COMMENT

GETTING PAST SUMMARY JUDGMENT IN PREDATORY PRICING CASES AFTER AMERICAN AIRLINES:

WILL POST-CHICAGO ANALYSIS EVER PREVAIL?*

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I. INTRODUCTION

The recent dismissal of the Department of Justice's predatory pricing suit against American Airlines on summary judgment highlights the demise of the effectiveness of predatory pricing claims brought under the Sherman Antitrust Act.[1] Since the landmark Supreme Court decision in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, few predatory pricing claims have survived summary judgment and none of the claims have succeeded on the merits.[2] The Supreme Court has acknowledged that successful predatory pricing schemes are few and far between.[3] Also, some commentators have noted that the factual issues in antitrust cases are very complicated and courts are wary of leaving such complicated cases to a jury.[4] Because of this complexity, it is argued summary judgment ought to be used more and more in new antitrust cases.[5] As a result of these opinions, most recent predatory pricing cases are dismissed on summary judgment or "by some sort of abbreviated review."[6]

This article suggests that the broad language of the Sherman Act in condemning monopolies[7] should encourage courts to consider a wider variety of ways in which companies can create a successful monopoly scheme through predation, and to consider the totality of the circumstances in determining if conduct violates the Sherman Act, instead of limiting possible monopolistic behavior to simplified, rigid models while ignoring secondary indicia of illegal monopolistic conduct. It will examine the conduct normally charged in predatory pricing suits to determine whether such conduct might successfully be charged under alternative theories under the Sherman Act. The article will begin with a brief overview of the history of predatory pricing, including the earlier cases under the Robinson-Patman

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1. United States v. AMR Corp., 140 F. Supp. 2d 1141 (D. Kan. 2001), *aff'd,* 335 F.3d 1109 (10th Cir. 2003).

2. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); Patrick Bolton et al., *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L. J. 2239, 2258-2259 (2000).

3. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) (stating "[t]here is a consensus among commentators that predatory pricing schemes are rarely tried, and even more rarely successful").

4. *See* Joel B. Harris & Lenore Liberman, *Can the Jury Survive the Complex Antitrust Case?*, 24 N.Y. L. SCH. REV. 611, 637 (1979); Jeffrey Oakes, *The Right to Strike the Jury Trial Demand in Complex Litigation*, 34 U. MIAMI L. REV. 243, 300 (1980); Herbert Hovenkamp, *Post-Chicago Antitrust: A Review and Critique*, 2001 COLUM. BUS. L. REV. 257, 277-78 (2001).

5. Hovenkamp, *supra* note 4, at 277-78.

6. *Id.* at 276-77.

7. Sherman Antitrust Act, 15 U.S.C. § 2 (2000).

Act. It will then discuss competing theories on how predatory pricing claims should be evaluated by the courts. Finally, the article will take an in-depth look at alternative theories under which predatory pricing-like claims might be successful and whether these alternatives will be acceptable to the Supreme Court in light of its current feelings towards predatory pricing in general.

II. MODERN HISTORY OF PREDATORY PRICING

A. *Robinson-Patman Act Era Claims*

Predatory pricing as a modern antitrust violation became popular with the Robinson-Patman Act.[8] The act prohibits discriminatory pricing which harms competition.[9] It was passed in response to the threat posed by the pricing practices of large chain stores to local retail stores.[10]

Predatory pricing is also available as a claim under Section 2 of the Sherman Antitrust Act.[11] A Section 2 claim requires proof of two elements, "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of superior product, business acumen, or historic accident".[12] Because of differences in the acts, it is important to remember which act may be applied to a case: The Robinson-Patman Act only applies to pricing of goods and not services, whereas the Sherman Act applies to every case of predatory pricing.[13]

One major difference between bringing a claim under the Sherman Act as compared to the Robinson-Patman Act is that the latter contains the "meeting competition defense," under

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8. Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(a) (2000) [hereinafter Robinson-Patman Act].

9. *Id.*

10. Clinton C. Carter & Kesa M. Johnston, *The Robinson-Patman Act: The Law of Price Discrimination*, 64 ALA. LAW. 246, 248 (2003).

11. Sherman Antitrust Act, 15 U.S.C. § 2 (2000) ("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 . . . shall be deemed guilty of a felony."); *see also* Ovitron Corp. v. General Motors Corp., 295 F. Supp. 373, 378 (D.C.N.Y. 1969) (stating, "There is little doubt that if a monopolist, other than a natural monopolist, were to engage in below-cost pricing with the purpose of acquiring or maintaining a monopoly, Section 2 would be violated").

12. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

13. *AMR Corp.*, 335 F.3d at 1111; Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 789 (2002).

which the alleged predator may defend a claim by showing it was merely meeting the competition's price. This defense is explicit in the Robinson-Patman Act but is not always available under the Sherman Act.[14] Some jurisdictions have allowed the defense to be inferred under the Sherman Act and others have disallowed it.[15] Under the Robinson-Patman Act, the meeting competition defense is an absolute defense and allows a company to allege that its pricing strategy was undertaken solely to meet the low prices of its competitors and not to undercut its competitors' prices.[16] This defense ignores the fact that such pricing on the part of the alleged predator may indeed be below the appropriate measure of cost.[17] Finally, it seems that the Robinson-Patman Act does not require proof of monopoly power.[18]

One of the first major cases interpreting the Robinson-Patman Act was *Utah Pie Co. v. Continental Baking Co.*[19] In *Utah Pie*, a large pie producer was charged with pricing pies at a lower price in locations farther from the large pie producer's factory.[20] The jury found for the plaintiff, but the appellate court reversed, holding that the evidence of harm to competition was insufficient as a matter of law to support the verdict.[21] The Supreme Court reversed the appellate court, finding that there was adequate evidence from which a jury could find both injury to competition and predatory intent.[22] Judges and academics interpreting *Utah Pie* opined that the case implied that any

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14. Robinson-Patman Act, 15 U.S.C. § 13(b) (2000); James R. McCall, *Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts*, 28 PAC. L.J. 311, 334 n.171 (1997) (noting, "It is, in any event, somewhat doubtful that a 'meeting competition' defense is available in an action to enforce section 2 of the Sherman Act").

15. ILC Peripherals Leasing Corp. v. Int'l Bus. Mach. Corp., 458 F. Supp. 423, 433 (N.D. Cal. 1978) ("A company should not be guilty of predatory pricing, regardless of its costs, when it reduces prices to meet lower prices already being charged by its competitors."); McCall, *supra* note 14, at 334 n.171.

16. Robinson-Patman Act, 15 U.S.C. § 13(b) (2000) (stating "[t]hat nothing herein contained shall prevent a seller rebutting the prima-facie case . . . by showing that his lower price . . . was made in good faith to meet an equally low price of a competitor . . .").

