THE REFRIGERATED REAL ESTATE BOOM: WHO IS REALLY PAYING THE PRICE OF SLOTTING?

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I. INTRODUCTION

In November of 2003, the Federal Trade Commission ("FTC") released a staff study titled "Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories."[1] The result of recent efforts by the legislature to scrutinize the secretive world of retailing slotting fees, the report sought to provide the ongoing debate with much-needed empirical data. Having failed in an attempt to use the Government Accountability Office ("GAO")[2] to investigate these practices in September of 2000, the U.S. Senate Committee on Small Business & Entrepreneurship requested that the FTC take the helm, authorizing the Commission to spend up to $900,000 on its inquiry.[3] The FTC's study was narrow in scope. The Commission sent a voluntary access letter to nine retailers in an attempt to obtain "data, documents, and interrogatory responses on slotting allowances and other retailer practices for five product categories."[4] This Note examines how much light the resulting data sheds on the practice of slotting and suggests that such studies alone will not resolve the issues surrounding the practice of slotting. Regulators and legislators alike must first develop a common language with

[1] Press Release, FTC, FTC Releases Grocery Industry Slotting Allowance Report (Nov. 14, 2003), *available at* http://www.ftc.gov/opa/2003/11/slottingallowance.htm.

[2] Formerly the General Accounting Office; *see* GAO Human Capital Reform Act of 2004, Pub. L. No. 108-271, 118 Stat. 811 (2004).

[3] S. REP. NO. 106-404 (2001), *available at* http://thomas.loc.gov/cgi-bin/cpquery/?&db_id=cp106&r_n=sr404.106&sel=TOC_558383&.

[4] FTC, SLOTTING ALLOWANCES IN THE RETAIL GROCERY INDUSTRY: SELECTED CASE STUDIES IN FIVE PRODUCT CATEGORIES, at ii (2003) [hereinafter FTC 2003 STUDY], *available at* http://www.ftc.gov/os/2003/11/slottingallowancerpt031114.pdf (The five product categories consisted of fresh bread, hot dogs, ice cream and frozen novelties, shelf-stable pasta, and shelf-stable salad dressing).

which to approach the problem and address possible limitations on traditional conceptions of the retailing industry.

A. The Practice of Slotting

For several decades, the grocery industry has used a system of negotiated upfront payments to extract discounts from suppliers seeking access to store shelves. While the terms of these payments vary, the most basic of these agreements involves a fixed-dollar purchase of the right to a reasonable trial period for the manufacturer's new product. This charge is called a "slotting allowance" or "slotting fee."[5] Other permutations of the standard slotting fee include arrangements that guarantee a specific location on the shelf, that require manufacturers to pay for an existing product to stay on the shelf, and that exclude competitive products from a particular retailing outlet altogether. As the size and frequency of these fees have continued to increase in recent years,[6] they have generated considerable debate in the business world, in the media, and in the legislature.

In their most innocent form, slotting fees address one of the more difficult aspects of the retailing business—new product introductions. The typical supermarket carries about 30,000 items on its shelves, which must be chosen from over 100,000 available products.[7] While existing products have a track record that a grocery store can use to make purchasing decisions, new products and their manufacturers are frequently unproven. These new products fail on the retailing shelves at rates estimated to be as high

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[5] FTC, REPORT ON THE FEDERAL TRADE COMMISSION WORKSHOP ON SLOTTING ALLOWANCES AND OTHER MARKETING PRACTICES IN THE GROCERY INDUSTRY, at 1 (2001) [hereinafter FTC 2001 REPORT], *available at* http://www.ftc.gov/os/2001/02/slottingallowancesreportfinal.pdf.

[6] *Id.* at 11.

[7] *Competitiveness in Agriculture and Food Marketing: Hearing Before the House Comm. on the Judiciary*, 106th Cong. (Oct. 20, 1999) (statement of Willard K. Tom, Deputy Director, Bureau of Competition, FTC), 1999 WL 27595793 [hereinafter Tom Statement].

as eighty percent.[8] Failure rates at these levels present two clear problems to the retailer seeking to maximize profits on very narrow margins. First, given limited shelf space, each product a retailer chooses to carry displaces another potentially profitable product, resulting in an obvious opportunity cost for each unsuccessful product added to the shelves. Second, the retailer often must invest a considerable amount of money into getting a new product into its inventory systems and onto the shelves before the first bar code is ever scanned at the checkout counter. As a result, large groceries and other retailers have used slotting fees to protect their bottom lines and to force manufacturers to internalize some of the costs of new items.

Even though these new products often fail, manufacturers appear to be making an increasing number of new product introductions. There is a good deal of disagreement over how many new products come out each year. While some estimate as many as 20,000 introductions each year, others report that the actual number is usually between 1,100 and 1,200.[9] This discrepancy likely stems in part from the difficulty of drawing a line between a new product and an old product that has been slightly modified. Regardless of the actual number, manufacturers have clearly been introducing "new and improved" merchandise at a quickening pace and retailers have allegedly resorted to slotting fees to combat the merchandise onslaught.

Slotting fees have gained their greatest notoriety in grocery and drug stores. However, computer software, compact disc, book, and apparel retailers have all added

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[8] *Competitiveness in Agriculture and Food Marketing: Hearing Before the House Comm. on the Judiciary*, 106th Cong. (Oct. 20, 1999) (statement of Timothy M. Hammonds, President and CEO, Food Marketing Institute), 1999 WL 27595799 [hereinafter Hammonds Statement].

[9] *Slotting: Fair for Small Business & Consumers?: Hearing Before the Senate Comm. on Small Bus.*, 106th Cong. (Sept. 14, 1999) (statement of the Grocery Manufacturers of America, presented by Jeffrey Schmidt, Counsel, Grocery Manufacturers Of America), 1999 WL 27594410 [hereinafter Schmidt Statement].

slotting allowances to their repertoire of business tactics.[10] Some even suggest the fees have found their way into the emerging Internet retailing sector.[11] In the grocery industry alone, slotting fees reportedly amount to $9.5 billion in annual promotional expenditures.[12] Moreover, these fees now account for roughly half of a grocery store's profitability.[13] The answer to the slotting question will ultimately determine where in the distribution chain these dollars will reside. Accordingly, as the practice has expanded and the number of stakeholders has increased, the call for investigation has grown louder.

