreement, Areeda and Turner's discussion about price discrimination in the same geographic market. *Id.* at 349-50 n.12. Areeda and Turner would not classify such pricing behavior as predatory under either antitrust law. See Areeda & Turner, *supra* note 62, at 725-27. Nor would Areeda and Turner classify such pricing behavior as predatory under either law if employed in different geographic markets. *Id.* at 726. Unless below marginal cost, neither pricing behavior is predatory. It is therefore probable that the *Hommel* court would accept both Areeda-Turner hypotheses and look for objective predatory conduct even in a case with parties in different geographic areas, such as was the case in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990). In other

In *Henry v. Chloride, Inc.*,⁷⁵ the Eighth Circuit used a second test for predatory pricing, although the court also used a unified approach to the Sherman Act and Robinson-Patman Act claims.⁷⁶ Defining its test, the Eighth Circuit stated that the Supreme Court had “import[ed] a rule of impossibility into predatory pricing cases: If the defendant could not have captured the market [in order to recoup its losses], its conduct cannot be predatory, no matter what its ‘intent.’”⁷⁷ Courts applying this recoupment test for predatory intent review not only price factors, but also other circumstantial factors—such as the defendant’s relative size or entry barriers—which are used to assess the economic plausibility of recouping losses after competition is eliminated.⁷⁸

Contrary to these two tests which use objective evidence to discern predatory intent, the Eleventh Circuit in *McGahee v. Northern Propane Gas Co.*⁷⁹ chose a third test and elevated the importance of direct, subjective evidence to establish competitive injury.⁸⁰ The court also employed a unified approach to analyze alleged Sherman Act and Robinson-Patman Act

words, the *Hommel* court would probably use a unified approach to the analysis of predatory pricing under either statute.

75. 809 F.2d 1334 (8th Cir. 1987).

76. *Id.* at 1345.

77. *Id.* (citing *Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). This rule presumes that firms act rationally and would not engage in predation if they could not successfully recoup their losses. *Id.* “The [*Matsushita*] opinion repeatedly discusses a defendant’s plausible or rational motives in acting . . .” *Id.* (citing *Matsushita*, 475 U.S. at 595-98). To assess its chances of reducing competition, a firm would need to gauge the economic plausibility of recovering the losses it sustains during the “low” stage of pricing. *Id.* at 1344-45. In other words, the price-cutter must be able at least to threaten domination of the market. *Id.* at 1345.

Although the Supreme Court decided *Matsushita* under the Sherman Act, see *Matsushita*, 475 U.S. at 584-85, the *Henry* court advocated using a uniform approach and interpreted *Matsushita* to put a gloss on the proper test for predatory conduct under the Robinson-Patman Act as well. *Henry*, 809 F.2d at 1345. The Eighth Circuit affirmed the *Henry* court’s approach in *Lomar Wholesale Grocery, Inc. v. Dieter’s Gourmet Foods, Inc.*, 824 F.2d 582, 599 (8th Cir. 1987), *cert. denied*, 484 U.S. 1010 (1988).

78. *Henry*, 809 F.2d at 1344.

79. 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

80. *Id.* at 1496-1502. The court interpreted the Acts’ legislative histories and Supreme Court precedents to allow the use of subjective evidence. *Id.* at 1500-02 (summarizing its review of the legislative history to show that “Congress intended for subjective evidence of a defendant’s intent to be relevant” and citing several Supreme Court decisions for the proposition that “subjective evidence is to be used” to determine whether a defendant has violated § 2 of the Sherman Act or § 2(a) of the Robinson-Patman Act).

violations.⁸¹

Thus, prior to *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, the circuits agreed that they should treat predatory pricing claims under the Sherman Act and Robinson-Patman Act uniformly. The courts did not agree, however, on what that treatment should be.⁸²

II. THE DECISION IN *ROSE ACRE*

Against this background, the Seventh Circuit took a dual approach to its analysis of the Sherman Act and Robinson-Patman Act claims in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*⁸³ The court recognized that a primary-line predatory pricing

81. *Id.* at 1493 n.9 ("The predatory pricing issues are the same for Sherman Act Claims as for Robinson-Patman Act claims.").

