The End of the Robinson-Patman Act? Evidence from Legal Case Data

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The Robinson-Patman Act (RP), an antitrust statute aimed at protecting small businesses, limits price setting in distribution channels. To avoid costly penalties under RP, managers take a variety of precautions when pricing to retailers and wholesalers. But how likely is a court to find a defendant guilty of violating the RP? We find that this likelihood has dropped drastically as a result of recent Supreme Court rulings from more than 1 in 3 before 1993 to less than 1 in 20 for the period 2006–2010. The analysis also points to an increased success of the no harm to competition defense, which reflects the view that the courts have raised the hurdle for plaintiffs to establish competitive harm. Finally, our results indicate that smaller plaintiffs over time have fared worse than larger ones, a trend that challenges the notion that RP protects small businesses.

Key words: pricing; channels of distribution; Robinson-Patman Act; case history

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1. Introduction

The Robinson-Patman Act1 (hereafter, the Act or RP) was passed in 1936 in the growing age of the “chain store” retailer. At that time, legislators viewed the growth of the chain store as a threat to smaller retailers. The Act, which prohibits price discrimination to different purchasers of commodities of like grade and quality where injury to competition may result, was deemed necessary to protect smaller competitors from the buying leverage of larger retailers.

The Act stipulates that those found guilty of illegal price discrimination are subject to penalties of three times the damage amount claimed by the plaintiff plus attorney fees.2 It is not surprising therefore, that many marketing managers fret about RP and perceive it to be a significant legal threat (Klompmaker et al. 2003). In fact, the industry trade press and some textbooks advise managers to take serious precautions to avoid an RP lawsuit. Suppliers offering a discount to a large retailer, for instance, are warned to carefully document that either the discount is available to all competing retailers (Institute of Management and Administration 2006) or that cost savings at that retailer (e.g., in transportation costs) justified the discount (Monroe 2002, Diana 2007). Alternatively, some business experts advise suppliers who offer differentiated pricing to avoid RP liability by ensuring that products are specialized (with modifications in service levels, delivery, or even color) for retailers receiving favorable prices (Klompmaker et al. 2003).

To demonstrate lengths that some businesses go to avoid liability, consider the preventative measures of large consumer packaged goods companies. Managers are well aware of RP and take care to avoid the appearance of offering discounts to favored retailers.3 For instance, large retailers such as Walmart obtain specialized labeling and packaging to ensure that the

2 In one Federal Court RP case (Hasbrouck vs. Texaco, 631 F. Supp. 258 (1986)), attorney fees incurred by the plaintiff were well over $1,000,000.
3 Based on anonymous interviews.
product sold to these retailers is not the same products sold to other retailers.

It is important to recognize that courts’ views of RP can change over time. Furthermore, this change in thinking may change the legal threat posed by RP. The goal of this research, therefore, is to empirically identify whether such shifts have recently occurred, determine the subsequent trends in court rulings, as well as explore the factors behind the trends. If the courts make it more difficult for a disfavored buyer to successfully claim itself a victim of illegal price discrimination, then suppliers may want to reassess the risk they face from RP.

We collected over 28 years of data from RP cases tried in U.S. federal courts. Our analysis indicates that the likelihood of winning an RP case has been considerably lessened over the past 16 years. For example, from 1982 to 1993, cases brought by private party plaintiffs were successful an average of 35% of the time. However, this drops to less than 5% for the period 2006–2010. The results indicate a downward trend in the threat of RP. We suggest that this trend stems from an evolution of antitrust thinking of “competitive harm” or injury to competition. Our results provide evidence that courts have been moving toward a more stringent criterion for plaintiffs to establish the existence of competitive harm resulting from the defendant’s price discrimination. The results demonstrate how the landmark case Brooke Group has led to a significant drop in the likelihood of success of RP cases. Brooke Group substantially raised the hurdle for parties bringing suit against rival sellers who supply to the same business at a discount—so called primary-line price discrimination. Specifically, Brooke Group established elevated requirements for plaintiffs to show competitive harm in primary-line cases (cases where the plaintiff is a competitor of the discriminating seller). We find that the percentage of plaintiff wins in primary-line cases, once 57% between 1982 and 1993, has dropped to less than 6% after 1993. No study to date has documented the quantitative impact of the Brooke Group ruling on these cases.

