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Whither Predatory Pricing? From Areeda and Turner to *Matsushita*

Wesley J. Liebeler*

Legal activity on the predatory pricing front has been frenetic since 1975. The subject has been featured in some twenty-five journal articles¹ and in approximately fifty-five cases in the federal courts.² In the thirty years preceding 1975 there appears to have been only one significant predatory pricing case.³ Nor was predatory pricing a popular subject in the legal journals during that period.⁴

This sharp increase in legal activity since 1975 might lead one to conclude that American businessmen have been on a predatory pricing binge. They have not. Judge Kaufman wrote in 1981 that "nowhere in the outpouring of literature on the subject do commentators suggest that [predatory] pricing is either common or likely to increase."⁵ In 1986 the Supreme Court reported that "there is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful."⁶ An examination of the predatory pricing cases decided since 1975 confirms these views.⁷ Most of those cases are insubstantial. Almost all could have been decided for the defendant on summary motions; many of them were. Not one of the cases is a real predatory pricing case.⁸

An important period in the history of concern with predatory pricing falls between the 1975 Areeda-Turner article⁹ and the 1986

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1 See Appendix C to this article.

2 See Appendix A to this article.

3 *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). *Utah Pie* was not a monopolization case. It was brought under the Robinson-Patman Act and the only real issue was whether the plaintiff had shown the requisite injury to competition.

4 John McGee did, however, write his important article in 1958. McGee, *Predatory Pricing: The Standard Oil (N.J.) Case*, 1 J. L. & ECON. 137 (1958) See also Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971).

5 *Northeastern Tel. Co. v. AT & T Co.*, 651 F.2d 76, 88 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

6 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357-58 (1986).

7 See Appendix A.

8 There are only two or three cases where reasonable persons might disagree with this judgment. See text accompanying notes 58-73 *infra*.

9 Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

Supreme Court decision in *Matsushita*.¹⁰ Professors Areeda and Turner argued that prices were predatory only if they were below short-run marginal cost or its surrogate, short-run average variable cost. Their work prompted a flood of articles offering criticism and advice on how to recognize and deal with predatory pricing.¹¹ Along with this academic flood came a torrent of cases.¹² Ironically, the Areeda-Turner article contributed to a vast increase in the number of predatory pricing cases, even though its authors seem to have intended to make it more difficult to win such cases.¹³ It also led the courts to focus particularly on the relationship between the alleged predator's prices and costs.

In *Matsushita*, the Supreme Court reminded us that predatory pricing is quite implausible. The Third Circuit had reversed the district court's grant of summary judgment for defendants which were principally a group of Japanese television manufacturers charged with conspiring for some twenty years to charge predatorily low prices in the United States. The Supreme Court in turn reversed the Third Circuit, emphasizing that "conduct as consistent with permissible competition as with illegal conspiracy [or predation] does not, standing alone, support an inference of antitrust conspiracy [or predation]."¹⁴ The fact that "predatory pricing schemes are rarely tried, and even more rarely successful"¹⁵ significantly increases the plaintiff's burden in resisting a motion for summary judgment by the defendant. Whenever predatory intent must be shown inferentially, as is almost always the case, the competing hypothesis of vigorous competition will ordinarily overcome an inference of predatory behavior. In discussing the improbability of predation, the Court focused on the problems of obtaining a mo-

10 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

11 See Appendix C.

12 By late April 1986 the Areeda-Turner article had been cited in fifty-nine decisions of the federal courts and a number of important Federal Trade Commission decisions. See Appendix A. To that date from 1975, 120 decisions in the courts of appeal contained the words "predatory pricing," although that term had appeared in only seventeen such decisions during the preceding thirty years. These are the results of running the queries "Areeda/predatory/pricing" and "predatory/pricing" in Westlaw's "AllFeds" library on April 20, 1986. That library extends back to 1945. Not all, if even a majority, of these decisions actually involved predatory pricing issues under the Sherman Act. This article refers to *decisions* while Appendix A sets forth only different *cases*. Many times one case will produce more than one decision.

13 Their average variable or marginal cost standard would be harder to overcome than the more traditional test for predatory pricing under which an inference of predation was supported by prices below average total cost. See *Utah Pie Co. v. Continental Baking Co.*, 385 U.S. 685 (1967). While there is usually no explicit discussion of the type of cost that supports an inference of predation in the older cases, it appears that the courts were thinking of average total cost.

14 106 S. Ct. at 1357.

15 *Id.* at 1357-58.

nopoly without incurring unrecoupable losses and the problem of preventing entry during the recoupment period. Unlike the Areeda-Turner article, the Court emphasized factors other than the relationship between the alleged predator's prices and costs.

I make three main points in this article. My first point is that post-1975 academic literature has led many courts to become excessively preoccupied with the relationship between price and cost. This in turn has led them to slight or ignore other factors on which a legitimate inference of predatory pricing depends. Absent such factors, no inference of predation can be drawn even if prices are significantly below the lowest appropriate measure of cost. These other factors include rigorously defined markets, a dangerous probability of success in monopolizing, and the ability to maintain higher prices long enough to recoup the predatory losses.

My second point is that almost all of the predatory pricing cases that have come before the courts since 1975 could have been decided summarily for the defendant under the standards set forth in *Matsushita*. More particularly, this usually could have been done without considering the relationship between the alleged predator's price and cost. The conclusion to be drawn from these two points is that courts should focus more on factors other than the price/cost relationship. Moreover, they should rely on these other factors more heavily to decide more cases summarily for defendants.

This approach could quickly reduce the social cost of the present approach to predatory pricing, which relies heavily on juries operating under vague and ill-defined rules of law. The value of the time of attorneys, experts, courts, and businessmen is one social cost of such an approach; this cost alone almost certainly exceeds the social costs of monopoly power that has been obtained via predatory pricing. The more important cost of the present approach, however, is that firms will tend to avoid price cuts that might prompt litigation by competitors. The existing approach almost certainly restricts competition by inhibiting such price cuts.¹⁶

Other medicine is available if needed to curb this nonproductive predatory pricing litigation. I develop this, my third point, in Part II. I argue there that competitors, even of a true predator, if there is such, are not injured by an antitrust violation unless the predatory prices actually fall below the predator's marginal cost. This is so for two reasons. First, predatory pricing does not cause any direct antitrust injury (create a market inefficiency) as long as

¹⁶ The Supreme Court in *Matsushita* emphasized that "courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct." 106 S. Ct. at 1360.

such prices remain at or above the predator's marginal cost. Second, if such predatory pricing causes any indirect antitrust injury, it must be the injury associated with the monopoly overcharges made by the predator after it becomes a monopolist. But there is no causal connection between that antitrust injury and the predator's competitors. Only the monopolist's customers suffer injury from that antitrust violation. It follows that treble damages for predatory prices, at least as long as those prices are above the predator's marginal cost, should be limited to recovery by consumers for the monopoly overcharges which the successful predator, now a monopolist, will be desperate to make to recoup its predatory losses.

I. Predatory Pricing in the Courts Since 1975

A. *Introduction*

The 1975 Areeda-Turner article and the flood of academic literature that followed has been associated with a sharp increase in the number of predatory pricing cases. There do not appear to have been any predatory pricing cases brought under section 2 of the Sherman Act in the thirty years preceding 1975. Approximately fifty-five such cases were decided in the federal courts from 1975 to date. The academic controversy over predatory pricing surely caused part of this increase, if only by bringing the possibilities to the attention of the antitrust bar.

The post-1975 flood of academic literature proposing various economic tests for predation, however, did little to help courts decide the increasing number of predatory pricing cases with which they were confronted. This was true in spite (or perhaps because) of the fact that the courts responded to the economic approach advanced by most of that literature with an alacrity not commonly observed in the history of the relationship between academics and judges. Indeed, many courts became preoccupied with a cost-based test for predatory pricing. This preoccupation has caused them more problems than it has solved. They have spent much time considering the nature and importance of different economic costs, while few if any of the cases decided since 1975 need have turned on such distinctions.¹⁷

Although the point has been submerged in the controversy over which costs provide the appropriate standard for predatory pricing, it must be remembered that pricing below cost does not by itself constitute a violation of section 2 of the Sherman Act. While

¹⁷ See text accompanying notes 58-73 *infra* and Appendix A.

formulations may differ somewhat, in order to show an attempt to monopolize, for example, a plaintiff must establish:

1. Specific intent to control prices or destroy competition in a relevant market.
2. Predatory or anticompetitive conduct directed to accomplishing the unlawful purpose.
3. A dangerous probability of success.
4. Antitrust injury.¹⁸

The second of the above elements, predatory or anticompetitive conduct, is common to all claims under section 2.¹⁹ A plaintiff can ordinarily establish that element by showing that the defendant has engaged in predatory pricing. To do that, however, the plaintiff must not only prove that the defendant's prices were below some relevant cost but also that the defendant had a "reasonable expectation of recovering, in the form of later monopoly profits, more than the losses suffered" during the period of predation.²⁰ To convince a trier of fact that predation is a plausible inference to draw from below-cost pricing, the plaintiff must show that the defendant has both a dangerous probability of successfully monopolizing and also a similar probability of recouping his predatory losses. Lacking direct evidence of predatory intent, the plaintiff must present evidence that tends to exclude the possibility that the defendant was simply engaged in vigorous competition.²¹ The Supreme Court believes, as *Matsushita* indicates, that with predatory pricing, "if the claim is one that simply makes no economic sense—[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary."²²

Since the plaintiff must prove all four of the above factors to establish predatory pricing, it would be wise for a court to scan all those factors before addressing any one of them in detail. It makes no sense for a court to consider at length which costs define predatory prices, or whether the defendant's prices were in fact below such costs, if it appears that the defendant lacks a dangerous probability of achieving a monopoly *and* maintaining it long enough to recoup its predatory losses. Nor does it make sense for a court to probe the remaining factors if the defendant's prices were not below the relevant cost.

If one factor in the plaintiff's case is clearly weaker than the

18 See, e.g., *Williams Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981); *California Computer Prod., Inc. v. IBM Corp.*, 613 F.2d 727 (9th Cir. 1979).

19 See, e.g., *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980).

20 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1357 (1986).

21 *Id.*

22 *Id.* at 1356.

others, the court should analyze it before considering the others. The Federal Trade Commission (FTC) has taken a similar approach in attempted monopolization cases. It believes that "the dangerous probability of success element should be evaluated 'before proceeding to the other two elements.'" ²³

No rule is needed, however, on which element to examine first. After a cursory examination of all the elements of the offense, the court should focus on the one which is easiest to resolve. It should hardly be necessary to state this obvious point. The necessity becomes clear, however, after reading the post-1975 predatory pricing cases. Some courts seem to go out of their way to focus on the price/cost issue, engaging in lengthy and often erroneous discussions of subjects best left to advanced economics seminars, when the cases before them could easily be resolved by analyzing one of the other elements of the relevant offense.²⁴ This point is well illustrated by the Ninth Circuit's decision in the *Inglis* case.²⁵

B. *Inglis v. ITT Continental Baking Co.*

Inglis was one of four wholesale bakers in the northern California-Nevada area.²⁶ It claimed that Continental and the other two independents had attempted to monopolize the white bread market in that area by charging discriminatory and below-cost prices over a period of approximately ten years beginning in 1967.²⁷ *Inglis* expired in 1976. Campbell-Taggart, the largest of the independents, settled. The jury found in favor of the third largest independent (American) but returned a verdict against Continental for over five million dollars. The district judge granted Continental's motion for judgment n.o.v. on the Sherman Act claims, holding that before it could prevail *Inglis* had to prove that Continental's prices were below marginal cost. The court of appeals reversed after an extensive discussion of the price/cost issue and remanded the case for another trial.²⁸

To analyze the *Inglis* case, it is necessary first to set forth some important facts about the white bread market in general and in the

²³ See *ITT Continental Baking Co.*, 104 F.T.C. 280, 407 (1984); *General Foods Corp.*, 103 F.T.C. 204 (1984); *E. I. duPont de Nemours & Co.*, 96 F.T.C. 653, 725-26 (1980).

²⁴ See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981); *Transamerica Computer Co. v. IBM Corp.*, 481 F. Supp. 965 (N.D. Cal. 1979); *Jays Foods, Inc. v. Frito-Lay, Inc.*, 614 F. Supp. 1073 (N.D. Ill. 1985).

²⁵ *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981).

²⁶ The other three independent bakers were Campbell-Taggart, American Bakeries, and ITT Continental. Retail chains such as Safeway and Lucky Stores also operated bakeries.

²⁷ 668 F.2d at 1024.