B. Small Business Backlash and Legislative Inquiry

The debate on slotting has intensified dramatically in recent years. In 2000, the Senate Small Business Committee held a hearing on the slotting fees charged by food retailers in exchange for a guarantee of shelf space and "put supermarkets on notice that they were determined to step up scrutiny of the industry."[14] Also in 2000, the Independent Bakers Association, the Tortilla Industry Association, and the National Association of Chewing Gum Manufacturers asked for the issuance and enforcement of guidelines to govern the practice of charging slotting fees.[15] However, despite multiple hearings and several FTC inquiries into the

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[10] *Slotting: Fair for Small Business & Consumers?: Hearing Before the Senate Comm. on Small Bus.*, 106th Cong. (Sept. 14, 1999) (statement of Gregory T. Gundlach, Associate Professor of Marketing, University of Notre Dame), 1999 WL 713691 [hereinafter Gundlach Statement].

[11] *Id.*

[12] Robert J. Aalberts & L. Lynn Judd, *Slotting in the Retail Grocery Business: Does it Violate the Public Policy Goal of Protecting Businesses against Price Discrimination?*, 40 DEPAUL L. REV. 397, 397 (1991).

[13] Evan Lee, Notes and Comments, *Supermarket Slotting Fees (Allowances): Are They Legal Under Sections 2(c) and 2(d) of the Robinson-Patman Act?*, 22 WHITTIER L. REV. 577, 578 (2000).

[14] Jerry Guidera, *Supermarkets Face Scrutiny Over Fees*, WALL ST. J., Sept. 15, 2000, at B6.

[15] Edward C. LaRose & Patrick J. Poff, *Slotting Allowances and the Emerging Antitrust Debate*, 74 FLA. B. J. 42, 44 (Nov. 2000).

practice, no formal guidelines have been issued. Instead, efforts to date have focused on increasing the information available to policy makers. While antitrust regulators acknowledge their role in protecting the consumer from the adverse effects of the accumulation of market power by demonstrating interest in the slotting controversy, this interest has been tempered by the desire to avoid unnecessary intervention in the free market.[16]

II. TREATMENT OF SLOTTING

A. The Pro-Competitive Case for Slotting

Scholars and industry lobbyists who argue that slotting fees should remain largely unregulated contend that the fees serve pro-competitive and pro-consumer functions. These proponents theorize that the payment of slotting fees can increase the efficiency of the new product introduction process by more fairly allocating the associated costs and risks and providing initial intelligence about the potential profitability of new goods. In this way, the payments not only provide the consumer with cheaper retail prices, but also a greater variety of available products.

1. A Necessary Response to the Never-Ending Stream of New Products

A new product can burden a retailer with significant expense before ever hitting the shelf. Activities such as rearranging products in the warehouse system, modifying the layout of the store shelves, and integrating the product into the inventory and accounting programs create numerous costs for retailers.[17] In addition, retailers must either mark down the products which are being replaced or remove them

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[16] *See Antitrust, Business Rights and Competition: Hearing on Antitrust Enforcement Before the Senate Comm. on the Judiciary*, 106th Cong. (Mar. 22, 2000) (statement of Robert Pitofsky, Chairman, FTC), 2000 WL 310085.

[17] FTC 2003 STUDY, *supra* note 4, at iv.

from the shelves entirely.[18] If every product selected by a retailer had an initially identifiable revenue stream, the retailer could pick and choose accordingly to maximize returns from each square foot of shelving with little worry of losing these up-front costs. However, since failure rates can be as high as eighty percent,[19] proponents argue that slotting fees serve an important purpose by reducing the potential losses born by retailers and thereby encouraging greater experimentation with unproven products.[20] According to this theory, without slotting, retailers operating on thin margins would be forced to limit variety and consumer choice by dealing only with known manufacturers and product lines. Furthermore, by sharing the up-front cost with the manufacturer, the retailer has essentially lowered its cost structure and thus has more room to compete on price across its product line with other retailers.[21] In this manner, the retailer has the ability to pass the benefits of the slotting fee on to the consumer.

2. Market Intelligence and Efficient Allocation of Shelf Space

Advocates of slotting fees also claim that the fees help retailers to allocate shelf space efficiently because the willingness of a manufacturer to pay the fees can serve as an indication of the likelihood of success for a new product line.[22] Given the sheer quantity of new products, retailers rely on slotting fees to get a more accurate sense of the manufacturer's view of the product's potential. The one-time payments provide informal access to any private information the manufacturer might have gained through research or

[18] *Id.*

[19] *See* Tom Statement, *supra* note 7.

[20] Hammonds Statement, *supra* note 8.

[21] Lee, *supra* note 13, at 585.

[22] *Id.*

test marketing.[23] Equipped with this information, retailers can stock their limited shelf space more profitably.[24]

Supporters of the fees also argue that despite some conceded hardships on smaller manufacturers, well-conceived products for which there is sufficient consumer demand will make it to the shelf regardless of the slotting fees charged.[25] They attribute the vocal resistance to slotting fees to the understandable bitterness of those who have lost a competitive battle on the shelves.[26] Moreover, retailers point out that they have taken active steps to mitigate some of the concerns of smaller manufacturers. For example, some retailers have established special programs that waive slotting fees in order to encourage the growth of local or minority-owned businesses.[27]

B. The Case Against Slotting

1. Damage to the Consumer

When manufacturers and others argue against the practice of charging slotting fees, they must take great care to put their complaints in a form which carries weight with the protectors of the competitive market place. Without ultimate injury to competition and consequent cognizable harm to the consumer, courts and regulators have been hesitant to intervene in the free market system. In particular, the antitrust inquiry will often terminate when actions are not perceived to raise consumer prices.[28] As a

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[23] FTC 2001 REPORT, *supra* note 5, at 13.