Secondary-line cases (cases where the plaintiff is a customer of the discriminating seller), were relatively unaffected in the years following Brooke Group. Some have suggested that the Supreme Court’s 2006 Volvo decision raised the competitive harm standard in secondary-line cases as well (Stoll and Goldfein 2006, Rodell 2006), making it substantially harder to win such cases. Others contend this is not the case as the Volvo ruling is too narrow to be applied to most cases (Kirkwood 2007, Suhr 2007). Our results indicate that Volvo has, indeed, had significant effect on subsequent RP cases. Specifically, we find a significant drop (27% down to below 5%) in the success of plaintiffs in secondary-line cases after Volvo.

As further evidence of the courts’ increased scrutiny of competitive harm after Brooke Group, our analysis indicates greater success for defendants using the no harm to competition defense. Specifically, before Brooke Group, defendants were successful in only 48% of the cases where this defense was used. After Brooke Group, this percentage jumped to 80%. As an indication that defendants recognize this change, we find an increasing trend in the use of competitive harm defense. Finally, our results are the first to offer systematic empirical evidence that Brooke Group has eroded RP’s role in fulfilling its goal of protecting small businesses. Before Brooke Group, small plaintiffs fared better in RP cases than large plaintiffs whereas large plaintiffs fared better afterward. We speculate that large plaintiffs, having access to more resources, are more equipped to show competitive harm after Brooke Group.

Much has been written about the Act since its passage. Economists and antitrust scholars have long debated the merits of RP. Early discussions address

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5 Specifically, whereas in primary-line violations competition between sellers (e.g., between Sellers 1 and 2 in Figure 1) may be injured, in secondary-line violations competition between customers of a seller may be lessened (e.g., between Buyers 1 and 2 in Figure 2).
whether RP is in accord with the goal of antitrust (Bork 1978, Posner 1976). Economists have also examined the implications of RP for welfare distribution and market efficiency. O’Brien and Shaffer (1994) argue that the welfare effects of banning the price discrimination covered in RP are ambiguous. Katz (1987), on the other hand, shows how under certain demand conditions, forbidding price discrimination in upstream markets can improve economic welfare. Ross’ (1984) empirical results suggest that RP may have harmed grocery chains without any benefit to others. These writings have focused on RP from the perspective of economic welfare. In contrast, our research makes no normative assessment of RP nor tries to determine its welfare implications. Rather, our objective is to assess the legal threat of RP.

Legal scholars have scrutinized court rulings from a legal perspective by qualitatively examining courts’ opinions. Some studies point to the Supreme Court’s majority argument in 

Brooke Group

as an indication that future primary-line cases are harder to win (Baker 1994, Denger and Herfort 1994). Additionally, legal research has suggested that the Court’s opinion in 

Volvo

delivers the same fate to secondary-line cases (Rodell 2006, Stoll and Goldein 2006), whereas others suggest that is not the case (Kirkwood 2007, Suhr 2007). None of these studies, however, offer systematic empirical evidence to support its conclusion.

Finally, the marketing literature has previously examined the implications of antitrust law for channel management. Stevens (1937) offers support for RP and argues that obtaining lower prices should be obtained through efficiency not bargaining power. Tarpey (1972) examines FTC cases to assess the legal liability of buyers who bargain for preferential prices under the Act. Spriggs and Nevin (1994) analyze functional discounts and suggest that authorities be conscious of their procompetitive effects. In contrast to these studies, our paper does not evaluate the merits of RP, but rather provides an objective assessment of the likelihood of success in litigating an RP case.

2. Background

Some have criticized RP for its lack of focus and obscure language (Edwards 1959). The fundamental notion of competitive harm, in particular, has been the source of much of the ambiguity throughout the history of RP. Moreover, how courts interpret competitive harm greatly depends on the type of case pursued.

In the text of RP, price discrimination is illegal whenever it has led to “a substantial injury to competition.” Deciding criteria for establishing “injury to competition,” however, has proved to be difficult. At the start of our data, the precedent for competitive harm in primary-line cases was 

Utah Pie

. In this case the plaintiff, Utah Pie, a regional pie baker serving the retail grocery industry in Utah, faced increased competition by out of state bakers. Continental Baking, a large pie baker in California, entered the Salt Lake City market and attempted to acquire market share with prices set below their costs. Because Continental’s prices in Salt Lake City were below what they charged in other markets in which Utah Pie did not compete, Utah Pie filed an RP suit.

The original trial ended in a jury ruling for Utah Pie, but the Appeals Court overturned this verdict. The Supreme Court reinstated the verdict arguing that below cost pricing was enough to show “predatory intent.” Critics have argued that this ruling made showing predatory pricing too easy (e.g., Bowman 1967, Elzinga and Hogarty 1978). Declining prices, critics point out, are inherently good for consumers. And, unless below cost pricing creates a subsequent monopoly or market power, low prices are a sign of healthy competition.

