Predatory Pricing Strategies: The Relevance of Intent Under Antitrust, Unfair Competition, and Tort Law

Michael C. Quinn

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PREDATORY PRICING STRATEGIES: THE RELEVANCE OF INTENT UNDER ANTITRUST, UNFAIR COMPETITION, AND TORT LAW

Honest, unfettered competition is the foundation of any free market economy, and the United States is no exception. Monopolization of the nation's markets is so antithetical to the competitive system that an enterprise whose sights are set on attaining monopoly status may be subject to harsh civil and criminal sanctions under the federal antitrust laws.


The 19th century philosopher and political economist John Stuart Mill stated that "[c]ompetition may not be the best available stimulus but is at present a necessary one and no one can foresee the time when it will not be indispensable to progress." 4 J. S. Mill, Principles of Political Economy with Some of Their Applications to Social Philosophy 793 (1909). This concept has been echoed continually by American courts and commentators. See Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979) (there is "a firm national policy that the norm for commercial activity must be robust competition"); cert. denied, 444 U.S. 1093 (1980); United Wild Rice, Inc. v. Nelson, 313 N.W.2d 628, 633 (Minn. 1982) ([c]ompetition is favored in the law.); A.L.I. Proc. Continuation of Presentation of Restatement (Second) of Torts § 196 (Tent. Draft No. 14, 1969) (statements of Worth Rowley). "[I]n a competitive society it should be assumed that competition is a good thing, and that a person need not be placed in the position of defending his status as a competitor when he engages in ... normal competitive acts." Id. "[T]he most important type of competition is price competition." J. Dirlam & A. Kahn, Fair Competition: The Law and Economics of Antitrust Policy 6 (1954).

2 See BLACK'S LAW DICTIONARY 1007 (6th ed. 1990). A "monopoly" is defined as follows: A form of market structure in which one or only a few firms dominate the total sales of a product or service. . . . It is "monopolization" . . . for persons to combine or conspire to acquire or maintain power to exclude competitors from any part of trade or commerce, provided they also have such power that they are able, as a group, to exclude actual or potential competition and provided that they have intent and purpose to exercise that power.

Id.

3 See 15 U.S.C. §§ 1, 2, 12, 13, 13a (1988). The Sherman Antitrust Act, id. § 1-2, and Clayton Act, id. § 12, as modified by the Robinson-Patman amendments, id. § 13a, confer power on the Department of Justice (which has jurisdiction only under the Sherman Act) and the Federal Trade Commission (which has jurisdiction under both the Sherman and Clayton Acts) to prosecute, as felonies, conspiracies and individual attempts to monopolize, punishable by fines up to $1 million per corporation or $100,000 per person, to sue on behalf
Former Supreme Court Justice Louis D. Brandeis once described predatory pricing methods as "the most potent weapon of monopoly." Attempted monopolization through price predation occurs when an illegal strategy of pricing below production cost disrupts ordinary competition so that the predator's competitor is either forced from the market or disciplined into settling for a smaller piece of the profit pie. Price-to-cost data is used as evidence of the public seeking civil damages, and to seek equitable relief. See D. Whitman & J. Gergacz, The Legal and Social Environment of Business 393-98 (1st ed. 1985). Class actions and parens patriae actions may be brought by the attorney general of a state on behalf of persons living in that state, although this is seldom done. See id. at 393-94. Section 4 of the Clayton Act, 15 U.S.C. § 15, authorizes private parties to sue violators of the Sherman and Clayton Acts for treble pecuniary damages, and to recover reasonable attorneys' fees. D. Whitman & J. Gergacz, supra, at 393. Section 16 provides for injunctive relief. Id.


* See 3 P. Areeda & D. Turner, ANTITRUST LAW 711 (1976); Rasmussen & Wiley, Antitrust and Spatial Predation: A Response to Thomas J. Campbell, 89 Colum. L. Rev. 1015, 1018 (1989). Predatory pricing is "conduct which has the purpose and effect of advancing the actor's competitive position, not by improving the actor's market performance, [but] by threatening to injure or injuring actual or potential competitors, so as to drive or keep them out of the market, or force them to compete less effectively." L. Sullivan, HANDBOOK OF THE LAW OF ANTITRUST 108 (1977). Predatory pricing has received a significant amount of attention from both academia and the judiciary. See Liebeler, Whither Predatory Pricing? From Areeda and Turner to Matsushita, 61 Notre Dame L. Rev. 1052, 1077-98 (1986) (collection of articles and cases). There is no explicit justification in the language of any statute for proclaiming that a "predatory" price is prohibited, yet it is customarily presumed that if a firm effectuates a "predatory" act involving the price of its products it has breached either the Sherman Act's proscription against monopolization or attempted monopolization, or the Clayton Act's ban on price discrimination. See Carstensen, Predatory Pricing in the Courts: Reflection on Two Decisions, 61 Notre Dame L. Rev. 928, 929 (1986). The gist of the complaint is that the offending party sold merchandise for an amount insufficient to cover the cost of its production, hoping to drive out or castigate rivals so that it might later market its goods at a monopoly price. See A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1399 (7th Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990); R. Posner, ANTITRUST LAW 185-86 (1976). See generally Baumol, Quasi-Permanence of Price Reductions: A Policy for
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The defendant's intent to destroy its competition. The defendant's documents and oral statements are also used as "smoking guns" from which intent to monopolize may be inferred. Unfortunately, for both antitrust plaintiffs and defendants, there is no consensus in the federal courts as to how proof of the defendant's subjective intent to monopolize should be used, or whether such evidence is even relevant to claims of predation. While the


The history of the legal concept of "predatory pricing" can be traced to 15th century England. See Note, Sales Below Cost Prohibitions, Private Price Fixing Under State Law, 57 YALE L.J. 391, 392 n.7 (1948) (citing School Master Case, Y.B. 11 Henry IV. 47, pl. 21 (1410)). In 1410, a teacher who was a new arrival to the English town of Gloucester opened a children's school at which he charged less than the customary rate for instructional services. Id. An action was brought by the schoolmaster of the Gloucester grammar school to enjoin the new teacher from charging a below-market-rate tuition. Id. The English court found for the defendant. Id. at 392. The court stated that the defendant, equally competent with the plaintiff, was providing a service to the community that was "a virtuous and charitable thing, and an ease to the people, for which he can not be punished by our law." Id.; see Kent Stores v. Wilentz, 14 F. Supp. 1, 7 (D.N.J. 1936) (setting forth text of English court's opinion). In the United States, the earliest reported state decision concerning predatory pricing followed the English precedent. See Commonwealth v. Hunt, 45 Mass. 111, 134 (1842) (dismissing criminal indictment which had arisen as result of price cutting activities of co-conspirators in boot-making industry). The federal rule was in accord with Hunt. See Passaic Print Works v. Ely & Walker Dry Goods Co., 105 F. 163, 167 (8th Cir. 1900) (placing print goods on market at "reduced cost" not actionable merely on basis of defendant's "secret intent" to ruin plaintiff's business), cert. denied, 181 U.S. 617 (1901).

