# *Background Paper*

# *SHELF-ACCESS PAYMENTS: SLOTTING FEES, PAY-TO-STAY FEES AND EXCLUSIVITY DEALS*

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## *INTRODUCTION*

The use of slotting fees[1] and other shelf-access payments has reportedly increased in recent years, and much work has been done to attempt to ascertain the scope and extent of this practice which some view as anti-competitive and others view as enhancing efficiencies in the marketplace. In May 2000, the Federal Trade Commission (FTC) held a public workshop, bringing together representatives of large chain retailers, small retailers, wholesalers, small manufacturers and others familiar with the grocery industry, to assist the agency in its understanding of shelf-access practices. As a result of the workshop, the FTC issued a report in February 2001 entitled *Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry* (2001 FTC Report). This report summarized the information presented at the workshop and identified areas where additional information was needed to better understand these practices.

In November 2003, the FTC issued a follow-up case study entitled *Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories* (2003 FTC Case Study). This case study was a limited study in which the FTC requested information from nine retailers throughout the country; seven of those retailers responded in varying degrees. The study focused only on five specific product categories (ice cream and frozen novelties, fresh bread, hot dogs, pasta and salad dressing). Because of the limited nature of the case study and the fact that it was necessarily based on a small sample that may not be representative of the entire grocery industry, the FTC stressed that its results “are suggestive, not probative” and warned against “overextrapolation of its results.”[2]

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1 The FTC uses the terms “slotting fee,” “slotting allowance,” and “slotting” interchangeably, and this background paper will follow suit. In addition, although some use the term “slotting fees” to include both slotting fees and pay-to-stay fees, this paper, like the FTC, will draw a distinction between the two.

2 Slotting Allowances in the Retail Grocery Industry: Selected Case Studies in Five Product Categories, Federal Trade Commission, November 2003, p. iii.

This background paper details the different types of shelf-access payments identified by FTC workshop participants as the most frequently used and potentially harmful to competition. The paper also describes what is known regarding the frequency with which the payments are used and the magnitude of the fees paid, as well as the potential benefits and harms of each payment. The paper identifies relevant statutes as well as a description of several cases challenging these payments. Finally, the paper notes the work that has been done in several other countries on this issue.

## *BACKGROUND ON SHELF-ACCESS PAYMENTS*

The 2001 FTC Report noted three types of shelf-access payments identified by participants in the workshop as the "most likely to raise business and competitive concerns".[3] They are (1) slotting fees, (2) pay-to-stay fees and (3) payments to limit rivals' shelf space.

### Slotting Fees

What are slotting fees?

While there is no standard definition of the term "slotting fee," the 2001 FTC Report indicated that the term has been used to describe a "lump-sum fee paid for new product introduction."[4] The payment is made by a supplier to a retailer "as a condition for initial placement of the supplier's product on the retailer's store shelves or for initial access to the retailer's warehouse space."[5] Typically, the agreement assures the manufacturer a spot on the shelf for a particular trial period.[6] It is important to note that, while slotting fees are generally paid in cash, sometimes the payment can take other forms such as free or discounted goods.[7]

While much of the discussion relating to slotting fees has centered on the use of the payments in the grocery industry, recent reports indicate that the payments are "becoming more widely used in other industries (e.g., computer software, compact discs, books, magazines, apparel, over-the-counter drugs and tobacco products)."[8]

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3 Report on the Federal Trade Commission Workshop on Slotting Allowances and Other Marketing Practices in the Grocery Industry, Federal Trade Commission, February 2001, p. 10.
4 Id.
5 2003 FTC Case Study, p. i.
6 2001 FTC Report, p. 11.
7 Id.
8 P. Bloom, G. Gundlach & J. Cannon, Slotting Allowances and Fees: Schools of Thought and the Views of Practicing Managers, 64 J. of Marketing 92, 92 (2000).

How much are slotting fees?