17. *Int'l Bus. Mach. Corp.*, 458 F. Supp. at 433 (*see supra* note, 15 "regardless of its costs").

18. Einer Elhauge, *Why Above-Cost Price Cuts to Drive out Entrants Are Not Predatory – and the Implications for Defining Costs and Market Power*, 112 Yale L.J. 681, n.321 (2003); *see also* Robinson-Patman Act, 15 U.S.C. § 13(a) (2000) (stating the offending pricing is illegal "where the effect of such discrimination may be *to substantially lessen competition or tend to create a monopoly* in any line of commerce *or to injure, destroy, or prevent competition*"(emphasis added)).

19. Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 690 (1967).

20. *Id.* at 690.

21. *Id.* at 689.

22. *Id.* at 702-03.

lowering of prices combined with predatory intent was considered a violation of the Act.[23] Both the act and the rulings following it were considered very plaintiff-friendly.[24]

B. *Predatory Pricing and the Chicago School of Law and Economics*

During this period of relatively easy-to-prove cases under the Robinson-Patman Act, a new school of thought was being created which would eventually bring the downfall of predatory pricing as a viable claim. Scholars in the Chicago School of Law and Economics believe that the purpose of antitrust legislation is to promote market efficiency.[25] Their theory assumed that every businessperson is rational and seeks increased profits for the business as opposed to maximizing growth or revenue.[26] This school of thought is in line with Adam Smith's "Invisible Hand" theory – the idea that competitors in the market will be most efficient when left alone – and therefore, Chicago scholars believe very little regulation of markets and especially very little regulation of pricing is required.[27]

Chicago scholars feel predatory pricing theories are unsound and irrational because there is no certainty the costly schemes can succeed.[28] They also worry stringent predatory pricing policies might dampen competition.[29] They also worry that stringent predatory pricing policies might have negative economic and legal effects, for low prices could reflect a legitimate means of aggressively competing in the marketplace, as opposed to being part of a predatory scheme.[30] The courts have been receptive to Chicago School views.[31] For instance, in

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23. Bolton, *supra* note 2, at 2250.

24. *Id.*

25. Hiroshi Iyori, *Competition Policy and Government Intervention in Developing Countries: An Examination of Japanese Economic Development*, 1 WASH. U. GLOBAL STUD. L. REV. 35, 48 (2002).

26. Marina Lao, *Tortious Interference with the Federal Antitrust Law of Vertical Restraints*, 83 IOWA L. REV. 35, 40 n.25 (1997).

27. Wendy J. Gordon, *Market Failure and Intellectual Property: A Response to Professor Lunney*, 82 B.U. L. REV. 1031, 1036 n.30 (2002); Gary Minda, *Cool Jazz But Not So Hot Literary Text in Lawyerland: James Boyd White's Improvisations of Law As Literature*, 13 CARDOZO STUD. IN L. & LIT. 157, 169 n.61 (2001).

28. Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 586 (1994).

29. *Id.*

30. Lino A. Graglia, *The Burger Court and Economic Rights*, 33 TULSA L.J. 41, 63-64 (1997).

31. William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 VA. L. REV. 1221, 1300 (1989).

Matsushita Electric Industries, the Supreme Court specifically adopted the tenets of the Chicago School that predatory pricing is a rare activity.[32]

C. *The Areeda-Turner View of Predatory Pricing*

Contemporary views on predatory pricing were widely influenced in 1975 with the publishing of an article by Phillip Areeda and Donald F. Turner.[33] In that article, the authors laid out a new theory of predatory pricing that was more lenient than the Chicago School's opinion.[34] The authors specifically rejected the *Utah Pie* line of cases.[35] Predatory pricing, they argued, should not be a violation of the law unless it is below marginal cost.[36] The measure of marginal cost was selected because no rational capitalist would charge a cost lower than marginal cost.[37] However, because marginal cost is so difficult to calculate, the authors suggested some other way of measuring cost be used.[38] Their suggested cost measure was average variable cost.[39]

Some Chicago scholars dispute the Areeda-Turner price test.[40] They argue there are situations in which pricing below average variable cost is not predatory but is merely part of a business strategy that may have beneficial effects.[41] For instance, a competitor may price a product below average variable cost in order to sell more of some other product.[42] They also argue it often merely appears a company is pricing below cost and there is usually an error in the measurement of cost where pricing below cost is found.[43]

D. *Matsushita and the End of the Utah Pie Era*

The Supreme Court signaled the beginning of its departure from the plaintiff-friendly *Utah Pie* line of cases in *Matsushita*

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32. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589-90 (1986) (citing Bork, Easterbrook, and McGee).

33. Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

34. Richard A. Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925, 940-941 (1979) (referring to Areeda and Turner as "unduly permissive").

35. Areeda and Turner, *supra* note 32, at 726-27.

36. *Id.* at 712.

37. *Id.*

38. *Id.* at 716.

39. *Id.*

40. *See* Baker, *supra* note 28, at 587.

41. *Id.*

42. *Id.* at 588.

43. *Id.* at 587.

Electric Industries v. Zenith Radio Corp.[44] In *Matsushita*, several Japanese companies were charged by American competitors with conspiring to fix television prices in both the United States and Japan.[45] The prices were alleged to be set high in Japan and low in the United States with the design of driving American companies out of business in the United States.[46] The district court granted summary judgment for the defendant but the Third Circuit Court of Appeals reversed.[47] The Supreme Court affirmed the Third Circuit stating that there were genuine issues of material fact.[48]

Matsushita was considered a departure from *Utah Pie* both because *Utah Pie* was hardly referred to in the case and because the factor of intent was given weak coverage by the Supreme Court.[49] The Supreme Court's only reference to intent was its statement that the scheme was irrational because the conspiracy's targets were larger, well-established companies and there was no evidence the conspirators would succeed and recover their losses.[50] Because the supposedly conspiring companies were assumed to be rational profit maximizers, the Supreme Court found that they had no motive to take part in the unprofitable scheme.[51] This statement strongly reflects the Chicago School view of predatory pricing as an irrational way of increasing profits in which no businessperson would take part.[52] *Matsushita* was also the first case to step down the road to the increased use of summary judgment in predatory pricing cases because the element of intent, a question usually reserved for a jury, was not deemed important in determining if there was actual predatory pricing.[53]

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44. *Matsushita Elec. Indus.*, 475 U.S. at 577-78.

45. *Id.* at 577-78.

46. *Id.*

47. *Id.* at 578-80.

48. *Id.* at 607.

49. Michael L. Denger and D. Jarrett Arp, *Predatory Pricing and Practices* 1290 PLI/Corp 187, 192-93 (2002); G. Everett Sinor, Jr., *The Belated Demise of Utah Pie*, 15 MISS. C. L. REV. 249, 262 (1994); Stephen Calkins, *In Praise of Antitrust Litigation: The Second Annual Bernstein Lecture*, 72 ST. JOHN'S L. REV. 1, 14 n.59 (1998).