See, e.g., International Air Indus. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975) (plaintiff must demonstrate either that defendant charged price below average variable cost in competitive market or below its short-run profit-maximizing price and barriers to entry great enough to enable defendant to reap benefits of predation before new entry possible), cert. denied, 424 U.S. 943 (1976).


Compare Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc., 735 F.2d 884, 891-92 (5th Cir. 1984) (illustrating that predatory pricing is not established unless defendant sets price below average variable cost), cert. denied, 469 U.S. 1160 (1985) and Northwestern Tel. Co. v. American Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981) (adopting theory that pricing falling below defendant's average variable cost is conclusively unlawful), cert. denied, 455 U.S. 943 (1982) with William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981) (stating that prices below average total cost does not brand defendant's prices predatory), cert. denied, 459 U.S. 825 (1982). The William Inglis court adopted a rebuttable presumption of predatory intent if the defendant's prices were found to be below average total cost, including allocation for overhead. Id. at 1035. The presumption must be supplemented, however, by other evidence of objective or subjective predatory intent if the prices are below average total cost but in excess of short
United States Supreme Court, in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*,\(^9\) indicated that specific intent is germane to the issue of attempted monopolization,\(^10\) the Court's most recent analyses of predatory pricing, in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,\(^11\) and *Atlantic Richfield Co. v. USA Petroleum Co.*,\(^12\) failed to address the issue of subjective intent, discussing predation only in the context of antitrust injury.\(^13\)

run marginal cost or average variable cost. *Id.*

A minority of jurisdictions go so far as to declare that more important market factors may render predatory pricing irrelevant. *See, e.g.*, *A.A. Poultry Farms*, 881 F.2d at 1401 (court need only examine relation between price and cost if structure of market makes recoupment possible); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 235-40 (1st Cir. 1983). Additionally, some leading commentators have expressed doubt that a “rational” firm would ever adopt such a strategy. *See R. Bork, The Antitrust Paradox* 149-60 (1978); Hovenkamp & Silver-Westrick, *Predatory Pricing in the Ninth Circuit*, 1983 Ariz. St. L.J. 443, 469 n.174. This argument, however, assumes that all firms behave rationally, which is perhaps a dubious notion. *See R. Posner, supra* note 5, at 186 (“predatory pricing cannot be dismissed as inevitably an irrational practice.”). Former Judge Bork suggests that predatory price cutting is “unlikely” to exist because factors such as lack of sufficient market power and insufficient barriers to entry make a would-be predatory stratagem nothing but a losing proposition. *See R. Bork, supra.* Therefore, any rule instituted to prohibit predatory pricing would be more likely to harm consumers than the absence of any legal sanction. *Id.* at 150-58. *See Easterbrook, Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 270-72 (1981) (no reasonable enterprise would engage in predatory pricing, and even if one did it would only result in windfall to consumers). “It is conceivable that predation could be profitable. . . . The question, though, is whether profitable predation is probable.” *Id.* at 268.

\(^10\) *Id.* at 602. *Aspen Skiing* dealt with exclusionary conduct rather than predatory pricing. *Id.* at 587-92. The Court held that “specific intent to monopolize” was necessary for liability under section 2 of the Sherman Act, but did not indicate to what extent evidence of subjective intent was admissible. *See id.* at 602-03.

\(^12\) 110 S. Ct. 1884 (1990).

\(^13\) *See id.* at 1892 (low prices kept above predatory levels do not effect competition and therefore are not antitrust violations); *Matsushita*, 475 U.S. at 585 n.8 (no antitrust injury unless defendant conspired to drive plaintiff out of relevant markets by “(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost”); *see also* Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117 (1986) (predatory price “below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run”); Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977) (antitrust regulations were created to protect “competition, not competitors” (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962))); Utah Pie Co. v. Continental Baking Co., 386 U.S. 685, 695 n.12, 703 (1967) (“predatory intent” coupled with “unreasonably low prices” and “drastically declining price structure” may be basis of liability under § 2(a) of Clayton Act).

It is interesting to note that both sides of the predatory pricing debate have cited *Cargill* and *Matsushita* as supporting their conflicting positions. *Compare A.A. Poultry Farms*, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1396 (7th Cir. 1989) (contending these cases stand for proposition that predatory pricing is illogical and such allegations are undeserving
This Note will examine the law concerning predatory pricing and the role subjective intent of a defendant plays in identifying prohibited attempts to monopolize. The historical framework of federal legislation directed at attempted monopolization and its modern influences will be explored, leading to the conclusion that these statutes are unsuitable vehicles in much of today’s anticompetition-based litigation. Finally, this Note will consider the alternative remedies available to injured competitors when relief under the federal antitrust statutes is inappropriate.

I. ATTEMPTED MONOPOLIZATION, PREDATORY PRICING, AND FEDERAL ANTITRUST LEGISLATION

Responding to public remonstrance over the failure of the individual states to check adequately the formidable influence on the nation’s economy being exercised by a handful of individuals and corporations in the latter nineteenth century. Congress moved, through enactment of the Sherman Act a century ago,\(^{14}\) to regulate monopolistic activity.\(^{15}\) Section 2 of the Sherman Act declares it unlawful to “monopolize, or attempt to monopolize ... any part of [interstate] trade or commerce.”\(^{16}\) The legislative history of the

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\(^{15}\) See Standard Oil Co. v. United States, 221 U.S. 1, 50 (1911); McGahee, 858 F.2d at 1497. In Standard Oil, the Supreme Court stated that the primary factor which led to the enactment of the Sherman Act was the popular notion that the power of a small group of influential corporations and individuals “would be exerted to oppress individuals and injure the public generally.” Standard Oil, 221 U.S. at 50. Justice Harlan noted that this extreme concentration of power raised concerns that “the country was in real danger from another kind of slavery sought to be fastened on the American people; namely, the slavery that would result from aggregations of capital in the hands of a few individuals and corporations.” Id. at 83 (Harlan, J., concurring in part, dissenting in part); see also United States v. Trans-Missouri Freight Ass’n, 166 U.S. 290, 323 (1897) (Sherman Act used to redistribute wealth from leviathans of commerce to “small dealers and worthy men”), overruled by, Standard Oil Co. v. United States, 221 U.S. 1 (1911); Pitofsky, The Political Content of Antitrust, 127 U. Pa. L. Rev. 1051, 1053-55 (1979) (reviewing historical fear of concentrated economic power addressed by Sherman Act).

