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The Economics of Predatory Pricing

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The revival of interest among economists in predatory pricing, spawned by Areeda and Turner's 1975 article,[1] and the tidal wave of literature which has followed, creates a serious problem for the lawyer interested in keeping up with what economists are saying on the subject. Articles appearing in the standard economics journals are often inaccessible, due to the advanced level of mathematics normally employed, and seem of little apparent relevance, due to the detailed but often artificially sounding assumptions used to generate conclusions. The materials appearing in law reviews, while perhaps less technical, is voluminous and not always original. Worst of all, no clear consensus seems to emerge, making lawyers skeptical that any useful purpose is served by attempting to master the material.

The present article does not attempt a detailed survey of the literature. Such a survey would be extremely lengthy, given the current volume of literature, and would itself be fairly technical.[2] Instead it tries to articulate the major economic and policy issues and to explain the apparent failure to achieve a consensus on the appropriate judicial stance toward predatory pricing.

I. ECONOMIC DEFINITION V. LEGAL RULE

It is customary to begin a discussion of predatory pricing by offering a definition. However, this step can be a source of much confusion if it is unclear whether what is being put forward is an economic definition

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[1]Areeda & Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). For an updated version of their position, *see* 3 P. AREEDA & D. TURNER, ANTITRUST LAW 710–22 (1978).

[2]For a technically oriented summary of the Areeda-Turner hypothesis and the first wave of subsequent articles, *see* Hay, *A Confused Lawyer's Guide to the Predatory Pricing Literature*, in STRATEGY, PREDATION, AND ANTITRUST ANALYSIS (S. Salop ed. 1981).

(or model) of predation or a legal definition, i.e., a suggested standard for distinguishing between an economic definition and legal rule will be developed in more detail below. For now it suffices to emphasize that Areeda and Turner's contribution consisted in framing a suggested legal rule. Despite some misleading characterizations such as "competition on the merits," they would not claim that their proposed rule was equivalent to an economic definition of predation.

This first part of this article will concentrate on economic definitions or models of predation. At the outset the definition will be very general, defining predation simply as pricing behavior by a dominant firm[3] that adversely affects competition either by injuring existing rivals or deterring new entry. Two aspects of this economic definition are readily apparent. First, the definition is somewhat tautological and therefore not very helpful in describing predatory behavior, and not easily translated into a legal rule. Pricing is predatory if and only if it has an anticompetitive effect. A legal standard based on the definition would require a full scale rule of reason inquiry into a dominant firm's pricing behavior. It would be of little value to judges, and would offer little guidance to dominant firms as to how to avoid prosecution.

A second aspect of this definition is that it refers both to behavior that excludes existing rivals and to behavior that discourages new entrants. There are two reasons for making the preliminary definition so general. First, much of the controversy surrounding the Areeda-Turner rule has to do with its alleged failure to deter strategies which prevent new entry that would have had a procompetitive impact. Second, the two concepts—excluding existing rivals and discouraging future entry—are closely linked in that, in some models of predation, pricing so as to kill off an existing rival may not be profitable as a short term strategy but is rational only insofar as it discourages subsequent new entry in one or more markets.

II. DOES PREDATION EXIST?

The early economic writings on predation accepted the standard definition of predation that was explicit or implicit in most of the discussion on the subject, i.e., pricing below cost to eliminate a competitor. The theme of this literature was radical and of great policy consequence, *viz.*, there is no such thing as successful predatory pricing in the

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[3]The definition of predation could be extended from pricing behavior by a dominant firm to include pricing behavior by a collusive or tightly knit oligopoly. Such an extension raises some additional problems which are not discussed in this article.

real world. Therefore judicial efforts to stop it are useless or, worse, counterproductive when they result in the conviction of nonculpable behavior or in the avoidance by large firms of socially desirable "aggressive" pricing.

The first line of evidence for this view was empirical.[4] An analysis of antitrust cases in which predation was claimed seemed, on close examination, not to reveal successful predation, either because it was attempted but did not succeed or because it was never attempted—any price cutting actually observed was simply the natural (and desirable) competitive response to additional supply.

There have been few published attempts to rebut these empirical observations.[5] A more common response is to regard the empirical evidence as reflecting the strong deterrent effect of the antitrust laws. Predation is rarely attempted because it is unlawful; absent legal sanctions it would be observed often enough to be of concern.

Possibly anticipating this rebuttal the nonbelievers in predation offered a theoretical argument to complement the empirical. Predation (even absent legal sanctions) would not be a rational strategy. It will not be successful in eliminating competition without incurring losses so large as to make the venture unprofitable. Being unprofitable it will not be attempted by rational firms.