²⁸ *Id.*

northern California-Nevada area in particular. These facts do not appear in the *Inglis* court's decision; they come from the FTC's opinion dismissing its predatory pricing case against Continental.²⁹ That opinion shows that in 1972 the relevant market shares were: Campbell-Taggart with 34%; Continental with 25.5%; American with 21.3%; Safeway & Lucky with 15%; and Inglis with 4.3%.³⁰ The FTC also noted that most wholesale bakeries had been operating at a loss since 1973 and that many smaller bakeries were going out of business.³¹ The Commission also found that:

The wholesale bakers' problems have been caused, in large part, by the activities and growth of chain bakeries, costly labor contracts, technological improvements that have created overcapacity, improved highways permitting larger areas to be served by a single plant, high ingredient, selling and distribution costs, problems arising from Federal price controls in effect since Aug. 1971, and the decline in per capita consumption of bread. Of particular current impact is the tremendous increase in the cost of flour following the shipment of flour to Russia in 1972 and the corresponding short supply here coupled with the inability to recoup costs because of price controls. These factors are generally found, to varying extents, in all markets, whether or not ITT Continental is present.³²

That these conditions were also present in the *Inglis* market appears most clearly from the excess capacity that was present there. The court of appeals noted that "during an eleven-week strike in December 1972 and January 1973, which closed the bakeries operated by Continental and Campbell-Taggart, American and Inglis were able to supply the entire demand with their existing capacity."³³ The particular importance of these facts is shown by the market share figures set forth above. American and Inglis together had about the same market share as Continental, while Campbell-Taggart was significantly larger than Continental. Either Campbell-Taggart or Continental had sufficient capacity *by itself* to supply the relevant market. American and Inglis apparently tripled their output to satisfy the demand left unfilled when the strike closed Campbell-Taggart and Continental. Presumably each firm could similarly increase its output in response to Continental's supposed attempt to monopolize this market.

This excess capacity requires an adjustment of the market share figures set forth above. Those figures show the relative output of each firm in the market. They do not compare the output of

29 See ITT Continental Baking Co., 104 F.T.C. 280 (1984).

30 *Id.* at 413.

31 *Id.* at 398-99 (1984).

32 *Id.*

33 668 F.2d at 1025.

any firm to the total capacity present in the market. The latter comparison is more relevant than the former in attempting to assess a firm's market power or its potential to obtain such power. Professor Hovenkamp makes this point in discussing *Inglis*:

It is now recognized that the best way to estimate a firm's market power on the basis of market share is to weigh the firm's current output against the total capacity of other firms in the industry, not against the competitors' current output. Any particular firm's ability to raise its prices is limited not only by the current output of its competitors, but also by their ability to produce more in response to a price increase. It is apparent that if the excess capacity of competing firms is included, Continental's real share of the northern California bread market was not twenty percent, but more like eight percent.³⁴

The FTC specifically found it "highly unlikely that Continental could have acquired monopoly power in any of the relevant markets."³⁵ It also found that "barriers to entry into the bread baking industry [were] not particularly high."³⁶

A cursory examination of these facts makes it clear that *Inglis* could have been decided without reference to the price/cost issue. All three of the necessary conditions of predation (those other than a price below cost) were clearly absent. First, the market was not realistically defined. The most striking thing about the *Inglis* opinion is that the court did not discuss the market definition problems at all.³⁷ It is clear, however, that it makes no sense to exclude bread made by bakeries that happen to be owned by retail grocery chains from the relevant market.

Second, Continental had no chance of monopolizing the market, however defined. It was the second largest firm in the market with a 25.5% share, almost ten percentage points behind the leading firm. This share drops to about 8% when we take account of excess capacity. The third largest independent (American) was about the same size as Continental. A properly defined market would also include other capable competitors in the form of Safeway and Lucky stores. *Inglis* was by far the smallest firm in an industry characterized by virulent overcapacity. These facts in themselves render utterly unbelievable any claim of predatory pricing.

³⁴ Hovenkamp & Silver-Westrick, *Predatory Pricing and the Ninth Circuit*, 1983 ARIZ. ST. L.J. 443. This approach is followed by the U.S. Department of Justice Merger Guidelines. Antitrust Division 1984 Merger Guidelines, 49 Fed. Reg. 26,823, 26,828 (1984). See also Landes & Posner, *Market Power in Antitrust Cases*, 94 HARV. L. REV. 937, 949 (1981).

³⁵ 104 F.T.C. at 412.

³⁶ *Id.* at 415.

³⁷ In addition, the court of appeals apparently intended to exclude from the relevant market the integrated bakeries owned by Safeway and Lucky, even though it admitted that the bread produced by those bakeries reduced the demand for bread from the independents. 668 F.2d at 1025-26.

ing on Continental's part. After *Matsushita*,³⁸ if not before, these facts alone would require summary judgment for the defendant.

Third, even if Continental somehow obtained monopoly power in this market, it would never be able to raise prices high enough for a sufficient period to recoup its losses. To play out the predation story, it had taken almost ten years and significant losses just to get rid of Inglis. How many more years and what losses would it take to get rid of American and Campbell-Taggart, let alone Safeway and Lucky? And, after all that, Continental would have succeeded in monopolizing an industry into which, according to the FTC, the barriers to entry were "not particularly high."³⁹

The *Inglis* court got matters precisely backwards. It did not focus on the elements that were easy to decide: probability of successfully monopolizing a realistically defined market and Continental's ability to recoup losses that had already extended over a ten-year period with more to come before a monopoly came within its grasp. Instead the court decided the case—wrongly—entirely on the price/cost issue. It appears to have been snared by the delusion that the relationship between price and cost provides the easiest way to decide predatory pricing cases.⁴⁰

It is, of course, true that some predatory pricing cases can be decided most easily by focusing on the price/cost issue. This is particularly true when the alleged predator's prices never fall below its long-run marginal costs. The relationship between a firm's prices and its costs, however, is often much more difficult to determine than it would first appear. Costs are difficult to define in the abstract and difficult to determine after they have been defined. In remanding for a new trial, the court held that "the determination of fixed and variable costs is a matter for the jury under appropriate instructions."⁴¹ These instructions would be difficult to formulate. Once formulated, it would be hard for many first-class accountants to provide the relevant figures.⁴²

In other cases the legal price/cost standard may be in doubt,⁴³ the relationship between the alleged predator's price and cost may be unclear, or such predator's prices may have dropped below the

38 *Matsushita Elec. Indus. v. Zenith Radio Corp.*, 106 S. Ct. 1348 (1986).

39 104 F.T.C. at 415.

40 It may also have fallen into the peculiar syndrome in which lawyers and judges want to play at being economists and vice versa.

41 *Inglis*, 668 F.2d at 1038.

42 A person really must try to define correctly in a particular case the various relevant costs in order to discover how complicated the problem is. Then, after the definition has been forged, try to get the facts. It has to be seen to be believed.

43 Very few if any courts have adopted the marginal/average variable cost test without reservation. Much time can be spent to show that the predator's prices are above (or below) those costs only to have the case decided on other grounds.

relevant cost standard. It will usually be much easier to decide such cases on the basis of market definition, probability of successful monopolization, or probability of recouping predatory losses.

Courts will be more effective, in short, if they review the facts of all necessary conditions for a legitimate inference of predatory pricing and then focus on those that are the easiest to resolve. The *Inglis* court could easily have decided the case before it if it had followed that procedure. If the court had done so it would have realized the additional bonus of deciding the case correctly, which it did not do after being led astray by the mirage of certainty which seems to surround the price/cost approach to predatory pricing. The same has been true of many other predatory pricing cases decided in the federal courts since 1975.

C. *Events in the Courts*

I have set forth in Appendix A brief descriptions of fifty-five cases decided between 1975 and April 1986. These cases all involve predatory pricing antitrust issues in one way or another.⁴⁴ Most cases are based on section 2 of the Sherman Act, although the Robinson-Patman Act⁴⁵ is also implicated in a fair number of them.

I have analyzed the cases in terms of the classic predatory pricing paradigm. In that story the defendant first cuts prices to destroy his competitors. It then raises prices to monopoly levels to recoup its losses and more, at the same time preventing entry or retarding it long enough to make the entire process profitable. The first question raised by this paradigm is how far prices must be cut before they can be predatory if the other necessary conditions of predation are present. Prices have traditionally not been regarded as predatory unless they fell below the suspected predator's average total cost.⁴⁶

Prices remained above the predator's average total cost in thirteen of the fifty-five cases discussed in Appendix A.⁴⁷ Under traditional standards, defendants' activities in these cases could not have been held predatory even if all the other conditions of predation had been present.⁴⁸

44 I excluded most cases involving only a motion to dismiss, unless they included some unique legal point. I also excluded cases reviewing decisions of regulatory agencies, as well as international trade cases.

45 15 U.S.C. 13 (1982).

46 See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967). The average total cost approach is tied to the view that predation is a function of intent as it historically has been. It is hard to conclude that prices that turn a current profit can raise a presumption of evil intent.

47 See Appendix B.

48 Price level was the only or most important factor in eliminating seven cases from candidacy for truly predatory pricing status. The most important cases in which an infer-

The second question raised by the paradigm is what market the alleged predator is monopolizing or attempting to monopolize. If we are serious in our enterprise of locating truly predatory pricing, this market must be real. It cannot be one of the gerrymandered beasts so commonly found in antitrust. It will not do, for example, to monopolize a "market" for band uniforms as distinct from all other kinds of uniforms or from clothing in general.⁴⁹ Nor will it do to monopolize a "market" like that for hauling garments on hangers in less than truckload lots over the highways from New York City to Pennsylvania.⁵⁰ In many cases an inference of predation from otherwise suspect conduct must fail because the market has been defined so narrowly as to bear little or no relationship to reality.⁵¹ Reasonable market definition would eliminate twelve of the fifty-five cases discussed in Appendix A from the true predatory pricing cases.⁵²

Thirdly, the paradigm requires the predator to have a dangerous probability of successfully monopolizing a realistically defined market. The predator must be able to do so within a time that will not entail losses so great that it has little or no chance of recovering them after he becomes a monopolist.⁵³ Thus, the predator should

ence of predation failed because prices were above average total (long run incremental) costs were *Southern Pac. Communications Co. v. AT & T Co.*, 740 F.2d 980 (D.C. Cir. 1984) (*Sprint*), and *MCI Communications Corp. v. AT & T Co.*, 708 F.2d 1081 (7th Cir. 1983). Even though the district court in the *Sprint* case had found that barriers to entry into inter-city long distance telephone service were low, it seemed best to rely on the fact that prices were above long run incremental costs rather than to stretch the barriers to entry point. It is interesting to note, however, that a considerable amount of entry has taken place in that market both by private and by common carriers. Only two additional cases would be eliminated by moving from an average total cost test to a short nonmarginal cost test. See *SuperTurf, Inc. v. Monsanto Co.*, 660 F.2d 1275 (8th Cir. 1981); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Co.*, 551 F.2d 790 (10th Cir. 1977); text accompanying notes 58-68 *infra*.

49 *United States v. Crowll, Collier and MacMillan, Inc.*, 361 F. Supp. 983 (S.D.N.Y. 1973).

50 *International Dist. Centers, Inc. v. Walsh Trucking Co.*, 618 F. Supp. 98 (S.D.N.Y. 1985). On the basis of such a market definition, plaintiff obtained treble damages of some \$39,000,000 plus attorney's fees; the district court refused to grant judgment n.o.v. for the defendant.

51 The market definition problem is an intimate part of the dangerous probability of success and barriers to entry questions. The more narrowly the market is defined, the easier it will be to find a dangerous probability of successful monopolization but the harder it will be to find barriers to entry. The converse will be true the more widely the market is defined. The problem of market definition thus is not really separable from the dangerous probability and barriers to entry issues. It seems better to set it forth separately, however, because many courts have ignored this problem or have accepted unrealistic market definitions.

52 See Appendix B.

53 The speed with which the alleged predator can accomplish his goal of monopolizing is an important factor in deciding whether an inference of predation is justified. In *Matsushita*, for example, the alleged conspiracy to predate had continued for some twenty years. Similarly, the alleged predation in *Inglis* had continued for approximately ten years. In

start with a substantial share of a realistically defined market and should not face rivals of equal or greater size and/or staying power. Inability to prove this requirement would defeat an inference of predation in twenty-five of the fifty-five cases set forth in appendix A.⁵⁴

Fourthly, the predator must be able to raise prices high enough after it becomes a monopolist and keep them there long enough at least to recoup his predatory losses. This problem is usually analyzed in terms of barriers to entry.⁵⁵ The absence of barriers to entry would defeat a legitimate inference of predation in thirty-two of the fifty-five cases set forth in appendix A.⁵⁶

Another problem that has received remarkably little attention is how the predator turned monopolist can avoid being hit with treble damage actions by its overcharged buyers. Price fixers and the like who do their dirty work in secret have some chance of avoiding the wages of section 4 of the Clayton Act. But predators do not work in secret. They must kill their rivals in open combat, and their rivals are sure to let the world know. Customers of those who become monopolists by pricing predatorily most surely lie in gleeful wait for the day when the predator begins to recoup. And if they do not, surely the plaintiff's antitrust bar does. The lack of mention of these cases in the dispatches tells us something about the incidence of the four conditions listed above.