Despite criticisms, courts relied on 

Utah Pie

to define the notion of competitive harm as “injury to a competitor.” Since 

Utah Pie

, however, legal scholars and economists have argued on behalf of a welfare standard for antitrust, which meant that to assess competitive harm one must examine whether supracompetitive prices resulted from the questioned price discrimination. Former Appeals Court judge and legal scholar Robert Bork (1978), most notably, suggested that the goal of antitrust should be to enhance consumer welfare. He and others (e.g., Gifford 2008) argued that if enhancing consumer welfare is the goal, then antitrust should not penalize competitive pricing even if low prices compromise sales at a rival firm. As the courts’ decisions have made clear, there has been since the 1970s, a judicial movement toward the welfare standard in RP cases.

3. Judicial Movement Toward the Welfare Standard

The Department of Justice (DoJ) and the Federal Trade Commission (FTC) have legal jurisdiction to pursue violations of RP. However, the DoJ has not enforced the Act since the 1960s, and the FTC has substantially decreased its activity in enforcement since the late 1970s. This reduced enforcement reflects changes in the way RP is viewed by government authorities. As legal scholars and antitrust critics urged the adoption of the welfare standard to RP, the DoJ and FTC backed away from government enforcement of RP. In a 1977 report, the DoJ indicated its position on

the Act by saying that it was based on “questionable economic assumptions prevalent in the 1930s.” 8 More recently, the Antitrust Modernization Commission of 2007, 9 convened by Congress, advocated the repeal of RP because, “…the RPA protects competitors over competition and punishes the very price discounting and innovation in distribution methods that the antitrust laws otherwise encourage.” Furthermore, the commission goes on to say that, “…it is not clear that the RPA actually effectively protects the small business constituents that it was meant to benefit.” Given the government’s stance on RP, most of the enforcement of the Act today is done by private party suits. Moreover, as we describe below, recent Supreme Court rulings reflect a judicial shift toward the welfare standard and have implications for lower courts’ decisions in private party cases.

3.1. Brooke Group vs. Brown and Williamson

The Supreme Court revisited the issue of competitive harm in Brooke Group. This primary-line case involved two cigarette manufacturers who were among the six largest in the market. Brooke Group faced declining market share in the industry and tried to boost this by introducing a generic cigarette to the market. Brown and Williamson responded by introducing its own line of generic cigarettes at the same price as Brooke Group. However, in instances which the two companies were utilizing the same distributor, Brown and Williamson offered discriminatory rebates.

Brooke Group alleged that Brown and Williamson’s price discrimination forced them to retreat from the generic market and ultimately led to higher consumer prices for generic cigarettes. In their case, Brooke Group effectively showed that Brown and Williamson priced below cost. However, Brooke Group was unable to show that Brown and Williamson could recoup their investment in below cost pricing. The Supreme Court decided that because Brooke Group could not offer evidence that the actions of Brown and Williamson ultimately led to supracompetitive prices for generics, they were not entitled to relief under RP. The Court supported its decision with the argument that maintaining supracompetitive prices, at the scale needed, was highly unlikely given a substantial number of other competitors in the cigarette market. The Court suggested that these manufacturers could enter the generic market segment if prices became sufficiently attractive. Given this, the Court felt that Brown and Williamson would not have a reasonable prospect of recoupment. Thus, they reasoned, consumers were not harmed, rather they benefited from below cost pricing.

The importance of Brooke Group for RP was in its interpretation of competitive harm in primary-line cases. Since Utah Pie, plaintiffs could establish competitive harm by showing that the defendant lowered prices to a level below its costs. After Brooke Group, a plaintiff was required to show the defendant had a significant probability to recoup losses from subcost pricing by sustaining supracompetitive prices at some point after the predatory price discrimination, significantly raising the bar for plaintiffs.

3.2. Volvo Trucks vs. Reeder-Simco

What Brooke Group was to primary-line cases, Volvo might be to secondary-line cases. In Volvo, the plaintiff, Reeder-Simco (Reeder), was a dealer of heavy-duty Volvo Trucks (Volvo). Reeder claimed that Volvo offered discounts to competing dealers not available to Reeder—a charge Volvo did not deny. Typically dealers in the industry carried little or no inventory of Volvo trucks, but rather offered quotes to prospective buyers. Volvo then set truck prices to the dealers based on the requirements of the prospective buyers.