Although its study was limited, the 2003 FTC Case Study concluded, in part, that "there is considerable variability across product categories both in the likelihood of paying fees and in the magnitude of fees paid. Products that must be refrigerated (where shelf space is more scarce and product introductions more common) are more likely to pay fees and to pay higher fees. Products that are distributed through direct store delivery are less likely to pay fees and to pay lower fees."[9]

Much of the information concerning slotting fees is anecdotal. For example, while exact figures are not available, one participant in the FTC workshop suggested that "it would cost approximately $16.8 million to introduce a small product line of four items in all supermarkets nationwide."[10] In its 2003 case study, the FTC reported that the suppliers surveyed indicated that "a nationwide introduction of a new grocery product would require $1.5 to $2 million in slotting allowances."[11] The same FTC Report found that the average amount of slotting fees (per item, per retailer, per metropolitan area) for all five categories surveyed ranged from $2,313 to $21,768, depending on the particular retailer and metropolitan area.[12]

The Food Marketing Institute (FMI), representing food retailers and wholesalers, indicates that the amount of slotting fees depends on various factors, including "whether the supplier has a proven track record, whether customer testing has been performed, whether the product is carried by competitors in the same market and whether the supplier has a well-conceived advertising program."[13]

FMI also asserts that slotting fees are not charged for "most established products or for new offerings that have a high likelihood of success. Manufacturers that perform thorough market research and support new products with strong advertising campaigns often do not pay allowances."[14] Such a practice can be problematic for smaller manufacturers, however, as noted by the American Antitrust Institute (AAI) in testimony before the U.S. Senate Committee on Small Business. In noting its belief that the imposition of slotting fees can be discriminatory, AAI stated, "Retail chains may demand different amounts from different suppliers in the same product category –

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[9] 2003 FTC Case Study, p. 64.
[10] 2001 FTC Report, p. 4.
[11] 2003 FTC Case Study, p. vii.
[12] Id.
[13] FMI Backgrounder: Slotting Allowances in the Supermarket Industry, Food Marketing Institute, available at http://fmi.org/media/bg/index.htm (visited January 25, 2005), p. 1.
[14] Id., p. 3.

indeed in some cases the leading supplier may pay nothing while its smaller rivals are expected to write large checks."[15]

As noted above, the FTC Case Study found that the average slotting fee paid in connection with the introduction of new ice cream and hot dog products was higher than the slotting fees paid in the other categories.[16] The retailers and suppliers surveyed suggested that this was the result of more limited and more costly shelf space for refrigerated and frozen products.[17]

Additionally, the FTC found that slotting fees can be a significant portion of a product's first-year revenues.[18] For example, the FTC noted, "roughly 10 percent of ice cream products fail to earn enough revenue in their first year to cover their slotting fees."[19]

<u>How often are slotting fees charged?</u>

Because slotting fees are often a part of private contract negotiations between manufacturers and retailers, much information relating to them is considered proprietary and competitively sensitive.[20] In fact, in 1999, the General Accounting Office (now known as the Government Accountability Office) was unable to complete a study on the issue requested by the U.S. Senate Committee on Small Business because it could not obtain the industry's cooperation in conducting the study.[21] Additionally, determining the prevalence of slotting fees may be difficult because many retailers do not maintain historical records of their use of the fees. For example, of the seven retailers surveyed in the FTC's 2003 case study, only one reported that it maintained historical electronic records of slotting fees.[22] Based on these responses, the FTC concluded:

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15 *Slotting Fees in the Grocery Industry, Before the Senate Committee on Small Business*, (September 14, 1999) (testimony of Robert A. Skitol, the American Antitrust Institute).

16 2003 FTC Case Study, p. 53.

17 Id.

18 Id., p. 64.

19 Id. The FTC noted, however, that responses from suppliers and retailers suggested that other new product introduction costs, such as advertising and promotional allowances, are often more costly than slotting fees.

20 Suppliers surveyed in the FTC's 2003 case study indicated that, in addition to paying slotting fees to introduce a new product, they also "negotiate with retailers over advertising allowances, introductory allowances per unit, marketing funds and other special funds, such as those used for in-store displays and demonstrations, couponing and customer savings cards." 2003 FTC Case Study, p. 51.