[24] Mike France, *Are Corporate Predators on the Loose?: Small Businesses Argue That the Microsoft Case is Symptomatic of a Broader Problem*, BUS. WK., Feb. 23, 1998, at 126 (comments of Gene Gabrowski, spokesperson for Grocery Manufacturers of America, discussing slotting fees).

[25] Hammonds Statement, *supra* note 8.

[26] *Id.*

[27] *Id.*

[28] William H. Borghesani et al., *Food for Thought: The Emergence of Power Buyers and its Challenge to Competition Analysis*, 4 STAN. J.L. BUS. & FIN. 39, 81(1999).

result, opponents of the practice focus primarily on how these fees negatively affect the interests of consumers. They articulate three principal adverse impacts on the buying population: higher prices, a decrease in product variety and innovation, and less access to information.[29]

a. Higher Prices

Opponents argue that slotting fees are up-front profits which reduce the incentive for retailers to compete through pricing.[30] If slotting fees exceed the potential gains from negotiating a better price, then manufacturers can avoid lowering the retail price to the levels that would exist in a purely competitive market situation. To the extent that slotting fees allow manufacturers to charge higher prices for their products, consumers end up paying more for their goods.[31] While it may be reasonable for a merchant to impose fees to compensate for the costs of allocating space to a new product, many fear that slotting fees go beyond the costs incurred by the retailer and that the excess is often paid by the consumer.[32] This argument seems to accept the possibility of slotting fees being used in a pro-competitive manner, but questions whether retailers meaningfully limit their use of the fees in practice given the current structure of the industry. Others point out that the tremendous conflict that these fees have created in the distribution chain has introduced new costs and wasteful disruptions which have hindered efficiency and burdened consumers.[33]

b. Less Variety and Innovation

Opponents of slotting further contend that the practice limits variety, innovation, and ultimately consumer choice. The magnitude and up-front nature of the fees can

[29] Gundlach Statement, *supra* note 10.

[30] Lee, *supra* note 13, at 586.

[31] FTC 2001 REPORT, *supra* note 5, at 27.

[32] Schmidt Statement, *supra* note 9.

[33] Gundlach Statement, *supra* note 10.

substantially limit the ability of some manufacturers to gain the access to the distribution channels that their products need to compete, a problem that is particularly troublesome for smaller suppliers.[34] The result is a narrowing of consumer options in the marketplace. Sometimes the appearance of choice on the store shelf can itself be illusory given the influence of these slotting arrangements.[35]

Proponents of the payments respond that a large number of products are simply "me too" items with little additional value.[36] They argue that given the commodity-like nature of many grocery products, regulators should focus on the price effect of these practices, rather than on non-price factors. However, variety may have significant inherent value worthy in its own right of antitrust consideration.[37] When one considers the growing influence these fees have outside of the grocery context, variety may have even greater relevance to the debate. Slotting may also reduce the incentive of large manufacturers to innovate across their product lines.[38] The presence of this formidable barrier to entry for potential competitors may allow products to retain their shelf space on a basis other than true merit.

c. Less Information is Made Available

Opponents also believe that since manufacturers often pay these slotting fees with funds earmarked for consumer-

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[34] *Id.*

[35] *See* El Aguila Food Prod. Inc. v. Gruma Corp., 301 F. Supp. 2d 612 (S.D. Tex. 2003) (suit brought by tortilla makers against a competitor for alleged slotting fees). A news article about the case reported that shoppers might see five to six different brands on supermarket shelves, but all of the brands actually belonged to one company, the defendant. Thus, the defendant was able to take the entire shelf while providing the appearance of choice to the consumer. Marla Dickerson, *Tortilla Makers Try Not to Get Flattened: Small Companies Face Off with Giant Rival Over Market Share*, L.A. TIMES, Oct. 28, 2003, at C1.

[36] FTC 2001 REPORT, *supra* note 5, at 5.

[37] Thomas B. Leary, *The Significance of Variety in Antitrust Analysis*, 68 ANTITRUST L.J. 1007 (2001).

[38] Aalberts & Judd, *supra* note 12, at 401.

directed marketing and other promotional expenditures, they now spend less on programs to inform the consumer.[39] One manufacturing representative speaking on the condition of anonymity (so as not to upset his chief customers) explained that in paying these fees manufacturers were taking "the eye off the consumer" by spending less on advertising and couponing, strategies that often get the consumer into the stores in the first place.[40]

2. Damage to Smaller Manufacturers

Consumers may not be the only ones hurt by slotting. Some commentators believe that large manufacturers have encouraged the proliferation of slotting fees in order to manipulate the cost of shelf space and reduce the access of smaller competitors. While the manufacturers of some brand name products such as Tide or Miracle Whip largely avoid paying any slotting fees, other large and cash-rich manufacturers seem to embrace the practice.[41] Opponents of slotting fees argue that these manufacturers understand the role the fees play in keeping out smaller rivals.[42] It has been estimated that it costs approximately $16.8 million to introduce a small product line of four items in all supermarkets across the country.[43] The upfront nature of the payment only exacerbates the precarious position of any new entrant to a market. The lack of cooperation on the part of most large manufacturers in providing data on slotting

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[39] Gundlach Statement, *supra* note 10.

[40] Caroline E. Mayer, *Supermarket Space Race: The Controversial Costs of Putting Products on the Shelves*, WASH. POST, Apr. 26, 1989, at E1.

[41] Aalberts & Judd, *supra* note 12, at 398.

[42] "They make offers of such high numbers that others can't match them. It's a way to control the shelves and force the small firms out of the market." Mayer, *supra* note 40 (quoting Allan Kaufman, Executive Director of Sales and Marketing of Ben & Jerry's Homemade Ice Cream Co.).