A lower court ruled in favor of Reeder in 2004, but Volvo appealed under the claim that its price discrimination did not result in competitive harm. Reeder’s argument that competitive harm occurred was based on the Morton Salt rule. 10 The Morton Salt rule allows plaintiffs to show competitive harm in secondary-line cases if a substantial price difference existed for a substantial period of time. The Supreme Court heard the case in 2006 and solicited evidence of competitive harm from Reeder. The Court specifically required Reeder to establish that Volvo’s favored discounts applied to circumstances in which Reeder and competing dealers were contemporaneously quoting to the same customers. Reeder produced insufficient evidence that such instances were common, from which the Court concluded that the two dealers were not competitors.

Interestingly, Reeder produced evidence that Volvo had a goal of reducing the number of its North American dealers, a charge, which again, Volvo did not deny. Despite Volvo’s admission that it wished to reduce downstream sellers, the Court sought evidence of competitive harm by determining whether the discriminatory discounts adversely affected buyers. Therefore, Volvo may have established a significant threshold for establishing competitive harm in secondary-line cases.

It is important to note that the Supreme Court had the opportunity to extend Brooke Group to secondary-line cases and overturn the controversial Morton Salt

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rule in *Chroma Lighting*. However, the Court decided not to hear the case. We believe that *Volvo* became the important secondary-line event because it allowed the Court to align secondary-line cases with the broader antitrust laws without totally reversing *Morton Salt*. A complete repudiation of *Morton Salt*, as would have been required in *Chroma Lighting*, would make RP totally powerless and the court may have been criticized for effectively repealing RP.

However, the holdings of *Volvo* are not without controversy because some in the legal community believe that Volvo should have specifically banned the *Morton Salt* rule. Rather, the ruling still permits the *Morton Salt* rule but only when buyers are competing for the same customers. Legal analysts differ in their opinion of implications of the ruling. Suhr (2007) suggests that the best reading of the Court’s opinion is a narrow one and that lower courts still allow the *Morton Salt* rule. Additionally, Kirkwood (2007) argues that *Volvo* did not attempt to implement the welfare standard for competitive harm in secondary-line cases. Conversely, Rodell (2006) believes that the same customer requirement enhances interbrand competition and better aligns RP with the other antitrust statutes. In our analysis, we hope to add to the understanding of the ruling by quantifying its impact.

### 4. Empirical Evidence

Our data set consists of all cases involving an RP ruling during the period from January 1, 1982, to March 31, 2010. To find these cases, we searched the Lexis-Nexis database for federal cases where RP was mentioned. From this search, we examined each record to determine if the case had an RP ruling or merely mentioned the Act for another purpose. After filtering out cases where the Act was merely mentioned, we merged cases where there were multiple rulings at possibly different levels of federal court such that each set of plaintiffs and defendants only represented one case in the final data set. The case outcome was determined by the most recent ruling. Thus, if a case was initially ruled for the plaintiff but overturned by the Court of Appeals, the case was recorded as a ruling for the defendant. Additional variables for the study were coded by reading the cases. When such information was not available from the case, we searched for other sources for that data.

To assess how well RP meets the goal of protecting small businesses in the consumer products industries, we collected data about litigant’s size and industry. We used annual revenue as the measure of size. Because revenue was not typically contained within the case record, we searched other sections of Lexis-Nexis as well as the Business and Company Resource Center. Often, we obtained a value or range for revenue from these sources, but not every company could be located. In these cases, we performed an internet search to find the data, and if this did not provide the information, we used our judgment to classify the companies as large or small. Typically, when we could not find revenue information it was because the company was a small retailer who operated from one location. Therefore, we could reasonably classify them as small. The final data set contained 345 cases. Table 1 summarizes the variables, before *Brooke Group*, between *Brooke Group* and *Volvo*, and after *Volvo*.

The expected trends are reflected in Table 1. It indicates a substantial reduction in the percentage of cases ruled in favor of the plaintiff. After *Brooke Group*, rulings for the plaintiff decreased from 35% to 23%. Since *Volvo*, a plaintiff was less than 5% likely to win its case. Whereas the No Harm to Competition Defense was used only 41% before *Brooke Group*, it jumped to 52% and further increased to 57% after *Volvo*, a trend that is consistent with the interpretation that defendants exploit the courts’ growing acceptance of tougher criteria for competitive harm.