This skepticism about the profit potential in predation was based on two observations. First, given the dominant firm's larger volume of production, it would lose more money during the period of predation than would an equally efficient victim.[6] At the very least, this condition would require that the monopolist have a substantially deeper pocket than the victim. Even in that situation, the victim, realizing that the predator was losing substantially more money than itself, would need only to locate a wealthy "parent" to help it ride out the storm. Given the long-run profit potential in sharing a concentrated market, such a parent should not be difficult to find. Therefore, since the threat of

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[4]*See* Koller, *The Myth of Predatory Pricing: An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); Elzinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J.L. & ECON. 223 (1970); McGee, *Predatory Pricing Cutting: The* Standard Oil *(N.J.) Case*, 1 J.L. & ECON. 137 (1958).

[5]F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE 336–38 (2d ed. 1980).

[6]There was a suggestion that this problem could be exacerbated by the victim's choosing to shut down during the period of the price cut, forcing the predator to serve the entire market at a loss, and then reappearing when the monopolist attempted to raise price. *See* McGee, *supra* note 4, at 140.

predation by the monopolist was not "credible," he might as well resign himself to sharing the market.[7]

Second, even if the predation did succeed in eliminating the victim, it would not be profitable unless the monopolist could then recoup his temporary losses by charging a supercompetitive price for some period of time. But this situation requires that there be barriers to entry, and if one firm could enter, there is a strong likelihood that others would be poised to do so as well once the prices were raised back to supercompetitive levels. Moreover, since the victim's assets are physically intact, they would presumably be available to be put back into action at the first opportunity, either by the victim or by a firm to whom the assets had been sold.

Much the same kind of argument is leveled at so-called limit pricing, i.e., the idea that a dominant firm would set a relatively low price so as to discourage new entry. The argument is that such behavior will rarely be rational in that it would be more profitable to maximize short-run profits and deal with entry (possibly by offering to collude) when and if it occurs. Even if limit pricing is attempted, it cannot be demonstrated to be anticompetitive since consumers get the benefits of low prices regardless of whether entry takes place.

In reaction to these theoretical arguments, a rich economics literature has developed, the thrust of which is to demonstrate that, as a matter of economic theory, predatory or limit pricing cannot be dismissed as irrational behavior and cannot be disregarded on the grounds that consumers are unharmed. Much of the literature is highly technical and largely inaccessible to the lay reader. Moreover, it is tentative in that the newer economic models are still being examined, criticized and reformulated. Other parts of the literature tend to be extremely informal, relying on intuitive notions or scenarios to suggest why predation might be rational and why it should be discouraged. Sometimes, of course, the intuitions or scenarios of one author are converted into a formal model by another. On the one hand, this is desirable since without a formal specification of assumptions and a formal derivation of results, it is difficult to probe the internal logic or plausibility of these intuitions so as to permit rejection of those that, on close examination, do not hold up. On the other hand, the inability to model an intuition formally should not be automatic grounds for rejection.[8]

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[7]In McGee's analysis, merger was the preferred option. Under present antimerger law, such mergers would not be possible in most circumstances.

[8]To paraphrase a Supreme Court opinion, economic theory has not read judicial experience and wisdom out of the Sherman Act.

It is not feasible to provide a detailed summary of all the economic literature. It is possible, however, to offer several summary ideas at the core of much of the writing.

Predation as Deterrence. Predatory pricing, however defined, may not be profitable in the context of a single entrant. But incurring losses to eliminate one rival may nonetheless pay off if it discourages entrants in this or closely related markets. In short, the threat of predation becomes the barrier that permits the dominant firm to earn monopoly profit without attracting a flood of additional entrants.

Predation Against a Less-Efficient Rival. The idea, which is analogous to the infant industry argument for trade protection, is that by nature many new firms may be inefficient and easily driven out (without requiring the dominant firm to incur losses). But over the longer run, these firms would develop and become efficient and offer real competition to the dominant firm. In short, over the long run, consumers would be better off by offering temporary protection to seemingly inefficient firms.

Even without the prospect for longer-term improvements in efficiency, the less efficient entrant may benefit consumers as the following example may suggest. Prior to entry the monopolist, with costs of $1.00 per unit, is charging a monopoly price of $2.00. A new entrant, with costs of $1.50, forces the market price approximately to that level. The dominant firm temporarily drops prices to $1.25 (above his own costs but below the entrant's) and bankrupts the entrant. Subsequently the monopolist restores the $2.00 price and no new entry occurs. Arguably, consumers would have been better off had the predation not occurred.