50. *Matsushita Elec. Indus.*, 475 U.S. at 596-97.

51. *Id.* at 597, 604.

52. Albert A. Foer, *The Third Leg of the Antitrust Stool: What the Business Schools Have to Offer to Antitrust*, 47 N.Y.L. SCH. L. REV. 21, 30-31 (2003).

53. Hovenkamp, *supra* note 4, at 276-77.

E. *Brooke Group and Its Progeny*

The Supreme Court faced the predatory pricing issue again in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, in which a major cigarette manufacturer was charged with predatory pricing against a competitor.[54] The Supreme Court refused to specifically deny the holding of *Utah Pie*, but simply stated it did not apply the same gloss to the decision which numerous scholars had.[55] The Supreme Court defined predatory pricing as pricing below some appropriate measure of cost where the defendant has a reasonable chance of recouping its losses from the activity.[56] Notably, the Supreme Court left to the lower courts the issue of determining which measure of cost is appropriate.[57] Most subsequent decisions decided average variable cost or marginal cost is the appropriate measure of cost.[58]

Furthermore, the Supreme Court required the plaintiff to show that the losses due to below-cost pricing were recouped through some anticompetitive method, either by gaining a monopoly and charging monopolistic prices or through some other method.[59] The requirement of recoupment was necessary, the Supreme Court held, because otherwise there is no evidence any consumer has been harmed.[60] The Supreme Court reiterated that the purpose of antitrust laws is to encourage competition, and not to protect competitors from harm.[61]

The effect of *Brooke Group* on subsequent cases has been astounding. Since *Brooke Group*, no predatory pricing cases have won on the merits.[62] This seems to have left the government skeptical of even bringing such claims. For instance, in *United States v. Microsoft*, the government claimed predatory pricing of Microsoft Internet Explorer in the district court but decided not to appeal the issue to the appeals court.[63]

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54. *Brooke Group Ltd.*, 509 U.S. 209, 209 (1993).

55. *Id.* at 221.

56. *Id.* at 210.

57. *Id.* at 222-223, n.1.

58. Charles E. Koob, *Whither Predatory Pricing? The Divergence Between Judicial Decisions And Economic Theory: The American Airlines and Virgin Atlantic Airways Cases*, 3 SEDONA CONF. J. 9, 10 (2002).

59. *Brooke Group Ltd.*, 509 U.S. at 224-225.

60. *Id.* at 224.

61. *Id.*

62. Bolton, *supra* note 2, at 2258-2259.

63. United States v. Microsoft, 253 F.3d. 34, 68 (D.C. Cir. 2001).

F. *The Rise of the Post-Chicago School of Thought*

The Post-Chicago School of Economics arose in response to the ascendancy of the Chicago School's theories in the 1970s and 80s.[64] Post-Chicago theories challenge the Chicago School's view as a simplistic view of economics.[65] They argue that unregulated markets are not nearly as efficient as the Chicago Scholars think them to be and the Chicago models leave out several important factors which make free markets sub-optimal with respect to efficiency.[66] The economic models they propose to determine the competitive effect of certain conduct also include market factors such as imperfect information and entry barriers.[67] These factors are often dismissed by Chicago scholars as being too complicated for use in a workable model.[68]

The Post-Chicago theorists also dispute the Chicago School's findings about predatory pricing.[69] Post-Chicago scholars mainly rely on new theories showing that predatory pricing can be rational in certain situations.[70] On the issue of pricing, Post-Chicago theorists claim that pricing *above* costs can have negative effects.[71] Additionally, Post-Chicago scholars are more likely to argue that recoupment can occur without subsequent monopoly power, not only in the relevant market, but also in other markets, and that it can occur even without monopoly power.[72]

The Post-Chicago scholars also tend to rely on new studies which show predatory pricing can be rational and is more prevalent than previously thought.[73] Post-Chicago theories are

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64. Michael S. Jacobs, *An Essay on the Normative Foundations of Antitrust*, 74 N.C. L. REV. 219, 220-22 (1995).

65. M. Sean Royall, *Symposium on Post-Chicago Economics: Editor's Note*, 63 ANTITRUST L.J. 445, 445-46 (1995).

66. *Id.* at 445-47. Some commentators have even questioned whether protecting efficiency is even a major concern of the Sherman Act. *See* Robert H. Lande, *Wealth Transfers as the Original and Primary Concern of Antitrust: Efficiency Interpretation Challenged*, 50 HASTINGS L.J. 871, 892-896 (1999).

67. Royall, *supra* note 64, at 446-47.

68. Frank H. Easterbrook, *Workable Antitrust Policy*, 84 MICH. L. REV. 1696, 1706 (1986) (stating that "[t]he purpose of any model is to strip away complications, to make intractable problems manageable, to make things simple enough that we can see how particular variations matter").

69. Ashutosh Bhagwat, *Unnatural Competition?: Applying the New Antitrust Learning to Foster Competition in the Local Exchange*, 50 HASTINGS L.J. 1479, 1487 (1999).

70. Fred S. McChesney, *Talking 'Bout My Antitrust Generation: Competition for and in the Field of Competition Law*, 52 EMORY L.J. 1401, 1414-15 (2003).

71. Baker, *supra* note 28, at 591.

72. *Id.* at 589-90.

73. John E. Lopatka, *Exclusion Now and in the Future: Examining Chicago School*

criticized for being too complex.[74] For this reason, some commentators argue the issues are too complicated for juries to handle and summary judgment should be used even more often with Post-Chicago theories.[75]

The Post-Chicago theories have not been without some success in the courts, but such success has been in areas other than predatory pricing. In the case of *Eastman Kodak Co. v. Image Technical Services, Inc.*, Kodak was charged with using tying agreements to monopolize the market for replacement parts for its own photocopiers and other machines.[76] Kodak defended the claim on several grounds, including that it did not have a monopoly in the market for photocopiers so it was impossible for Kodak to have a monopoly in the derivative market for replacement photocopier parts.[77] Kodak reasoned that if it were able to monopolize the derivative market of replacement parts and used its monopoly to charge higher prices, it would suffer as a result of lost sales of the original equipment.[78] The district court dismissed the claim on summary judgment, holding there was no evidence of illegal tying agreements and not reaching the question of market power, but the Ninth Circuit Court of Appeals reversed.[79] The Supreme Court affirmed the Ninth Circuit, refusing to adopt a presumption in Kodak's favor and stating it is possible for a manufacturer without monopoly power in a primary market to still have monopoly power in a derivative market.[80] This was considered a major step forward for Post-Chicago theories because the Court recognized that imperfect information in the market was a factor causing consumers to be tied-into Kodak's products after purchasing them.[81] Without this imperfect information, the consumers might not have been tied-into Kodak products and Kodak's power over the derivative market of replacement parts might not have been found to be anticompetitive.[82]

Orthodoxy, 17 MISS. C. L. REV. 27, 32 n.45 (1996).