[43] FTC 2001 Report, *supra* note 5, at 4.

certainly raises suspicion of their complicity in the practice.[44] At the same time, retailers often defend slotting by highlighting the cooperation of manufacturers.[45]

In response to these criticisms, supporters of slotting point out that while the practice may exclude small manufacturers from selling their products through large retailers, they are nonetheless able to make their products available through other distribution methods such as coffee and juice bars, specialty food shops, the Internet, and mail order.[46] Success in these formats will generate the consumer demand required to reach the supermarket shelves. However, opponents of slotting caution that the implications of such a bifurcated distribution structure are not necessarily economically advantageous.[47]

3. Damage to Smaller Retailers

Opponents argue that smaller retailers also lose out in the slotting equation. They contend that while retailers of considerable size are able to extract these fees from manufacturers, "mom and pop" operations are unable to command the same treatment.[48] Manufacturers can therefore focus their slotting dollars on retailers offering broad market access and can forgo the independent stores if they attempt to extract similar fees.[49] Without the cushion provided by the slotting fees, these stores are at a competitive price disadvantage against their larger adversaries.[50] In this manner, chains are able to use their size to tighten their grip

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[44] The FTC was unable to get the large retailers and suppliers to participate significantly in a public workshop on slotting in 2000. *Id.* at 26.

[45] Aalberts & Judd, *supra* note 12, at 398.

[46] Hammonds Statement, *supra* note 8.

[47] Borghesani et al., *supra* note 28, at 81-82.

[48] Gundlach Statement, *supra* note 10.

[49] Aalberts & Judd, *supra* note 12, at 401.

[50] *Id.*

on the overall retailing market,[51] and the cycle of slotting continues.

4. Alternatives to Slotting

Even if one concedes a need to help retailers efficiently manage new product introductions, opponents of slotting fees point out that there are other available tools.[52] Test marketing can help to alleviate some of the risk in chain-wide product rollouts, and to determine winners and losers before the products hit the mainstream shelves.[53] Unfortunately, the sheer number of new products hitting the shelves each year limits the usefulness of this method as a stand alone solution. Failure fees can also help retailers hedge risk.[54] However, some protest that retailers are left overexposed if a company is out of business at the time the retailers call to collect.[55] One should also consider how the knowledge that a cash payment will follow the failure of a product might alter the behavior and incentives of a retailer.[56] One of the more compelling alternatives to slotting is a fee charged per unit. This would theoretically help small manufacturers circumvent the barrier to entry created by large lump sum cash payments,[57] and could guarantee a transfer payment more in line with the costs of the new product. Such an arrangement would make it easier and less risky for the small manufacturer which need no longer worry that it paid a large sum for an uncertain stay on the

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[51] *Id.*

[52] The FTC has acknowledged that even if slotting fees are shown to be beneficial, if there is anticompetitive harm the analysis will ask if the benefits are achievable through less restrictive means. FTC 2001 REPORT, *supra* note 5, at 6.

[53] *Id.* at 16.

[54] *Id.* at 17.

[55] "Manufacturers, particularly the smaller manufacturers, are almost never around to buy back inventory that will not move." Hammonds Statement, *supra* note 8.

[56] FTC 2001 REPORT, *supra* note 5, at 18.

[57] *Id.* at 17.

shelves.[58] Interestingly, companies like Wal-Mart and Kroger have found profitable ways to do business without using slotting fees.[59]

5. Buyer Power

Furthermore, anti-slotting factions attack the fundamental assumption of a purely competitive retailing market critical to the position of allowance proponents. The competitive state of the retailing market directly impacts not only the amount being charged for slotting, but, more importantly, the amount of savings being passed along to consumers. "If the retail market is competitive—a very important precondition—the discount is likely to be passed through to consumers and competition will not ordinarily be harmed."[60] In the real world, opponents argue, there are many signs that this precondition doesn't hold. When a *Supermarket Business Magazine* survey asked the question, "What is the going slotting allowance that your company charges," the response it received was, "Whatever the traffic will bear."[61] The economics of the grocery industry make the additive effect of the fees on the bottom line quite transparent. Taking the typical margins of a supermarket, "a $40,000 slotting fee is equal to the profit of $4 million of sales."[62] Opponents believe that retailing chains have begun to consider shelf space as real estate for the use of which they charge manufacturers.[63]

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[58] Some say as little as six weeks. *See* Mayer, *supra* note 40.

[59] *See Competitiveness in Agriculture and Food Marketing: Hearing Before the House Comm. on the Judiciary*, 106th Cong. (Oct. 20, 1999) (statement of Nicholas Pyle, Vice President of Legislative Affairs, Independent Bankers Association) [hereinafter Pyle Statement], *available at* http://www.house.gov/judiciary/pyle1020.htm.

[60] Tom Statement, *supra* note 7.

[61] *Slotting: Fair for Small Business & Consumers?: Hearing Before the Senate Comm. on Small Bus.*, 106th Cong. (Sept. 14, 1999) (statement of Kenneth Partch, Editor-at-Large, *Supermarket Business Magazine*), 1999 WL 27594409 [hereinafter Partch Statement].

[62] Mayer, *supra* note 40.

[63] Partch Statement, *supra* note 61.

The "merger mania" of the past few decades may have made the assumption of perfect competition particularly vulnerable. Though the retailing industry has traditionally been viewed as highly competitive with very low barriers to entry, this notion has started to change. Mergers reported under the Hart-Scott-Rodino Act have increased dramatically from 1,529 in 1991 to 4,679 in 1998.[64] While in 1996 the top five U.S. grocery retailers accounted for approximately twenty percent of the overall market, by 1999 their share had jumped to a whopping sixty percent with the top twenty grocery chains holding seventy-eight percent.[65] When the FTC investigated a potential merger between Staples and Office Depot, it discovered that non-superstore retailers did not exercise a significant competitive restraint on the chains, since they constituted a market unto themselves.[66] Consumer prices were higher in markets with two chains than in those with three, regardless of what other outlets remained.[67] Even the presence of Wal-Mart in a market had no effect on this trend.[68]

Curtin has noted that a key European decision rejecting a proposed merger of two Finnish supermarkets acknowledged the competitive dangers of increasing combinations in retailing.[69] Determining that the merger would have created a level of concentration potentially harmful to consumers, the decision also voiced concern over the considerable pressure the combined entity could exert on manufacturers. High levels of concentration might create "gatekeeper" retailers with the power to determine both the extent and price of a producer's access to the marketplace.[70] Opponents

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[64] Tom Statement, *supra* note 7.