Although the debate over its wisdom was intense at the time of its passage, the Sherman Act has been referred to since as an economic “charter of freedom.” See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359-60 (1933), overruled by, Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

\(^{16}\) 15 U.S.C. § 2 (1988). More specifically, section 2 provides: “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with
Sherman Act suggests that the statute is plenary in its remedial capabilities, drawing from common-law principles to protect the public from economic oppression by a small group of wealthy industrialists.  

Subsequent federal antitrust laws focused on numerous monopolistic strategies the Sherman Act failed to deter.  

Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, for example, specifically addressed the regulation of unfair pricing schemes carried out under the guise of legitimate trade. Today,
however, a major area of dissent among the federal circuits and scholars is the degree of deference to be afforded the original objectives of the federal antitrust statutes.\textsuperscript{22}

II. INTENT, DANGEROUS PROBABILITY OF SUCCESS, AND THE INFLUENCE OF THE CHICAGO SCHOOL’S ANTITRUST POLICIES

In early cases under the Sherman Act, such as \textit{Swift & Co. v. United States},\textsuperscript{22} the United States Supreme Court indicated that the defendant’s intent was an important element of a cause of ac-

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\textit{or delivered.} 15 U.S.C. § 13a (1988). \textit{See L. Kitner & J. Bauer, 3 Federal Antitrust Law} 89-91 (1982). Rather than completely eliminate the “meeting competition” exception, the clause was transformed into an affirmative test in section 2(b). \textit{See id.} In addition, the Conference Committee indicated that the “meeting competition” clause was to operate not as a substantive defense, but only as a rule of evidence. \textit{Id.; see also} Henry v. Chloride, Inc., 809 F.2d 1334, 1339 (8th Cir. 1987). “The evil addressed in the Sherman Act was the big trust, which could swallow up or drive out smaller businesses and charge monopoly prices. The villain of Robinson-Patman was the big chain store, which could command low prices from manufacturers, thereby undercutting smaller enterprises and bypassing wholesale distributors.” \textit{Id.; S. REP. No. 1502, 74th Cong., 2d Sess. 4} (1936) (detailing need for modification).

The Robinson-Patman Act has been criticized severely. \textit{See Elman, The Robinson-Patman Act and Antitrust Policy: A Time for Reappraisal,} 31 Antitrust Bull. 579, 580-88 (1986). The criticism is two-fold: (1) the Act tends to fix prices, and (2) by emphasizing uniformity, the Act has required the kind of price rigidity the Sherman Act condemned. \textit{See id.} In addition, critics assert that prohibitions on price discrimination cause distortions in price decisions. \textit{Id.} Price discrimination laws were passed in response to two threats: the power of a rational seller to use territorial price discrimination to destroy local competition, and large buyers doing the same. \textit{Id.} The Justice Department concluded, however, that territorial price discrimination rarely occurs because of the expense involved. \textit{Id.}


Aside from the controversy over the deference to be afforded the original goals of the Sherman Act, there is considerable debate over what these original goals in fact were. \textit{Compare} Lande, \textit{Wealth Transfers Challenged,} 34 Hastings L.J. 65, 93-96 (1983) (goal of antitrust laws was to protect consumers from unfair transfers of wealth) \textit{with} Bork, \textit{Legislative Intent and the Policy of the Sherman Act,} 9 J.L. & Econ. 7 passim (1966) (Congress only intended to deal with “common welfare” by ensuring legitimate competition).

\textit{22} 196 U.S. 575 (1905).
tion for attempted monopolization. Later, in *Utah Pie Co. v. Continental Baking Co.*, the Court permitted the use of oral and written statements made by the defendant's employees to support a finding, under the Robinson-Patman Act, of prohibited intent to monopolize. As recently as 1985, the Court's decision in *Aspen Skiing* gave some indication that specific intent remains an essential element for the imposition of liability under the Sherman Act.

Today, there is significant disagreement as to whether the de-

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24 See id. at 396. Justice Holmes, in outlining the elements of the attempt to monopolize offense, stated:

Intent is . . . essential to such an attempt [to monopolize] [w]here acts are not sufficient in themselves to produce a result which the law seeks to prevent,—for instance, the monopoly,—but require further acts in addition to the mere forces of nature to bring that result to pass, an intent to bring it to pass is necessary in order to produce a dangerous probability that it will happen. But when that intent and the consequent dangerous probability exist, [the Sherman Act], like many others and like the common law in some cases, directs itself against that dangerous probability as well as against the completed result. *Id.* (citation omitted).

Soon after *Swift*, a "rule of reason" was adopted, apparently for all litigation under the Sherman Act, giving judges wide latitude when measuring the monopolistic and efficiency effects of practices in each case. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *Standard Oil Co. v. United States*, 221 U.S. 1, 63-67 (1911). Generally, the elements of an attempt to monopolize offense under section 2 of the Sherman Act are said to be "(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; and (4) Antitrust injury." *Liebeler*, supra note 5, at 1056; see *C.A.T. Indus. Disposal, Inc. v. Browning-Ferris. Indus.*, 884 F.2d 209, 210 (5th Cir. 1989) (discussing elements to be proven for successful action under Clayton Act); *Conoco, Inc. v. Inman Oil Co., Inc.*, 774 F.2d 895, 904 n.6 (8th Cir. 1985) (collecting cases supporting three-element approach to liability for attempted monopolization); *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 431-32 (2d Cir. 1945) (specific intent needed for attempted monopolization); VAHERICS, ANTITRUST BASICS § 5.03 (1989) (attempt to monopolize requires three elements of proof: specific intent to monopolize; conduct by defendant that is anticompetitive or predatory in nature; and "dangerous probability" that defendant will succeed in monopolizing market).


26 See id. at 696-97. The Court stated that in determining whether the defendant's discriminatory pricing scheme was aimed at injuring the plaintiff, the jury could rely on statements made by the defendant's management that the plaintiff was "an unfavorable factor" who "d[u]g holes in [the defendant's competing] operation." *Id.*


27 See *Aspen Skiing*, 472 U.S. at 602-03; see also supra note 10 (discussion of case).
fendant’s intent is still relevant in the context of federal antitrust litigation. The problem centers on the difficulty of distinguishing between intent that is merely symptomatic of aggressive competition, for which a firm should be lauded, and intent indicative of a desire to monopolize a particular market, for which a firm should be disciplined. Examining a corporate defendant’s pricing practices was determined to be a particularly difficult method by which to prove an antitrust violation.