21 *Slotting Fees: Effort to Study the Use of These Payments in the Grocery Industry, Before the Senate Committee on Small Business*, (September 14, 2000) (testimony of Lawrence J. Dyckman, GAO).

22 2003 FTC Case Study, p. 7. Other retailers indicated some form of data collection, but the FTC nevertheless noted that "many retailers simply do not maintain the information in a

> [D]espite retailer cooperation, it is very difficult to obtain complete, historical data on the frequency and aggregate dollar amounts of slotting. As a result, the FTC staff believe that the frequency and overall amounts of slotting dollars reported by the retailers in this study may be lower than the actual incidence of slotting.[23]

Retailers surveyed for the 2003 FTC Case Study reported that the frequency of slotting fees varies widely, ranging from 50 to 90 percent of all new product introductions (not just those product categories included in the case study).[24] Suppliers, on the other hand, perceived that slotting fees are charged more frequently: 80 to 90 percent of new product introductions.[25] The FTC noted that its belief that the frequency and amounts of slotting fees reported by the surveyed retailers may be lower than the actual incidence of the fees may help to explain this discrepancy.[26]

According to FMI, retailers may waive slotting fees for "minority-owned vendors because of their increasing value in markets with high levels of diversity, and for local growers and suppliers."[27] The FTC also noted this fact in its case study, reporting that some retailers indicated that "they will waive or reduce slotting for smaller vendors, vendors who do not pay slotting to anyone in the market, and minority or ethnic vendors, especially if they provide products that satisfy specific consumer demands."[28]

Furthermore, a key finding of the 2003 FTC Case Study indicated that, for the five product categories studied, slotting fees were less likely to be used by the surveyed retailers (and, if used, were likely to be lower), if the products were distributed through "direct store delivery" instead of the retailer's warehouse system.[29] In addition to relieving the retailer of costs associated with adding the product to its warehouse distribution system, direct store delivery often means that suppliers provide services, such as stocking, that the retailers would otherwise provide.[30]

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manner easily usable for a retrospective study; that is, they do not maintain historical, product-specific electronic data on slotting allowances."

23 Id., p. 8.

24 Id., p. vi.

25 Id., p. 65.

26 Id.

27 FMI Backgrounder: Slotting Allowances in the Supermarket Industry, *supra* note 13, at 3.

28 2003 FTC Case Study at 51.

29 Id., p. v.

30 Id.

Why are slotting fees charged?

According to FMI, slotting fees are used for three principal reasons: (1) to cover the costs of introducing a new product, (2) to remove the item that previously occupied that shelf space, and (3) to recover the retailer's investment in the case of a product failure.[31] Interestingly, the FTC reported that some of the largest retailers, such as Wal-Mart and Costco, do not charge slotting fees.[32]

What are the potential benefits of slotting fees?

Supporters of slotting fees have been referred to as proponents of the "efficiency school of thought," viewing slotting fees as a means for enhancing "the efficiency of new product distribution."[33] The 2001 FTC Report further elaborated on the potential benefits of slotting fees, noting that they "may serve some practical business purposes."[34] Specifically, the FTC noted that some workshop participants felt that a manufacturer's willingness to pay a slotting fee up-front is a "tangible, credible statement of confidence in the product's success," which may help to persuade the retailer to stock the product on its shelves based on the fact that the manufacturer is likely to have researched and test-marketed the product.[35]

Another benefit cited by FTC workshop participants is that slotting fees shift the risk of product failure back to the manufacturer and, therefore, make retailers more willing to stock new products.[36] According to the 2001 FTC Report, approximately 20,000 new products are introduced every year and roughly 80 to 90 percent of these new products fail within a relatively short time period.[37]

As noted by FMI above, retailers argue that slotting fees help to offset the costs (and risks) of introducing a new product and to recover some of the investment in the case of a product failure. For example, according to FMI, introducing a new product requires a retailer to take as many as 24 steps, including reprogramming computers for inventory management and shelf labels, providing space in the warehouse and on the shelf, verifying that the checkout registers scan the new item correctly and changing accounting records.[38] Similarly, removing a product to make room on the shelf for the new item requires the retailer to take another ten steps including deleting the old