[65] LaRose & Poff, *supra* note 15, at 43.

[66] Tom Statement, *supra* note 7.

[67] *Id.*

[68] *Id.*

[69] *See* John J. Curtin et al., *The EC's Rejection of the Kesko/Tuko Merger: Leading the Way to the Application of a "Gatekeeper" Analysis of Retailer Market Power Under U.S. Antitrust Laws*, 40 B.C. L. REV. 537, 541 (1999).

[70] *Id.* at 539.

of slotting fees in the United States claim this behavior has manifested itself in the actions of our own retailing giants.[71]

C. The Legal Challenge to Slotting

Currently, there are no laws which specifically govern retailer slotting. While the Robinson-Patman Act,[72] Sherman Act,[73] Clayton Act,[74] and FTC Act[75] have all been invoked as possible tools to confront any excessive fees, these usual suspects of competition law have not provided an effective framework for slotting opponents. In particular, the Robinson-Patman Act has been singled out as "a poor remedy."[76] In 1995, Robert Skitol urged Congress to amend the Robinson-Patman Act, arguing that the Act "does not appear to have inhibited pervasive and markedly anticompetitive exercises of monopsony power by dominant retailers, one of the fundamental objectives of this legislation at its inception. This is an objective of continuing importance to our economy today and tomorrow . . . ."[77] Unfortunately, given the uncertain outcome of a legal challenge, the expense of litigation, and the potential distribution dislocation, few cases have thus far been brought by the manufacturing industry. One unreported case in the 1990s did address the question of slotting, and acknowledged the possibility of a claim under the Robinson-Patman Act.

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[71] "...chains began to look at themselves as gatekeepers, or toll collectors, who owned the retail estate, and were going to charge the manufacturers for its use..." Partch Statement, *supra* note 61.

[72] 15 U.S.C. § 13 et seq. (2000).

[73] 15 U.S.C. § 1 (2000).

[74] 15 U.S.C. § 12 et seq. (2000).

[75] 15 U.S.C. § 45 (2000).

[76] Barbara O. Bruckmann, *Articles: Discounts, Discriminations, and Exclusive Dealing: Issues under the Robinson-Patman Act*, 68 ANTITRUST L.J. 253, 292 (2000).

[77] *Hearings on Global and Innovation-Based Competition Before the Fed. Trade Comm'n,* 1910 (Nov. 8, 1995) (remarks of Robert A. Skitol, Drinker, Biddle & Reath), *available at* http://www.ftc.gov/opp/global/gc110895.pdf.

1. *Atlantic Coast Vess Beverages*

In *Atlantic Coast Vess Beverages, Inc. v. Farm Fresh, Inc.*, the Federal District Court in Richmond, Virginia, had the opportunity to address a slotting scenario.[78] In the spring of 1989, Vess paid a $10,000 slotting fee to Farm Fresh to guarantee Farm Fresh shelf space for Vess' soft drink products.[79] In September of 1990, Royal Crown, a competitor of Vess, approached Farm Fresh to retail its soft drink product, Diet Rite.[80] As discussions between Farm Fresh and Royal Crown progressed, Farm Fresh halted its relationship with Vess.[81] Royal Crown paid its own slotting fee (of the same amount paid by Vess), and, at the request of Fresh Farm, agreed to purchase and remove Farm Fresh's remaining stock of Vess beverages.[82] Vess commenced an action alleging that Farm Fresh's decision to stop retailing Vess beverages violated section 2(c) of the Robinson-Patman Act.[83] Vess also alleged that Farm Fresh's decision was influenced by an unfair discriminatory payment, also in violation of section 2(c) of the Act.[84]

Vess urged the court to adopt a broad reading of section 2(c), in order to capture all forms of disguised payments made between a buyer and seller that are not based on services rendered.[85] As opponents of slotting practices have also argued, Vess claimed that slotting fees amounted to nothing more than a gratuity with no legitimate economic value.[86] Interestingly, the court allowed Vess' claim to survive a summary judgment motion,[87] despite

[78] Atl. Coast Vess Beverages, Inc. v. Farm Fresh, Inc., Civ. Action No. 3:93CV284, 1993 U.S. Dist. LEXIS 21405 (E.D. Va. Oct. 8, 1993).

[79] *Id.* at *3.

[80] *Id.* at *4.

[81] *Id.*

[82] *Id.*

[83] *Id.* at *5.

[84] *Id.*

[85] *Id.* at *8.

[86] *Id.* at *12.

[87] *Id.* at *22.

acknowledging that the slotting fees were not technically a "brokerage" by name within the meaning of Section 2(c).[88] The parties settled, however, before any fact findings were made or a final judgment was rendered.

Not all courts have thought it wise to move in this direction. In *Zeller Corp. v. Federal-Mogul Corp.*, the Sixth Circuit refused to expand the scope of Robinson-Patman as had been contemplated in *Vess* and ruled that Section 2(c) did not apply to a signing bonus for which no service was rendered.[89] The court so ruled despite admitting that the bill was passed "with the express purpose of preventing sellers from having to yield to the economic pressures of large buyers by granting unfair price preferences."[90] Courts might be concerned that these types of claims introduce significant turmoil into the marketplace and ultimately could cost the consumer more than the practice of slotting itself.

2. *El Aguila Food Products*

In addition to these interpretive difficulties in sustaining a slotting claim, the recent decision in *El Aguila Food Products Inc. v. Gruma Corporation* has further highlighted the challenges of bringing a slotting suit. In *El Aguila*, plaintiffs sued a national brand leader in the tortilla market alleging violations of Sections 1 and 2 of the Sherman Act and discriminatory practices in violation of the Robinson-Patman Act.[91] The plaintiffs argued that Gruma made "up-front" exclusionary payments to retailers for the purposes of managing and controlling retail placement through a financial incentive program.[92] The plaintiffs further claimed

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[88] "While the slotting fee is perhaps not brokerage by name, it may be brokerage in fact under the authority of *Southgate*." *Id.* at *16.