Next we examine what factors affect the courts’ decisions and how the impact of these factors were influenced by the *Brooke Group* ruling. As suggested previously, the decisions in *Brooke Group* and *Volvo* serve as key shifts in the courts’ view of competitive harm and, therefore, the outcomes of RP cases. However, because of the recency of *Volvo* we have

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12. *Volvo* provided a unique and nuanced legal question to the Supreme Court. In its appeal to the Court, *Volvo* framed the case as presenting whether “a manufacturer (may) be held liable for secondary-line price discrimination under RP in the absence of a showing that the manufacturer discriminated between dealers competing to resell its product to the same retail customer.” The unique part of the *Volvo* ruling was the same customer requirement.

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<table>
<thead>
<tr>
<th>Table 1</th>
<th>Case Trends and Litigant Characteristics Before and After <em>Brooke Group</em> and <em>Volvo</em></th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of Cases</td>
<td>153</td>
</tr>
<tr>
<td>Won by Plaintiff (%)</td>
<td>35</td>
</tr>
<tr>
<td>No Harm to Competition Defense was used (%)</td>
<td>41</td>
</tr>
<tr>
<td>Plaintiff over 50 Million in Revenue (%)</td>
<td>24</td>
</tr>
<tr>
<td>Defendant over 50 Million in Revenue (%)</td>
<td>65</td>
</tr>
<tr>
<td>Consumer Goods (%)</td>
<td>67</td>
</tr>
<tr>
<td>Primary-Line Case (%)</td>
<td>27</td>
</tr>
</tbody>
</table>

*Note.* This table shows substantial reduction in the percentage of wins in favor of the plaintiff and an increase in the use of No Harm to Competition Defense consistent with the interpretation that defendants exploit the courts’ growing acceptance of tougher criteria for competitive harm.

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too few data points to evaluate its impact at a more detailed level. Therefore, we focus our attention in
this section on before and after *Brooke Group*, until the *Volvo* ruling of 2006. In the next section, we outline
our model. Results are presented in §4.2. Then, in §4.3, we discuss the evidence after *Volvo*.

4.1. Factors Affecting Court Outcomes: Before and
After Brooke Group

To examine the effects of *Brooke Group*, we employ a probit model where the case outcome is the dependent variable, either in favor of the plaintiff (1) or the defendant (0). Cases that are classified as rulings for the defendant include several legal outcomes: summary judgment for the defendant, dismissal of the plaintiff’s claims, and jury rulings for the defendant. Rulings for the plaintiff include summary judgment for the plaintiff, failure to dismiss the plaintiff’s claims, and jury rulings for the plaintiff. In the following subsections we provide a rationale for the independent variables included in our model and an expectation of what we should find upon estimating the model.

*Brooke Group Ruling*. We include a variable in the model that indicates whether the case occurred before (0) or after (1) *Brooke Group*. The *Brooke Group* variable is also used to form interactions with all other variables.

*Type of Case*. One aspect that should affect the relative success of plaintiffs is the type of case: primary-line (1) or secondary-line (0). This is taken into account because, as explained in §2, the judicial interpretation of competitive harm is different for primary and secondary-line cases. Since the 1967 *Utah Pie* ruling provided plaintiffs an easy standard for competitive harm in primary-line cases, plaintiffs in subsequent cases leading up to *Brooke Group* may have an advantage relative to secondary-line cases. This may reverse after *Brooke Group*, however, since the *Brooke Group* ruling substantially raised the bar for plaintiffs in a primary-line case.

*No Harm to Competition Defense*. This variable indicates whether (1) or not (0) the defendant argued that the alleged price discrimination caused no injury to competition. The ease of showing competitive harm in the years following *Utah Pie*, suggests that the no harm to competition defense was not a successful defense strategy before *Brooke Group*. As such, we expect other defenses (e.g., meeting competition, cost justification) to be relatively more effective for the defendant before 1993. After *Brooke Group*, however, the stricter interpretation of competitive harm should lead to an increase in success for defendants (i.e., decrease in success for plaintiffs) in cases where a competitive harm ruling was made.

*Litigant Size*. The size of the litigant may be a factor in its success in court. As noted earlier, *RP* has been seen as a protector of small businesses against large ones. If courts take the same view of *RP* then we would expect smaller litigants to have relatively more success. We classify both plaintiffs and defendants as large (1) if their revenues are greater than 50 million dollars a year and as small (0) otherwise.