In 1975, Harvard Professors Philip Areeda and Donald Turner attempted to resolve this dilemma by describing an objective test for illegal predation. Under the Areeda-Turner analysis, evidence demonstrating that the defendant priced its merchandise below a calculable level cost of production supported a finding of an imper-

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28 The conflict that has developed in the circuits focuses on how the defendant’s intent is to be weighed in light of the probable chances of monopolization. Compare A.A. Poultry Farms, Inc. v. Rose Acre Farm, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989) (specific intent immaterial), cert. denied, 110 S. Ct. 1326 (1990), and Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983) (subjective intent irrelevant to liability under Sherman Act) with Aspen Shining, 472 U.S. at 602 (anticompetitive intent of dominant firm relevant to attempted monopolization claim) and Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953) (analogous to law of criminal attempt, requirement of specific intent in attempted monopolization claim confines reach to conduct threatening monopolization) and McGhee v. Northern Propane Gas Co., 858 F.2d 1487, 1496 (11th Cir. 1988) (evidence of subjective intent admissible), cert. denied, 110 S. Ct. 2110 (1990), and William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1027-28 (9th Cir. 1988) (evidence of subjective intent admissible, cert. denied, 459 U.S. 825 (1982).

Both sides of the debate cited the Supreme Court's decision in Matsushita as standing for the proposition that subjective intent plays either no part in an attempt to monopolize a claim under the Sherman Act, or an important part of such a claim, respectively. See supra note 13 (discussion of use of Matsushita decision by both camps).

29 See A.A. Poultry Farms, 881 F.2d at 1402 (“desire to extinguish one's rivals is entirely consistent with, [and] often is the motive behind, competition”); Barry Wright Corp., 724 F.2d at 232 (savvy firm will not make “overt descriptions of a hostile plan.”); see also United States v. Aluminum Co. of Am., 148 F.2d 416, 429-30 (2d Cir. 1945) (company which has achieved competitive success should not be “turned upon” merely because of such success). But see Gifford, The Role of the Ninth Circuit in the Development of the Law of Attempt to Monopolize, 61 Notre Dame L. Rev. 1021, 1021-23 (1986) (“defendant's intent resolves . . . ambiguity of . . . defendant's present behavior by showing that it is instrumental to . . . forbidden goal of monopolization”). The tension between promoting open competition while penalizing “overly competitive” firms is the crux of the “antitrust paradox.” R. Bork, supra note 8.

30 See Monroe & Hill, The Predatory Pricing Controversy: Academic Theories Enter the Courtroom, 13 U. ToL. L. Rev. 539, 539 (1982). “Since the time of the Standard Oil Trust, the notion that low pricing may be an anti-competitive practice which violates the antitrust laws has been elusive and almost unprovable.” Id.

missible "intent to monopolize" under section 2 of the Sherman Act. This test applied two principal rules for predatory pricing claims: (1) a price at or above the defendant's average variable production cost was legal, and (2) a price below the defendant's average variable production cost was illegal. While the courts frequently cited the Areeda-Turner analysis following its publication, many of the cases which followed the Areeda-Turner paradigm became mired in the difficulty of applying these economic and accounting principles to individual fact patterns.

A coalition of skeptical antitrust reformers, collectively known as the "Chicago School," expressed dissatisfaction with the judi-

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32 See id. The publication of the Areeda & Turner article had a profound effect upon antitrust litigation. See Liebeler, supra note 5, at 1053 n.12, 1055 (59 decisions cited Areeda & Turner between its publication in 1975 and April 1986 alone). See generally id. at 1077-94 (containing short syllabi of many of these cases).

33 See Areeda & Turner, supra note 31, at 732-33 (summarizing various conclusions and inferences to be drawn from cost-based analysis). Professors Areeda and Turner actually called for using "short-run marginal cost," but as this was often difficult to prove, average variable cost was suggested as an acceptable substitute. See Areeda, Predatory Pricing, 49 ANTITRUST L.J. 897, 901-02 (1980); see also Transamerica Computer Co. v. IBM, 698 F.2d 1377, 1388 (9th Cir.) (prices below average total costs are presumptively illegal, but presumption can be rebutted), cert. denied, 464 U.S. 955 (1983).

Evidence of below-cost pricing also is used when evaluating primary-line competitive injury in Robinson-Patman Act cases. See Hansen, Robinson-Patman Law: A Review and Analysis, 51 FORDHAM L. REV. 1114, 1139-40 (1983); The Robinson-Patman Act: Policy and Law, 1 ABA ANTITRUST SEC (ABA Monograph No. 4) 81-90 (1980).

34 See, e.g., Matsushita, 475 U.S. at 585 n.8 (recognizing conflicting uses of cost data but deferring on issue of which standard to apply); A.A. Poultry Farms, Inc. v. Rose Acre Farm, Inc., 881 F.2d 1396, 1400-03 (7th Cir. 1989) (difficult to choose correct cost measure), cert. denied, 110 S. Ct. 1326 (1990); MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1114-23 (7th Cir.) (various measures of cost can lead to either suppression or promotion of competition), cert. denied, 464 U.S. 891 (1983); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 431-32 (7th Cir. 1980) (potential for arbitrary results with differing price-cost relations).

Recently, the Supreme Court impliedly approved the Areeda-Turner model of predatory pricing. See Atlantic-Richfield Co. v. USA Petroleum Co., 110 S. Ct. 1884, 1892 (1990). "[I]n the context of pricing practices, only predatory pricing has the requisite anticompetitive effect [for Sherman Act liability]." Id. (citing Areeda & Turner, supra note 31, at 697-99). However, because the plaintiff conceded the defendant's prices were set "above predatory levels," the Court did not have to decide which economic principles were used in determining what constituted a "predatory price." Id. at 1889.

35 See Easterbrook, supra note 22, at 1698. "[T]he Chicago School is not a 'school' so much as it is a method of asking questions." Id. at 1699 n.7. The "Chicago School" of antitrust criticism originated in the late 1950's, when Professor John McGee, writing in the Journal of Law and Economics, argued that a major antitrust precedent had confused desirable competition for predation. See McGee, Predatory Price Cutting: The Standard Oil (N.J.) Case, 1 J.L. & Econ. 137 (1958). Other members of academia and the judiciary soon joined in espousing the University of Chicago's economic-efficiency creed, forming a power-
cial tendency to focus almost exclusively on cost-based intent while ignoring other elements in the predatory pricing blueprint.\textsuperscript{38} The Chicago School maintained that the focus in attempted monopolization claims should not be on the defendant's subjective intent, but rather on the requirement that the attempt have a "dangerous probability of success."\textsuperscript{37} Unless an attempt to monopolize was likely to succeed, the Chicago School adherents argued, there would be no danger of antitrust injury, and therefore, no antitrust liability.\textsuperscript{38}

The Seventh Circuit recently applied the Chicago School's analysis in \textit{A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.}\textsuperscript{39}

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\textit{ful lobby for modification of federal antitrust policies. See Rasmussen & Wiley, supra note 5, at 1015-16.}