[89] Zeller Corp. v. Federal-Mogul Corp., 1999-1 Trade Cas. (CCH) ¶ 72,522, 1999 U.S. App. LEXIS 6345, at *8 (6th Cir. 1999).

[90] *Id.* at *7.

[91] El Aguila Food Products Inc. et al. v. Gruma Corp. et al., 301 F. Supp. 2d 612, 616 (S.D. Tex. 2003).

[92] *Id.* at 615.

that Gruma's conduct "affected the quantity, quality, variety, choice and price that consumers pay for tortillas."[93]

Gruma defended its practices with many of the arguments put forth by pro-slotters: there are no significant barriers to entry in the tortilla market,[94] competition for limited shelf space is accordingly intense,[95] and these programs reduce the prices paid by retailers.[96] The court ultimately granted summary judgment and a directed verdict for the defendants, struck down the testimony of the plaintiff's expert witness and showed just how high the current hurdles are for those attacking these arrangements.

In essence, the court viewed the payments as business as usual in the complex world of buyer-supplier negotiations. In the court's eyes, the agreements were not only a "part of the mix in the competition arena between competing products,"[97] but they were also an "acceptable and desirable means to acquire market share."[98] As such, the payments were not seen as per se unlawful.[99] While the plaintiffs' expert witness outlined an anti-competitive theory, the court found his opinion was based "on wholly insufficient data."[100]

Unfortunately for plaintiffs, given the complexity of the marketplace it will be extremely expensive, if not impossible, to isolate the point at which these payments traditionally regarded as lawful become illegal. Importantly, the court relies on traditional assumptions that the retailing market ensures that these fees result "in discounts that are passed on to the consumer."[101] The court also stressed that the

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[93] *Id.* at 616.

[94] *Id.* at 617.

[95] *Id.* at 616.

[96] *Id.*

[97] *Id.* at 620.

[98] *Id.* at 629.

[99] *Id.* at 621.

[100] *Id.* at 624. Interestingly, the court points out that the expert testimony relied solely on the 2003 FTC Study, *supra* note 4.

[101] *Id.* at 629.

presence of private label brands mitigated some of their competitive concerns.[102]

However, the difficulty for the small manufacturer does not end there. Interestingly, the court found that the conduct could not be exclusionary as a matter of law because some of the plaintiffs engaged in similar practices,[103] and at the same time posited that manufacturers who refused to negotiate for shelf space with retailers suffer a "self-inflicted wound."[104] Such findings clearly put manufacturers in a difficult strategic position in deciding how best to find their way onto the store shelves.

D. The 2003 FTC Study

The 2003 FTC Study attempted to provide some data with which to examine the slotting controversy. However, given the limited scope of the study, the authors emphasize the need to use appropriate caution in considering its results.[105] The FTC sent out nine surveys to retailers and received various degrees of responses from seven.[106] The study also incorporated the interview responses of eight suppliers—six manufacturers and two food brokers representing manufacturers of products in the study's categories.[107] While the authors warn against drawing significant conclusions from the results, a good deal can be learned about slotting by examining the answers that were given by various survey groups across different product categories.

The study makes it clear that retailers and suppliers have different perspectives as to the frequency and negotiability of

[102] *Id.*

[103] *Id.*

[104] *Id.* at 621.

[105] FTC 2003 STUDY, *supra* note 4, at iii ("The Study is based on a small sample of detailed case studies and may not be representative of all retailers in the United States. Care must be taken to avoid over-extrapolation of its results. At most, the study's results are suggestive, not probative").

[106] *Id.* at iii.

[107] *Id.*

slotting allowances.[108] Retailers view them as the flexible result of a negotiation process which incorporates many promotional, cost, and risk factors.[109] Suppliers, on the other hand, see a rigid environment when it comes to slotting,[110] with the amount of the required payment "known by vendors in advance of discussions."[111] Data from retailers further suggest inconsistency in the occurrence of slotting for new products in the same product category, with some suppliers making the payments and others refraining.[112] This result highlights the arbitrariness at the heart of many opponents' complaints, but could still cut in both competitive directions. These two dramatically different pictures provide only one easy conclusion—the answer to the slotting debate will only be found through more access to data.

The survey suggests that when most new products are introduced, retailers and suppliers negotiate over the amount of slotting allowances as part of a larger conversation.[113] If a retailer accepts a new product onto its shelves, the product is usually given a trial period of four to six months, but in most cases there is no contractual commitment to a specific length of time.[114] The retailers indicated that slotting allowances are used to help defray the costs and the risk associated with new product introductions.[115] This is a principal justification used in the defense of slotting which, if accurate, would support the pro-competitive case. However, the authors of the study go on to admit that "other information provided by the retailers

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[108] *Id.* at 58.

[109] *Id.*

[110] Six of eight suppliers stated slotting occurred eighty to ninety percent of the time. *Id.*

[111] *Id.*

[112] *Id.* at v.

[113] This conversation spans advertising allowances, introductory allowances per unit, marketing funds, and other special funds such as those used for in-store displays, couponing, and customer savings cards. *Id.* at iii.

[114] *Id.*

[115] *Id.* at iv.

in the study raises questions as to whether cost recoupment is the sole reason for slotting allowances."[116]

The new product risk rationale for slotting finds additional support in the data on refrigerated and frozen goods, which are more expensive for the retailer to introduce. The study correspondingly found a higher level of slotting in the hot dog and ice cream categories.[117] Again, the FTC authors point out that while this does support a risk-sharing theory of slotting, it does not rule out any of the other theories.[118] The data on direct-to-store-delivery items also reinforce a cost/risk sharing aspect to the fees. Direct-to-store products impose fewer of the warehousing and distributional expenses on the retailer and are accordingly charged smaller and less frequent slotting fees.[119] In addition, the retailers report that they consider many of these items, such as breads, less risky for them.[120]

All of these data could be used to construct the pro-competitive theory for slotting. However, none of the data rules out the possibility of excessive use of these fees, which many claim is the true heart of the issue. The FTC admits that the various theoretical models on slotting are not "mutually exclusive."[121] In fact, one retailer in the study explained that it requests slotting allowances "to remain on a competitively level playing field with the other retailers that require slotting."[122] It might therefore be foolish to think that one theory alone can account for the tremendous variation observed in the retailing world.