The spectre of future treble damages for unlawful monopolization, however, does more than inform us about the incidence of the other necessary conditions of predatory pricing. It is a matter of *substantive* importance because it addresses the question of how reasonable an inference of predation might be. Is it reasonable to suppose that a firm would fight the predatory battle just for the pleasure of paying treble damages to its subsequently overcharged customers? The Supreme Court specifically addressed a compara-

both cases there was still much ground to cover before monopoly was realized. An inference of predation in such circumstances is wholly unjustified. The Court in *Matsushita* remarked that "[t]he alleged conspiracy's failure to achieve its ends in the two decades of its asserted operation is strong evidence that the conspiracy does not in fact exist." 106 S. Ct. at 1359.

54 See Appendix B.

55 In discussing predatory pricing cases in terms of barriers to entry, this article does not imply that barriers to entry are necessarily bad, or that it even follows that the existence of barriers to entry along with the other necessary conditions of predation means that true predation is present. To avoid a lengthy discussion of this point, suffice it to say for now that "barriers to entry" are a necessary but not a sufficient condition for a legitimate inference of predatory pricing *even if all the other conditions are in fact present*. Put another way, assuming that all the other factors are present, the absence of barriers to entry defeats a presumption of predation; the presence of such barriers does not validate that presumption.

56 See Appendix B.

ble issue in *Matsushita*: "Maintaining supracompetitive prices in turn depends on the continued cooperation of the conspirators, on the inability of other would-be competitors to enter the market, and (not incidently) on the conspirators' ability to escape antitrust liability for their *minimum* price-fixing cartel."⁵⁷ The ability to escape liability for price fixing and the ability to escape liability for monopoly prices charged by an unlawfully obtained monopoly are functionally indistinguishable in this context. It is hard to see why the threat of such treble damages is not enough in itself to defeat a legitimate inference of predation.

The scarcity of circumstances that meet the conditions set forth above is borne out by the cases. I asked the following questions about each of the fifty-five cases in Appendix A:

1. Were the allegedly predatory prices below average total (long run incremental) cost?
2. Was the market realistically defined?
3. Did the defendant have a serious chance of monopolizing a realistic market?
4. Were there significant barriers to entry or expansion in that market?

A negative answer to any of these questions prevents a trier of fact from inferring predation from suspicious behavior that might meet all of the remaining tests.

Without stretching, one or more of these questions must be answered in the negative in fifty-two of the fifty-five cases. Only three cases are not eliminated by this four-question screen as candidates for predatory pricing. The jury in one of these cases, *Super-Turf, Inc. v. Monsanto Co.*,⁵⁸ found that the defendant's conduct was not predatory and the judgment entered on that verdict was upheld by the court of appeals. In a second case, *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*,⁵⁹ the court of appeals reversed the district court's judgment that the defendant had engaged in predatory pricing. Only one case in which the defendant was found to have engaged in predatory pricing, *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*,⁶⁰ passes muster under the four-question screen set forth above. I will examine these three cases more closely.

The jury in *SuperTurf* found that Monsanto had not engaged in predatory pricing of Astro Turf; the court of appeals upheld the judgment entered on that verdict largely because there was no evidence that Astro Turf prices ever dropped below Monsanto's average variable cost. I might have excluded this case as a candidate for

57 106 S. Ct. at 1359.

58 660 F.2d 1275 (8th Cir. 1981).

59 551 F.2d 790 (10th Cir. 1977).

60 692 F.2d 1245 (9th Cir. 1982).

the real thing on the ground that Monsanto could not recoup its predatory losses by raising prices to monopoly levels. I did not, however, because there was little or no information in the court of appeals opinion about barriers to entry and because I wished to include all cases that were even plausible contenders. There were two or three other firms in the industry, however, and Monsanto's large market share stemmed largely from a superior product. It seems clear, as the court and jury concluded, that Monsanto was simply competing vigorously for artificial turf sales and that no real predatory pricing existed.

*SuperTurf*⁶¹ is one of only two cases listed in Appendix A which the short run marginal/average variable cost test would significantly help to decide. Summary judgment could have been granted both in this case and in *Pacific Engineering* if predatory prices were limited to prices below the alleged predator's short run marginal or average variable cost.

In *Pacific Engineering*⁶² four firms had been producing ammonium perchlorate (A/P), a chemical used almost exclusively as an oxidizer in solid rocket fuel, when the demand for that product fell sharply due to changes in defense policy. Two of the producers withdrew from the market and mothballed their plants.⁶³ Of the two remaining firms, the plaintiff "was a one-product company which was vastly undercapitalized," while AMPOT [defendant] was larger and more diversified."⁶⁴ The court stated the dilemma which these firms faced as follows:

Excess capacity was precisely the problem facing AMPOT and PE. Each had plant capacity sufficient to supply substantially the entire demand for A/P. Individually, AMPOT and PE faced demand curves sharply responsive to price. With the nearly identical products, a small price cut by either of them could result in the acquisition of nearly all the business. Each of them also faced consistently decreasing marginal costs. Additional units of A/P could be produced at less cost than previous units. In this situation each competitor would be tempted to lower price and expand output to reach a lower point on its marginal cost curve. This in turn would drive the other competitor back up its marginal cost curve and increase its losses at the new, lower price.⁶⁵

The court noted that the possible outcomes of such a situation were a price war to the death of one of the firms or some type of collusion between them to share the market and raise prices. The

61 660 F.2d 1275 (8th Cir. 1981).

62 551 F.2d 790 (10th Cir. 1977).

63 *Id.*

64 *Id.* at 792.

65 *Id.* at 796 (footnote omitted).

court rightly concluded that antitrust policy favored war to the death rather than collusion.⁶⁶ Any other result would have protected competitors at the expense of competition. Believing that the defendant's behavior was competitive, the court of appeals reversed the district court's judgment for the plaintiff.

I might have eliminated this case on the ground that the continued existence of other "mothballed" plants would prevent the defendant from raising prices to monopoly levels. That is problematic, however, since it appeared that the defendant's costs declined throughout almost the entire range of output required to satisfy existing demand. The existence of such cost and demand conditions, however, is enough in itself to negate any legitimate inference of predation, as the court of appeals recognized.

While the court of appeals correctly concluded that the defendant's pricing had not been predatory, the facts of *Pacific Engineering* raise some interesting speculative questions. Suppose that the defendant's prices had fallen below its marginal or average variable costs. Should the result have been different? If so, what remedy would have been appropriate? These questions are interesting because of the disagreement they would probably produce. While an answer to them is not necessary to maintain the theses advanced in this article, nothing in the *Pacific Engineering* opinion leads to a conclusion that the result should have been different even if the defendant had priced below its own short run marginal cost.⁶⁷ In one actual event, however, as long as defendant's prices remained above its average variable cost, as they in fact did,⁶⁸ a straightforward application of the short run marginal/average variable cost test, as opposed to an average total cost test, would have made it easier for the court to decide this case.

*Sierra Redi-Mix*⁶⁹ is the only case to survive the four-question screen in which the plaintiff actually prevailed. Indeed, it is the only predatory pricing case in which a plaintiff has prevailed in the courts of appeals since 1975. Defendant was the only maker of ready-mix concrete in Sierra Vista, Arizona, a town of about 7000 persons. Defendant successfully repelled the plaintiff, a small entrant who tried to compete only in that portion of the market made up by nonunion contractors and individual home projects. Plaintiff did not have the capability to make specification concrete required by the Arizona Highway Department and a nearby military base and

66 *Id.*

67 See Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).

68 551 F.2d at 792.

69 *D & S Redi-Mix v. Sierra Redi-Mix and Contracting Co.*, 692 F.2d 1245 (9th Cir. 1982).

union contractors would not patronize the plaintiff's nonunion operation.

The court of appeals noted that this was not a "classic predatory pricing case."⁷⁰ Defendant's owner had created a new company to compete directly with the plaintiff and caused another company he owned to provide equipment, materials, and credit on favorable terms.⁷¹ The new company granted extensive long-term credit to its customers, who found this attractive because they often did not get paid until they finished the job for which the concrete was required. The extension of this credit and the new company's relationship with the individual owner and his other company made the relationship between the new company's prices and costs uncertain. Plaintiff's expert testified on the basis of certain assumptions that the defendant's prices were below average variable costs at least at some times during the period of alleged predation.⁷² Defendant apparently did not try to rebut this testimony, to its subsequent chagrin. The court of appeals held that the burden of showing that the prices were not predatory shifted to the defendant once the plaintiff introduced some evidence that they were below average variable cost. Thus, the price/cost issue was decided principally on the base of presumptions and lack of evidence.

It is hard to know just what to make of this case. Surely there are many towns of more than 7000 persons that have only one supplier of ready-mix concrete. Indeed, many towns probably have no local supplier at all. Some of these towns may not be relevant markets by themselves, as might have been the case with *Sierra Vista*.⁷³ It might also be doubted that ready-mix concrete used for home improvement projects and nonunion contractors is a market separate from concrete that is mixed on the job, particularly where labor costs are as low as they are near the U.S.-Mexican border. It might also be that the *Sierra Vista* case is like *Pacific Engineering* in that such a small town may be a one-firm market. This is suggested by the fact that several small concrete mixers had entered the market before the plaintiff made the attempt, but all had withdrawn within a short time.

But all this is speculation. The fact is that one case survives my four-question screen. That screen cannot eliminate *Sierra Vista* without stretching matters too far. It does not, of course, follow

70 *Id.* at 1248.

71 *Id.* at 1247.

72 The expert testified that on the basis of one set of assumptions the defendant's prices were below average variable costs for the first nine months after the plaintiff's entry; on the basis of other assumptions prices were below that level only during some months. *Id.* at 1248.

73 The town of Bisbee, Arizona is about thirty miles away.

that predatory pricing was actually involved in that case, in the sense that the plaintiff's demise subtracted more from the sum of consumer and producer surplus than it added. There is, however, no way to answer that question on the basis of the sparse facts that the court of appeals included in its opinion. In my judgment, there probably was no real predatory pricing present in *Sierra Vista*. If there was, however, the potatoes were pretty small.

D. *Conclusion*

Thus far we have seen that the outburst of academic writing on predatory pricing that started in 1975 either caused or was associated with a sharp increase in the number of cases on that subject. From essentially no cases in the thirty years preceding 1975, the number jumped to approximately fifty-five in the next twelve years. We have also seen that the academic emphasis on a cost-based test for predatory pricing has led many courts to overemphasize the price/cost issue at the expense of other conditions that must necessarily be present before predatory pricing can be inferred legitimately.

The recent *Matsushita* case, however, has reemphasized both the implausible nature of predatory pricing and the factors other than below-cost pricing which must be present before such pricing can be inferred. That case also indicates that the implausibility of predatory pricing places a considerable evidentiary burden on plaintiffs attempting to defeat summary motions by defendants.

I have argued that the courts should follow the lead of the FTC and examine briefly the evidence on all of the necessary elements of the claims before them. They should then focus specifically on those most easy to decide. If courts adopt this approach, they will almost certainly decide predatory pricing cases on summary motions in increasing numbers for defendants.

If that does not happen, we may have to turn to the concept of antitrust injury to limit the number of counterproductive predatory pricing cases that have found their way into court. I consider that subject in the next section.

II. Predatory Pricing and Antitrust Injury

*Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*⁷⁴ announced in 1977 that plaintiffs in private treble damage actions must prove "antitrust injury." Plaintiffs, which operated bowling alleys, sought to recover for damages they suffered when Brunswick acquired and operated some competing bowling centers. Brunswick manufac-

⁷⁴ 429 U.S. 477 (1977).

tured bowling alley equipment and had acquired individual alleys that had defaulted on equipment payments. It operated those alleys that covered their average variable costs; it closed those that did not.⁷⁵

Even though Brunswick acquired bowling alleys only to collect for equipment it had sold and owned less than 2% of the bowling alleys in the country, the lower courts held that Brunswick had violated section 7 of the Clayton Act. Plaintiffs argued that this violation injured them in that their profits would have been higher if Brunswick had not acquired their competitors and continued to operate them.⁷⁶

The Supreme Court rejected this theory. It held that to recover damages, a plaintiff had to show more than a violation of section 7 and a causal link between that violation and the alleged injury. The Court said:

Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effects either of the violation or of anticompetitive acts made possible by the violation.⁷⁷

Although *Brunswick* created the doctrine of antitrust injury, it left the nature of that doctrine quite unclear.