\textsuperscript{38} \textit{See, e.g., Easterbrook, supra note 8, at 284-66. Judge Easterbrook suggests that the confusion of predatory pricing theories stems from a preoccupation with cost-based analysis. Id. at 264.}

\textsuperscript{37} \textit{See Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1413 (7th Cir. 1989); cf. Easterbrook, supra note 8, at 268 ("antitrust law should ban only those predatory practices that reduce efficiency yet are profitable to the predators"). Whether an attempt to monopolize has a dangerous probability of success depends on "maintaining monopoly power for long enough both to recoup the predator's losses and to harvest some additional gain." Matsushita, 475 U.S. at 589. This concept is limited by a number of factors. For example, where barriers to entry are low, the predator faces a "no-win" situation because once prices are raised to recoup losses accumulated while eliminating competitors, new firms will enter the market and force prices back down. See \textit{A.A. Poultry Farms, 881 F.2d at 1403. Market structure may also make recoupment impossible if, in an unconcentrated market, the predator's customers can turn to other sources of supply. See id. It has been proposed that single-firm market shares of less than 30% are insufficient to establish the requisite market power for a successful predatory pricing campaign. See Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 612-13 (1953); \textit{A.A. Poultry Farms, 881 F.2d at 1403 (collection of cases). Without assurances that a monopoly will result and can be maintained through its efforts, "[t]he predator must make a substantial investment with no assurance that it will pay off." Id.; see also R. Bork, supra note 8, at 145. Bork asserted the following: Any realistic theory of predation recognizes that the predator as well as his victims will incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined). The future flow of profits, appropriately discounted, must then exceed the present size of the losses. Id.}

\textit{38 See Page, The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency, 75 Va. L. Rev. 1221, 1269-78 (1989). "Antitrust injury is a general doctrine that limits antitrust damages to the kinds of harms that are caused by the anticompetitive aspect of a practice." Id. at 1270. The Supreme Court has indicated that an antitrust plaintiff's right to recover is confined to harm that is "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977).}

\textit{39 881 F.2d 1396 (7th Cir. 1989), cert. denied, 110 S. Ct. 1326 (1990). In A.A. Poultry
Judge Easterbrook, one of the Chicago School’s most prominent members,40 addressed the issue of attempted monopolization under section 2 of the Sherman Act sua sponte,41 and formulated what may be termed the “recoupment theory” of predatory pricing. Under this concept, where the alleged predator has no possibility of recapturing his losses by charging monopoly prices after the price war is over, even below-cost pricing will not be found violative of the Sherman Act’s proscription against attempted monopolization.42 Despite the presence of clear evidence of the defendant’s intent to monopolize, Judge Easterbrook rejected a subjective intent analysis and declared that “unless recoupment lies in store even the most vicious intent is harmless to the competitive system.”43

Farms, seven plaintiff companies claimed that the defendant, a vertically integrated egg producer and processor, sold a portion of its products to their former customers at below-cost prices in violation of the Robinson-Patman amendments to section 2(a) of the Clayton Act. Id. at 1397.

See Easterbrook, supra note 22, at 1698-1702 (outlining what Judge Easterbrook considered fundamental aspects of “Chicago School” antitrust policy).

See id. at 1399-1400. Although the plaintiffs brought suit under the Robinson-Patman Act, Judge Easterbrook addressed the Sherman Act section 2 issue by using the standard of notice pleading. See id. Given his well-publicized views on the implausibility of predatory pricing, it should have surpised few observers that Judge Easterbrook would take advantage of the opportunity to put future Sherman Act claimants on notice that the Seventh Circuit would be unfriendly to such assertions.

See A.A. Poultry Farms, 881 F.2d at 1401-02. The recoupment theory bypasses the need for an inquiry into subjective intent by focusing on the viability of future monopolistic pricing (i.e., supracompetitive pricing). Id. at 1401. Even though low prices are beneficial to consumers, their present evil lies in the specter of monopoly prices once the predation succeeds. Id. Competitors may suffer from the low price, but absent future monopoly pricing, consumers will not. Id. Since antitrust laws protect consumers and not competitors, there will be no antitrust injury, but rather a “gift” that actually benefits rather than harms consumers. Id.

It is asserted that although Judge Easterbrook’s opinion is influenced strongly by his proposal that a price war between the plaintiff and the defendant egg producers would only result in a consumer “windfall,” such a windfall may, in this case, be illusory. Between December 1984 and November 1986, while the A.A. Poultry Farms litigants continued to do battle, there was a 3.65% drop in the average wholesale price of shell eggs (large) delivered in Chicago. See Commodity Research Bureau, 1987 Commodity Year Book 86. During this same period, the Consumer Price Index for eggs in the Chicago area rose 6.95%. See U.S. Dept. of Agriculture, Consumer Price Index (1984-1987). Admittedly, there is a plethora of possible grounds for this discrepancy, and the statistic is noted only to support the proposition that a closer examination of the actual benefit to consumers is needed to see if, in reality, the benefit is lost by retail profit-taking.

See A.A. Poultry Farms, 881 F.2d at 1401-02. Judge Easterbrook worried that “[i]f courts use the vigorous, nasty pursuit of sales as evidence of a forbidden ‘intent,’ they run the risk of penalizing the motive forces of competition.” Id. at 1402. This is the Chicago School’s greatest fear: that competition will be frustrated when the courts tread the fine line
It is suggested that the schism over the relevance of intent in attempted monopolization cases stems from conflicting views of how federal antitrust laws are to be enforced. One jurisdiction adopting the element of specific intent is the Eleventh Circuit, as reflected in its decision in McGahee v. Northern Propane Gas Co.\(^4\) In McGahee, a detailed examination of the Sherman Act's historical framework led the court to conclude that evidence of subjective intent is relevant to the issue of antitrust liability.\(^4\) Additionally, Professor Areeda, who co-authored the seminal article on pricing activities as evidence of predation,\(^4\) continues to advocate the use of conduct alone as proof of intent in attempting to encourage consistency among the circuits.\(^4\)

Courts employing the Chicago School approach, on the other hand, see the Sherman Act as authorizing the federal judiciary to promote economic efficiency,\(^4\) rendering evidence of predatory in-

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4. See Easterbrook, supra note 8, at 266-67. Adherents to the Chicago School's approach believe that a cost-based intent analysis will deter some legitimate and beneficial competitive actions. Id.; see also Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc., 784 F.2d 1325, 1338 (7th Cir. 1986). The Ball court stated: Competition is a ruthless process. A firm that reduces cost and expands sales injures rivals—sometimes fatally. The firm that slashes costs the most captures the greatest sales and inflicts the greatest injury. The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds. Id. But see Spivack, The Chicago School Approach to Single Firm Exercises of Monopoly Power: A Response, 52 Antitrust L.J. 651, 662 n.61 (1983) ("self-deterring" nature of predatory conduct is no reason to allow monopolist to inflict damage "before he discovers that his strategy has been unprofitable").