The size of the litigant may also play a role in its ability to hire legal counsel and therefore its skill to argue its case. This suggests that size may be a positive factor in winning a case. Moreover, we expect that the *Brooke Group* ruling will change the way size affects the outcome of cases. First, because this ruling places the additional burden of showing recoupment on the plaintiffs, the legal resources that a plaintiff has may become more important after the ruling. This will make the probability of receiving a favorable ruling after *Brooke Group* more likely for large plaintiffs as compared to smaller plaintiffs. However, we have no a priori expectation for the *Brooke Group* × Large Defendant interaction because defeating an *RP* allegation may have become easier for both large and small defendants.

*Industry*. Industry was used in the model because characteristics of the industry may lead to greater success in pursuing an *RP* case. We classify cases into two broad industries: consumer goods (1) and industrial goods (0). Because the Act was originally targeted at retail chain stores, which sell consumer goods, the judicial interpretation of *RP* may lead to an environment where plaintiffs in the consumer goods industry have an advantage when pursuing *RP* cases.

4.2. Results

Table 2 presents our coefficient estimates from the estimation of the probit model. We discuss below the

<table>
<thead>
<tr>
<th>Variable</th>
<th>Parameter estimate</th>
<th>Standard error</th>
<th>p-value</th>
<th>Marginal effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>Intercept</td>
<td>−0.782</td>
<td>0.272</td>
<td>0.004</td>
<td></td>
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<tr>
<td>No Harm to Competition Defense</td>
<td>0.741</td>
<td>0.236</td>
<td>0.002</td>
<td>0.215</td>
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<tr>
<td>Consumer Goods Industry</td>
<td>0.344</td>
<td>0.242</td>
<td>0.156</td>
<td>0.100</td>
</tr>
<tr>
<td>Large Plaintiff</td>
<td>−0.677</td>
<td>0.350</td>
<td>0.053</td>
<td>−0.197</td>
</tr>
<tr>
<td>Large Defendant</td>
<td>−0.381</td>
<td>0.258</td>
<td>0.140</td>
<td>−0.111</td>
</tr>
<tr>
<td>Primary-Line Case</td>
<td>0.805</td>
<td>0.289</td>
<td>0.005</td>
<td>0.234</td>
</tr>
<tr>
<td>Brooke Group</td>
<td>−0.161</td>
<td>0.426</td>
<td>0.705</td>
<td>−0.046</td>
</tr>
<tr>
<td>Brooke Group × No Harm to Competition Defense</td>
<td>−0.832</td>
<td>0.340</td>
<td>0.015</td>
<td>−0.242</td>
</tr>
<tr>
<td>Brooke Group × Consumer Goods</td>
<td>0.158</td>
<td>0.346</td>
<td>0.649</td>
<td>0.044</td>
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<tr>
<td>Brooke Group × Large Plaintiff</td>
<td>0.943</td>
<td>0.472</td>
<td>0.046</td>
<td>0.275</td>
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<tr>
<td>Brooke Group × Large Defendant</td>
<td>0.475</td>
<td>0.408</td>
<td>0.244</td>
<td>0.138</td>
</tr>
<tr>
<td>Brooke Group × Primary-Line</td>
<td>−1.692</td>
<td>0.492</td>
<td>0.001</td>
<td>−0.495</td>
</tr>
</tbody>
</table>

*Positive coefficients and marginal effects indicate an increased probability of a ruling for the plaintiff.

*Marginal effects are calculated by finding the marginal effect at each observation then averaging across observations.*
case factors and the implications of *Brooke Group* on each of them.

**Type of Case.** The main effect of the Primary-Line variable has a positive coefficient, indicating that before *Brooke Group* primary-line cases were more likely to be ruled for the plaintiff than secondary-line cases. This is consistent with the idea that *Utah Pie*’s easy standard for showing competitive harm in primary-line cases was in effect during the years preceding *Brooke Group*. The *Brooke Group* ruling, however, seems to have moved the advantage toward secondary-line cases, as evidenced by the large negative estimate of the *Brooke Group* × Primary-Line interaction coefficient. This can also be seen by examining the percentages in Table 3. By separately examining primary-line cases we find the percentage of favorable rulings for the plaintiff drops from 57% to 6%. This demonstrates how unlikely it is to win a primary-line RP case after *Brooke Group*. Interestingly, the change in the percentage of wins for secondary-line cases was negligible across the *Brooke Group* ruling.

**No Harm to Competition Defense.** The findings support the notion that this defense was a positive factor for plaintiffs until *Brooke Group*, as suggested by the significant and positive estimate of the No Harm to Competition Defense coefficient. As expected, the *Brooke Group* ruling had a profound effect on the impact of this defense, as indicated by the large negative and significant estimate of the *Brooke Group* × No Harm to Competition Defense coefficient.