Limit Pricing When There are Economies of Scale. A common reaction to a description of limit pricing is that while it may discourage new entry it does so only by giving the consumer the benefits of competition, i.e., a price at least as low as that which could reasonably be predicted to result from entry.[9] As demonstrated in the Scherer[10] and Williamson[11] responses to Areeda and Turner, this conclusion may not hold when there are scale economies requiring the entrant to enter on a fairly significant scale to avoid serious cost disadvantages. The trick for the dominant firm is to set a pre-entry output (and corresponding price)

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[9]*See, e.g.,* Areeda & Turner, *supra* note 1, at 705.

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

[11]Williamson, *Predatory Pricing: A Strategic Welfare Analysis,* 87 YALE L.J. 284 (1977).

high enough that the output of the entrant at its minimum efficient scale, when added to that of the dominant firm (which is maintained) leads to a total output too large for the market to support, leading to losses all around. The prospective entrant, forseeing this possibility, will be deterred from the challenge. Meanwhile the monopolist is never actually required to incur a loss.

These intuitions, singly or in combination, indicate that, as a matter of economic theory, it is *not* possible to claim that successful predation cannot occur. Moreover, additional economic models not discussed here, based on factors such as risk aversion or asymmetric information, point generally to the same conclusion. It is also clear that there is no simple and more precise economic definition of predation than that articulated at the outset. In particular, a definition that describes predation as below-cost pricing, whatever its suitability as the basis of a legal rule, does not capture all the pricing strategies that injure rivals or deter entry to the long-run detriment of consumers. It must be stressed however, that the numerosity of models, notwithstanding their mathematical correctness, does not offer an infallible guide as to the frequency of predation in practice or to the quantitative risk of predation in an environment without legal sanctions against predation.

III. IS A BRIGHT LINE RULE GOVERNING PREDATION DESIRABLE?

The theme switches at this point from economic models or definitions of predation to the advisability of a precise legal definition, a "bright line" standard for separating lawful from unlawful behavior, and the attributes that such a rule should have. The polar alternative to such a rule is a full-fledged inquiry into the actual or reasonably likely competitive impact of a particular pricing strategy in the context within which it occurs. The inquiry would presumably permit evidence of intent as part of the process of determining the likely competitive impact and would also include testimony from injured rivals and expert economic testimony from both sides.

The attractiveness of a bright line standard is that it may conserve judicial resources and reduce the risk of erroneous decisions attributable to judges' limited ability to absorb and resolve complex economic issues in the face of conflicting expert testimony. In addition, it can provide a clear guideline to business as to permissible behavior limiting the possibility that firms will be deterred from pursuing socially desirable behavior out of uncertainty with regard to the outcome of a litigated complaint.

Of course there is no guarantee that any particular rule would have these properties. Moreover, a poorly chosen rule could introduce new sources of social cost if it is underinclusive and fails to deter important categories of undesirable predation or is overinclusive and penalizes significant categories of desirable behavior.

An ideal rule would have the following properties:

a. It would minimize the probability of failing to brand as unlawful behavior that has an anticompetitive impact.

b. It would minimize the probability of erroneously condemning legitimate, procompetitive behavior.

c. It would be sufficiently clear that business entities in the prospective position of defendant would know *ex ante* whether contemplated actions are lawful, and prospective entrants would be able to assess the limits of what dominant firms could do to them if they elected to enter.

d. It would correspond to available data so that judges could make, at low cost, an *ex post* judgment as to whether the behavior was in compliance with the rule.

As Joskow and Klevorick[12] have pointed out, no one standard is likely to score well on each of these criteria. In particular, rules that reduce the probability of overlooking anticompetitive conduct will tend to increase the risk of condemning innocuous or desirable behavior. In the absence of a perfect rule, therefore, the goal is to find one that minimizes the overall costs of error. Once the best of all possible rules has been identified, it will become feasible to address the question posed at the beginning of this section. It may turn out that no single rule is sufficiently attractive to warrant dispensing with a full scale rule of reason analysis.

IV. CANDIDATES FOR AN OPTIMAL RULE

In this section, I consider the various candidates put forward as legal rules to categorize pricing by dominant firms and indicate criticisms that have been or might be raised against them. The criticisms are offered to permit comparisons among the rules, not to suggest that any rule should be disqualified. Most of the attention will be directed at the Areeda-Turner test which is the most commonly cited in recent judicial opinions.