74. Hovenkamp, *supra* note 4, at 277-78.

75. *Id.*

76. Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 458 (1992).

77. *Id.* at 452.

78. *Id.* at 465-66.

79. *Id.* at 456, 459-60.

80. *Id.* at 471.

81. *Id.* at 473; Robert H. Lande, *Chicago Takes it on the Chin: Imperfect Information Could Play a Crucial Role in the Post-Kodak World*, 62 ANTITRUST L.J. 193, 193-95 (1993).

82. *See* Lande, *supra* note 80, at 194-95.

G. *American Airlines: Hope for Post-Chicago Predatory Pricing*

The most recent major predatory pricing case to go to the appeals courts was *United States v. AMR Corp.*[83] In that case, American Airlines was charged by the Department of Justice with predatory pricing at its Dallas-Fort Worth hub.[84] The Department of Justice alleged that American dropped its prices to meet those of certain low-cost carriers (LCCs), expanded capacity to deprive the LCCs of passengers, and intended to drive the LCCs them out of business.[85]

The claim was brought under the standards of Section 2 of the Sherman Act instead of the Robinson-Patman Act because the latter only applies to the predatory pricing of goods, and the Federal Trade Commission Act specifies that airline flights are services, not goods.[86] American defended its action by asserting the "meeting competition defense."[87] The government's case was dismissed on summary judgment in the district court and the Tenth Circuit Court of Appeals affirmed.[88]

The district court found that it was unlikely that American could recoup its costs by charging a monopolistic price in the market.[89] The district court limited the scope of recoupment to the markets on which American was contended to have priced predatorily and disallowed evidence of recoupment in other markets where predatory pricing was not charged.[90] This foreclosed the government's claim that American could recoup its losses through "predation by reputation."[91] "Predation by reputation" is a theory alleging that a predator can recoup its losses from one market segment where it prices in a predatory manner by using reputation to keep entrants out of other markets, thereby allowing the predator to maintain a monopoly.[92] This theory was rejected because the district court, looking at the language of *Brooke Group*, decided recoupment must be shown in the market where the predation takes place and not in any other

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83. *AMR Corp.*, 335 F.3d at 1109.

84. *Id.* at 1111.

85. *Id.* at 1112.

86. *Id.* at 1111; Paul Stephen Dempsey, *Predation, Competition & Antitrust Law: Turbulence in the Airline Industry*, 67 J. AIR L. & COM. 685, 789 (2002).

87. *See* Robinson-Patman Act, 15 U.S.C. § 13(b) (2000); McCall, *supra* note 14, at 334.

88. *AMR Corp.*, 335 F.3d at 1111.

89. *AMR Corp.*, 140 F. Supp. 2d at 1209-10.

90. *Id.* at 1214-17.

91. *Id* at 1214.

92. *Id* at 1213.

market.[93] Furthermore, the court found that there was no evidence of such reputation in the facts presented.[94]

Notably, both the district court and the Court of Appeals found that the incremental costs (a close approximation of marginal costs) had to be considered for an *entire* route, as opposed to considering them for only the *added* flights to that route.[95] Because the Tenth Circuit found the government had not met its burden on the element of pricing below cost, it did not go on to discuss recoupment.[96]

This case highlights many of the problems Post-Chicago theories face in federal courts. They are very complicated and highly fact specific, and because of this they are very expensive, even among antitrust cases as a group.[97] The Post-Chicago analysis also requires looking more closely at many "varied and complex" markets, another difficult task.[98] The cases are ripe for summary judgment because judges typically does not think a jury can handle the complicated issues without becoming confused.[99] Furthermore, courts typically worry about protecting fair competition, so courts will often dismiss the case if even a small fear exists that the competition in question is merely aggressive and not anti-competitive.[100]

H. *Predatory Pricing in the News: Wal-Mart Toy Pricing*

The issue of predatory pricing was recently in the news because of Wal-Mart Corporation's pricing of certain products.[101] These products, referred to as "loss-leaders," are priced clearly below the acquisition cost.[102] The losses from these sales are then recouped by Wal-Mart when customers attracted to the store for the "loss-leader" products then purchase other products in the store marked above the acquisition cost.[103] This practice with regards to certain drug store products was challenged under an

93. *Id* at 1214, 1216-17.

94. *Id* at 1214, 1216-17.

95. *See generally id.* at 1116-21 (discussing methods of approximating marginal costs).

96. *Id.*

97. Jacobs, *supra* note 63, at 256.

98. Hovenkamp, *supra* note 4, at 268.

99. *Id.* at 277-78.

100. Thomas G. Krattenmaker & Steven C. Salop, *Appendix A—Analyzing Anticompetitive Exclusion*, 56 ANTITRUST L.J. 71 (1987).

101. Constance L. Hays, *Toy Retailers Find Prices at Wal-Mart Tough to Beat*, N.Y. TIMES, Dec. 23, 2003, at C1, C4, *available at* 2003 WLNR 4632964.

102. *See* Wal-Mart Stores v. Am. Drugs, 891 S.W.2d 30, 32-33, 34 (Ark. 1995).

103. *Id.* at 34.

Arkansas state statute similar to the Robinson-Patman Act.[104] The case in the Arkansas court failed because the Arkansas Law requires a showing of specific intent to "injure competitors and destroy competition", and the plaintiff was unable to prove such intent.[105]

Meanwhile, Wal-Mart has continued the practice, most recently in a price war between itself, Target, and Toys R' Us over toy prices.[106] During the past shopping season, Wal-Mart had the lowest prices on 92% of the toys surveyed by a Prudential study, sometimes pricing below manufacturer's cost to achieve the feat.[107] Also, as a result of losing the pricing war, Toys R' Us' stock was forecast to drop as much as three dollars, and Goldman-Sachs analysts recommended investors deemphasize the stock.[108] While Toys R' Us has been specifically hurt by the practice, apparently due to press coverage of the issue, it is unlikely Toys R' Us would be successful if it sought to enjoin the practice because of the strictness of the current predatory pricing standard.[109]

III. CAN THE PREDATORY PRICING STANDARD BE SAVED?

It should be clear now that predatory pricing claims face many difficulties in court. How then can conduct bearing all the hallmarks of predatory pricing be successfully brought? This discussion will begin by looking to the past and then considering whether the element of intent should be brought back to determine if a competitor is guilty of predatory pricing. Then, this discussion will discuss whether the current standard can be manipulated to make predatory pricing claims easier to prove in court. To do this, I will look for new claims that either extend predatory pricing theory or are distinct from it. I will then discuss whether these theories are likely to have much success in the courts. I will include in this analysis existing theories under which the same conduct also may be brought and determine whether the claim would be as successful.