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31 FMI Backgrounder: Slotting Allowances in the Supermarket Industry, *supra* note 13, p. 2.
32 2001 FTC Report, p. 18.
33 Bloom et al., *supra* note 8, p. 93.
34 2001 FTC Report, p. 12.
35 Id., p. 13.
36 Id., p. 14.
37 Id.
38 FMI Backgrounder: Slotting Allowances in the Supermarket Industry, *supra* note 13, p. 3.

product from all computer records and selling unsold units, often at a significant discount.[39]

What are the potential harms of slotting fees?

The 2003 FTC Report raised a number of criticisms of slotting fees. For example, slotting fees have been criticized for increasing the cost of entry into a market, thus shutting out smaller competitors.[40] Workshop participants indicated that the additional costs of slotting fees affect smaller businesses much more than larger businesses because, among other things, a larger business is more likely to be able to pay a slotting fee from cash flows generated by other, more established product lines, "whereas a small new entrant is less likely to have this kind of pre-existing revenue base."[41]

AAI further notes that smaller retailers may also be harmed by slotting fees, stating "smaller retailers without any ability to extract slotting fees end up paying more than their larger rivals for the goods on their shelves, thereby becoming uncompetitive in their resale prices and forced to accept little more than 'niche' positions in their markets."[42]

Others have suggested that slotting fees harm competition by reducing innovation and product variety.[43] Specifically, they assert that consumers are hurt and lose variety because new product introductions are reduced.[44] In fact, several manufacturers reported to the FTC that "they had refrained from introducing new products because of the cost of slotting allowances."[45] In addition, because any small change in the product will require a new stock-keeping unit (SKU) (and often a new slotting fee)[46], some manufacturers are reluctant to even improve their products.[47]

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[39] Id.

[40] 2001 FTC Report, p. 19. Larger competitors have also argued that slotting fees are harmful to competition. For example, in RJ Reynolds Tobacco Co. v. Philip Morris USA, Inc. 199 F. Supp. 2d 362 (M.D.N.C. 2002) aff'd 67 Fed. Appx. 810 (4th Cir. 2003), RJ Reynolds sued Philip Morris for violations of the Sherman Act as a result of Philip Morris' retail marketing program in which it provided discounts to retailers on Marlboro cigarettes in exchange for the most advantageous display space. The court granted Philip Morris' motion for summary judgment, dismissing the case.

[41] 2001 FTC Report, p. 22.

[42] Skitol testimony, *supra* note 17.

[43] Id.

[44] 2001 FTC Report, p. 25.

[45] Id. The FTC notes, however, that "some research has found that new product introductions increased during the time that slotting allowances have increased, suggesting that the allowances do not deter innovation."

[46] The FTC noted that whether a product is "new" varies from retailer to retailer. Some "define a new product as any product that enters their store with a new Universal Product Code (UPC), even if it is simply a change in the size of the package. Others define a new product

Another criticism of slotting fees is that they increase prices paid by consumers because the manufacturer increases its price to cover the cost of the slotting fee.[48] In addition, they express the concern that slotting fees permit retailers to obtain a benefit in a form that is less likely to be passed along to the consumer and, because the retailer obtains the payment upfront, there is no incentive to lower the price to sell more of the product.[49]

### Pay-to-Stay Fees

<u>What are pay-to-stay fees?</u>

Another form of shelf-access payment is known as a pay-to-stay fee. Such fees are charged to manufacturers to keep their products on the shelf after the initial period has elapsed. These fees differ from slotting fees in that they are charged for existing products rather than new products.[50]

<u>How often are pay-to-stay fees charged?</u>

The anecdotal evidence provided to the FTC at its workshop indicated divergent attitudes regarding how often pay-to-stay fees are charged. The report noted that some participants believed that the fees are "seldom charged" and others indicated that the fees "exist and are substantial."[51] The retailers surveyed in the FTC's 2003 case study indicated that they "have no policy or practice with respect to pay-to-stay fees, and they virtually never use pay-to-stay fees in the product categories for which information was requested."[52]

<u>What are the potential benefits of pay-to-stay fees?</u>

Because pay-to-stay fees are imposed upon existing products, any risk-shifting benefit, as described above relative to slotting fees, is much more limited.[53] Also, because the products in question have been on the shelf and have a track record of sales, there are fewer risks "for which the retailer needs to be

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as only a truly different product from something already on the market." 2003 FTC Case Study, p. i.