III. SUGGESTIONS FOR THE FUTURE

To date, many questions about the competitive role of slotting fees in the market remain unresolved and the

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[116] *Id.*

[117] *Id.* at v.

[118] *Id.* at 63.

[119] *Id.* at iv.

[120] *Id.* at 16.

[121] *Id.* at vi.

[122] *Id.* at 9-10.

practice continues to become more prevalent. Without the necessary data to prove their case, opponents have been unable to convince regulators to alter the status quo. Regulators have themselves examined the practice and have yet to reach any conclusions. The 2003 FTC study reiterated the need for additional examination of the issue while remaining hesitant to suggest any specific action or intervention.[123] To move forward and find a satisfactory answer, investigators must overcome several hurdles. First, they must find a way to get better information. Second, they must develop a common language with which to analyze the information. Finally, they must retest many of the assumptions under which they have previously patrolled the retailing landscape.

A. Mandate Record Keeping and Better Disclosure of the Fees

The poor record keeping of the retailing industry has been a major hurdle in the effort to learn more about the practice of slotting. The FTC study found that retailers lack any "complete, historical electronic records" of slotting allowances.[124] Only one of the seven retailer respondents had an electronic system to record the fees and only two more recorded slotting fees separately on their deal sheets.[125] Retailers claim they do not need to maintain detailed records of slotting fees for regular business purposes.[126] Often, retailers lump the slotting fee allowances into a general line item recognizing other promotional allowances, focusing not specifically on the slotting fees themselves, but on the aggregate amount of cost reductions which negotiations with the manufacturer have produced.[127] As a result, studies such as the one performed by the FTC will continually understate

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[123] FTC 2001 REPORT, *supra* note 5, at 67.

[124] FTC 2003 STUDY, *supra* note 4, at vi.

[125] *Id.* at 7.

[126] *Id.* at vi.

[127] *Id.* at 65.

the occurrence and magnitude of slotting even with full cooperation from retailers.[128] Although supermarkets have invested a great deal to modernize their inventory management systems and squeeze out every incremental penny of margin, they have not put a fraction of this effort into recording the results of slotting negotiations with their suppliers. While any effort to impose disclosure and record keeping requirements has the drawback of additional costs, this is one industry which seems well positioned to comply.

The retailers stress that there has not been a need to keep track of specific figures.[129] While plausible, the importance which the retailers attach to these fees in curbing the costs of new product introductions seems to warrant more attention on their part to tracking and recording the terms of each deal. While buyers and suppliers negotiate deals according to specific sets of circumstances, a data set collected across a broad spectrum of transactions should nonetheless provide a significant amount of market intelligence for retailers. In an industry like the grocery business where slotting accounts for an estimated one half of profits, one would expect at least a minimum level of care to be taken to document and analyze each transaction.

Because the negotiations often take place behind closed doors and involve numerous promotional considerations which are difficult to separate, any effort to understand the impact of these fees will be hindered without a firm grasp of the numbers involved. Poor record keeping, however, is just one informational challenge which must be overcome. Even on the rare occasion when the retailing industry does participate in slotting discussions with regulators, the companies, citing competitive concerns, refuse to provide specific details on slotting.[130] The futility of the effort has led one legislator spearheading the investigation to analogize

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[128] *Id.* at 8.

[129] *Id.* at vi.

[130] FTC 2001 REPORT, *supra* note 5, at 3.

the secrecy involved in the practice to a "blockbuster whodunit."[131]

Manufacturers have not been eager to fill in the blanks either. Most of the manufacturers participating in a workshop set up by the FTC to discuss the issue of slotting allowance were smaller firms, despite the fact that larger manufacturers had also been invited.[132] While not conclusive by any stretch, the absence of large manufacturers does provide some support for those who argue that such manufacturers have supported and intensified the practice of slotting as a means of excluding competition. Even small manufacturers have been hesitant to come forward given the possibility of retailer retaliation. Given the prevalence and significance of slotting fees for the manufacturer, it is interesting that the FTC receives few complaints concerning such fees, one every three months on average.[133]

In 2001, the Financial Accounting Standards Board decided to change the way manufacturers recorded slotting fees in an attempt to make them more transparent.[134] Many manufacturers had adopted the practice of treating the fees as a marketing expense without deducting the fees when they reported their top line revenue figures. By including the expenses with numerous other marketing costs, the manufacturers had helped protect the secrecy of the slotting expenses and boosted their growth results. As of the first quarter of 2002, companies were asked to deduct the slotting fees from their revenues. More accurate disclosure throughout the process will provide regulators and legislators with the information they have been thus far unable to obtain. Importantly, even if regulators and legislators continue to resist intervention, additional

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[131] *Retailers Stonewall Slotting Investigators, Feds Turn up Heat*, CANDY BUS. (Nov./Dec. 2000), (quoting Christopher S. Bond), *available at http://*www.retailmerchandising.net/cbus/archives/1200/ news.asp.

[132] FTC 2001 REPORT, *supra* note 5, at 3.

[133] Tom Statement, *supra* note 7.

[134] Greg Winter, *Audit Shift Set on Fees to Put Goods in Stores*, N.Y. TIMES, May 15, 2001, at C4.

transparency may provide the information which plaintiffs like El Aguila need to make their case in the courtroom. In addition, mandated disclosure might better ensure the payments serve the pro-competitive purpose of risk sharing by making sure all parties comprehend the going rate of shelf space.