82. The following hypothetical scenario illustrates how three jurisdictions, each applying their version of the predation test, would analyze predatory pricing claims with a unified approach under the Sherman and Robinson-Patman Acts. Under the hypothetical scenario, the court is evaluating the following evidence:

1. Defendant entered a new geographic market and set its sales price at a level which undercut its competitors but exceeded its average variable costs.
2. Defendant charged different prices in its different geographic markets during the period in question.
3. Numerous competitors comprise the market at issue and few barriers to entry exist.
4. Plaintiff(s)' witnesses will testify that defendant's president, on more than one occasion, declared her intent to "drive every competitor out of business" regardless of current sacrifices her company had to endure.

Plaintiff has sued defendant under both § 2 of the Sherman Act for attempted monopolization and § 2(a) of the Robinson-Patman Act for price discrimination.

Based on these facts, courts from the three jurisdictions would apply their predation test in the following manner. A court sitting in a jurisdiction employing a cost-price test would find the defendant not liable because its price exceeds average variable cost. (This simplified illustration ignores the struggle courts have faced when determining the proper price-cost relationship. *See, e.g., Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345-46 (8th Cir. 1977) (listing various cost-price relations courts use)). A court using the second test, the "recoupment theory," would also find the defendant not liable because the market structure prevents it from deterring entry when it later charges monopoly prices to recoup current sacrifices. A court using the third test which emphasizes subjective intent, however, may well find the defendant liable because she exhibited subjective intent to monopolize. All three courts would use a unified approach, employing the predatory pricing test of choice, to analyze both the Sherman and Robinson-Patman Act claims. In comparison, the *Rose Acre* court would dismiss the Sherman Act claim but could find liability under the Robinson-Patman Act.

83. 881 F.2d 1396, 1404 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

ing violation under the Robinson-Patman Act has much in common with a predatory pricing violation under the Sherman Act because in both "the aggressor sold goods for too little money, hoping to cripple or discipline rivals."⁸⁴ Although the Seventh Circuit found no liability under either law in *Rose Acre*, it emphasized that the tests are not identical.⁸⁵

The *Rose Acre* court first analyzed the plaintiffs' claim of injury under the Sherman Act.⁸⁶ The court held that subjective intent will not form "a basis of liability . . . in a predatory pricing case under the Sherman Act."⁸⁷ Rather, the court chose to follow a recoupment approach outlined in two recent Supreme Court cases to discern injury to competition.⁸⁸ The Seventh Circuit found this approach superior to both the cost/price relationship and subjective intent tests.⁸⁹ Using its

84. *Id.* at 1399.

85. *Id.* at 1404, 1408.

86. *Id.* at 1400.

87. *Id.* at 1402. The court began its analysis by recognizing that a "plaintiff's observation that it is losing business to a rival that has slashed prices is consistent with both aggressive competition and predatory pricing." *Id.* at 1400. The court then reviewed the various methods which courts have followed to separate predatory from competitive pricing, including pricing below an appropriate measure of cost, subjective intent, and its own choice—the possibility of recoupment. *Id.* at 1400-01. (The Seventh Circuit had previously adopted the recoupment approach in *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*, 864 F.2d 1409 (7th Cir. 1989)).

88. *Rose Acre*, 881 F.2d at 1401 (citing *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) and *Matsushita Electric Indus. v. Zenith Radio Corp.*, 475 U.S. 574 (1986)). The Seventh Circuit in *Rose Acre* used the recoupment theory in a manner somewhat different than did the Eighth Circuit in *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1344-45 (8th Cir. 1987). See *supra* notes 75-78 and accompanying text (discussing the *Henry* case). The Eighth Circuit in *Henry* recognized that circumstantial evidence in addition to pricing could be used to infer predatory intent. 809 F.2d at 1344-45. The Seventh Circuit in *Rose Acre*, however, used recoupment as a direct test for predation. 881 F.2d at 1401-03. The *Rose Acre* court read *Cargill* and *Matsushita* to employ such a test. *Id.* at 1401. The court went on to say that "making likelihood of recoupment the initial hurdle avoids not only questions of cost but also questions of intent." *Id.*

89. *Rose Acre*, 881 F.2d at 1401-02. The court recognized that if price is less than cost, this fact "may reflect a sacrifice in the hope of suppressing competition and collecting a monopoly profit later." *Id.* at 1400. The court went on to recognize, however, that circuits throughout the country are grappling with exactly what the appropriate cost/price relationship is for the test. *Id.* The existence of this struggle, indicating how difficult it is to determine the existence of predatory pricing, supports the possibility of the recoupment test's superiority. *Id.* at 1401.