45 See id. at 1496-1501; see also Hovenkamp & Silver-Westrick, supra note 8, at 472-73 (despite "plethora of inconsistent tests for measuring predation," one thing remains clear: "predatory pricing has a strategic element and subjective intent is still relevant to judicial measurement of strategic behavior").

46 See Areeda & Turner, supra note 31 (detailing economic model of predatory pricing activities).

47 See Areeda, Monopolization, Mergers, and Markets: A Century Past and the Future, 75 Calif. L. Rev. 959, 972-73 (1987) (actual intent still requirement for attempt to monopolize carried over from criminal law; but better to focus on conduct to achieve consistency).

48 See R. Bork, supra note 8, at 50-59. "Economic efficiency" as referred to by Chicago School adherents is defined by neoclassical price theory. Id. From this standpoint, the exclu-
tent irrelevant. In the Seventh Circuit's A.A. Poultry Farms and the First Circuit's Barry Wright Corp. v. ITT Grinnell Corp. decisions, for example, the courts considered themselves free under the economic efficiency concept to disassociate efficient from inefficient business practices as the economy grows in complexity, and ignore predatory allegations that represented nothing more than the whining of inefficacious losers.

It would appear that the Chicago School's logic concerning the misuse of "smoking gun"-type evidence of a defendant's intent is
the most convincing argument for curtailing its use in Sherman Act litigation. It appears that some plaintiffs, through clever lawyering, attempt to cajole juries into awarding treble damages under the Sherman and Clayton Act where, in fact, there is no real antitrust injury. Tales of “dirty tricks” played by would-be monopolists may fascinate juries to such an extent that the credibility of the alleged predatory pricing scheme is ignored. For example, in A.A. Poultry Farms, the plaintiff’s attorneys used facially pro-competitive statements of the defendant to obtain a $9.3 million jury verdict on a predatory pricing claim—a staggering $27.9 million after trebling. Because of the possible chilling effect awards of this magnitude may have on legitimate competition, it is suggested that the federal courts strictly supervise the use of such evidence, and, when instructing juries sitting in antitrust actions, establish precise guidelines for the use of evidence of subjective intent to monopolize.

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52 See Indiana Grocery, Inc. v. Super Valu Stores, Inc., 864 F.2d 1409, 1416 (7th Cir. 1989) (rejecting claim that defendant’s conduct constituted predatory “intimidation”). But see McGahee, 358 F.2d at 1504 (defendant specified wish to “contribute to [plaintiff’s] financial problems” as district goal); Henry v. Chloride, Inc., 809 F.2d 1334, 1346-48 (8th Cir. 1987) (allowing use of defendant regional manager’s statements that his firm would see to it that plaintiff’s employees “all don’t make it” to indicate predatory intent).


Antitrust can be a dry subject. The structural analysis that is usually required may be of great importance, but the general public and even the legal profession fail to find it as stirring as economists think they should.

By contrast, the analysis of conduct, of the dirty tricks played by would-be monopolists or conspirators, has a fascination that appeals even to the palate uneducated by exposure to serious economics. Moreover, a focus on conduct leads to a search for “smoking gun” documents—a search that lawyers revel in and that can produce results that juries can understand (or think they do) far better than arguments over market definition and similar subjects.

Behind all this there is the natural human appreciation for a good story, preferably with heroes and villains. Antitrust stories are surrounded by such myths and legends, popularly believed, but often without much sound basis in fact or economic analysis.

Id. at 969; cf. Monroe & Hill, supra note 30, at 550. “There is a respectable body of opinion that holds that a jury cannot comprehend the legal niceties in this free-wheeling type of atmosphere; however, a motion for a jury trial is almost always granted and it will be up to counsel to make the case understandable.” Id. (footnote omitted).

54 A.A. Poultry Farms, 881 F.2d at 1397.

55 See Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980) (limiting use of evidence of subjective intent to monopolize); see also Areeda, supra note 33, at 900-01 (to lessen burden of antitrust litigation on society, court should “refuse to consider intent, unless the party relying upon it gives the tribunal reason to believe his evidence is unusually probative”); Hovenkamp & Silver-Westrick, supra note 8, at
Merely because a claim is not appropriate under the federal antitrust laws, however, does not mean that a company injured by unfair business practices is without a remedy. It is submitted that a plaintiff professing injury from predatory conduct may be able to plead successfully a cause of action for violation of a state "unfair competition" statute, or characterize the defendant's conduct as tortious and proceed accordingly.

III. STATE "UNFAIR COMPETITION" STATUTES AND TORT REMEDIES

Several state constitutions declare a policy against monopoly, and approximately half the states have enacted sales-below-cost statutes of general application. Although similar in substance and application to federal law, these statutes have withstood preemption and other constitutional challenges. While state predatory

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447 (due to evidentiary problems inherent in subjective-intent element, theory that depends on it will "be applied erratically at best" (quoting R. Posner, Antitrust Law, An Economic Perspective, 189-90 (1977)).

But see Bork, Contrasts in Antitrust Theory: I, 65 Colum. L. Rev. 401, 402 (1965) (all competitors may profitably employ unfair practices as means of competing or meeting practices of other competitors).

W. Lifland, State Antitrust Law § 2.02, at 2-6 (1990). States which have constitutional proscriptions against monopoly include Alabama, Arizona, Arkansas, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Oklahoma, South Carolina, South Dakota, Tennessee, Texas, Virginia, and Wyoming. Id. at n.1.13.

See id. § 2.04, at 2-11 n.7 (Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, North Dakota, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming). Nearly half of these statutes apply to retailers and wholesalers and seem to omit manufacturers from their proscriptions. Id.; see also supra note 3 (partial listing of state statutes).

Some of these statutes are venerable. South Dakota's statute, for example, dates back to 1902. Note, State Legislation Prohibiting Sales Below Cost, 52 Harv. L. Rev. 1142, 1142 n.1 (1939).