As Table 4 indicates, cases with a competitive harm defense were ruled for the plaintiff 52% of the time before *Brooke Group*, but only 20% afterward. Note, in addition, that *Brooke Group* had little impact on cases in which the competitive harm defense was not used, plaintiffs winning 23% before and 26% afterward. This supports our view that the change in the competitive harm standard by *Brooke Group* increased the value of the no harm to competition defense.

**Litigant Size.** According to the probit estimates, there is a relative advantage to being a small plaintiff before *Brooke Group*, as evidenced by the significant negative estimate of the Large Plaintiff coefficient and is consistent with the original intent of RP. The large positive estimate of the Large Plaintiff × *Brooke Group* parameter indicates, however, that this advantage has reversed after the *Brooke Group* ruling. If courts require plaintiffs to have stronger evidence of competitive harm after *Brooke Group*, then smaller plaintiffs may have relatively fewer financial resources with which to hire effective legal counsel.

Table 5 demonstrates this impact based on winning percentages before and after *Brooke Group*. Before *Brooke Group*, small plaintiffs fared successfully 38% of the time compared to only 22% after. On the other hand, the success of large plaintiffs actually rose slightly by 3% after *Brooke Group*. In fact, Table 5 indicates an advantage for large plaintiffs relative to small plaintiffs since *Brooke Group*. Overall, our results suggest that the view of RP as a protector of small plaintiffs has been diminished through *Brooke Group*.

**Industry.** We classified cases as coming from two broad industries: consumer goods and industrial goods. In contrast to the originally stated goal of the Act, the results in Table 2 indicate no significant effect of industry, either before or after *Brooke Group*. This may be an indication that over the span of our data, courts have not shown favorable treatment

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**Table 3** Effect of Type of Case on Ruling for Plaintiff

<table>
<thead>
<tr>
<th>Type of case</th>
<th>Before <em>Brooke Group</em></th>
<th>After <em>Brooke Group</em> until <em>Volvo</em></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Ruled for plaintiff</td>
<td>Number of cases</td>
</tr>
<tr>
<td>Primary-line</td>
<td>42</td>
<td>24 (57%)</td>
<td>32</td>
</tr>
<tr>
<td>Secondary-line</td>
<td>111</td>
<td>30 (27%)</td>
<td>115</td>
</tr>
<tr>
<td>Total</td>
<td>153</td>
<td>54 (35%)</td>
<td>145</td>
</tr>
</tbody>
</table>

*Notes.* This table shows that after *Brooke Group* the percentage of favorable rulings for the plaintiff drops substantially in primary-line cases. This is consistent with the notion that *Brooke Group* raised the standard for establishing competitive harm for this type of cases.

**Table 4** Effect of No Harm to Competition Defense on Ruling for Plaintiff

<table>
<thead>
<tr>
<th>No harm to competition defense</th>
<th>Before <em>Brooke Group</em></th>
<th>After <em>Brooke Group</em> until <em>Volvo</em></th>
<th>Total</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Number of cases</td>
<td>Ruled for plaintiff</td>
<td>Number of cases</td>
</tr>
<tr>
<td>Yes</td>
<td>63</td>
<td>33 (52%)</td>
<td>75</td>
</tr>
<tr>
<td>No</td>
<td>90</td>
<td>21 (23%)</td>
<td>70</td>
</tr>
<tr>
<td>Total</td>
<td>153</td>
<td>54 (35%)</td>
<td>145</td>
</tr>
</tbody>
</table>

*Note.* This table shows that after *Brooke Group*, cases with a competitive harm ruling were less likely to be ruled for the plaintiff.
to plaintiffs in consumer goods industries and that *Brooke Group* did nothing to change this.\(^{13}\)

### 4.3. Secondary-Line Cases: The Impact of *Volvo*

Just as *Brooke Group* had a noticeable effect on primary-line cases, we expected *Volvo* to adversely affect success in secondary-line cases. Given the recency of the *Volvo* ruling, however, there are not enough cases to do as full analysis as was conducted for *Brooke Group*. Nevertheless, a limited analysis of the cases following *Volvo* does, in fact, support the expected trend. As indicated in Table 6, we see that success in secondary-line cases dropped from 27\% to 5\% (\(p\)-value < 0.01).

The long-term consequences of *Volvo* are debated. Although our data suggest a significant downturn in the likelihood of winning a secondary-line RP case, some legal scholars have argued that the Court’s opinion in *Volvo* does not reshape RP doctrine (e.g., Suhr 2007, Kirkwood 2007). Our data are too recent to convincingly support or refute these claims. What is clear, however, is that the chance for a plaintiff to win an RP case was significantly reduced since *Volvo*. But, unlike as was done for *Brooke Group*, we are unable to empirically determine the factors that *Volvo* has affected without more data.