The Seventh Circuit also found the possibility of recoupment test superior to the subjective intent test for a number of reasons. *Id.* at 1401-02. The court determined that subjective intent fails to distinguish competitive statements

recoupment test, the court found no predatory pricing and therefore no Sherman Act violation.⁹⁰

The Seventh Circuit applied a different approach, however, to decide the Robinson-Patman Act claim. The court stated that “[t]o conclude that Rose Acre did not engage in predatory pricing is not necessarily to absolve it under the Robinson-Patman Act.”⁹¹ Although the Seventh Circuit acknowledged the dissension caused by the *Utah Pie* decision,⁹² it interpreted that case to suggest “that the Robinson-Patman Act condemns at least some primary-line price discrimination that the Sherman Act permits.”⁹³ The court reached this conclusion by reasoning that under *Utah Pie*, subjective predatory intent,⁹⁴ coupled with unreasonably low prices, can form the basis of liability.⁹⁵ Based

readily from those that are predatory. *Id.* at 1402. The court also said that the use of subjective intent complicates litigation by causing parties to “[t]raips[e] through the warehouses of business in search of misleading evidence [which] both increas[es] the costs of litigation and reduc[es] the accuracy of decisions.” *Id.* Finally, and foremost, the court observed that “[i]f courts use the vigorous, nasty pursuit of sales as evidence of a forbidden ‘intent,’ they run the risk of penalizing the motive forces of competition.” *Id.* The court based this observation on the simple fact that companies “intend” to do all the business they can and will inevitably make statements to that effect. *Id.* at 1401.

90. *Id.* at 1404.

91. *Id.*

92. *Id.*; see *supra* note 41 and accompanying text.

93. *Rose Acre*, 881 F.2d at 1405. The court acknowledged that many other appellate courts had reached the conclusion that “the standard of primary-line liability under the Robinson-Patman Act should be the same as that under § 2 of the Sherman Act.” *Id.* at 1404.

94. *Id.* at 1406. In its discussion of subjective intent, the Seventh Circuit addressed the double inference test. *Id.* at 1400 (stating that “[i]f a seller plans to drive out competition by fowl [sic] means, then the court infers that its price is unlawfully low now and will be too high later”). See *supra* note 37 (explaining the double inference test). The *Rose Acre* court criticized the double inference test for clouding the importance of predatory pricing. It stated: “Some courts almost seem to overlook the fact that predatory pricing is the evil, and write sometimes as if the conduct is important only because it is evidence of the firm’s evil intent.” *Rose Acre*, 881 F.2d at 1400 (quoting PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 714.2b n.5 (Supp. 1988)).

To the Seventh Circuit, therefore, predatory pricing is a separate concept from predatory intent. The court’s extreme care to distinguish the concepts may be a matter of semantics. The Seventh Circuit recently revisited analysis of predatory pricing under the Robinson-Patman Act in *American Academic Suppliers, Inc. v. Beckley-Cardy, Inc.*, 922 F.2d 1317 (7th Cir. 1991). There, the court acknowledged that the Supreme Court seemed to equate these terms in *Utah Pie*. *Id.* at 1322. Areeda and Turner also acknowledge that using objective tests to prove predatory intent, a subjective concept, tends to erode the objective/subjective distinction. AREEDA & HOVENKAMP, *supra*, ¶¶ 701-02.

95. *Rose Acre*, 881 F.2d at 1406. In reaching this conclusion, the *Rose Acre* court stated that *Utah Pie* found the Robinson-Patman Act to protect competi-

upon this reasoning, the Seventh Circuit concluded that a company may violate the Robinson-Patman Act without violating section 2 of the Sherman Act. The court found, however, that the plaintiff did not violate the Robinson-Patman Act because it had not practiced price discrimination.⁹⁶ Consequently, the circuits have split over whether a unified approach is appropriate for analyzing violations under the Sherman and Robinson-Patman Acts.