47 One workshop participant indicated that a "very minor change" in processing hash browns "would have required a whole new slotting allowance just to make that change in the same slot, so that's an idea where innovation is killed." 2001 FTC Report, p. 25.

48 Id., p. 26.

49 Id., p. 27.

50 Id., p. 29.

51 Id.

52 2003 FTC Case Study, p. 19. Despite this statement from the surveyed retailers, the FTC notes that one retailer does in fact appear to engage in practices that meet its definition of pay-to-stay fees. Specifically, when an item is discontinued, sometimes the supplier will offer a payment to reinstate the item which is often accepted by the retailer. The retailer noted that it does not solicit the payment and does not maintain any records regarding the frequency of the practice.

53 2001 FTC Report, p. 29.

compensated" and there is "less need for a signal from the manufacturer as to whether it is likely to succeed."[54] Several FTC workshop participants indicated that pay-to-stay fees provide retailers a way to rationally allocate limited shelf space and permit retailers to "auction their shelf space and efficiently determine its highest-valued use."[55]

What are the potential harms of pay-to-stay fees?

Because pay-to-stay fees are similar to slotting fees in that they involve an up-front, lump-sum payment, similar concerns are raised relating to burdens imposed on manufacturers who cannot afford the payment. Several participants in the FTC workshop indicated that pay-to-stay fees can be significantly exclusionary and could potentially limit competition and increase prices.[56]

**Payments to Limit Rivals' Shelf Space**

What are payments that limit rivals' shelf space?

The FTC reported that several workshop participants alleged that "certain suppliers make payments that limit or disadvantage a rival's shelf space."[57] The FTC noted that these payment agreements can be "outright exclusivity agreements, partial exclusivity agreements or preferential shelf space arrangements," and noted that the exclusivity can be paid in different ways including slotting fees or pay-to-stay fees.[58]

How are such agreements used?

Information obtained by the FTC in its 2003 case study indicated that "some supplier-retailer agreements guarantee the supplier more than 50 percent of the shelf space allocated to a particular product category," significantly limiting the amount of shelf space available for competing products.[59] The study also noted that "six of the seven surveyed retailers stated that they did not use exclusive or partially exclusive dealing arrangements in the product categories surveyed."[60] The 2001 FTC Report noted the following comments from workshop participants indicating a different experience with exclusivity deals:

> For example, a small supplier of canned tomatoes, tomato products and sauerkraut stated that national brands of canned vegetables pay

[54] Id., p. 30.
[55] Id.
[56] Id., p. 29.
[57] Id., p. 30.
[58] Id., p. 31.
[59] 2003 FTC Case Study, p. 13.
[60] Id., p. 57.

high slotting fees “just to keep us off the shelf;” an air freshener producer claimed that the dominant producers of automotive air fresheners “will pay large amounts of money to keep everybody else out;” and a small tortilla manufacturer claimed that a dominant supplier had paid to have the smaller firm’s product placed in a disadvantageous shelf location, eventually taking all the shelf space except for “three feet in a corner.”[61]

[61] 2001 FTC Report, p. 31.

## *STATUTORY AND LEGAL BACKGROUND*

### Relevant Federal and California Statutes

Because critics of shelf-access payments have argued that use of the payments harms competition and violates antitrust law, this paper briefly explains the relevant statutory framework.