*California Computer Products, Inc. v. IBM Corp.*⁷⁸ adds to the understanding of antitrust injury. Plaintiffs there claimed that IBM had monopolized and attempted to monopolize the market for IBM compatible peripheral equipment. The court of appeals wrote:

Satisfying the latter burden [to show antitrust injury] is dependent on a showing that the injury was caused by a reduction, rather than an increase, in competition flowing from the defendant's acts, since "[t]he antitrust laws . . . were enacted for the protection of competition not competitors." Accordingly, the plaintiff must demonstrate that the defendant's conduct was intended to or did have some anticompetitive effect beyond his own loss of business or the market's loss of a competitor.⁷⁹

The court concluded that "IBM's price cuts were a part of the very competitive process the Sherman Act was designed to promote."⁸⁰

Taken together, *Brunswick* and *CalComp* indicate that antitrust injury must be defined independently of plaintiff's loss of business and the number of competitors in the market. This conclusion

75 *Id.* at 479-80.

76 *Id.* at 480-81.

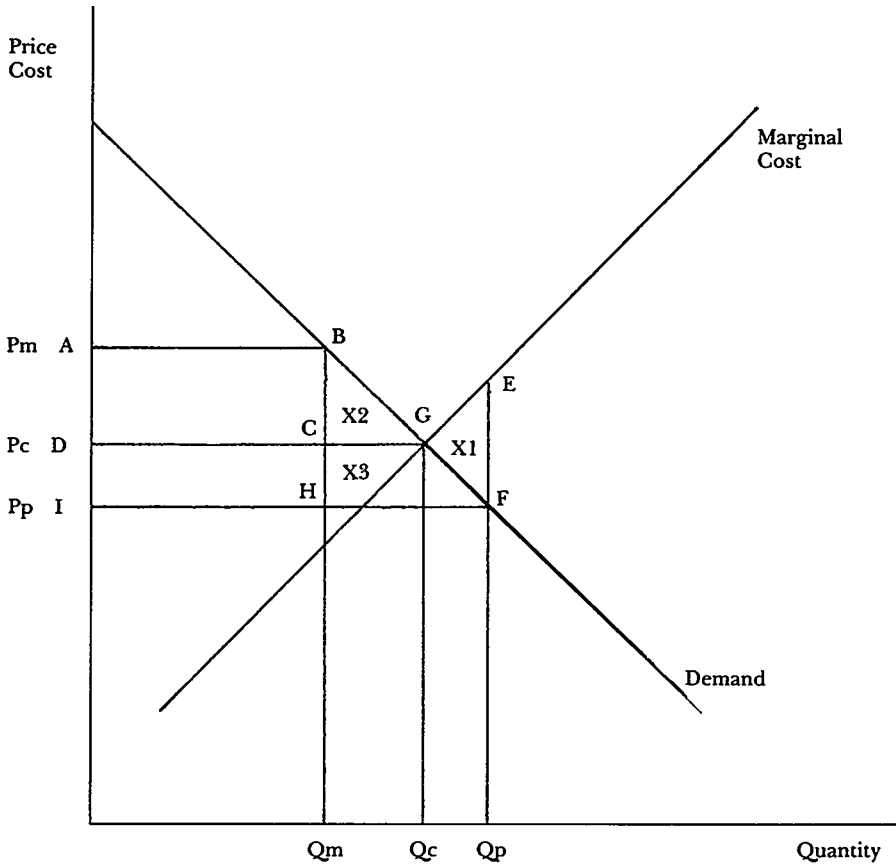
77 *Id.* at 489.

78 613 F.2d 727 (9th Cir. 1979).

79 *Id.* at 732 (emphasis added, and citations omitted).

80 *Id.* at 742.

Figure 1



leads to the question of how an injury to competition can be shown in the context of predatory behavior without relying on injury to competitors. An economist knows the answer to that question immediately. Something injures competition when it reduces economic efficiency.⁸¹ An act can injure competition and thereby create antitrust injury only when it creates a market inefficiency.⁸²

81 See R. BORK, *THE ANTITRUST PARADOX* 58-61 (1978).

82 See Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 471 (1980). He wrote about this as follows:

Such a basis [for identifying antitrust injury] is provided, however, by the recognition that antitrust policy should be directed toward promoting efficiency, or as some prefer to call it, consumer welfare. The "rule of reason" narrows the class of illegal restraints from all those that limit any individual's commercial freedom to those that limit the efficient operation of markets generally. In parallel fashion, antitrust injury can consistently be seen as narrowing the standard for recoverable damages from all those suffered by the plaintiff as a result of an antitrust violation to those that actually flow from the aspect of the violation that causes market inefficiency.

A plaintiff can show antitrust injury under this standard only by identifying the market inefficiency which the antitrust violation causes and then showing that its damages flow from that inefficiency.

Take, for example, a consumer injured by price fixing. P_c is the competitive price in Figure 1. Suppose the members of the industry cartelize and raise price to P_m , restricting output from Q_c to Q_m . This creates a market inefficiency equal to triangles X2 and X3. Buyers are damaged by the higher price which is directly associated with such market inefficiency.

The size of the loss suffered by those who continue to buy from the cartel members equals to the rectangle ABCD. The relationship between that loss and the antitrust injury which the cartel inflicts on the economy (triangles X2 and X3) is such that we can safely say that the overcharged buyers have suffered damages that flowed from the antitrust injury which the price fixing caused.⁸³ This antitrust injury can come into existence, however, only if a cartel raises price above marginal cost.⁸⁴

Similar inefficiencies may result from prices *below* marginal cost. Price P_p in Figure 1 creates an inefficiency measured by the triangle X1. That inefficiency occurs because consumers value the output over the range Q_c — Q_p at amounts increasingly less than the incremental cost of its production. The measure of consumer value declines from G to F as output increases from Q_c to Q_p , while the marginal cost of producing that output rises from G to E. Society would be wealthier if the resources used to produce output Q_c — Q_p produced something else that consumers valued at least as highly as the marginal cost of its production.

The relationship between the inefficiency caused by predatory prices that drop below marginal cost and the undercharges associated with such pricing is conceptually similar to the relationship between the inefficiency caused by cartel prices that rise above marginal cost and the overcharges associated with such pricing. We permit buyers from the cartel to recover because their damages are causally connected with an antitrust injury; there is a similar connection between antitrust injury and damages suffered by com-

Id.

83 The relationship between the market inefficiency and the overcharge to buyers will vary with the price elasticity of demand (the slope of demand curve) and the elasticity of supply for inputs (the slope of marginal cost curve). See J. HIRSHLEIFER, *PRICE THEORY AND APPLICATIONS* 285-87 (1976).

84 Prices above marginal cost are a necessary but not a sufficient condition for non-optimal resource allocation. See Williamson, *Economies as an Antitrust Defense: The Welfare Tradeoffs*, 58 AM. ECON. REV. 18 (1968); Liebler, *Market Power and Competitive Superiority in Concentrated Industries*, 25 U.C.L.A. L. REV. 1231 (1978).

petitors of a predator who prices below marginal cost.⁸⁵

The important point is that when we focus only on the predatory period, antitrust injury (market inefficiency) occurs *only* if the predator cuts prices below its own marginal cost. Unless prices fall below the putative predator's marginal cost, therefore, its competitors should be foreclosed from treble damage recoveries by the absence of antitrust injury. This would be true even if the price is legally held to become predatory before it drops below marginal cost, as it may well be if the legal rule is not based on a marginal cost standard.⁸⁶

It might seem surprising at first that the plaintiff could show the defendant's prices were "predatory" and still not recover damages unless it also showed that those prices were below marginal cost. But that is the nature of the antitrust injury doctrine. That is precisely what happened in *Brunswick*. Plaintiff showed a violation of the antimerger law but was denied recovery because of failure to show that its damages were related to an injury to competition (market inefficiency) that flowed from that violation.

The antitrust injury question cannot, however, be disposed of entirely by focusing only on the predatory period. We must also consider the possibility that today's predator will become tomorrow's monopolist. Suppose that it does. Does the monopoly pricing cause an antitrust injury that could plausibly support an action by the predator's competitors for injury they suffered during the predatory period? This is best answered by tracing through a predatory scenario.

Suppose a predator predares its way to "monopoly"⁸⁷ and then

85 It should be noted that these undercharges are not the same as the decline in the competitors' going concern value. The usual view seems to be that the decline in going concern value is the appropriate measure of damages in this type of case. See *Indian Coffee Corp. v. Procter & Gamble Co.*, 752 F.2d 891, 900 (3d Cir. 1985); Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 485 (1980). This view is incorrect. A competitor should not recover for injuries it suffers from *all* price cuts. The injury results only from those price cuts which are illegal and which flow from an identifiable antitrust injury. By analogy to the price fixing case, the competitors' damages should not exceed three times the predator's undercharges or perhaps three times the difference between the market price and the predator's marginal cost times the output which the competitor sold at that price during the predatory period.

86 No contemporary legal standard is based on a strict marginal cost standard. The Areeda-Turner test uses average variable cost because of the difficulty of determining marginal cost. Some courts have said prices can be predatory even if they are above average total cost. See, e.g., *Transamerica Computer Co. v. IBM Corp.*, 698 F.2d 1377 (9th Cir.), cert. denied, 464 U.S. 955 (1983). Thus, a discrepancy between a finding of a predatory price and the absence of antitrust injury could arise even if we substituted average variable cost for marginal cost in the discussion in the text.

87 To become a "monopolist" in this context means simply that the former predator obtains a large share of the market. Some, perhaps many, of his former competitor victims will still be in the market with him when he becomes a "monopolist." While they will suffer from the low prices extant during the predatory period, they will benefit from the high

raises prices above "competitive" levels to recoup its predatory losses. Leaving aside the possibility that the predator creates or exploits productive efficiencies in becoming a monopolist,⁸⁸ those increased prices will create an inefficiency similar to that created by the cartel discussed above. This will create an antitrust injury (an injury to competition) which may support some type of treble damage action.

But a plaintiff cannot show that it has suffered from antitrust injury just by showing an inefficiency somewhere in the relevant market. Plaintiff's injury must "flow" from the antitrust injury, i.e., in some sense be caused by it or at least be "inextricably intertwined" with the antitrust injury.⁸⁹ The inefficiency (antitrust injury) created when the monopolist raises prices clearly bears the requisite relationship to the monopolistic overcharges. The monopolist's *customers* have suffered damages that flow from an antitrust injury and they may recover treble damages. But what is the relationship between the antitrust injury caused by monopolistic pricing and the losses suffered by the monopolist's competitors during the period of predation?

First, there is no relationship between the existence of antitrust injury caused by monopolistic pricing and losses the monopolist's competitors may suffer during a preceding predatory period. Those competitors may suffer losses during a predatory period but the predator may never be able to raise prices to monopolistic levels. Conversely, monopolists may be able to raise prices for reasons largely unrelated to any previous predation. Either the predatory low prices and/or a subsequent ability to maintain monopolistic prices may, for example, be a manifestation of emerging economies of scale and/or shifts in demand. These underlying economic factors might be causally related both to the "predatory" prices and to the later "monopoly" prices; there need be no causal relation between the predatory prices and the monopoly prices at all.⁹⁰ Neither courts nor administrative agencies will be able to distinguish between these different cases.

Certainly the relationship between antitrust injury caused by monopoly and the damages competitors may suffer during the predatory period is vastly different from the relationship between monopoly antitrust injury and the damage inflicted on the monopolist's overcharged customers. In the latter relationship, the

prices that presumably must exist during the monopoly period in order to justify the predatory campaign.

88 See authorities cited in note 84 *supra*.

89 See *Blue Shield v. McCready*, 457 U.S. 465 (1982).

90 A related point is made in Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 887-88 (1976).

overcharges cannot occur without causing the antitrust injury⁹¹ and the antitrust violation cannot exist unless the overcharges occur. Nothing remotely similar to that can be said about the causal relationship between the monopolistic antitrust injury and the injury suffered by competitors during the predatory period.⁹²

Second, there is no general relationship between the amount of any antitrust injury caused by monopolistic pricing and the losses which the monopolist's competitors may have suffered during the predatory period. The efficiency losses (antitrust injury or injury to competition) from monopoly pricing as well as the injury to consumers from such pricing depend largely on how high and how long the monopolist can raise its prices.⁹³ A competitor's losses from predation, on the other hand, depend primarily on how low prices went during the predation period, how long the period lasted, and upon the competitor's strategic responses to the predation.⁹⁴ The size of the monopoly overcharges bears no general relationship to the size of losses suffered by competitors during the predatory period and vice versa.