III. PREDATORY PRICING UNDER THE ANTITRUST LAWS: USE OF A UNIFIED APPROACH IS APPROPRIATE

Lacking direction from the Supreme Court, lower courts have developed three distinct tests to analyze alleged predatory pricing violations. Two methods rely on objective evidence

tors, rather than competition in general. *Id.* at 1404. The First Circuit independently followed this approach in *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 529 (1st Cir. 1989). Without discussing the use of objective or subjective evidence of intent or whether a cost-price or recoupment test is superior to discern predation, the *Monahan* court simply stated that the Robinson-Patman Act protects competitors. *Id.* at 528. It reached this conclusion by focusing on language Congress added to the 1936 amendments, see *supra* note 27, rather than the original language of the Clayton Act, see *supra* note 25, which addresses competitive injury in the primary line context.

96. *Rose Acre*, 581 F.2d at 1406. This legal, as opposed to economic, price discrimination means that "under the Robinson-Patman Act, a firm is entitled to charge the same price to everyone even though its costs differ." *Id.* Economic price discrimination occurs when a firm sells its product at different price-cost ratios. *Id.* This can occur when a seller charges customers in different geographic locations the same price regardless of differences in costs such as for transportation. *Id.* If a firm charges different prices due to differing costs, the firm must justify the cost differences under the Robinson-Patman Act. 15 U.S.C. § 13(a) (1988); see 3 KINTNER, *supra* note 19, § 19.7 (discussing the cost justification defense). In *Rose Acre*, the defendant sold eggs at the same price to customers in different cities. *Rose Acre*, 881 F.2d at 1406. This is not illegal price discrimination. *Id.*

Plaintiffs also alleged price discrimination in defendants' practice of charging different prices to different customers, and giving different numbers of "specials" to different customers. *Id.* When the court analyzed these allegations, it found no basis for a violation for the first charge because the price difference resulted from a difference in the timing of the contracts. *Id.* at 1407. The court stated that "[n]o case of which we are aware holds, however, that fluctuations over time to the same customer are 'price discrimination' within the meaning of the Robinson-Patman Act." *Id.* Similarly, the plaintiffs failed to prove the second allegation because they failed to calculate the mean price paid by customers for regular and "special" eggs. *Id.* Additionally, the "specials" were not necessarily the same grade and quality as regularly priced eggs, another justification for price differences. *Id.* at 1407-08.

either of a firm's cost-price relation⁹⁷ or an industry's market structure to determine violations.⁹⁸ The third method allows direct proof of a defendant's subjective intent to harm the competitive process by driving out competition.⁹⁹ When developing these tests, courts were often called upon to assess Robinson-Patman and Sherman Act claims concurrently. In so doing, courts recognized that predatory pricing claims under the two Acts are substantively similar; they employed the same approach using the test of their choice to analyze charges under either law.¹⁰⁰

In 1989, however, the Seventh Circuit's decision in *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* concluded that the Sherman and Robinson-Patman Acts called for different approaches to predatory pricing claims.¹⁰¹ A thorough analysis of

97. See *supra* notes 72-73 and accompanying text. Although the courts use some form of cost-price test, it is probable that no two tests are exactly the same. See *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345-46 (8th Cir. 1987) (listing various cost-price relations used by courts).

98. See *supra* notes 77-78 and accompanying text. *Rose Acre* indicated that, but for the Supreme Court's decision in *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), the Seventh Circuit would apply a market structure theory to alleged predatory pricing violations under the Robinson-Patman Act. *Rose Acre*, 881 F.2d at 1404-06.

99. See *supra* notes 79-81 and accompanying text. Although the First Circuit in *Monahan's Marine, Inc. v. Boston Whaler, Inc.* held that "evidence of a violation of the Robinson-Patman Act, showing injury only to competitors, does not automatically show a violation of the Sherman Act as well," it did not outline means by which such injury to competitors could be shown. 866 F.2d 525, 529 (1st Cir. 1989). Thus, it is possible that a fourth test exists to determine a violation of the Robinson-Patman Act.

It is more likely, however, that the *Monahan* court was pointing to one or more of the tests already presented. In its discussion of the Robinson-Patman Act, the court alluded to Congress's concern over large chain stores driving smaller competitors out of business so they could charge monopoly prices. *Id.* The court merely stated, however, that "[t]he evidence in this case . . . would not permit a finding that any such result is at all likely. [The evidence] does not . . . show . . . the likely disappearance of smaller firms, to the point where the market would become significantly more concentrated." *Id.* One could interpret this language as allowing the use of subjective intent to harm competitors or objective evidence of the industry's market structure to assess the probability of recoupment by keeping competitors out once they have been ousted, as did the court in *Henry*, 809 F.2d at 1345; see *supra* notes 75-78 (discussing the test in *Henry*).