Federal Law

**Sherman Antitrust Act** (15 U.S.C. section 1): The main source of antitrust law, the Sherman Act makes illegal any contract, combination or conspiracy in restraint of trade or commerce. Designed to "maintain economic liberty, and to eliminate restraints on trade and competition," the Sherman Act has been in effect since 1890.[62] Not every contract or agreement limiting trade or competition is prohibited under the Sherman Act, however. Rather, courts have held that an act is unlawful only when it constitutes an *unreasonable* restraint on interstate commerce.[63]

**Robinson-Patman Price Discrimination Act** (15 U.S.C. section 13). The Robinson-Patman Act provides that it is unlawful for a seller to charge competing purchasers different prices for the same product unless the price difference reflects unique costs of doing business with the different purchasers.[64]

**Clayton Act** (15 U.S.C. section 12 et seq.). The Clayton Act makes it unlawful "to maintain or attempt to create a monopoly through tactics that either unreasonably exclude firms from the market or significantly impair their ability to compete."[65] The key factor in determining whether or not the Clayton Act has been violated is whether the effect of the sale or contract for sale may

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62 Antitrust: An Overview, Legal Information Institute, available at http://www.law.cornell.edu/ (visited January 26, 2005).
63 See Stearns Airport Equip. Co. v. FMC Corp., 170 F.3d 518, 532 (5th Cir. 1999).
64 Antitrust: An Overview, *supra* note 62.
65 Id.

"substantially lessen competition or tend to create a monopoly in any line of commerce."[66]

**Federal Trade Commission Act** (15 U.S.C. section 41 et seq.). Under the Federal Trade Commission Act ("the act"), "unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce" are unlawful.[67] The act empowers the FTC to enforce its provisions and prevent businesses under its jurisdiction from using unfair methods of competition and unfair or deceptive acts or practices.[68]

California Law

**Cartwright Act** (Business and Professions Code section 16600 et seq.). The Cartwright Act prohibits trusts which are defined as "a combination of capital, skill or acts by two or more persons" from, among other things, creating or carrying out restrictions in trade or commerce, increasing the price of merchandise, or preventing competition in the sale or purchase of merchandise, produce or any commodity.[69]

**Unfair Competition Law** (Business and Professions Code section 17200 et seq.). Since the first Civil Code was enacted in 1872, California has prohibited unfair competition by one business against another. Specifically, the Unfair Competition Law prohibits any unlawful, unfair or fraudulent business act or practice.[70]

**Caselaw**

Several cases have been brought challenging the use of shelf-access payments under both state and federal antitrust law. Antitrust analysis must necessarily be very fact-specific in order to determine whether competition (and not merely the competitor) is harmed. For example, how the market is defined is critical to determining whether or not the defendant possesses monopoly power and this determination will vary on a case-by-case basis. The following is a sample of these key cases.

**El Aguila Food Prods. v. Gruma Corp.** In El Aguila Food Prods. v. Gruma Corp., 301 F. Supp. 2d 612 (S.D. Tex. 2003), the plaintiffs brought an antitrust action against Gruma Corporation, the maker of tortilla products marketed under the names Mission, Guerrero and La Predilecta. The plaintiffs alleged that Gruma had violated the Sherman Act by monopolizing the retail tortilla

[66] 15 U.S.C. section 14.
[67] 15 U.S.C. section 45.
[68] Id.
[69] Business and Professions Code section 16720.
[70] Business and Professions Code section 17200 et seq.

market and engaged in price discrimination in violation of the Robinson-Patman Act. The plaintiffs' case was based on Gruma's agreements with retailers providing for preferential shelving of its tortillas in return for slotting fees.[71] The plaintiffs argued that the agreements allowed Gruma to "manage or control the placement, location, availability, visibility and promotional activity of competing retail tortillas."[72]

The district court granted the defendant's motion for summary judgment, dismissing the plaintiffs' case. According to attorneys familiar with the case, the plaintiffs have appealed the decision. In rejecting the plaintiffs' claims, the court held that the plaintiffs failed to allege that Gruma possessed monopoly power in the retail tortilla market. In fact, the court noted its belief that Gruma's agreements were an "acceptable and desirable means to acquire market share."[73] In addition, the court held the agreements at issue did not have an adverse effect on competition, noting that the evidence did not show that Gruma was the recipient of any shelf space lost by a plaintiff.[74]