Third, a predator's competitors are never injured by the high prices which a predator may charge after becoming a monopolist. Those higher prices and the antitrust injury associated with them actually *benefit* those firms that remain in the market with the "monopolist." They will increase both output and profits as the monopolist restricts its output to increase market prices.⁹⁵ A competitor cannot show antitrust injury from low prices by arguing that its damage from low prices is somehow related to later damage to consumers from high prices—when such high prices could never

91 Always with the caveat that productive efficiencies associated with the monopoly may be greater than the inefficiencies created by the monopolistic output restriction. See text accompanying note 88 *supra*.

92 Look at Figure 1 to see this point. Triangle X2 + X3 is the antitrust injury caused by monopoly pricing. Rectangle ABCD is the damage that monopoly prices inflict on consumers. There is always a direct relationship between those two things. Rectangle DCHI is the damage inflicted on competitors by the predator's low prices. There is no relationship between that rectangle and triangle X2 + X3.

93 As noted above, these losses will also turn on the elasticity of supply and demand. Neither of these factors need appreciably affect a competitor's losses from predation. They could have such an effect if the competitor kept its output up in an attempt to satisfy the demand unleashed by the low predatory prices, but a competitor need not do that. He may, indeed, shut down during the predatory period and force even greater losses on the predator itself.

94 See Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).

95 This was recognized even in *Monfort of Colorado, Inc. v. Cargill, Inc.*, 761 F.2d 570 (10th Cir. 1985), which oddly found standing for a competitor to enjoin the merger of other competitors on the grounds that the merger *might* enable them to engage in predatory pricing. *Brunswick* was read broadly because the plaintiff in *Monfort* sought an injunction under section 16 of the Clayton Act, 15 U.S.C. § 26 (1982), rather than damages under section 4, 15 U.S.C. § 15 (1982).

damage the competitor in any event. The only antitrust injury in the picture—the inefficiency created by monopolistic pricing—does not bear any discernible relationship to losses that competitors might suffer during the predatory period.

One last problem will arise unless there is one economics-based standard with which to analyze antitrust injury. A problem of double recovery will arise if competitors are permitted to recover for losses suffered during a “predation” which does not involve prices below marginal cost and consumers are later allowed to recover damages for the predator’s subsequent overcharges. There is only one efficiency loss or injury to competition in the entire predatory scenario, so long as the predator’s prices do not drop below marginal cost.⁹⁶ That is the dead weight loss associated with the monopoly prices. The monopolist’s overcharged customers can base their recovery on that antitrust injury. If the predator’s competitors recover on the same inefficiency, however, double recovery on the same antitrust injury would result. Such double recovery is contrary to the policy that underlies the doctrines of standing⁹⁷ and antitrust injury that are designed to place realistic limitations on the otherwise expansive language of section 4 of the Clayton Act.⁹⁸

This analysis leads to the conclusion that predatory prices do not create any antitrust injury unless they fall below the predator’s marginal cost. If they do not, a predator’s competitors should not be allowed to recover for damages unless they can show that those damages are causally related to the antitrust injury associated with the monopoly prices that the predator will supposedly charge once he prelates his way to the promised land. But the analysis also shows that there is no such causal relationship. It follows, therefore, that under an efficiency-based concept of antitrust injury, a predator’s competitors should never be allowed to recover damages they suffer from low prices unless the predator’s price drops below its marginal cost. In such cases the competitor’s measure of damages should not exceed three times the difference between the market price of the product and the predator’s marginal cost.⁹⁹

96 The predator’s competitors will be able to recover damages they suffer from the antitrust injury that results if the predator’s prices do drop below his own marginal cost. See text accompanying note 99 *infra*.

97 This is particularly clear from a case like *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), where the possibility of double recovery is specifically used to justify denial of standing to remote purchasers from a price fixer. This point is also made in *Blue Shield v. McCready*, 457 U.S. 465 (1982).

98 See Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

99 The courts have not used the antitrust injury doctrine to limit the recovery of a predator’s competitors in the way this article suggests. Neither the courts nor the commentators, however, have thought through either the nature or the implications of the antitrust

III. Conclusion

Antitrust is as subject to fads as any other human institution. While the idea of predatory pricing has been with us a long time, it has reached the fad level during the last decade or so. While plaintiffs and their lawyers have surely not grown rich in their pursuit of this particular fad, they have done better than the alchemists of old.¹⁰⁰

Antitrust's concern with predatory pricing is a negative sum game of perhaps considerable proportions. It may have made a few plaintiffs and their lawyers somewhat better off, though more of them have lost than gained. But the efforts of all of them—winners, losers, and their unwilling defendants alike—must be counted as a social loss. For they have produced nothing that anyone would be willing to buy in a voluntary transaction. They have all been engaged in the moral equivalent of a game of cops and robbers; worse actually, because the defendants have not voluntarily entered the fray as participants in a game that produces at least enough satisfaction to keep the attention of its players. The defendants have been dragooned into the action.

This would not be worth even the modest attention of a law review article if the gains and losses were confined to voluntary participants. But they are not. The search for treble damages in the antitrust arena chills the price-cutting incentive of competitors far from the scene of litigation. How much we do not know. But it must be more than the social losses that could ever flow from predatory pricing itself. Theory, history, and even an examination of recent cases, shows that those losses are nonexistent or close thereto.

The approach which the Supreme Court has taken in *Matsushita* will hopefully move these cases quickly out of court and staunch the flow of future litigation. Even if *Matsushita* produces this result, we should refine our thinking about the nature of antitrust injury, both in predatory pricing cases and more generally. Under either *Matsushita* or a revised application of antitrust injury, there should be fewer predatory pricing cases in the future. The sooner the better.

injury doctrine. That topic should be high on the agenda for future work. It would be much more productive than another article about predatory pricing.

100 See generally C. MACKEY, MEMOIRS OF EXTRAORDINARY POPULAR DELUSIONS (London 1852).

Appendix A
Predatory Pricing Cases
Decided From
January 1, 1975 Through April 30,
1986¹

1. **Matsushita Electric Industrial v. Zenith Radio Corp.*² The Third Circuit reversed the district court's grant of summary judgment for defendants. The Supreme Court reversed the court of appeals. Plaintiffs alleged that defendants had conspired to drive them out of business by selling Japanese electronic equipment at low prices in the United States. The Court noted that predation was an extremely improbable inference to draw when circumstances would admit of more than one inference. That was particularly true here where an alleged predatory conspiracy had continued for some twenty years. The Court found that even if defendants could later raise prices to monopoly levels, they could not realistically expect to recoup the enormous loss that had occurred during such a long period of alleged predation. Entry of other firms would probably occur in response to monopoly prices and it would be difficult to hold together an alleged conspiracy of predators after they became monopolists. The Court found that the improbability of predation under such circumstances must be taken into account when deciding motions for summary judgment in predation cases.

2. **Conoco, Inc. v. Inman Oil Co.*³ The court of appeals affirmed judgment for defendant after a trial before a magistrate. Plaintiff claimed that defendant had attempted to monopolize the sale of lubricating oil in the Viburnum Trend, a lead producing area in the state of Missouri. There was no dangerous probability of success and nothing would have kept other firms from entering the market if defendant had tried to raise prices to recoup its predatory losses. The court noted that "[c]ompetition was stiff—some seven oil suppliers were vying for the business of the four lead mining companies."⁴ In addition, buyers generally solicited new bids each year. Summary judgment could have been granted for defendant in this case on the basis of a market that was defined too narrowly, lack of a dangerous probability of successful monopoliza-

1 An asterisk before the case name indicates that the case cited Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

2 106 S. Ct. 1348 (1986) (this case produced a number of other decisions, the most relevant of which are referred to in the Supreme Court opinion).

3 774 F.2d 895 (8th Cir. 1985).

4 *Id.* at 898.

tion, and inability to raise prices to monopoly levels in the post-predation period.

3. **National Reporting Co. v. Alderson Reporting Co.*⁵ The court of appeals reversed the district court's judgment holding defendant liable for attempted and actual monopolization of reporting services for the United States Tax Court. Contracts were awarded annually on bids. The Tax Court permitted the current holder of the contract to continue at its current price, but put the contract out for bids again if that holder tried to raise prices. In reversing, the court of appeals wrote:

Even if we assume that Alderson's pricing was predatory as so defined [by Areeda & Turner] and even if we assume predatory intent, there is no evidence that Alderson ever possessed monopoly power. Alderson did not have the power to raise prices or eliminate competitors . . . so it could not "[recoup] losses through higher profits earned in the absence of competition."⁶

This would have justified summary judgment for defendant; a result reached in *Kirk-Mayer, Inc. v. Pac Ord, Inc.*,⁷ a similar case discussed in paragraph 37 below.

4. *Indian Coffee Corp. v. Procter & Gamble Co.*⁸ The court of appeals reversed the district court's grant of a directed verdict for defendant at the close of the plaintiff's case. Plaintiff alleged geographic price discrimination, in violation of the Robinson-Patman Act, by Procter in its introduction of Folgers coffee into the eastern part of the United States in the early 1970s. Plaintiff made no claim of monopolization, nor could there have been such a claim given the intensive competition in those markets between Procter and General Foods. The FTC dismissed a similar Robinson-Patman Act complaint.⁹ The court of appeals held in this case that the evidence was sufficient for the matter to go to the jury on the Robinson-Patman issue. It seems clear, however, that summary judgment could have been granted for defendant on any claim under section 2 of the Sherman Act; Procter was in fact a new entrant into the plaintiff's market where the dominant firm had been General Foods. It is simply not plausible that Procter was attempting to monopolize or actually could have monopolized eastern coffee markets.

5. *Airweld, Inc. v. Airco, Inc.*¹⁰ The court of appeals affirmed the district court's grant of defendant's motion for judgment n.o.v.

5 763 F.2d 1020 (8th Cir. 1985), *rev'g* 567 F. Supp. 1011 (E.D. Mo. 1983).

6 763 F.2d at 1023 (citations omitted).

7 626 F. Supp. 1168 (C.D. Cal. 1986).

8 752 F.2d 891 (3d Cir. 1985), *rev'g* 482 F. Supp. 1104 (W.D. Pa. 1980).

9 103 F.T.C. 204, 332 (1984).

10 742 F.2d 1184 (9th Cir. 1984).

on Sherman Act claims. Plaintiff was a terminated former distributor of Airco's industrial gases in Portland, Oregon. After the termination, Airco started its own distribution operation and cut gas prices in order to get its old customers back from the plaintiff. Plaintiff alleged an attempt to monopolize via pricing below cost. While there was some evidence that some of Airco's prices were below average variable cost, the court of appeals affirmed because the evidence of predatory pricing was insufficient.

This was strictly a vertical case. Airco was attempting to regain its old customers to which it had previously sold gas through plaintiff. Even if Airco had been totally successful in this respect, driving plaintiff out of business in the process, Airco's share of the generic gas market would not have been any larger than it was before. This case, therefore, could have been decided summarily for defendant regardless of the relationship between Airco's prices and costs.

6. **Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*¹¹ The court of appeals affirmed the district court's grant of defendant's motion for judgment n.o.v. The market was defined as renting cars to insurance companies that were required to replace cars of their insureds that had been stolen or wrecked. The court stated that barriers to entry were "slight—not negligible, perhaps, but assuredly not so great as to permit a monopoly born of predatory pricing to be exploited before new competitors would scotch the potential for extranormal profits."¹² Summary judgment for defendant could have been granted on this point alone.

7. **Southern Pacific Communications Co. v. AT&T Co.*¹³ The court of appeals affirmed the district court's judgment for defendant, principally because defendant's prices never dropped below long run incremental cost. Summary judgment for defendant would have been justified on this basis.

8. **Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*¹⁴ The district court entered a judgment for plaintiff following a jury verdict in its favor on claims of monopolization and attempted monopolization of the market for asphalt highway paving contracts let by the Ohio Department of Transportation and the Ohio Turnpike Commission in a thirteen county area in northwest Ohio. The court of appeals vacated the judgment because the evidence showed that defendant's bids were above its own average total cost, even though they may have been below plaintiff's costs. The court observed that the antitrust laws did not require a party to price above its competitor's costs, since this would deprive parties of their rewards from greater

11 735 F.2d 884 (5th Cir. 1984).

12 *Id.* at 893.

13 740 F.2d 980 (D.C. Cir. 1984), *aff'g* 556 F. Supp. 825 (D.D.C. 1983).

14 729 F.2d 1050 (6th Cir. 1984).

efficiency.¹⁵ Since it was undisputed that its prices were not below average total cost, this case could have been decided by summary judgment for defendant.