100. See *supra* notes 71-81 and accompanying text. Although this appears to lead to redundancy in the antitrust laws, one should note that firms can employ other means to monopolize. See *supra* note 36 (listing examples such as industrial espionage, false advertising, threats, and agreements with competitors to exclude rivals). Only when a firm chooses price as its weapon will the two laws appear redundant.

101. 881 F.2d 1396, 1406 (7th Cir. 1989), *cert. denied*, 110 U.S. 1326 (1990).

the antitrust laws, however, does not indicate that courts must employ different approaches. Both statutes require proof of anticompetitive effect, which one should properly view as harm to competition in general. Further, it appears that the Seventh Circuit could have factually distinguished the Supreme Court's decision in *Utah Pie Co. v. Continental Baking Co.* without violating *stare decisis*.

A. STATUTORY INTERPRETATION

1. The Statutes' Language

Courts analyzing claims brought under either the Sherman or Robinson-Patman Act must interpret the statute's language to discern what behavior is prohibited. Courts and commentators agree that Congress passed the Sherman Act to protect competition. The Act's formal title, "an Act to protect trade and commerce against unlawful restraints and monopolies," renders this goal explicit.¹⁰² Section 2 of the Sherman Act, which courts have construed to include predatory pricing claims, expressly refers to the illegality of monopolization or attempted monopolization of trade or commerce.¹⁰³ Through Congress's declaration of these acts as unlawful, courts analyzing claims under section 2 of the Sherman Act have found congressional intent to protect competition.¹⁰⁴

Dissatisfied with judicial interpretation and enforcement of the Sherman Act, Congress later passed the original portion of section 2(a) of the Robinson-Patman Act,¹⁰⁵ which prohibits price discrimination that reduces *competition* or tends to create a monopoly.¹⁰⁶ To deal with secondary level antitrust injuries, Congress added the Robinson-Patman Act amendments in 1936, addressing price discrimination that affects a *competitor*.¹⁰⁷ Predatory pricing claims arise, however, at the primary level,

102. See *supra* note 20 and accompanying text.

103. 15 U.S.C. § 2 (1988); see *supra* note 35 (quoting the statutory language).

104. "The Sherman Act was . . . aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958).

105. Clayton Act, ch. 323, § 2, 38 Stat. 730 (1914). The Robinson-Patman Act amended § 2 of the Clayton Act. It is therefore the Clayton Act's original language and legislative history that is pertinent to a discussion of price discrimination and predatory pricing. See *supra* notes 25-27.

106. See *supra* note 25 (quoting the statutory language).

107. See *supra* note 27 (noting that secondary line discrimination refers to price discrimination at the buyer level).

which the statute addressed before amendment.¹⁰⁸ Therefore, when searching the statute's language for guidance on prohibited behavior in a primary line context, courts should strive to define injury to *competition*.¹⁰⁹

2. Legislative History

Not only does the original statutory language support the idea of prohibiting behavior that injures competition in general, but the legislative history does as well. The House Judiciary Committee echoed the words of the statute, stressing that the Clayton Act was aimed at those business concerns seeking to secure a monopoly or to destroy competition by using price discrimination.¹¹⁰ By specifying the particular unfair trade practice, price discrimination, Congress supplemented the Sherman Act's general language.

3. General Policy

A consideration of general policy reasons also supports the use of a unified approach to predatory pricing. Congress designed the antitrust laws to protect competition. To this end, the Supreme Court mandated reconciliation of the laws on several occasions.¹¹¹ Courts should therefore interpret and apply the Robinson-Patman Act to protect competition in a primary line context. If a firm's pricing behavior does not harm competition by enabling that firm to monopolize, its low prices constitute legitimate price competition.

The antitrust statutes' language and legislative history, as well as general policy, support the contention that Congress intended to protect competition in general from the ill effects of discriminatory pricing at the primary level. The Sherman and Robinson-Patman Acts overlap to prohibit a firm from discriminating on price in a predatory manner in an attempt to monopolize. Thus, if courts employ a unified approach to claims

108. See *supra* notes 25-26.

109. See *supra* note 37 (distinguishing injury to competition and injury to a competitor). *Contra* *Monahan's Marine, Inc. v. Boston Whaler, Inc.*, 866 F.2d 525, 528 (1st Cir. 1989) (noting that the statute's language calls for a finding of harm to a competitor); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.* 881 F.2d 1396, 1404 (7th Cir. 1989) (interpreting *Utah Pie* as reading the statutory language to call for use of an "injury to competitor" standard), *cert. denied*, 110 U.S. 1326 (1990).