A. *Bringing Intent Back into the Predatory Pricing Standard*

Some scholars have suggested intent should be an element of

104. Roy Beth Kelly, *Wal-Mart Stores, Inc. v. American Drugs, Inc.: Drawing the Line Between Predatory and Competitive Pricing*, 50 ARK. L. REV. 103, 104 (1997).

105. *Wal-Mart Stores*, 891 S.W.2d at 33.

106. Hays, *supra* note 100, at C1.

107. *Id.*

108. *Id.*

109. *See id.*

predatory pricing because certain types of predatory pricing are impossible to prove any other way.[110] How else can courts distinguish between aggressive competition and anti-competitive behavior?[111] However, the analysis in *Brooke Group* still stands: harm to competition, and not intent to harm competitors, is controlling in the analysis.[112] Harm to competition is always the limiting factor.[113] As courts have pointed out, if competition is not hurt by certain conduct, why should a competitor, even one with predatory intent, be punished?[114] However, if particular conduct harms competition, what should prevent the government from stopping it regardless of a competitor's intent?

At a glance, these arguments are sound; however, these arguments assume that "anti-competitive conduct" proscribed by the antitrust laws is an act readily distinguishable from "aggressive competition."[115] Intent could play a role in predatory pricing other than as a required element of the test for predatory pricing.[116] Where an intent to harm competition exists, marginal aggressive/anti-competitive conduct could be found to violate the antitrust statutes.[117] For instance, a lack of predatory intent might serve as a mitigating factor in narrow cases and existence of predatory intent could be likewise considered as an aggravating factor.[118] In cases such as *AMR* where the issue of pricing below cost might have been close, a finding of predatory intent on American Airlines' part could have tipped the balance in favor of the Department of Justice's case.[119] For instance, in *AMR*, quotations from the CEO of American Airlines, Robert Crandall, such as "If you are not going to get them out then no point to diminish profit" could have been weighed by the jury in determining whether or not AMR's additional capacity and lower prices were merely meeting competition or were instead predatory in nature. Nonetheless, the court ruled the prices were above an appropriate measure of cost.[120] The issue of existence of predatory intent would be a factual inquiry left to the jury, which

110. Steven R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242, 1242 (1991).

111. *Id.* at 1248.

112. *Brooke Group Ltd.*, 509 U.S. at 225.

113. *See id.*

114. *See id* at 224-25.

115. *Brooke Group Ltd.*, 509 U.S. at 225.

116. *See* Beck, *supra* note 109, at 1242.

117. *See id.*

118. *See id.*

119. *See AMR Corp.*, 140 F. Supp. 2d at 1153, 1218.

120. *See id.* at 1153.

would allow some claims that were formerly dismissed on narrow grounds, to escape summary judgment.[121]

B. *Predatory Capacity Claims in Lieu of Predatory Pricing*

One option presenting itself for skirting the strict predatory pricing standard is to construe the offending conduct as predatory saturation of the market (also referred to as predatory capacity or "dumping").[122] Under this claim, the plaintiff would show the defendant had added some quantity of excess capacity to the market in order to draw customers away from competitors, forcing the competitors out of business, and creating a monopoly for the predator.[123]

A predatory saturation claim was attempted by the Department of Justice midway through the American Airlines case.[124] Apparently sensing the case was doomed under the strict *Brooke Group* predatory pricing standard, the Department of Justice attempted to construe the case as one of predatory capacity increases by American Airlines.[125] The court rejected this argument and insisted the total price of the capacity for the relevant market be examined to determine if it was below average variable cost.[126]

While the Department of Justice was unsuccessful in changing the direction of the American Airlines case,[127] other cases have shown that the predatory saturation claim is viable.[128] One successful case claiming predatory saturation of a market is *Photovest Corp. v. Fotomat Corp.*[129] In that case, a franchisor of photo processing kiosks tried to drive one of its franchisees out of a profitable market by opening competing kiosks within a few miles of the franchisee's more successful kiosks.[130] The court found the conduct violated the franchise agreement's implied duty of good faith and fair dealing under state contract law.[131] More important to predatory pricing theory, the court found the same conduct of opening many competing stores in the area

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121. *See* Hovenkamp, *supra* note 4, at 276-78.

122. *See* Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 715 (7th Cir. 1979).

123. *See id.*

124. *AMR Corp.*, 140 F. Supp. 2d at 1193-94; Aaron S. Edlin, *Stopping Above Cost Predatory Pricing*, 111 YALE L.J. 941, 984-85 (2002).

125. *See* Edlin, *supra* note 123, at 984-85.

126. *See id.*

127. *AMR Corp.*, 140 F. Supp. 2d at 1193-95.

128. *Photovest Corp.*, 606 F.2d 704.

129. *Id.*

130. *Id.* at 716-18.

131. *Id.* at 727-29.

violated the Sherman Act because it was an illegal attempt to monopolize the market.[132]

Overall, the *Photovest* case was a positive development for the Post-Chicago School of analysis. The court in *Photovest* looked closely at the nature of the market and parties involved – the type of fact intensive analysis Post-Chicago analysts would like to see in antitrust cases.[133] The court did not apply a hard and fast predatory pricing standard as the court in the *AMR* case did.[134] In *AMR*, the court dismissed the claims based on an exacting distinction of whether a price was below average variable cost or whether it was below marginal cost.[135] Yet in *Photovest*, the court stepped back and examined all the facts of the situation.[136]

Cost was considered, but was not controlling where there were prior dealings between the parties and the specific intent of the defendant to drive the competitor from the market was proven.[137] Applying this fact-intensive analysis to the *AMR* case, the court might have decided that while the price may have been slightly above average variable cost,[138] factors such as the introduction of additional flights on routes directly competing with the low cost carriers' flights,[139] and an increase in price and removal of the competing flights after the low cost carriers left the market,[140] all point to predatory conduct that violated Section 2.[141]

Photovest suggests predatory capacity added and directly targeted at locations or times near a competitor's goods or services should be considered as a factor, thus making a violation of Section 2 more likely to be found.[142] In the *Photovest* case, the added capacity was in the form of the defendant's kiosks placed

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132. *Id.* at 714-717.

133. *See id.* at 715; Lawrence A. Sullivan, *Post-Chicago Economics: Economists, Lawyers, Judges, and Enforcement Officials in a Less Determinate Theoretical World*, 63 ANTITRUST L.J. 669, 672 (1995)("It is important to note that the post-Chicago approach invites detailed factual analysis").

134. *AMR Corp.*, 140 F. Supp. 2d at 1194-95.

135. See generally *id.* at 1196-1204 for an in-depth discussion of costs.

136. *Photovest Corp.*, 606 F.2d at 714-19 (many factors are mentioned, including the fact that one of Fotomat's stores in the area was kept open even though it was losing money).