9. *Bayou Bottling, Inc. v. Dr. Pepper Co.*¹⁶ The court of appeals affirmed the district court's grant of summary judgment for defendant in relevant part because defendant's prices for its full product line were above average total cost. The court refused to find predation just because 32 ounce bottles of soft drinks may have been priced below cost, when the full product line was not. The issue here was primarily a legal one; once the "instrument of predation" was defined as defendant's entire product line rather than 32 ounce bottles of the soft drinks involved, the case could have been decided summarily for defendant.

10. **Barry Wright Corp. v. ITT Grinnell Corp.*¹⁷ The court of appeals affirmed the district court's judgment for defendant after a trial before the court. Plaintiff alleged that Grinnell helped Pacific Scientific Co. exclude plaintiff from the market for mechanical snubbers used in building nuclear reactors. Grinnell was a buyer of such snubbers, had tried to develop Barry as a supplier, and turned to Pacific only when Barry was unable to produce snubbers satisfactorily. Prices were above average total cost. In addition, as Frank Easterbrook has pointed out, it would not have been in Grinnell's interest to help Pacific become a snubber monopolist since Grinnell was a buyer of that product.¹⁸ Summary judgment would have been appropriate here, in that prices were not below average total cost and because defendant had no plausible reason to support Pacific's alleged monopolistic ventures.

11. **D.E. Rogers Associates Inc. v. Gardner-Denver Co.*¹⁹ The court of appeals affirmed the district court's dismissal of plaintiff's claims of violations of section 2 of the Sherman Act and the Robinson-Patman Act. The relevant market was nut setters. The court of appeals found defendant's share of that market to be 10-15%. The court also found that there were no significant barriers to entry. Since defendant held a relatively small part of the market, the court could also have rested its decision on the absence of a dangerous probability of successful monopolization. Summary judgment for defendant would be appropriate in fact situations such as this.

¹⁵ *Id.* at 1055-56.

¹⁶ 725 F.2d 300 (5th Cir. 1984), *aff'g* 543 F. Supp. 1255 (W.D. La. 1982).

¹⁷ 724 F.2d 227 (1st Cir. 1983), *aff'g* Barry Wright Corp. v. Pacific Scientific Corp., 555 F. Supp. 1264 (D. Mass 1983).

¹⁸ See Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 25 (1984). For a criticism of this point that does not cover the actual situation in *Barry Wright*, see Markovits, *The Limits to Simplifying Antitrust: A Reply to Professor Easterbrook*, 63 TEX. L. REV. 41, 78 (1984).

¹⁹ 718 F.2d 1431 (6th Cir. 1983).

12. **MCI Communications Corp. v. AT&T Co.*²⁰ The court of appeals found that defendant's prices for certain telephonic services were not predatory because they remained at or above long run incremental cost. Summary judgment for defendant would be appropriate when the alleged predator's prices remain above its average total cost.²¹

13. **Transamerica Computer Co. v. IBM Corp.*²² The court of appeals affirmed the district court's judgment that IBM had not monopolized central processing units and peripheral computing equipment. Prices were above average total cost and defendant did not have a dangerous probability of successful monopolization. In addition, customers would have switched back to other suppliers (such as plaintiff) if IBM tried to raise prices later to recover losses incurred during the period of alleged predation. See paragraphs 27, 30, and 36 of this Appendix for similar cases. Prices above average total cost would justify summary judgment for defendant, as would the fact that defendant would not have been able to raise prices without attracting entry or expansion in the relevant market.

14. *Sunshine Books, Ltd. v. Temple University.*²³ The court of appeals reversed summary judgment for plaintiff on its claim that defendant had attempted to monopolize the market for books around Temple University. Plaintiff had set up a trailer at the beginning of the college term to sell the most popular textbooks at low prices. The college bookstore cut prices in response and this action resulted. There was no discussion of the relevant geographic market. The court concluded that defendant had not reduced prices below average variable cost, but the case could have been decided on the basis of the University's inability to raise prices to monopoly levels following a period of predation. Prices could not have been increased to such levels because plaintiff or others could easily repeat the activities that had led to this litigation. Additionally, it is not clear that the college campus was a relevant geographic market. Summary judgment for defendant in this case would have been appropriate principally because of defendant's inability to raise prices to monopoly levels.

15. **Zoslaw v. MCA Distribution Co.*²⁴ The court of appeals affirmed the district court's grant of summary judgment for defend-

20 708 F.2d 1081 (7th Cir. 1983).

21 Summary judgment would not be justified on this basis in a jurisdiction in which prices above average total cost could be regarded as predatory, which is the case at the moment in the Ninth Circuit. The statement in the text is meant to refer to the historical test which typically refused to find predatory intent when prices exceeded the defendant's average total cost.

22 698 F.2d 1377 (9th Cir. 1983), *aff'g* 481 F. Supp. 965 (N.D. Ca. 1979).

23 697 F.2d 90 (3d Cir. 1982), *vacating* 524 F. Supp. 479 (E.D. Pa. 1981).

24 693 F.2d 870 (9th Cir. 1982).

ant on the plaintiff's charge of an attempt to monopolize the retail record and tape market in the San Francisco Bay Area. The only relevant defendant had two stores and less than 10% of sales in that area. There was no dangerous probability of success. Nor could defendant raise prices to monopoly levels without inducing massive entry or expansion. Summary judgment for defendant was granted in this case and affirmed.

16. *D&S Redi-Mix v. Sierra Redi-Mix & Contracting Co.*²⁵ The court of appeals affirmed judgment for plaintiff entered after remittitur on a jury verdict in a suit brought under sections 1 and 2 of the Sherman Act. From 1956 until 1969, defendant was "virtually" the only maker of ready-mix concrete in Sierra Vista, Arizona. A few smaller firms had entered and quickly left; plaintiff entered in 1969. Plaintiff's proof showed that defendant opened another ready-mix plant to compete more directly with plaintiff in the non-union and non-specification concrete markets. Plaintiff's expert testified on the basis of one set of assumptions that the new company's prices were below average variable cost for the first nine months of its life; on other assumptions price was below such cost only during some of those months. The court found that defendant had not proved that its prices were justified "without regard to their destructive effect on competition" as it was required to do under *Inglis*²⁶ once plaintiff had shown some prices to be below average variable cost. It is hard to see from the facts mentioned in the opinion of the court of appeals how summary judgment could have been granted to the defendant in this case. This case is discussed in the text accompanying notes 69-73.

17. **Richter Concrete Corp. v. Hilltop Concrete Corp.*²⁷ The court of appeals affirmed the district court's grant of a directed verdict for defendant at the close of plaintiff's case. Plaintiff had charged attempted monopolization of ready-mix concrete in the Cincinnati, Ohio area. A number of other firms had entered during the alleged period of predation. The district court had found that defendant had no dangerous probability of success (with a maximum market share of 44%) and that entry was "fairly easy" at least on a small level.²⁸ The grant of a directed verdict at the close of plaintiff's case suggests that the case could have been decided for defendant on summary judgment.

25 692 F.2d 1245 (9th Cir. 1982).

26 *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981).

27 691 F.2d 818 (6th Cir. 1982), *aff'g* 547 F. Supp. 893 (S.D. Ohio 1981).

28 *Id.* at 824.

18. *Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co.*²⁹ The court of appeals affirmed the district court's judgment for defendant on plaintiff's claim that it was injured because it had to increase the amount of its discounts because of defendant's alleged predatory pricing. Plaintiff had failed to prove that its increased discounts were caused, at least to some extent, by the alleged predatory pricing. Plaintiff also made no attempt to show what part of such increase resulted from the alleged predatory pricing. The court concluded that there was no evidence of any injury which resulted from defendant's alleged anticompetitive actions. The absence of such evidence suggests that this case could have been decided on a motion for summary judgment.

19. **Dimmitt Agri Industries v. CPC International Inc.*³⁰ The court of appeals reversed the district court's judgment for plaintiff entered after it refused to grant defendant's motion for judgment n.o.v. Plaintiff had charged that defendant (the old Corn Products Co.) had monopolized and attempted to monopolize the markets for corn starch and corn syrup. The court of appeals reversed because defendant had only 25% and 17% of those markets, respectively. That was not enough to support a finding of monopolization. The court ordered a new trial on the attempt charge, on which the jury had found for defendant. Even on the attempt claim, however, it would seem that a court could easily find summarily for defendant because of the lack of a dangerous probability of successful monopolization and/or because defendant would not have been able to charge monopoly prices without inducing entry or the expansion of existing facilities.

20. **Borden, Inc. v. FTC.*³¹ The court of appeals upheld a FTC order finding that Borden's subsidiary, ReaLemon, had unlawfully maintained monopoly power in the market for reconstituted lemon juice. While the Commission brought this case under section 5 of the Federal Trade Commission Act, the court applied the same standards it would apply to an unlawful maintenance of monopoly power under section 2 of the Sherman Act. The FTC found that ReaLemon had unlawfully maintained monopoly power through geographic price discrimination and "unreasonably low prices." The Commission believed that ReaLemon's prices were "unreasonably low" because they forced a competitor to sell at a loss. This occurred because ReaLemon was able to command a 30% price premium over competitive brands because of superior consumer acceptance. In spite of this, the Commission insisted that the com-

29 690 F.2d 411 (4th Cir. 1982).

30 679 F.2d 516 (5th Cir. 1982).

31 674 F.2d 498 (6th Cir. 1982).

petitor (Golden Crown) was just as efficient as ReaLemon. The evidence also showed that Golden Crown's costs were reduced because it adulterated its product. ReaLemon estimated this adulteration reduced Golden Crown's costs by about 20%.

The analysis of this case was badly handled because of an inability to avoid making value judgments about the strong preference that consumers had for ReaLemon as compared to less popular brands such as Golden Crown. Professor Scherer has suggested that "an image advantage, permitting the maintenance of a price premium, is conceptually analogous to a unit cost advantage."³² If the 30% price premium ReaLemon was able to charge for its product were deducted from its nominal costs, it seems unlikely that prices for ReaLemon ever would have fallen below ReaLemon's adjusted average total costs. If the treatment of price premiums suggested by Professor Scherer is accepted as the law, this case apparently could have been decided for defendant on summary judgment.

21. *SuperTurf, Inc. v. Monsanto Co.*³³ The court of appeals affirmed judgment for defendant entered on a verdict rejecting plaintiff's claim that defendant had violated section 2 of the Sherman Act. Defendant's prices had not dropped below its average variable cost. This case could have been decided on a motion for summary judgment if the law required prices to be below average variable cost before they could be held to be predatory. Under the more traditional average total cost test, however, this case could not have been decided on a motion for summary judgment. This is one of only two cases set forth in this Appendix that could have been decided more readily under the Areeda-Turner test than under the more traditional test for predation. The other case, *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*³⁴ is discussed in paragraph 33 below.

22. *O. Hommell Co. v. Ferro Corp.*³⁵ The court of appeals refused to find competitive injury and reversed the district court judgment entered on a jury verdict for plaintiff on a Robinson-Patman claim. The jury had found for defendant on plaintiff's claim under section 2 of the Sherman Act. Defendant's share of the market for porcelain enamel frit fell from 42% to 40% during the period of alleged predation, while the shares of the second and third largest firms increased. The share of the fourth largest firm (plaintiff) remained about the same while the fifth firm's share dropped from 7% to about 5%. Predation on the basis of these facts seems

³² Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869, 889 (1976).

³³ 660 F.2d 1275 (8th Cir. 1981).

³⁴ 551 F.2d 790 (10th Cir. 1977).

³⁵ 659 F.2d 340 (3d Cir. 1981).

an unlikely explanation for defendant's conduct even if its prices had fallen below relevant costs. (Defendant's prices were apparently below average total cost in some transactions, but not below average variable cost.) An attempted monopolization claim here could have been decided summarily on the grounds that defendant had no reasonable probability of successfully monopolizing the market for porcelain enamel frit.

23. **William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*³⁶ This case is discussed at length in text accompanying notes 25-43 of this article. As indicated there, this case could have been readily decided on a motion for summary judgment.

24. **Northeastern Telephone Co. v. AT&T Co.*³⁷ The court of appeals reversed judgment for plaintiff on its claim that defendant had engaged in predatory pricing to maintain its monopoly of sales of business telephone equipment. The court held that prices at or above marginal or average variable cost could not be predatory. This case could have been decided for the defendant on a motion for summary judgment. A large number of firms could have supplied retailers like plaintiff if defendant had raised its prices after plaintiff left the market. The fact that defendant could never have recouped its allegedly predatory losses makes predation an implausible explanation of the behavior challenged in this case.

25. **Murphy Tugboat Co. v. Crowley.*³⁸ The court of appeals affirmed the district court's grant of defendant's motion for judgment n.o.v. on the grounds that there was insufficient evidence to show damage to plaintiff. Defendant's prices were always significantly higher than plaintiff's prices and apparently significantly above average total cost as well. This case could, therefore, readily have been decided on a motion for summary judgment.