110. See *supra* note 26.

111. See *supra* notes 28-33 and accompanying text.

involving this overlap, they should reap the benefits of more accurate and consistent decisions, as well as judicial efficiency.

The *Rose Acre* court agreed that policy considerations support the use of a unified approach to analyze the same injury—predatory pricing—under either statute, but it stated that Supreme Court precedent precludes adopting a policy-based analysis. To use a unified approach requires interpreting the Robinson-Patman Act to protect competition in general, rather than specific competitors. This interpretation, according to the *Rose Acre* court, is precluded by *Utah Pie*. *Rose Acre* interpreted *Utah Pie* to stand for protection of competitors from price discrimination. Use of a unified approach would therefore violate *stare decisis*.¹¹²

B. *UTAH PIE* REVISITED: DOES IT MANDATE DIFFERENT APPROACHES?

1. *Rose Acre*'s Interpretation of the *Utah Pie* Holding

The *Rose Acre* court stated that *Utah Pie* stands for the proposition that subjective intent to harm a competitor, combined with injury to that competitor, constitutes a violation of the Robinson-Patman Act.¹¹³ *Rose Acre*'s interpretation of *Utah Pie* therefore forecloses the use of tests for predatory pricing claims under the Robinson-Patman Act which employ only objective evidence to discern predatory intent. Thus, according to *Rose Acre*, if a plaintiff establishes injury to itself as a competitor and provides subjective evidence of intent, *Utah Pie* requires inferior courts to find liability.¹¹⁴

The *Utah Pie* court's analysis is unclear, however, about the standard of competitive injury the Robinson-Patman Act requires. The *Utah Pie* Court stressed "injury to competition," while speaking in terms of "injury to competitors."¹¹⁵ This reasoning is not illogical; competitors *are* hurt if competition is hurt. Yet the Court's interchangeable use of both terms, in light of today's more sophisticated analysis, muddied the waters.¹¹⁶ Contrary to the position the *Rose Acre* court seems to have taken, *Utah Pie*'s holding appears ambiguous. Courts

112. *Rose Acre*, 881 F.2d at 1404.

113. *Id.* at 1406.

114. *Id.*

115. See *supra* note 53 and accompanying text.

116. See *supra* note 37 (noting that the difference between injury to competition and to a competitor is key to the analysis of a Robinson-Patman Act claim).

should read *Utah Pie* informed by subsequent cases in which the Supreme Court has admonished lower courts to reconcile the antitrust laws. A survey of such cases indicates injury to competition is the appropriate standard for a Robinson-Patman Act violation.

2. Critique of *Rose Acre's* Methodology

A Robinson-Patman plaintiff must prove two elements to establish a prima facie case: price discrimination and anticompetitive effect.¹¹⁷ Accepting *arguendo*, that the Robinson-Patman Act requires proof of injury to competition in general, the *Rose Acre* court still faced a hurdle with regard to the use of subjective intent to prove competitive injury. Most other circuits acknowledged that *Utah Pie* looked for predatory intent to establish an anticompetitive effect, but these courts did not automatically leap to the conclusion that the Court's decision meant direct, subjective predatory intent only.¹¹⁸ Indeed, most circuits have steered clear of direct, subjective intent¹¹⁹ and have focused on a double inference test¹²⁰ to determine whether the defendant exhibited the requisite predatory intent. When employing the double inference test, courts look only for objective evidence of prices below an appropriate measure of cost or a market structure indicating that recoupment of losses is improbable.¹²¹ A court therefore need not consider a plaintiff's subjective intent to harm a competitor in its analysis.

The *Rose Acre* court, however, did not use the double inference test to discern predatory intent.¹²² Rather, the court in-

117. 15 U.S.C. § 13(a) (1988).

118. *Utah Pie* indicates a place for, but does not mandate, the use of direct, subjective intent. The *Utah Pie* court seemed to use the concepts of predatory pricing and predatory intent interchangeably, thereby allowing the development of the double inference test. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 696-97 (1967). Since *Utah Pie*, courts have based the double inference test on objective evidence of cost-price relations and market structure. See *supra* note 37 (citing cases which used the double inference test and explaining that courts rely on objective evidence of predatory intent when they look for the presence of predatory pricing).