In considering the constitutionality of Oklahoma sales-below-cost statutes, the Supreme Court stated:

One of the chief aims of state laws prohibiting sales below cost was to put an end to 'loss-leader' selling. The selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offers such an amazing bargain is full of
PREDATORY PRICING STRATEGIES

Pricing statutes routinely require proof of below-cost pricing as an element of any claim thereunder, most demand the additional ingredient of specific intent to injure or destroy a competitor.\(^6\) State courts have observed that these “unfair pricing laws” were enacted to ease “the hardships of ‘cut-throat’ competition.”\(^6\) Some of these courts have decided, in contrast to the current trend in the federal courts,\(^2\) that the presence of specific intent to injure competitors is required for a predatory pricing statute to pass constitutional muster.\(^6\) Specific intent to monopolize, therefore, seems to retain a

... other such bargains. Clearly there is a reasonable basis for a conclusion that selective price cuts tend to perpetuate this abuse . . . . Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass’n, 360 U.S. 334, 340 (1959) (footnote omitted). In concluding that the statutes at issue were constitutional under the equal protection clause of the fourteenth amendment, the Court remarked that “[c]ertainly this Court will not interpose its own economic views . . . when the State has made its choice.” Id. at 341; see also William Inglis & Sons, 668 F.2d at 1048-50 (proscription by state statute of conduct federal law permits not sufficient to warrant preemption). For discussion on the legislative history of the Sherman Act and cases on state action immunity, see generally Note, State Action Immunity and Preemption in Antitrust Challenges to State Pricing Laws: Alcoholic Beverage Control Board v. Taylor Drug Stores, Inc., 71 Ky. L.J. 703, 703-709 (1983) (no suggestion of purpose to restrain state action in Act’s legislative history).

\(^6\) W. LIFLAND, supra note 57, § 2.04, at 2-11. Some of these statutes address injuring a competitor or competition. Id. at 2-13. While competitors may be injured without injuring competition, “injury to competition must be proved by showing substantial injury to competitors as a group.” Id. Pricing strategies assist the courts in establishing the existence of an intention to injure or destroy competitors. Id. “[E]xceptions included in such statutes generally include bona fide clearance sales, disposal of perishables and defective goods, business liquidations, and sales which are charitable, governmental or made pursuant to court order.” Id. (emphasis omitted). Also, a meeting-competition defense is often found in these statutes, which becomes extraneous in cases where the need to price to meet competition renders illogical a search for predatory intent. Id. at 2-13 to -14; see also id. at 2-13 n.10 (collection of cases discussing level of competitive pricing from numerous states).

\(^6\) Burt v. Woolslate, Inc., 106 Utah 156, 158, 146 P.2d 203, 205 (1944). The Maryland Court of Appeals once stated that “[i]t is only when the object of price-cutting is sinister that the sale of goods at less than cost may constitute an economic evil” subject to state regulation. Blum v. Engelman, 190 Md. 109, 111, 57 A.2d 421, 423 (1948) (emphasis added).

\(^6\) See supra notes 39-51 and accompanying text.

viable and important role in this particular sphere of litigation.

The plaintiff alleging injury resulting from predatory conduct might also seek relief under tort law principles, which seek to hold every legally responsible party liable for damages resulting from its conduct, provided that conduct is the proximate cause of the alleged injury. Contrary to federal antitrust law, intent has a clearly defined role in determining the defendant’s potential tort liability.

Dean Prosser described the role of tort law in the field of trade rivalry as one of protecting legitimate businesses from overzealous rivals who may engage in unfair competition practices. Indeed, as demonstrated by the $8.5 billion dollar verdict in *Texaco, Inc. v.*


See W. Prosser, D. Dobbs, R. Keeton & D. Owen, *Prosser and Keeton on the Law of Torts* § 1, at 5-6 (5th ed. 1984). Tort law is directed toward the compensation of individuals, rather than the public, for losses which they have suffered within the scope of their legally recognized interests. Id. The law of torts is concerned with the allocation of losses arising out of “carrying on business in competition with fellow members of that society,” among other things. Id. at 6 (emphasis added) (quoting Wright, *Introduction to the Law of Torts*, 8 Camb. L.J. 238 (1944)).

Under tort law, an injured party is awarded compensatory damages, sufficient to place the party in the same position that he or she would have occupied had the wrong not occurred. See 1 M. Minzer, *Damages in Tort Actions* § 1.00, at 1-3 (1987). Additionally, punitive damages may be “assessed both as an example and as a warning against particularly egregious conduct, . . . serv[ing] both punitive and deterrent functions.” Cochetti v. Desmond, 572 F.2d 102, 105 (3d Cir. 1978).

See, e.g., *Restatement (Second) of Torts* § 13, 18 (1979) (detailing specific intent requirements for tort of battery).

*See W. Prosser, The Law of Torts* § 130, at 956. (4th ed. 1971). Dean Prosser stated:

Though trade warfare may be waged ruthlessly to the bitter end, there are certain rules of combat which must be observed. “The trader has not a free lance. Fight he may, but as a soldier, not as a guerrilla.” In the interest of the public and the competitors themselves, boundaries have been set by the law, and numerous practices have been marked out as “unfair” competition, for which, in general, a tort action will lie in favor of the injured competitor . . . .

Included in the list [but not exclusive of others] are defamation of the competitor, disparagement of his goods and his business methods, intimidation, harassing and annoyance of his customers or his employees, obstruction of the means of access to his place of business, threats of groundless suits, commercial bribery, and inducing employees to commit sabotage.

*Id.* (footnotes omitted).
Pennzoil, Co., claims related to the tort of unfair competition can result in devastating financial liability. Tort claims which resemble antitrust actions include the misappropriation of a competitor’s trade secrets, customer lists, or employees. In addition, an injured business rival may have a cause of action for tortious interference with contract. Remunerable injury may be as attenuated as loss of the damaged party’s prospective business advantage, if the defendant’s intentional and unjustifiable activities, including illegal pricing plans, induced a third party to forego entering into a prospective relation with the plaintiff or prevented the plaintiff from acquiring or continuing a prospective relation.

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68 See id. at 784-805 ($7.53 billion in compensatory damages and $1 billion in punitive damages in action for tortious interference with merger contract). The judgment against defendant Texaco resulted in its filing for bankruptcy protection under Chapter 11. See Wall St. J., Apr. 13, 1987, at 1, col. 6.
69 See Note, Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act, 58 TEX. L. REV. 415, 416-19 (1980). These torts are considered pro-competitive actions, “since they quite often intensify competition, although they may harm a competitor.” Id. at 416. The term “competitive tort” is used often to describe these actions. See Note, Developments in the Law-Competitive Torts, 77 HARV. L. REV. 888, 890-91 (1964).
71 See Buckaloo v. Johnson, 14 Cal. 3d 815, 827, 537 P.2d 865, 872, 122 Cal. Rptr. 745, 752 (1975) (“prospective advantage” is relationship not yet materialized but merely foreseeable at time of interference). To recover damages, the plaintiff need only establish “the probability of future economic benefit.” Id.

According to the Restatement (Second) of Torts: “One who intentionally and improperly interferes with another’s prospective contractual relation (except a contract to marry) is subject to liability to the other for the pecuniary harm resulting from loss of the benefits of the relation . . . .” RESTATEMENT (SECOND) OF TORTS § 766B (1979).