26. *Broadway Delivery Corp. v. United Parcel Service.*³⁹ The court of appeals reversed the district court's dismissal of plaintiff's monopolization claim after a jury trial. The reversal was based on the fact that the district court had instructed the jury that the monopolization claim must fail unless plaintiff showed that defendant had at least 50% of the relevant market. Although the court of appeals reversed because of this erroneous instruction, it went on to indicate that monopoly power could not be inferred from "consistently operating below cost while also realizing steady gains in its volume of traffic."⁴⁰ Plaintiff had to show a relevant market and show de-

36 668 F.2d 1014 (9th Cir. 1981).

37 651 F.2d 76 (2d Cir. 1981).

38 658 F.2d 1256 (9th Cir. 1981), *aff'g* *Murphy Tugboat Co. v. Shipowners & Merchants Towboat Co.*, 467 F. Supp. 841 (N.D. Cal. 1979).

39 651 F.2d 122 (2d Cir. 1981).

40 *Id.* at 130.

fendant's position in it as a condition of sustaining a charge of predatory pricing. It is not possible to tell whether a properly pleaded case based on the facts of this case could have been decided summarily because plaintiff had not shown a relevant market or defendant's share in it. Its failure to do so, on the other hand, would justify summary judgment for defendant.

27. *Memorex Corp. v. IBM Corp.*⁴¹ The court of appeals affirmed the district court's grant of defendant's motion for a directed verdict, granted after a full trial of eighty days. The court of appeals reached this conclusion on the basis of its inability to distinguish this case from *California Computer Prod., Inc. v. IBM Corp.*⁴² See paragraphs 13, 30, and 36 of this Appendix for similar cases. As in the other IBM cases, the fact that prices were above average total cost would justify summary judgment for defendant.

28. *Pierce Packing Co. v. John Morrell & Co.*⁴³ The court of appeals affirmed the district court's judgment for defendant on a jury verdict. The court affirmed in part because plaintiff's counsel did not object to an instruction that prices could not be predatory unless they were below marginal or average variable cost. While the decision thus turned on price/cost issues there were other bases for a decision in defendant's favor. Most particularly, the market was defined as pork and pork products in *Montana*. Even if defendant could have been successful in obtaining a monopoly in that market, there is nothing to prevent others from shipping pork and pork products into Montana from other places should defendant raise its prices to monopoly levels. Moreover, defendant had 50% of the defined market at the start of the predatory period while plaintiff held 21%. Those percentages were unchanged at the end of the period, so we may doubt a dangerous probability of success even accepting the market as defined in this case. This would also support summary disposition in defendant's favor.

29. **Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*⁴⁴ The district court granted a directed verdict for defendant at the close of plaintiff's case and the court of appeals affirmed. While the court noted that prices were above average variable cost, it also commented on the relative ease of entry. The case could have been decided on the latter point without reference to the relationship between price and cost. The directed verdict for defendant at the close of plaintiff's case strongly suggests that the case could have been decided for defendant on summary judgment.

41 636 F.2d 1188 (9th Cir. 1980), *aff'g per curiam* ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423 (N.D. Cal. 1978), *cert. denied*, 452 U.S. 972 (1981).

42 613 F.2d 727 (9th Cir. 1979).

43 633 F.2d 1362 (9th Cir. 1980).

44 615 F.2d 427 (7th Cir. 1980).

30. **California Computer Products, Inc. v. IBM Corp.*⁴⁵ The court of appeals affirmed the district court's grant of a directed verdict for defendant. As with the other IBM cases, summary judgment for defendant would have been justified. See paragraphs 13, 27, and 36 of this Appendix for similar cases.

31. **Buffalo Courier-Express, Inc. v. Buffalo Evening News, Inc.*⁴⁶ The court of appeals reversed the district court's grant of an injunction preventing defendant from distributing free copies of its new Sunday paper for five weeks and limiting such distribution to only two weeks. Judge Friendly, for the court of appeals, found that defendant did not have a dangerous probability of successfully monopolizing the Buffalo, New York newspaper market. The facts of this case suggest that a summary judgment for defendant would have been upheld if appealed.

32. *Janich Brothers Inc. v. American Distilling Co.*⁴⁷ The court of appeals affirmed the district court's grant of a directed verdict for defendant on plaintiff's claim that defendant attempted to monopolize the sale of private label gin in California by charging allegedly predatory prices for half-gallon bottles of the product. The court did not mention defendant's market share. The case was decided for defendant because its prices were not below average variable cost. But even if they had been the case could have been decided summarily for defendant because virtually nothing prevented others from selling private label gin if defendant had obtained a monopoly of this narrowly defined market and attempted to raise prices therein. In addition, the price of private label gin is constrained by the price of branded gin. Finally, plaintiff had not made any showing of a dangerous probability of successful monopolization.

33. **Pacific Engineering & Prod. Co. v. Kerr-McGee Corp.*⁴⁸ The court of appeals reversed the district court's judgment for plaintiff on plaintiff's charge that defendant had monopolized and attempted to monopolize the market for ammonium perchlorate (A/P), a chemical used exclusively as an oxidizer in solid rocket fuel. This case is discussed in the text accompanying notes 62-68. The Areeda-Turner test would have facilitated decision of this case.

34. **C. O. Hanson v. Shell Oil Co.*⁴⁹ The court of appeals affirmed the district court's order directing a verdict for defendant in part and ordering a new trial. Plaintiff was a spectacularly unsuccessful retailer of gasoline who, after his failure, charged Shell Oil

45 613 F.2d 727 (9th Cir. 1979).

46 601 F.2d 48 (2d Cir. 1979).

47 570 F.2d 848 (9th Cir. 1977).

48 551 F.2d 790 (10th Cir. 1977).

49 541 F.2d 1352 (9th Cir. 1976).

with attempting to monopolize an unspecified market by charging low prices which he made no attempt to show were below any particular costs. There is nothing appreciable to prevent parties from entering the retail gasoline market, which Shell has no apparent incentive or ability to monopolize in any event. Nor is it clear how driving plaintiff out of business would help Shell monopolize the wholesale or manufacturing markets for gasoline. This case easily could have been decided for defendant on summary judgment.

35. *United States v. Empire Gas Corp.*⁵⁰ The court of appeals affirmed the district court's judgment for defendant in a government charge of attempted monopolization on the ground that plaintiff had not shown that defendant had a dangerous probability of success in that attempt. This case could have been decided summarily on the basis of lack of dangerous probability of success and absence of factors that would enable defendant to maintain monopoly prices, even if some of its competitors had been driven from the relevant market.

36. *Telex Corp. v. IBM Corp.*⁵¹ The court of appeals reversed judgment for plaintiff in the district court. This case is similar to the IBM cases decided in the Ninth Circuit. See paragraphs 13, 27, and 30 of this Appendix for similar cases.

37. *Kirk-Mayer, Inc. v. Pac Ord, Inc.*⁵² The district court granted summary judgment for defendant. Plaintiff claimed that defendant had violated section 2 of the Sherman Act by making the low bid on an exclusive, fixed price government contract for a fixed term. Defendant obtained the contract at issue for a term of three years, after which it was again submitted to bids. The court held that defendant could never reap any benefits from its alleged predation and, accordingly, it would be highly doubtful if defendant's pricing was predatory even if it was below its average variable or marginal cost. This case provides an interesting analogy to other cases in which entry is sufficiently easy that the alleged predator has little or no chance to "reap predation's benefits."⁵³

38. **Jays Foods, Inc. v. Frito-Lay, Inc.*⁵⁴ The district court denied plaintiff's motion for summary judgment because it had not established that defendant had engaged in predatory pricing in violation of the Sherman Act and because there was an issue of fact on a price discrimination issue. Plaintiff claimed that Frito-Lay had attempted to monopolize the distribution of potato chips in Chicago.

50 537 F.2d 296 (8th Cir. 1976), *aff'g* 393 F. Supp. 903 (W.D. Mo. 1975).

51 510 F.2d 894 (10th Cir. 1975), *rev'g* 367 F. Supp. 258 (N.D. Okla. 1973), *cert. dismissed*, 423 U.S. 802 (1975).

52 626 F. Supp. 1168 (C.D. Cal. 1986).

53 *Id.* at 1172.

54 614 F. Supp. 1073 (N.D. Ill. 1985).

After a lengthy discussion of the price/cost controversy, the court concluded that Frito-Lay's prices were above variable cost but perhaps not above long run incremental cost. It did not focus on the dangerous probability question even though plaintiff had improved its market position slightly during the period of defendant's alleged predation and even though Frito-Lay had only about 25% of the market. Plaintiff argued that shortages of shelf space would make entry difficult if defendant obtained a monopoly. Such "shortages" reflect the competitive nature of the market. Presumably retailers would be willing to make shelf space available to a rival if one supplier began to raise prices after obtaining a "monopoly." The opinion gave no information about market shares or the number of suppliers other than plaintiff and defendant. The court was correct in denying summary judgment for plaintiff; the facts suggest that such judgment should have been granted for defendant.

39. **International Distributing Centers, Inc. v. Walsh Trucking Co.*⁵⁵ This case wins the Golden Fleece Award for predatory pricing cases. The district court refused to grant defendant's motion for judgment n.o.v. after the jury gave a verdict for some \$13,000,000 on plaintiff's claim that defendant had attempted to monopolize the market for transporting garments on hangers in less than truckload quantities along the traffic lanes running from New York City to Pennsylvania. The district court denied defendant's motion because it believed that the evidence supported jury findings that defendant had a dangerous probability of success, that it had charged predatorily low prices, and that there were high barriers to entry in this market.

What were these barriers to entry? Defendant, had, after all, successfully entered the market. Presumably other haulers could divert trucks to Pennsylvania from other destinations and, if need be, trucks hauling garments on hangers in truckload lots could take some garments out, thereby penetrating the market for less than truck load lots when defendant raised its prices to recoup its predatory losses. Trucks could also be leased and cheaply adapted to hauling garments on hangers. The district court was wrong in refusing to grant the defendant's motion for judgment n.o.v. It should have dismissed the complaint or granted summary judgment for defendant.

40. **Gemini Supply Corp. v. Zeitlin.*⁵⁶ The court denied plaintiff's request for an injunction against, among other things, price discrimination because the sanitary supply business was "highly competitive, has relatively low barriers to entry and . . . [defendant]

55 618 F. Supp. 98 (S.D.N.Y. 1985).

56 590 F. Supp. 153 (E.D.N.Y. 1984).

is only one of many companies competing in that market.”⁵⁷ The competitive nature of the sanitary supply business would justify summary disposition of this case.

41. **Raul International Corp. v. Sealed Power Corp.*⁵⁸ The district court refused to grant defendant’s motion for summary judgment on plaintiff’s claim that defendant had attempted to monopolize the market for manufacturing valve tappets. Defendant made 9.2% of all tappets made in the United States and 5.3% of those made in the world. The court denied the motion because it believed a genuine issue of fact existed on plaintiff’s claim that defendant’s share of the “aftermarket” or replacement tappet market was greater than its share of the market for all tappets. It is hard to see what would prevent manufacturers of tappets for the original equipment market from diverting output into the replacement market (“aftermarket”) if defendant ever obtained a tappet monopoly there. Defendant’s motion for summary judgment should have been granted either because of the absence of a dangerous probability of success or on the basis that defendant lacked the ability to raise prices in the “aftermarket” to recoup its predatory losses.

42. **Double H. Plastics, Inc. v. Sonoco Products Co.*⁵⁹ The court of appeals affirmed judgment for defendant on a section 2 Robinson-Patman Act claim. The district court found that plaintiff had failed to show that defendant’s admitted price discrimination had injured competition. Plaintiff also claimed that defendant had violated section 2 of the Sherman Act by selling plastic and paper business machine cores (small spools that carry the paper used in adding machines, etc.) at predatory prices. Unpersuaded that defendant had sold cores at prices below average variable cost, the district court dismissed the Sherman Act claims and plaintiff did not appeal that portion of the judgment. Plaintiff had made extensive efforts to show pricing below average variable cost and the district court engaged in an extended discussion of the price/cost issue. Only at the very end of its discussion of the Sherman Act claims did the court note that plaintiff had 60% of the relevant market while defendant had approximately 30%. That fact alone would have justified summary judgment for defendant on plaintiff’s attempted monopolization claim.

43. **Joseph Cicconne & Sons, Inc. v. Eastern Industries Inc.*⁶⁰ The district court granted judgment for defendant on plaintiff’s claim that defendant had violated section 7 of the Clayton Act by acquir-

57 *Id.* at 154.

58 586 F. Supp. 349 (D.N.J. 1984).

59 575 F. Supp. 389 (E.D. Pa. 1983).