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[12]Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213 (1979).

A Simple Price-Below-Cost Test. As indicated above, the early literature implicitly or explicitly defined predation simply as below-cost pricing. There are three problems with this test. The first is that several scenarios exist in which prohibiting the dominant firm from pricing below cost does not prevent the undesirable elimination of existing competition or the deterrence of new entry which would generate a procompetitive influence over the long run. Thus a below-cost standard is potentially underinclusive.

Second, any test which is geared to the costs of the dominant firm creates a serious information problem for the smaller rival or prospective entrant. These firms can observe the current market price and presumably know something about their own costs. Absent the threat of predation this may be sufficient basis for an intelligent decision about whether to enter or how aggressive to be. (Where the entrant must be of significant size to achieve necessary scale economies, it must also know something about the elasticity of demand to be able to assess the impact of its entry decision on the market price.)

However, the entrant is less likely to be knowledgeable about the dominant firm's costs, and hence has little guidance as to how low the market price may fall. One can imagine a scenario in which a prospective entrant, due to this uncertainty, might be discouraged from challenging the dominant firm notwithstanding the current high price even where the entrant is in fact just as efficient as the dominant firm.

The third problem is that a single price-below-cost test is meaningful only in the simplest economic model where unit costs are constant, i.e., invariant with respect to output. As Areeda and Turner's and Williamson's diagrams have demonstrated, in the more typical case average costs, marginal costs, and average variable costs all differ and, in addition, must be defined with respect to a specific time frame (e.g., short-run or long-run). The need for greater precision in the meaning of a cost-based test leads directly to the Areeda-Turner rule.

Areeda-Turner's Marginal Cost—Average Variable Cost-Test. Putting aside some special cases, the heart of the Areeda-Turner test focuses on the relation between price and short-run marginal cost, with average variable costs used as a proxy for the latter. The Areeda-Turner rule suffers the two basic deficiencies of the simple cost test, i.e., it permits predation against a less efficient rival and provides no clear parameters for the prospective entrant. In addition, the Areeda-Turner test is deficient on several other grounds. First, as contrasted with a full-cost test (price cannot be reduced below average total costs), it may permit predation

against smaller rivals who are equally efficient but have a shallower pocket and/or a cost structure in which a higher percentage of total costs is variable. Second, as Scherer and Williamson have indicated, where scale economies require the entrant to be of a certain minimum size, the rule permits pre-entry strategic behavior to discourage even an equally efficient entrant. Third, average variable costs may not be a very close proxy for marginal costs. Subsequent efforts to adjust the rule to account for situations where they may be expected to diverge cause confusion and remove the simplicity that is supposed to be a major feature of the rule. Fourth, average variable costs may not correspond neatly with the way corporate accounts are kept. This produces extensive litigation about the precise dollar amount of the lower bound for price.

Average Total Costs as a Floor. The obvious alternative to Areeda-Turner's short-run marginal cost floor (or average variable costs as a substitute) is to label unlawful any price by a dominant firm that is less than average total costs and that such a price thereby injures rivals. I doubt that anyone seriously believes that such a rule, by itself, could possibly be optimal. Like the Areeda-Turner rule and the simple price-below-cost rule, the average cost rule fails to catch pricing behavior which under some scenarios reduces competition over the long run. In addition, there are problems involved in measuring total costs particularly in multiproduct operations where it is necessary to allocate common costs. Even in single-line businesses there is the problem of properly amortizing costs with an investment aspect like capital equipment and advertising.

However the real problem with an average costs floor lies in the opposite direction. There are many circumstances (generally involving diminished demand or increased supply and resulting excess capacity) in which a price less than average total costs is both privately rational and socially desirable. Indeed there may be circumstances in which pricing below average total cost is inevitable (consider the number of Fortune 500 firms that operated at a loss last year). Hence the rule is potentially vastly overinclusive, promising extensive litigation and forcing firms to freeze prices at a level too high to satisfy all but the rivals that benefit from the umbrella thereby created.

Hybrid Tests. Apparently dissatisfied with the Areeda-Turner test and unwilling to turn to a pure average cost test, several authors (and courts) have proposed hybrid tests that bring in other elements when prices are less than average total costs but greater than short-run mar-

ginal (or average variable) costs.[13] One academic proposal is to condemn such prices when intent to exclude can be shown.[14] Another proposal, judicially created, would condemn such prices when there are high entry barriers and the price cannot be shown to be loss-minimizing in the short run.[15] This creates the practical problem of deciding when a price is loss-minimizing. Inevitably this will turn into a determination of intent.