137. *See id.*

138. *AMR Corp.*, 140 F. Supp. 2d at 1196.

139. *Id.* at 1144.

140. *Id.*

141. *Photovest Corp.*, 606 F.2d at 717-721.

142. *Id.*

specifically near to the plaintiff's profitable kiosks.[143] Similar conduct was found in the *American Airlines* case.[144] While Photovest had information from franchise payments about which locations were most profitable,[145] American Airlines paid people to stand outside of the LCC's flights to determine how many people were boarding each flight.[146] Although this is normal conduct in the airline industry, American Airlines used this information to increase the number of flights flying the same routes as the Low Cost Carriers' flights and to lower the fares on those routes.[147] While this conduct is not unlawful on its face, as the court in *Photovest* stated, "lawful practices may become unlawful if they are part of an illegal scheme."[148]

The *Photovest* decision may have several limitations if it were applied today. First, intent was considered as an element.[149] The *Photovest* case was pleaded as an attempted monopolization claim.[150] Under the attempted monopolization doctrine, specific intent to monopolize is an element of the cause of action.[151] Also, the *Photovest* case was also decided before the *Brooke Group* and *Matsushita* cases, which removed the element of intent from claims of monopolization,[152] but not from claims of *attempted* monopolization.[153] Because intent was used to make the decision, it is unclear whether the court used the intent element to show the "attempt" portion of attempted monopolization or whether the court used intent as a factor in the underlying monopolization claim. If intent was used merely to prove the attempt element, then the *Photovest* decision remains unscathed by *Brooke Group* and *Matsushita*.[154] However, if intent was also used to show the conduct violated Section 2 of the Sherman Act,

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143. *Id.* at 715-717.

144. *AMR Corp.*, 140 F. Supp. 2d at 1181-83.

145. *See Photovest Corp.*, 606 F.2d at 717 (discussing the terms of the franchise and placement of one the competing kiosks near Photovest's best store).

146. *AMR Corp.*, 140 F. Supp. 2d at 1182.

147. *AMR Corp.*, 335 F.3d at 1112.

148. *Photovest Corp.*, 606 F.2d at 719.

149. *See Photovest Corp.*, 606 F.2d at 715-717 (stating that plaintiff's actions were "designed to reduce plaintiff's profits for purposes of reacquiring plaintiff's stores at the lowest possible price," and further concentrating on efforts to drive plaintiff from the market by purchasing plaintiff's stores).

150. *Id.* at 711.

151. *Id.*

152. *Id.* (*Photovest* was decided in 1979); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986); Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 225 (1993).

153. *AMR Corp.*, 140 F. Supp. 2d at 1193 (emphasis added).

154. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 604; *Brooke Group Ltd.*, 509 U.S. at 225.

then the *Photovest* decision may have been weakened by *Brooke Group* and *Matsushita* to the extent that intent was used to show the conduct could violate Section 2.[155]

Merely because specific intent has been removed as an element of the claim does not necessarily mean courts shouldn't consider it as a factor.[156] Indeed, the court in *Photovest* considered the specific plot of Fotomat to drive Photovest out of the market.[157] In *AMR*, there was evidence of similar anti-competitive intent to drive competitors from the market, coupled with actions designed to do so.[158] As mentioned above, where courts have difficulty finding the difference between aggressive competition and anti-competitive conduct, the conjunction of anti-competitive intent and action manifesting that intent ought to be at least considered when determining whether conduct violates Section 2, even if a strictly defined standard like that of predatory pricing has not been met.[159]

Claiming predatory capacity has other pitfalls associated with it. As the lawyers in the *AMR* case found, if predatory capacity is pleaded at the same time as predatory pricing, the court may merge the claims into one predatory pricing claim which may then be dismissed on summary judgment.[160] Perhaps if American Airlines had framed its case as a predatory capacity claim from the beginning, the court would not have felt constrained to use the current strict predatory pricing standard.[161] However, the problems with bringing predatory capacity claims go deeper than just the timing of the claim and other claims brought simultaneously with it. The major problem is that capacity and pricing are inexorably tied together.[162] Where a predator lowers price, it must increase the availability of its product (capacity) to meet the increased demand for the same product which is now at a lower price.[163] The result of the change is the same whether the question is framed as one of adding

155. *See Matsushita Elec. Indus. Co.*, 475 U.S. at 604; *Brooke Group Ltd.*, 509 U.S. 225.

156. *See* Beck, *supra* note 109, at 27.

157. *Photovest Corp.*, 606 F.2d at 715-718 (discussing Fotomat's determination that direct-owned kiosks were more profitable that franchised agreements, coupled with subsequent Fotomat decisions that made acquiring and maintaining franchises more expensive).

158. *See AMR Corp.*, 140 F. Supp. 2d at 1153.

159. *See id.* at 1216 (criticizing government's stance that intent should play a role in determining if the conduct violated Section 2).

160. *AMR Corp.*, 140 F. Supp. 2d at 1193-94.

161. *See id.*

162. *See id.*

163. *See id.*

capacity at a lower price or lowering price and adding capacity.[164] Even if predatory capacity is the only conduct claimed, the court may find, as the court in *American Airlines* did, that capacity and price "are two sides of the same coin."[165]

Another serious flaw in the *Photovest* case is there is no way to determine whether or not Fotomat was merely an efficient competitor driving a less efficient competitor from the market without looking at Fotomat's costs and pricing.[166] Whether it is in the form of extra capacity or lower cost, conduct must be anticompetitive to violate Section 2.[167] It is not anticompetitive for a more efficient competitor to gain a monopoly by driving less efficient competitors from a market.[168] If Fotomat were more efficient than Photovest and was able to add the extra stores above cost, then the additional capacity would not be anticompetitive, and therefore, would be allowable under Section 2.[169] Indeed, there was some evidence that Fotomat may have been more efficient than Photovest.[170] Fotomat only lost profits on one of the stores it added.[171] Also, before attempting to drive Photovest from the market, Fotomat had found the non-franchised locations were more profitable than the franchised locations, thus providing evidence that Fotomat gained some sort of efficiency from directly running the kiosks.[172]

Fotomat's expansion may merely have been "aggressive competition."[173] Indeed, if a competitor is making a large profit by offering some good or service in a certain geographic market, competitors would naturally want to offer their goods or services in the same market in order to share the profitable area.[174] This

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164. *See id.*

165. *See id.*

166. *See Photovest Corp.*, 606 F.2d at 719. The court examined the cost of only one of the many kiosks that were added in the area, stating "[o]ne of Photovest's best stores was devastated by Fotomat's opening of three new stores in its immediate market area. One of these new store's sales never exceeded Fotomat's incremental breakeven point and by trial were well below it" *Id.*

167. *Brooke Group Ltd.*, 509 U.S. at 224-225.