60 559 F. Supp. 671 (E.D. Pa. 1983).

ing certain companies in the blacktop, aggregate, and road paving businesses. The court also dismissed plaintiff's claims that defendant had attempted to monopolize such business because plaintiff had not shown specific intent to monopolize or a dangerous probability of success. This case turned largely on geographic market issues. Once that issue had been resolved, defendant's market share was so small and the number of competitors was so large that plaintiff's claim could have been summarily denied.

44. *Sales and Advertising Promotion, Inc. v. Donrey, Inc.*⁶¹ The district court rejected plaintiff's claim that defendant had attempted to monopolize and monopolized a market consisting largely of newspaper display advertising in Okmulgee County, southwest Tulsa county, and part of eastern Creek County, Oklahoma. The court found that plaintiff had failed to provide a basis to determine defendant's market share and failed to show that defendant had any dangerous probability of success in attempting to monopolize such market or monopoly power in the relevant market.⁶² Plaintiff's failure to show a relevant market or defendant's market share suggests that this case might have been decided for defendant on summary judgment.

45. **Rohm and Haas Co. v. Dawson Chemical Co.*⁶³ This was a complicated patent litigation in which the court disposed of allegations of predatory pricing on plaintiff's part by noting that no evidence had been introduced to show that prices were below average total cost. Failure to produce evidence of prices below average total cost would justify summary judgment for defendant under the traditional predation rules.

46. *Island Tobacco Co. v. R.J. Reynolds Industries.*⁶⁴ The district court granted summary judgment for defendant on a monopolization claim because Reynolds had only 22% of the market. The court refused, however, to grant such a motion on an attempted monopolization claim because there were unresolved issues of fact on the relationship between defendant's prices and costs. This case developed when Reynolds decided to replace plaintiff—an independent tobacco distributor—with its own distribution system. Just as *Airco*,⁶⁵ this case was strictly vertical in nature. Reynolds was simply trying to replace its previous distributor with its own distribution system. It was not attempting to monopolize anything except the distribution of its own products. The district court should also have granted defendant summary judgment on the attempt

61 598 F. Supp. 538 (N.D. Okla. 1984).

62 *Id.* at 547.

63 557 F. Supp. 739 (S.D. Tex. 1983).

64 513 F. Supp. 726 (D. Hawaii 1981).

65 *Airweld, Inc. v. Airco, Inc.*, 742 F.2d 1184 (9th Cir. 1984).

claim, without regard to the relationship between its prices and costs.

47. *Hoyt Heater Co. v. American Appliance Manufacturing Co.*⁶⁶ The district court granted defendant's motion for summary judgment on a Robinson-Patman Act claim, largely on the grounds that plaintiff had not shown that defendant's prices for hot water heaters were below average variable cost. There were other grounds for not finding competitive injury, however, in that it appeared that plaintiff had a better year at the time the alleged violation occurred than in any previous year.

48. *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc.*⁶⁷ The district court granted defendant's motion for summary judgment on plaintiff's claim that defendant had attempted to monopolize the car leasing market because of its participation in fly-drive plans with two different airlines. The court found that defendant had about 20-25% of the car rental market in Hawaii. This was not sufficient to show a dangerous probability of successful monopolization.

49. *Foremost International Tours, Inc. v. Qantas Airways, Ltd.*⁶⁸ The district court held that plaintiff had not established its claim that defendant had engaged in predatory conduct to monopolize the inclusive tour market in the South Pacific. Even though defendant lost money on the land portion of inclusive tours it sold after integrating into tour sales following a period when plaintiff acted as its agent for the sale of such tours, prices for the combined air transport-land portion taken together were above average total cost. This was basically a vertical dispute between a terminated agent and its former principal and as such does not involve a monopolization problem at all. Summary judgment could have been granted for defendant both because of the vertical nature of the dispute and because defendant's prices were above average total cost.

50. *Outboard Marine Corp. v. Pezetel.*⁶⁹ On a motion to dismiss, the district court held that defendant's low prices for electric golf carts could not give rise to an inference of bad intent under section 2 of the Sherman Act because such prices resulted from subsidies granted by the Polish government. Although the court declined to dismiss the complaint entirely because it raised other issues not related to predatory pricing, the court effectively eliminated all predatory pricing issues from the case in its decision of the motion to dismiss.

66 502 F. Supp. 1383 (N.D. Cal. 1980).

67 491 F. Supp. 1199 (D. Hawaii 1980).

68 478 F. Supp. 589 (D. Hawaii 1979).

69 461 F. Supp. 384 (D. Del. 1978).

51. *Structure Probe, Inc. v. Franklin Institute*.⁷⁰ The district court held that plaintiff had not shown that defendant had any dangerous probability of succeeding in an alleged attempt to monopolize the market for services from scanning electron microscopes within a 150 mile radius of Philadelphia. Summary judgment could have been granted for defendant because plaintiff had failed to establish a relevant market and, even assuming a narrow definition of such market, defendant "does not even approach a share of this market which would justify a finding of monopoly or even a dangerous probability of success in an attempt case."⁷¹

52. *Weber v. Wynne*.⁷² The district court granted judgment for defendant on plaintiff's claim that defendant had attempted to monopolize the newspaper clipping service market because the "barriers to entry into the relevant market are so low as to be almost non-existent."⁷³ The court also held that there was no dangerous probability that defendant could successfully monopolize the relevant market. The absence of barriers to entry that the court noted would justify summary judgment for defendant.

53. *Flair Zipper Corp. v. Textron, Inc.*⁷⁴ The district court granted defendant's motion for a directed verdict at the close of plaintiff's case to the court and jury. Plaintiff claimed that defendant's low prices for No. 2 nylon zippers involved an attempt to monopolize the market for that product in violation of section 2 of the Sherman Act. The court found that defendant's cuts had been made in response to reductions it believed plaintiff had already made. In any event, plaintiff had not shown what the market shares were and, therefore, had failed to lay a foundation for showing that defendant had a dangerous probability of successfully monopolizing the relevant market. For these reasons summary judgment for defendant would also have been appropriate.

54. *Lormar, Inc. v. Kroger Co.*⁷⁵ The district court found that defendant's price cuts in the Blanchester, Ohio, Kroger store were in response to cuts already made by its competitor, plaintiff, and, therefore, denied plaintiff's motion for a temporary restraining order to prevent defendant from selling at unreasonably low or below cost prices.

55. *Inter City Oil Co. v. Murphy Oil Co.*⁷⁶ Plaintiff's attempt to enjoin defendant from charging allegedly predatorily low prices

70 450 F. Supp. 1272 (E.D. Pa. 1978).

71 *Id.* at 1285.

72 431 F. Supp. 1048 (D.N.J. 1977).

73 *Id.* at 1055 n.9.

74 1980-2 Trade Cas. (CCH) ¶ 63,555 (S.D.N.Y. 1980).

75 1979-1 Trade Cas. (CCH) ¶ 62,498 (S.D. Ohio 1979).

76 1976-1 Trade Cas. (CCH) ¶ 60,948 (D. Minn. 1976).

failed because defendant apparently had only from 23% to 29% of the market for No. 2 heating oil. This was insufficient to show a dangerous probability of successful monopolization. Barriers to entry were also low.

Appendix B

Summary of Predatory Pricing Cases

A. ¹ Case (1)	B. Was Case Decided For D on Motion	C. ² Could It Have Been Decided for D on Motion Under <i>Matsushita</i> ?	D. Basis For Answer to C (2)
1	Y (SJ)	Y	3, 4
2	N	Y	2, 3, 4
3	N	Y	4
4	N	Y	3, 4
5	Y (JNOV)	Y	2, 3, 4
6	Y (JNOV)	Y	2, 3, 4
7	N	Y	1
8	N	Y	1
9	Y (SJ)	Y	1
10	N	Y	1
11	N	Y	3, 4
12	N	Y	1
13	N	Y	1, 4
14	Y (SJ)	Y	2, 3, 4
15	Y (SJ)	Y	3, 4
16	N	N	
17	Y (DV)	Y	3, 4
18	N	Y	5
19	N	Y	3, 4
20	N	Y	1
21	N	Y	7
22	N	Y	3
23	N	Y	2, 3, 4
24	N	Y	4
25	Y (JNOV)	Y	1, 5
26	N	Y (?)	6
27	Y (DV)	Y	1, 4
28	N	Y	2, 4
29	Y (DV)	Y	4
30	Y (DV)	Y	1, 4
31	N	Y	3
32	Y (DV)	Y	2, 3, 4

1 The numbers in Column A of Appendix B refer to the cases set forth in Appendix A.

2 The key to the numbers in Column D of Appendix B is set forth below:

1. The alleged predator's price exceeded its own average total cost.
2. The court defined the market in an unrealistically narrow way.
3. The alleged predator did not have a dangerous probability of successfully monopolizing a realistically defined market.
4. The alleged predator would not have been able to raise and maintain monopoly prices long enough to recoup the losses suffered during the predatory period.
5. Plaintiff did not prove that it was injured by defendant's conduct.
6. Plaintiff failed to allege or prove a relevant market.
7. Summary judgment could be granted for defendant if the law defined predatory prices as those below the alleged predator's short run marginal or average variable cost.
8. Defendant's low prices were supported by foreign government subsidy.
9. Defendant's price cuts were in response to plaintiff's price cuts.

33	N	Y	7
34	Y (DV)	Y	2, 3, 4
35	N	Y	4
36	N	Y	1, 4
37	Y (SJ)	Y	4
38	N	Y	3, 4
39	N	Y	2, 3, 4
40	N	Y	3, 4
41	N	Y	2, 3, 4
42	N	Y	3, 4
43	N	Y	3, 4
44	N	Y	6
45	N	Y	1
46	N	Y	2, 3, 4
47	Y (SJ)	Y	5, 7
48	Y (SJ)	Y	3
49	N	Y	1, 2
50	Y (MTD)	Y	8
51	N	Y	3
52	N	Y	4
53	Y (DV)	Y	6, 9
54	Y (TRO)	Y	9
55	Y (INJUNCTION)	Y	3, 4

Appendix C
Predatory Pricing Articles Since 1975

1. Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976).
2. Areeda & Turner, *Scherer on Predatory Pricing: A Reply*, 89 HARV. L. REV. 891 (1976).
3. Scherer, *Some Last Words on Predatory Pricing*, 89 HARV. L. REV. 901 (1976).
4. Williamson, *Predatory Pricing: A Strategic and Welfare Analysis*, 87 YALE L.J. 284 (1977).
5. Areeda & Turner, *Williamson on Predatory Pricing*, 87 YALE L.J. 1337 (1978).
6. Williamson, *Williamson on Predatory Pricing II*, 88 YALE L.J. 1183 (1979).
7. Baumol, *Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979).
8. Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).
9. Koller, *When is Pricing Predatory?*, 24 ANTITRUST BULL. 283 (1979).
10. Schmalensee, *On the Use of Economic Models in Antitrust: The ReaLemon Case*, 127 U. PA. L. REV. 994 (1979).
11. Greer, *A Critique of Areeda and Turner's Standard for Predatory Practices*, 24 ANTITRUST BULL. 233 (1979).
12. McGee, *Predatory Pricing Revisited*, 23 J. L. & ECON. 289 (1980).
13. Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 66 CORNELL L. REV. 738 (1981).
14. Lefever, *Predatory Pricing Rules: A Comment on Williamson's Output Restriction Rule*, 90 YALE L.J. 1639 (1981).
15. Williamson, *Reply to Lefever*, 90 YALE L.J. 1646 (1981).
16. Ordoover & Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J. 8 (1981).
17. Note, *The Retreat from the AVC Rule and the Search for a Practical Alternative*, 22 B.C.L. REV. 467 (1981).
18. Sherrer, *Predatory Pricing: An Evaluation of its Potential for Abuse Under Government Procurement Contracts*, 6 J. CORP. L. 531 (1981).
19. Monroe & Hill, *The Predatory Pricing Controversy: Academic Theories Enter the Courtroom*, 13 U. TOL. L. REV. 539 (1982).
20. Morse, *The Measure of Damages in a Lawsuit Involving Allegations of Price Discrimination or Predatory Pricing: Proving Antitrust Damages*, 48 BROOKLYN L. REV. 479 (1982).

21. Areeda, *Predatory Pricing*, 49 ANTITRUST L.J. 897 (1980).
22. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263 (1981).
23. Hurwitz & Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND. L. REV. 63 (1982).
24. Zerbe & Cooper, *An Empirical and Theoretical Comparison of Alternative Predation Rules*, 61 TEX. L. REV. 655 (1982).
25. Hovenkamp & Silver-Westrick, *Predatory Pricing in the Ninth Circuit*, 1983 ARIZ. ST. L.J. 443 (1983).