Each of these proposals reduces somewhat the risk of excessive leniency but increases the judicial burden and, through fear of erroneous prosecution, may encourage large firms to be overly timid. In the extreme, they begin to look not too much different from a full-scale rule-of-reason analysis.

Non-Cost-Based Tests. The most frequently cited non-cost-based tests are those of Williamson[16] and Baumol.[17] Williamson's conclusion, cited earlier, was that the Areeda-Turner test provides incentives for long-run strategic behavior involving building in excess capacity so as to permit the dominant firm, in reacting to entry, to expand output without pricing below marginal or average variable costs. Not only does predation or entry deterrence occur anyway but the excess capacity carried so as to permit predation can fairly be labeled socially wasteful. As an alternative, Williamson proposes that dominant firms not be permitted to expand output in the face of new entry. Williamson admits that the rule does not discourage all undesirable efforts at eliminating rivals or deterring entry but is nonetheless superior to the Areeda-Turner rule, especially in not encouraging wasteful expenditures on capacity.

Baumol's rule would permit limit pricing and would even permit the extinction of existing competition but would guarantee the consumer the benefit of a competitive price by prohibiting a firm that had cut

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[13]There is no controversy among economists about the proposition that a price below marginal cost or average variable cost (properly measured) is never desirable, offering analytical support for a legal rule that such a price by a dominant firm ought to be presumptively or conclusively unlawful.

[14]Richard Posner suggests a long-run marginal cost floor combined with intent to exclude an equally efficient competitor. R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 184–85 (1976). There may be problems in attempting to measure long-run marginal costs.

[15]*See, e.g.*, ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 433–34 (N.D. Cal. 1978).

[16]Williamson, *supra* note 11.

[17]Baumol, *Quasi-Performance of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J. 1 (1979).

price in the face of entry from reversing the price cut for a set period of time. This would tend to discourage classical predation (i.e., lowering prices to eliminate a rival and then raising prices back up again) and would also discourage price cuts aimed at disciplining smaller rivals in an effort to achieve an oligopolistic price level. Baumol's rule also has the feature that it can be applied to predation against a less efficient entrant.

Williamson and Baumol each claim that his rule, as a matter of economic theory, is more attractive than the Areeda-Turner rule, in that it is less underinclusive than their rule, and, if properly applied, does not pose a threat to legitimate pricing behavior. The major criticism of both rules has been directed at whether they are judicially workable. Williamson's rule must be adjusted to permit output to grow with overall demand and Baumol's rule must allow for cost-induced price increases. Baumol's rule also puts the traditional victim of predation, the injured rival, in a curious position since the "crime" is not eliminating the entrant but subsequently increasing prices. So far as I am aware neither rule has been the basis of litigation so it is difficult to determine how serious these operational problems may be.[18]

V. THE LIMITED PROSPECT FOR A CONSENSUS

It seems clear from this brief survey that at present no consensus exists among those who have attempted to deal with the problem of predation. Even among economists there are several competing models and vigorous criticism of one another's proposed solutions. More importantly, there is little reason to believe that such a consensus will emerge in the near future. The reasons for this prediction can be briefly summarized.

First, economists whose stock-in-trade is building complex economic models that show conditions under which predation is rational behavior are predisposed to believe that there are real-world counterparts to their abstract models and feel compelled to invent clever solutions to the problem. They will tilt away from most simple cost-based tests.

Second, economists who by instinct and training believe that it is efficient to view the economy as approximating the textbook model of competition where all firms maximize profits over the relevant time period, that information about important market parameters is good,

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[18]For an attempt to simulate the litigation problems posed by the Williamson and Baumol rules, *see* Brodley & Hay, *Predatory Pricing: Competing Economic Theories and the Evolution of Legal Standards*, 65 CORNELL L. REV. 738 (1981).

and that there is little risk aversion and no barrier to entry, will be well disposed to a marginal or average variable cost floor. This is based on a strong feeling among most economists that, whatever the rule, instances of actual predation will be quite rare, and that aggressive pricing is almost always in the best long-run interest of consumers.