B. The Value of Product Variety

Regulators must also examine the importance of variety in the antitrust equation. Thomas Leary has recently argued that variety alone may have significant value which deserves antitrust consideration in its own right.[135] Recent decisions, such as in *LePage's, Inc. v. 3M*, could demonstrate that such notions about consumer welfare may be coming into judicial favor.[136] In *LePage's*, a predatory pricing case involving the packaged bundling of several product lines, the Third Circuit recognized that despite the lower overall costs the 3M plan provided, its actual effect was to drive a smaller competitor from the shelves.[137] Turning its back on the *Brooke Group* line of Sherman Act cases, the court found antitrust injury despite the absence of a negative, near-term price effect for the consumer. This is illustrative of a new way of thinking about protecting smaller market participants and defending consumer choice. Future studies should account for the possible importance of variety on the store shelf.

C. The Definition of a New Product

Proponents of slotting are quick to point out that the proliferation of new products seems to contradict the arguments that slotting discourages innovation and new product introductions.[138] However, one must first analyze the make-up of new products to examine where and why these new products are coming to market. If a large percentage of

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[135] Leary, *supra* note 37, *passim*.

[136] LePage's, Inc. v. 3M, 324 F.3d 141 (3d Cir. 2003).

[137] *Id.* at 155.

[138] *See* Hammonds Statement, *supra* note 8.

these "new" products are minor cosmetic changes or "new and improved" versions of existing lines, then this would weaken the retort dramatically. In fact, the quantity of new products being thrown at the retailer could be an attempt by large manufacturers to continue to bid up these slotting allowances to maintain their anti-competitive effect as a barrier to entry. The increasing frequency and size of slotting at a time when both information collection and analysis have improved seem to hint that there may be something more to the story.

The recent FTC study highlighted the need for a more developed approach in analyzing these new product introductions. Differentiating items along a well-defined scale of novelty would allow for an apples to apples comparison of risk and cost. Not only would this help regulators dig deeper into the seemingly arbitrary nature of slotting suggested by the FTC study, it would also help monitor innovation, the introduction of "new and improved" products by the dominant manufacturers, and the real risk of failure which the retailers confront. Importantly, regulators could then better identify the point at which pro-competitive uses of slotting became anti-competitive.

D. Retailer Intelligence

Proponents of slotting argue that the fees serve a signaling function of a product's ultimate success. This justification, however, runs into trouble as the information disparity between manufacturer and retailer changes. While a manufacturer would logically be willing to pay more in slotting allowances for a product in which it had more faith, the value of that information to a retailer may not be as large as proponents of the practice argue. The modern retailer, equipped with barcode scanning and real-time data analysis capabilities, should be in a much better position to make predictions as to the ultimate success or failure of a new product. The retailer occupies a position closer to the consumer and has access to firsthand data on how the consumer makes purchasing decisions. Furthermore, the retailer ultimately has the ability to place a product in the location capable of maximizing its potential revenues. While the corroborative effect of a manufacturer putting dollars behind a product in this fashion is certainly informative, it seems that unless the product in question is revolutionary, the retailer has a real opportunity to exploit its informational advantage to help its own bottom line.[139] Increasing the size of the retailer would only magnify the power of its data.

E. Power Buyers and the Role of Self-Branded Products

Borghesani points out that antitrust legislation and enforcement have traditionally focused on the ability of manufacturers to control prices or competitive entry into a market.[140] Unfortunately, this methodology does not appear to contemplate the emergence of power-buyers.[141] Importantly, European regulators have taken notice of the possibility of the anti-competitive effects of these buyers acting as gatekeepers for the manufacturer's products.[142] While U.S. authorities may not consider this a current threat, the possibility of buyer power necessitates a greater role in their analysis of the slotting equation.

Both Borghesani and Curtin also call for the antitrust establishment to account for the impact of retailer-branded products in the marketplace. The retailer's dual role as both a customer and competitor in the marketplace could create additional avenues for the enhanced exercise of market power.[143] Not only do these retailers have access to consumer information and the promotional strategies of the

[139] Several speakers at the FTC workshop brought attention to these potential informational advantages at the retailer level. FTC 2001 REPORT, *supra* note 5, at 16.

[140] Borghesani et al., *supra* note 28, at 81.

[141] *Id.*

[142] Curtin et al., *supra* note 69, at 539.

[143] *Id.* at 540.

manufacturers, they also may be able to price with an advantage: the absence of slotting fees.[144]

Private-label brands account for slightly less than fifteen percent of total dollar sales in U.S. supermarkets and are the dominant brands in about twenty percent of more than 350 product categories that most stores carry.[145] These private-label products are guaranteed full distribution and advantageous shelf placement.[146] Furthermore, these derivative products might push out the secondary names which drive competition through innovation, resulting in markets which only have one research and development based manufacturer.[147]

These forces at work in the market do not act in a vacuum. Power buyers are selling self-branded products and competing with the small manufacturer who once would have been secondary suppliers. At the same time, the direct purchasing power of large retailers makes wholesalers and distributors less efficient and indirectly raises the cost structure of the smaller retailer.[148] Yet, decisions like *El Aguila* do not seem to account for this new reality. The *El Aguila* court continues to take solace in self-branded products as a guarantor of competition and takes for granted that the discounts represented by slotting would be passed along to consumers. To address the concerns of slotting opponents and commentators like Borghesani and Curtin, further study must be done to examine how these self-branded products might combine in a cumulative fashion with slotting and a power-buyer dynamic to decrease the variety of products on the shelves, hamper innovation, and ultimately weaken the competitive marketplace.

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[144] Borghesani et al., *supra* note 28, at 61.

[145] Curtin et al., *supra* note 69, at 568.

[146] Borghesani et al., *supra* note 28, at 60.

[147] *Id.* at 62.

[148] *Id.* at 52.

IV. CONCLUSION

The slotting controversy is far from being settled. Recent investigations by the FTC have proved inconclusive. The complexity of slotting requires greater precision and more data. To get closer to a satisfactory answer, regulators must not only better define the terms of debate but they must also analyze the question within a vision of retailing which acknowledges the many forces at play. The retailing world of the twenty-first century has changed dramatically. Suppliers no longer appear to have a chokehold on competition and the corresponding market power. In sharp contrast, retailers have consolidated their market shares, improved their intelligence capabilities, and now compete with their own self-branded products. Attempts to move forward without first establishing a new framework of analysis will likely leave all concerned parties with an empty stomach.