The Restatement carves out space for ferocious business practices which technically resemble tortious interference but nevertheless are legitimate:

One who intentionally causes a third person not to enter into a prospective contractual relation with another who is his competitor or not to continue an existing contract terminable at will does not interfere improperly with the other’s relation if

(a) the relation concerns a matter involved in the competition between the
The common law was relatively late in recognizing a cause of action based specifically on unethical pricing strategy and even today some courts refuse to do so. The original litigation that established legal treatment of predatory pricing itself as an actionable restraint-of-trade offense was Tuttle v. Buck, decided by the Minnesota Supreme Court in the early part of this century. In the eight decades since Tuttle, courts consistently have used evidence that the defendant’s unfair pricing practices enticed customers away from the plaintiff for the dual purposes of proving intentional interference and removing the defendant’s behavior from
the protection of the rule's "safe harbors," which allow for meritorious business tactics.\textsuperscript{77}

Recently, some courts have incorporated the concept of predatory pricing as an element of the tort of "unfair competition."\textsuperscript{78} Although price cutting is generally regarded as a fair and welcome part of spirited competition, if prices are cut for the principal objective of bankrupting a rival business, then such activity is considered a tortious and unfair trade practice.\textsuperscript{79} Upon reexamination, then, it appears that many predatory pricing claims inappropriately filed under the Sherman Act and related federal statutes would be actionable as either intentional interference with existing

\textsuperscript{77} See Restatement, supra note 65, \S 768. Justification is the most common affirmative defense to an interference or unfair competition action. See, e.g., Hope Basket Co. v. Product Advancement Corp., 187 F.2d 1008, 1014-15 (6th Cir.) (patent licensees must show justification for wrongfully inducing other manufacturers to breach licenses), cert. denied, 342 U.S. 833 (1951); Polytech, Inc. v. Utah Foam Prods., Inc., 439 So. 2d 683, 689 (Ala. 1983) (whether defendants were justified in interfering with plaintiff's business is generally question for jury). "Interference is unjustifiable when it is done 'for the indirect purpose of injuring the plaintiff, or of benefitting the defendant at the expense of the plaintiff.'" Stephen- son v. Plastics Corp. of Am., 276 Minn. 400, 416, 150 N.W.2d 668, 680 (1967) (quoting Johnson v. Gustafson, 201 Minn. 629, 634, 277 N.W. 252, 255 (1938)); see also Western Fireproofing Co. v. W.R. Grace & Co., 896 F.2d 286, 290 (8th Cir. 1990) (licensor's allegedly preferential pricing of products to licensee's competitor and lobbying of licensee's customers to move their business away from licensee unjustified for purposes of claim that licensor tortiously interfered with business expectancy under Missouri law); H.J., Inc. v. Interna- tional Tel. & Tel. Corp., 867 F.2d 1531, 1548 (8th Cir. 1989) (predatory pricing considered "wrongful means" of competition, intended as "illegal restraint of trade," taking defendant out of competitor's privilege); Johnson, 201 Minn. at 634, 277 N.W. at 255 (in interference action, malicious purpose of injuring plaintiff or benefiting defendant at plaintiff's expense actionable if injury arises).

\textsuperscript{78} See Bartholomew County Beverage Co. v. Barco Beverage Corp., 524 N.E.2d 353, 358 (Ind. Ct. App. 1988) (tort of unfair competition includes actions for interference with contract or business relation, as well as predatory price cutting); 1 R. Callman, The Law of Unfair Competition, Trademarks & Monopolies \S 4.03 (4th ed. 1981). The Bartholomew court expanded the cause of action to include lawsuits for interference with a business relationship through predatory price cutting. See Bartholomew, 524 N.E.2d at 358-59.

\textsuperscript{79} See, e.g., Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 117-18 (1986) (below-cost pricing is unfair trade practice); Cleaning & Dyeing Plant Owners Ass'n v. Sterling Cleaners & Dyers, Inc., 285 Ill. App. 336, 351-52, 2 N.E.2d 149, 155 (1936) (price cutting primarily to injure rival results in tort liability); Karges Furniture Co. v. Amalgamated Woodworkers' Local Union No. 131, 165 Ind. 421, 423-26, 75 N.E. 877, 879-80 (1905) (if firm "singly or with others, advertises its goods, undersells, solicits, and wins away the customers of his rival by false representation, intimidation or artifice, not to better himself, but to injure his rival, he has committed an actionable wrong") (emphasis added).
or prospective advantage, or as tortious unfair competition.80

CONCLUSION

Antitrust cases brought under the federal statutes are among the most expensive and protracted types of litigation known to our system of justice.81 The Sherman Act and related legislation were not enacted to redress intentional injury, however malicious, but were established to protect the nation’s competitive system.82 Federal courts need to maintain strict supervision over the progress of such litigation and limit the use in jury trials of "smoking gun"-type evidence of subjective intent to monopolize. Such evidence is of limited relevance and tends to overshadow the significance of other vital elements of the plaintiff’s cause of action. This increased vigilance may help prevent insubstantial allegations of attempted monopolization from clogging the federal courts and deny inefficient businesses from recovering treble damages and attorneys’ fees from efficient competitors. The alternatives of state “unfair competition” statutes and tort law provide sufficient shields behind which the warriors of the marketplace can protect themselves from their rivals’ unethical tactics. Since an intentional campaign of predatory pricing constitutes such unprincipled and unjustified behavior, it is suggested that courts that have not already done so adopt predatory pricing as an element of either intentional interference with business relations or the tort of unfair competition.

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80 See, e.g., A.A. Poultry Farms, 881 F.2d at 1404-08 (egg producer and processor did not engage in price discrimination in violation of Robinson-Patman Act by offering supermarket “specials”). Under the test in Bartholomew, 524 N.E.2d at 359, plaintiff Gressell could have used the defendant’s hostile statements (“We are going to run you out of the egg business. Your days are numbered.”), as evidence that Rose Acre’s predatory prices were set primarily to injure him. See A.A. Poultry Farms, 881 F.2d at 1402.

One potential problem under this analysis, beyond the general scope of this Note, is the conflicts of laws and questions that arise when a defendant is charged with tortious unfair competition by plaintiffs of different jurisdictions. One court faced with such a dilemma described its task as “an unnecessary nightmare of judicial administration.” American Rockwool, Inc. v. Owens-Corning Fiberglass, Corp., 640 F. Supp. 1411, 1432 (E.D.N.C. 1986). One leading commentator has suggested choosing one jurisdiction based on where most of the alleged harm has occurred, and trying the case under the appropriate law. R. Weintraub, Commentary on the Conflicts of Law § 6.30, at 342-43 (2d ed. 1980).

81 See Easterbrook, supra note 8, at 336 (“costs of litigating predation cases are staggering; no more complex cases could be imagined”).

82 See supra notes 14-21 and accompanying text.