Third, claims made by economists about the administrative feasibility of their proposed rules should be heavily discounted. Rules that sound simple because they involve only one variable or can be expressed in a single short sentence may become far less clear cut in the context of actual litigation where important facts are not "given" but must be discovered and litigated. Moreover, the maze of actual background "facts" within which the alleged predation may have occurred would provide several classroom hours of "what if?" questions in a Socratic law school class that is discussing a proposed rule. Experienced lawyers and judges may still opt for simple tests on the grounds of administrative feasibility but are likely to be far more cautious in claims about the savings involved as compared to the customary method of "hearing all the evidence."

Fourth, plaintiffs' lawyers, economists strongly opposed to dominant firms irrespective of superior efficiency, and many judges would be unwilling to constrain a court with a rule that works well "most of the time" if they are persuaded that "this case" may be different. The *per se* rule against price fixing or boycotts is effective because there is a consensus that an agreement on price among competitors or an agreement to boycott is almost never likely to be necessary to achieve some desirable result. Even that consensus has not prevented courts from expanding the inquiry, at least to a limited extent, when defense lawyers can catch their attention long enough to make a plausible argument that a basis for an exception may exist.[19] In the predation context, where the consensus is weaker, a particularly obnoxious document suggesting intent or a blatant incident of targeting a price cut to injure a rival is likely to induce a full hearing, if not a plaintiff's verdict, notwithstanding the rule.[20]

Fifth, defense lawyers will continue to argue for a simple, generally cost-based, rule on the grounds of predictability and fairness. Being familiar with the corporate internal vocabulary and the reward struc-

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[19]In both the price fixing and the boycott areas, cases involving professions have reflected at least a tentative willingness to listen to defense arguments.

[20]This is not to suggest that judges will not cite the rule in writing an opinion where they have decided the case for the defendant.

ture by which lower echelon management are motivated to increase sales, they will vigorously oppose reliance on isolated documents containing embarrassingly inflammatory language.

VI. FUTURE PROSPECTS

Although it is extremely unlikely that a consensus will emerge among all relevant parties in favor of a relatively simple rule, cost-based or otherwise, the proliferation of scholarly work and informed opinion has performed an important educational process. The impact of this process may be both beneficial and longlasting, although it may be less than apparent at the present time due to the focus on the areas of disagreement. In particular, the following themes can be extracted from almost all contributions to the predation debate.

A price reduction by an established firm can be a natural, innocent reaction to new entry or increased competition from existing smaller rivals. It may be rational behavior without any prospect whatever of eliminating significant competitors. Moreover, depending on market conditions, it would not be surprising or unusual to find that prices fail to result in a profit.

Moreover, even natural, innocent, price cutting may injure or even eliminate some rivals, commonly the less efficient but occasionally simply the less well-financed. Such price reductions are not thereby rendered undesirable. Competition does not require an uncountably large number of firms and the process of competition will inevitably result in the failure of some. Unless the established firm is a substantial factor in the market, and unless the departed rivals represented the bulk of the competition facing the established firm, there is little likelihood of a serious, permanent anticompetitive impact from these departures. Moreover, the cost of attempting to preserve every possible competitor is likely to be prohibitive, especially if the spillover impact of protective judicial decisions in discouraging firms in other markets from reducing prices is considered.

From these two themes the following suggestions are offered:

First, conclusive standards, whatever their attraction to defense lawyers and their clients, are unlikely to be workable. Conclusive legality for prices above marginal costs or even average total costs fail to pick up important theoretical possibilities, and there is insufficient empirical basis for concluding that such possibilities are so rare as to be ignored. Conclusive illegality for prices below short-run marginal costs or average variable costs is consistent with economic theory although probably

will not eliminate litigation but simply shift the focus to what is included in or excluded from those cost categories.

Second, presumptive legality for prices above average total costs and possibly even short-run marginal costs (or average variable costs) probably cannot do much harm, but by the same token may not avoid that much litigation. More important is that judges understand the spirit behind the standard, which is that price cutting, even by a dominant firm, is frequently innocent and desirable.

Third, more attention should be paid to structural features. Complaints should be greeted skeptically where the defendant does not have at least 50 percent of a properly defined market and where the injured rival is only one of several competitors of the dominant firm.

Finally, it is probably fruitless to urge that courts not use the Sherman Act or Robinson-Patman Act to protect one firm against the deliberate (perhaps irrational) targeted efforts of a larger rival to drive it out of business even without the prospect of recouping the temporary loss through long-term monopoly profits. It can be stressed, however, that all efforts to be competitive "injure" rivals and the courts should intervene if at all only in the clearest and most egregious case of vindictive assault, as determined from documentary or testimonial evidence. Moreover, courts should not be permitted the luxury of believing they are genuinely helping consumers by such actions.