168. Frank H. Easterbrook, *Is There a Ratchet in Antitrust Law,* 60 TEX. L. REV. 705, 708 (1982).

169. *See Grinnell Corp.*, 384 U.S. at 570-71.

170. *Photovest Corp.*, 606 F.2d at 714, 719.

171. *Id.* at 719.

172. *Id.* at 714.

173. *AMR Corp.*, 140 F. Supp. 2d at 1215 (talking about aggressiveness versus anti-competitiveness in the context of reputation).

174. Arash Mostafavipour, *Law Firms: Should They Mind Their Own Business*, 11 GEO. J. LEGAL ETHICS 435, 442 n.49 (1998) (citing Robert E. Hall & John B. Taylor, MACROECONOMICS: THEORY, PERFORMANCE, AND POLICY (5th ed. 1997)).

takes some of the force out of the arguments in *Photovest*[175] and *AMR,*[176] both of which found that excess capacity was added at the same places and times their competitors were offering their goods or services. As the Supreme Court has specifically stated, a monopoly created through superior business acumen does not violate Section 2.[177]

Even if a court were to allow a plaintiff to bring a charge of predatory saturation of a market, the defendant might be able to assert the "meeting competition defense."[178] As mentioned earlier, the meeting competition defense is a judicially created defense not expressed in the Sherman Antitrust Act but explicit in the Robinson-Patman Act.[179] Where this defense is available, an alleged monopolist may meet the price of a competitor regardless of the cost of providing the product.[180] Where the alleged monopolist lowers prices to meet the competitor's price, this will necessarily increase the public demand for the alleged monopolist's goods or services.[181] With lower prices, the monopolist will naturally increase capacity to meet this increased demand.[182] As the *AMR* court stated, because price and output are "two sides of the same coin," the "meeting competition price" defense, where recognized, has a corollary in the "meeting competition capacity" defense as well.[183] Naturally, to determine if the alleged monopolist is merely meeting the competition in its increased capacity, the court will have to look at the relative prices at which the product is offered and determine if the monopolist has merely met the competitor's price or has exceeded it.[184] Once again, when a predatory capacity claim is brought, this mode of analysis would force the court to study the claim as if it were a predatory pricing case.[185]

After considering the judicially developed doctrines governing predatory capacity, one may wonder what viability the claim of predatory capacity has. The answer is that saturation of a market may be used to show the existence of predatory conduct

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175. *Photovest Corp.*, 606 F.2d at 715.

176. *AMR Corp.*, 335 F.3d at 1112.

177. *Grinnell Corp.*, 384 U.S. at 570-71.

178. *AMR Corp.*, 140 F. Supp. 2d at 1207-08.

179. *See id.* at 1204-06 (discussing reasons for inferring the meeting competition defense into the Sherman Antitrust Act).

180. *See id.* at 1207-08 (stating that "[t]he ability to match prices implicitly but necessarily requires the ability to increase sales capacity").

181. *See id.*

182. *See id.*

183. *See id* at 1207-08, 1194.

184. *AMR Corp.*, 140 F. Supp. 2d at 1207-08.

185. *See id.*

that is harmful to competition.[186] Where marginal cost is hard to determine, the optimal capacity for a market might be more easily ascertainable.[187] Instead of searching for prices "below an appropriate measure of cost", the court could look for added capacity or excess capacity as an indication of predatory activity.[188] While extra capacity added to a market might not alone be enough to prove a violation of Section 2, it might be used as a factor in determining if conduct violating the statute is present.[189]

Focusing on the manner in which capacity is added may provide evidentiary value that cannot be found by merely looking at prices.[190] Once a relevant product market has been defined, the price charged by the alleged predator within that market is probably uniform.[191] Besides the comparative prices of competitors in a market, where marginal cost cannot be easily determined, the price of a good or service provides no information about any predatory tactics a company may be using.[192] However, by looking at the time, amount, and location of added capacity, the court may at least infer both the intended strategy and the relative harm to competition from the added capacity.[193] For instance, if capacity were added in a way clearly designed to drive competitors from the market,[194] the finding of anticompetitive conduct might be easier than if the capacity were added to maximize the profit from the excess capacity.[195]

C. *Leveraging as a Way of Enhancing a Predatory Scheme*

The standard of leveraging has been undergoing major changes in the past years in much the same way that predatory pricing has been developing.[196] Leveraging was traditionally

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186. Areeda & Turner, *supra* note 32, at 716 (stating "we have suggested a prohibition of prices below marginal cost. The primary administrative impediment to enforcing that prohibition is the difficulty of ascertaining a firm's marginal cost").

187. *See id.*

188. *See id.*

189. *See Photovest Corp.*, 606 F.2d at 719.

190. *See id.*

191. Willard F. Mueller, *The Sealy Restraints: Restrictions on Free Riding or Output*, 1989 WIS. L. REV. 1255, 1305-6 (1989).

192. *AMR Corp.*, 140 F. Supp. 2d at 1194-95.

193. *See Photovest Corp.*, 606 F.2d at 719.

194. For example, adding kiosks close to competitors' kiosks to drive down their profit. *See id.*, 606 F.2d at 715-19.

195. *Id.* at 719. For instance, if the capacity was added based on optimal geographic location and population density or at times when consumer demand for the service was highest. *See id.* at 718-19.

196. *See* Jennifer M. Clarke-Smith, *The Development of the Monopolistic Leveraging*

defined as the use of monopoly power in one market to harm competition in another market.[197] This definition is disputed by some courts which would only find leveraging a violation of the Sherman Antitrust Act where the conduct threatens to or actually creates a new monopoly.[198] Regardless, leveraging theory has important implications where it may be used by a predator to enhance a predatory pricing scheme.[199] This section will give a brief overview of the leading leveraging case and then go on to analyze how leveraging may be used in the context of predatory pricing to enhance a company's predatory scheme.

Chicago and Post-Chicago scholars, both of whom are active in analyzing predatory pricing, have also taken a critical look at the leveraging doctrine. The Chicago School criticizes leveraging theory, much like they criticize predatory pricing theory.[200] Chicago School economists assert a monopolist can use leveraging to gain a monopoly in a secondary market, but the monopolist cannot use the secondary monopoly to increase total profits past what could be gained with only the primary monopoly and not the secondary.[201] Because the monopolist is not engaging in the leverage to gain extra profits, these theorists assert the conduct is engaged in for neutral or even pro-competitive reasons.[202]

Post-Chicago theorists dispute the Chicago theorists' findings about leveraging.[203] They assert that there are market imperfections that the monopolist can exploit to harm rivals.[204] As in predatory pricing and antitrust cases generally, the Post-Chicago theorists believe courts must use a fact-intensive investigation into the circumstances of each case to determine if there has been conduct violating Section 2 of the Sherman Act.[205]

One example of leveraging can be found in the case of *Berkey Photo v. Eastman Kodak Co.*[206] In that case, Berkey Photo, one of Kodak's smaller competitors, brought a private antitrust action

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Theory and Its Appropriate Role in Antitrust Law, 52 CATH. U. L. REV. 179, 179-81 (2002).