Additionally, we examine the *Chroma Lighting* ruling to see if a similar change can be observed after this case. As indicated in Table 7, we find no significant difference before and after *Chroma Lighting*.

### 5. Discussion and Conclusion

In this paper, we examined an antitrust law that holds an important place in the marketing discipline. Managers have long known about the Robinson-Patman Act and the associated pricing practices that it covers. However, the legal risk that managers attribute to RP may be outdated given recent precedents set by the Supreme Court decisions in *Brooke Group* and *Volvo*. The aim of our research is to accurately assess the legal threat of RP in the twenty-first century. Our results indicate that the probability of winning an RP case has been substantially reduced over the past 17 years.

Since *Brooke Group*, winning an RP case has become significantly tougher for plaintiffs pursuing primary-line cases. This finding suggests that businesses affected by primary-line price discrimination have a less effective RP Act to recover damages. Additionally, we find that the *Brooke Group* ruling drastically

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\(^{13}\) Note that our observations are not independent because the legal system is reliant on precedent. In our data we believe the main precedent is *Brooke Group*. Thus, we allow for a structural break in the parameters following *Brooke Group*, as implemented through the interaction and main effect parameters.
increased the effectiveness of the no harm to competition defense. This defense was significantly less successful than other defenses before the 1993 ruling. Consistent with the explanation that courts look to a more stringent standard for competitive harm in primary-line cases, the no harm to competition is a more successful defense after Brooke Group. And, defendants seem to have reacted to this as evidenced by the substantial increase in its use as a defense strategy. Moreover, an examination of recent court outcomes suggests that the 2006 Volvo decision has had a similar effect on secondary-line cases.

Finally, we find that the decrease in plaintiff success due to Brooke Group has been more profound for small plaintiffs. Consistent with the historical objectives of RP, small plaintiffs fared particularly better than large ones before Brooke Group. This advantage has reversed in favor of large plaintiffs after the ruling. The view that RP is a protector of small businesses is less meaningful today than before.

The decreased probability of success in RP cases, as found in our analysis, has implications for managers, for marketing educators, and for antitrust policy. First, potential plaintiffs should incorporate this knowledge when deciding whether to pursue an RP case. Because the resources needed to carry out an RP case are not trivial, it is important to accurately estimate the likelihood of success in bringing a suit. Especially, small businesses should take into account the fact that after Brooke Group their chances of winning an RP case are significantly lower. Second, the courts’ modern view of competitive harm implies that managers should reassess how skittish they need to be about their pricing policies. The courts do not view RP as a ban on price discrimination nor do they view selective discounts as automatically injurious to competition. Managers in charge of pricing can, therefore, feel less threatened by a possible RP lawsuit if their discriminatory pricing can be shown to benefit consumers. Third, as an implication for marketing educators, it is important to recognize how the interpretation of the Act has changed for the next generation of managers. Given these changes, marketing educators should highlight the specific conditions where RP is applicable and emphasize the reduced threat of RP. Finally, for antitrust policy, our results indicate the
A general word of caution should be noted when applying our results. First, although the results show that risk of a defendant losing an RP case have decreased considerably over time, managers should take into account the fact that antitrust environment could shift in a different direction. For example, despite the recommendation of the Antitrust Modernization Committee of 2007 to repeal RP, Congress has left it in place. Finally, although the probability of a ruling for the plaintiff has diminished considerably, plaintiffs have and may still prevail in individual cases. Two such cases may provide insights into how RP is being applied in the current environment.

In Beech-Nut vs. Gerber,\(^\text{16}\) we find that winning a primary-line case is still possible. Unlike Brooke Group in which parties involved had low market shares, this case involved a duopoly where the defendant Gerber had a dominant market position. In this context, the 9th Circuit found that recoupment is possible when a monopoly can be created. Similarly, after Volvo a plaintiff\(^\text{17}\) successfully survived summary judgment by showing that price discrimination occurred between competing dealers for the same customer highlighting the logic from Volvo that the important unit of analysis for price discrimination is the end customer not the product.

### References


\(^{14}\) Note that this bias may be less clear cut if weak or naïve attorneys bring cases to the courts ignoring the precedent set by Brooke Group and Volvo.

\(^{15}\) We thank two anonymous reviewers for suggesting the analyses that we present here about intervening events.