119. One exception is the court in *MaGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

120. See *supra* note 37 (explaining the double inference test).

121. See *supra* note 37 (discussing objective versus subjective evidence of predatory intent).

122. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1406 (7th Cir. 1989), *cert. denied*, 494 U.S. 1019 (1990).

In its discussion of the double inference test, the *Rose Acre* court recognized the inherent difficulty in determining the appropriate nature of a firm's

terpreted *Utah Pie*'s search for predatory intent to mandate the finding of liability under the Robinson-Patman Act in the face of direct, subjective intent.¹²³ The court found subjective intent in statements such as: "We are going to run you out of the egg business. Your days are numbered."¹²⁴

Courts and commentators have discussed at length the proper role, if any, of subjective intent in antitrust litigation.¹²⁵ Although not unanimous, most argue against using subjective intent because "[i]ntent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition. It also complicates litigation."¹²⁶ *Rose Acre*'s interpretation of *Utah Pie* once again brings the issue of subjective intent in predatory pricing analysis to the forefront. Had *Rose Acre* chosen to do so, however, the court could have analyzed the Robinson-Patman Act claim without resorting to evidence of subjective intent.

3. Factual Distinctions that Affect Application of *Utah Pie* to *Rose Acre*

The *Rose Acre* court also failed to address important factual differences between its case and *Utah Pie*. The *Utah Pie* court stressed the presence of a "drastically declining price structure."¹²⁷ *Utah Pie* had entered the market pricing its frozen pies at \$4.15 per dozen and was selling at \$2.75 per dozen at the time it filed suit, a drop of thirty-four percent. Its competitors experienced similar, or much greater, price declines.¹²⁸ *Rose Acre*, by contrast, makes no mention of a "drastically falling price structure."¹²⁹ In *Utah Pie*, the pie market was highly

cost-price relations. *Id.* at 1401. That difficulty, coupled with recent Supreme Court decisions favoring the use of a recoupment theory to prove predation, prompted the Seventh Circuit to adopt a recoupment test for alleged Sherman Act violations. *Id.* Contrary to the Eighth Circuit's approach in *Henry v. Chloride, Inc.*, 809 F.2d 1334 (8th Cir. 1987), the Seventh Circuit believed that the recoupment theory could not be used to analyze Robinson-Patman Act claims because the theory did not allow for subjective predatory intent. *See Rose Acre*, 881 F.2d at 1406.

123. *Rose Acre*, 881 F.2d at 1404.

124. *Id.*

125. *See supra* notes 37, 89 (discussing dangers of using subjective intent in predatory pricing analysis).

126. *Rose Acre*, 881 F.2d at 1402.

127. *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685, 703 (1967); *see supra* notes 55-57 and accompanying text (discussing the rapidly declining price structure and its effect on competition).

128. *Utah Pie*, 386 U.S. at 690.

129. The plaintiffs' expert witness was the only one to mention anything

concentrated,¹³⁰ whereas the egg market in *Rose Acre* was unconcentrated.¹³¹ In *Utah Pie*, the aggregate market share of the four parties to the suit increased from eighty-seven percent to ninety-two percent while the number of sellers had decreased.¹³² The egg market, on the other hand, enjoyed new entrants during the relevant period.¹³³ In addition, the *Utah Pie* Court appeared unable to identify any legitimate reason for the rapidly declining price structure (although today many commentators would presume this situation resulted from vigorous, healthy price competition). The *Rose Acre* court, however, identified new technology and vertical integration along with plain, old-fashioned price competition as direct reasons for lower prices.¹³⁴

The Seventh Circuit in *Rose Acre* did not use *Utah Pie*'s factual differences to distinguish the cases.¹³⁵ Yet shortly after deciding *Rose Acre*, the Seventh Circuit distinguished another alleged violation of the Robinson-Patman Act from *Utah Pie* by noting the lack of evidence showing a "drastically declining price structure."¹³⁶ Thus the Seventh Circuit could—and should—have distinguished *Rose Acre* from *Utah Pie* because the distinctions are important.