**Diaz v. Gruma Corp.** In Diaz v. Gruma Corp., No. BC 316086 (Los Angeles Superior Court, filed August 6, 2004), the plaintiff sued Gruma Corporation as well as several supermarkets, including Ralphs, Vons and Food 4 Less, alleging that the defendants had violated the Cartwright Act and the Unfair Competition Law. In this case, the plaintiff is not a manufacturer of tortillas, but rather a consumer of tortillas. The plaintiff alleged that Gruma paid significant fees to the defendant supermarkets "in exchange for exclusive or dominant shelf and display space with the intention of eliminating availability and visibility of competing products in Southern California."[75] The suit, which is currently pending, is in its early stages.

## Other Countries

The use of shelf-access payments is not limited to the United States. In fact, several other countries have reported on and taken action on the issue. The following is a brief summary.

**Israel**. In its "Annual Report on Competition Policy Developments in Israel (January 2003 through April 2004)," the Israel Antitrust Authority reported

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71 An article at the time noted that, although the shelves at the local supermarket appeared to be stocked with competing tortilla products, many of the tortilla brands were actually manufactured by Gruma. (Marla Dickerson, Tortilla Makers Try Not to Get Flattened: Small Companies Face Off with Giant Rival over Market Share, Los Angeles Times, October 28, 2003, p. C1.).

72 El Aguila Food Prods. v. Gruma Corp., 301 F. Supp. 2d 612, 615 (S.D. Tex. 2003).

73 Id., p. 628.

74 Id., p. 630.

75 Diaz v. Gruma Corp., No. BC 316086 (Los Angeles Superior Court, filed Aug. 6, 2004), first amended complaint, p. 10.

that the general director had published an opinion in May 2003 finding evidence of violation of that country's antitrust laws before taking legal action and noted the following examples:

> Dominant suppliers demanded the retail chains, in some of their commercial agreements, to refrain from admitting competing "private labels." In addition, a dominant supplier agreed to pay one of the large retail chains for the removal of all but one of the competing products from their shelves.
>
> Dominant suppliers and large retail chains agreed that the shelf space allotted to their products would be significantly larger than half of the shelf space allotted to similar products sold by the chain. In addition, a dominant supplier made an arrangement with a retail chain that the latter would receive payment in return for its guarantee that it would strive to maintain or increase the market share of the supplier's products in several categories where the supplier has a market share significantly above fifty percent.[76]

The general director issued his position prior to taking any legal action "in order to prevent any continuance of the problematic practices."[77] The report further states that "the general director's final position and guiding rules will be published soon" and notes that "many of the suppliers already expressed their agreement to comply with the rules recommended in the general director's position."[78]

**Canada**. In November 2002, the Canadian Competition Bureau (CCB), tasked with promoting and maintaining fair competition, published a report entitled "The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector." The purpose of the report was to "provide the grocery industry with a better understanding of how the abuse of dominance provisions could be applied by the bureau and to assist in deterring anti-competitive conduct in the grocery sector by encouraging compliance with the law."[79]

With respect to slotting fees and other shelf-access payments, the CCB report noted that, while retailers with market power may not be violating Canadian law by soliciting slotting fees, "it is clear that, given the imposition of fees in

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[76] Annual Report on Competition Policy Developments in Israel (January 2003 through April 2004), Israel Antitrust Authority, available at http://www.antitrust.gov.il (visited January 26, 2005).

[77] Id.

[78] Id.

[79] The Abuse of Dominance Provisions (Sections 78 and 79 of the Competition Act) as Applied to the Canadian Grocery Sector, Canadian Competition Bureau, November 2002.

exchange for shelf space and the fact that shelf space is limited, such schemes could have an exclusionary effect on some competitors or classes of competitors."[80] The CCB then went on to note that it "would be concerned if the payment of a slotting allowance is being used by the dominant firm(s) to acquire exclusivity or to tie up enough of the available shelf space to preclude other competitors from entering or expanding into the market."[81]

80 Id.
81 Id.