4. Rationale for Using a Unified Approach

Unless the statutory language, legislative history, or general policy considerations demand different analyses, using different approaches to predatory pricing injuries under the Sherman and Robinson-Patman Acts appears to complicate an

about the egg market's price structure. *Rose Acre*, 881 F.2d at 1398, 1403. Although this expert stated that prices were declining, the opinion provides little data and does not mention a "drastically declining price structure." This lack of emphasis suggests that the egg market's price structure was not "drastically declining."

130. See *Utah Pie*, 386 U.S. at 700. The top four firms in the pie market controlled 92% of the market. *Id.*

131. *Rose Acre*, 881 F.2d at 1403. The plaintiffs did not compute concentration ratios, see *id.*, but the defendant controlled only nine percent of the market, *id.* at 1398, a far cry from the leader in the pie market which controlled 45% of the market. See *Utah Pie*, 386 U.S. at 691-92 n.7.

132. *Utah Pie*, 386 U.S. at 700; see *supra* note 57 (noting that the Court's use of this "evidence" is misleading).

133. *Rose Acre*, 881 F.2d at 1398, 1403 (stating that "Rose Acre did nothing to stem the inflow of productive capacity").

134. *Id.* at 1404.

135. See *id.* at 1405.

136. *American Academic Suppliers v. Beckley-Cardy*, 922 F.2d 1317, 1322 (7th Cir. 1991).

already complex area of the law needlessly. Because the Supreme Court has admonished courts to reconcile the anti-trust laws whenever possible, courts should search no further than to design the most appropriate test to handle the situation under either statute.

Use of a uniform approach to predatory pricing claims would also create judicial efficiencies. Concurrent claims under the Acts happen with some frequency,¹³⁷ and use of a unified approach would allow courts to consider only once whether a plaintiff had satisfied its burden of proof for competitive injury.¹³⁸ Other efficiencies arise as courts become more adept and precise with their analysis. An added benefit of this efficiency would accrue to attorneys as they advise clients. Counsel would be in a better position to assess the impact of their clients' actions with regard to these laws.

Finally, but most importantly, courts—including the Supreme Court—could concentrate on designing the best test to discern predatory pricing, after settling the issue of a unified approach. For example, courts and commentators have raised valid concerns about the propriety of subjective intent in predatory pricing.¹³⁹ Additionally, the cost-price tests for predation are quite varied.¹⁴⁰ As predatory pricing analysis focuses on the “best test,” a consensus could build supporting one method over another. To seek the “best test” is a most appropriate goal because “mistaken inferences in cases . . . [involving predatory

137. See *supra* note 73 (listing cases with concurrent Sherman and Robinson-Patman Act claims).

138. Some courts and commentators have noted that the Sherman and Robinson-Patman Acts may call for different degrees of injury or certainty of injury in predatory pricing claims, i.e., that Congress passed the Robinson-Patman Act to reach certain unfair trade restraints earlier than the Sherman Act might. See *supra* note 72 (addressing evidentiary burdens the Acts place on plaintiffs). Yet courts have also interpreted the Sherman Act to attack certain practices in their incipiency. See *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431 (2d Cir. 1945) (stressing that the Sherman Act “also covered preliminary steps [taken toward monopoly], which, if continued, would lead to it. . . . [These steps] are dangerous and the law will nip them in the bud”). Thus a unified approach would seem to allow courts to decide if a plaintiff has injured competition under both Acts. To analyze a given set of data once will result in time and cost savings. Currently, the “costs of litigating predation cases are staggering; no more complex cases could be imagined.” Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 336 (1981).

139. See *supra* notes 37, 89 (discussing the dangers of using subjective intent in predatory pricing analysis).

140. See *Henry v. Chloride, Inc.*, 809 F.2d 1334, 1345-46 (8th Cir. 1987) (discussing cases which use various cost-price tests).

pricing] are especially costly, because they chill the very conduct the antitrust laws are designed to protect."¹⁴¹

CONCLUSION

Courts were well on their way to settling on the use of a unified approach to predatory pricing claims brought under the Sherman and Robinson-Patman Acts when the Seventh Circuit complicated matters with its *Rose Acre* decision. Neither the relevant laws nor precedent, however, necessitate this dual approach. Unless and until the Supreme Court decides to the contrary, courts that are bound by *Rose Acre* should construe the opinion narrowly, and the rest should continue to reconcile the antitrust laws by using a unified approach.

141. *Matsushita Elec. Indus. v. Zenith Radio*, 475 U.S. 574, 594 (1986).