197. *Id.* at 179.

198. *Id.* at 180-81.

199. Sarah G. Lopez, *Evaluation of the AOL Time Warner Consent Decree's Ability to Prevent Antitrust Harm in the Cable Broadband ISP Market*, 17 ST. JOHN'S J. LEGAL COMMENT. 127, 150-51 (2003).

200. *See* Robin Cooper Feldman, *Defensive Leveraging in Antitrust*, 87 GEO. L.J. 2079, 2084 (1999).

201. *Id.*

202. *Id.* at 2085-86.

203. *Id.* at 2086.

204. *Id.*

205. *Id.* at 2086-87.

206. 603 F.2d 263, 267-68, 275 (2d Cir. 1979).

against Kodak alleging Kodak had leveraged its monopoly in film and cameras to gain a competitive advantage in the market for photofinishing and related services by releasing an improved type of film which would only work with one of Kodak's cameras, and by failing to disclose the details of a camera-film system to competitors beforehand.[207] Kodak defended by asserting it never actually gained a monopoly or even attempted to gain a monopoly in the market for photofinishing and related services.[208]

The court held that a firm violates Section 2 of the Sherman Act by using its monopoly power to gain a competitive advantage in another market even where there is no attempt to monopolize the second market.[209] The court limited the finding by stating the competitive advantage does not violate Section 2 where the "competitive advantage is effective because of the company's efficiency, prestige, and innovativeness."[210] The court further found that use of a monopoly in one market to leverage competition in another market to be a violation of Section 2 of the Sherman Act even where the monopoly in the primary market is legally acquired.[211] In using this standard, the court found Kodak had *not* engaged in illegal leveraging because Kodak did not have a duty to predisclose its new system to competitors[212] and releasing the film and camera as a single system was not improper conduct.[213]

Berkey Photo is a good example of a Post-Chicago decision. It uses a fact intensive look at the relevant conduct to determine if the conduct violates Section 2 of the Sherman Act.[214] *Berkey Photo* looked very closely at Kodak's conduct in introducing the new camera and film system and Kodak's conduct in failing to freely disclose the new system.[215] *Berkey Photo* presents interesting ideas about how predatory pricing cases such as *AMR* and *Wal-Mart* ought to be handled.[216]

As stated previously, a required element of predatory pricing is "a dangerous probability of recoupment of the losses due to the

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207. *Id.* at 275, 279.

208. *See id.* at 275.

209. *Id.*

210. *Id.* at 292 (rejecting the lower court's decree because it "forecloses not only the use of monopoly power but the legitimate benefits of integration as well").

211. *Id.* at 284 ("Moreover, as indicated by our discussion of § 2 principles, such a use of power would be illegal regardless of whether the film monopoly were legally or illegally acquired.").

212. *Berkey Photo*, 603 F.2d at 285.

213. *Id.* at 288.

214. *See* Feldman, *supra* note 199, at 2086.

215. *See Berkey Photo*, 603 F.2d at 279-80, 285, 289.

216. *See id.* at 281-289.

low pricing."[217] This recoupment is usually proven by showing the predator had the ability to recoup the losses through supra-competitive prices in the primary relevant market.[218] However, if the predatory pricing was conducted in one market while the predator maintained supra-competitive prices in another, the predator could in effect leverage the existing monopoly to recoup the losses from the market where the predatory scheme was taking place.[219] In this case, a monopoly gained in the first market, albeit by superior business acumen or some other competitive means,[220] could be used to create a monopoly in another secondary market where the primary market's profits were used to pay for a predatory scheme in the secondary market.[221]

This possible scheme suggests several interesting ways in which the *AMR* case could have been analyzed. First, recall that the district court, looking at the Supreme Court language in *Brooke Group*, stated the Department of Justice could not look to other markets to show American Airlines had a dangerous probability of recoupment.[222] However, the *Berkey Photo* leveraging standard implies courts should be willing to look for harm to competition existing not only in the primary market where the predatory pricing is alleged, but also in other markets where the predator might have market power.[223] The *Berkey Photo* standard would be especially useful for showing misuse of monopoly power where the monopoly in the other market is unchallenged by superior business acumen or some other judicially excepted reason.[224] For instance, in *AMR*, the Department of Justice alleged American Airlines maintained a monopoly in other markets due to its reputation for predation.[225] The court could have found that the dangerous probability of recoupment element was satisfied by super-competitive pricing in those other markets, even without finding a reputation for predation, by showing American Airlines was using the monopoly

217. *AMR Corp.*, 140 F. Supp. 2d at 1194-95 (citing Brown Shoe Co. v. United States (1962)).

218. *Id.* at 1195.

219. *See* Feldman, *supra* note 199, at 2081-84.

220. *Grinnell Corp.*, 384 U.S. at 570-71.

221. *See* Feldman, *supra* note 199, at 2081-84.

222. *AMR Corp.*, 140 F. Supp. 2d at 1214-17.

223. *See Berkey Photo*, 603 F.2d at 263, 275.

224. *See id.* at 284; *Grinnell Corp.*, 384 U.S. at 570-71.

225. *AMR Corp.*, 140 F. Supp. 2d at 1183 (alleging that American Airlines had a monopoly in markets where "American's market share by revenue as of the end of 1999 on the route [was] 60% or greater; and that no low fare airline currently [was] offering service on the route").

in those markets to enhance the strength of American's predatory scheme.[226]

Evidence of leverage used to recoup predation losses could also help show predatory pricing against Wal-Mart's use of "loss-leaders."[227] There are numerous ways in which Wal-Mart could recoup its losses from below-cost toy sales without actual supra-competitive pricing on the toys themselves. Wal-Mart could leverage across geographic markets, product markets, or both.[228] For the geographic leverage, if Wal-Mart owned two stores, one in a rural market in which Wal-Mart monopolized toy sales and one in an urban market where Wal-Mart competes with Toys R' Us, then Wal-Mart could charge prices below manufacturer's cost in the urban market and pull customers away from Toys R' Us while recouping the losses from the below-cost sales by charging supra-competitive prices on toys in the rural market.[229] For a product-market leverage, if Wal-Mart had a single store in which it had a monopoly on pharmaceuticals and that store was also competing with a nearby Toys R' Us in toy sales, that Wal-Mart store could price toys below manufacturer's cost while making up the loss by charging a supra-competitive price on pharmaceuticals.[230]

Wal-Mart might defend such accusations by claiming that its wide variety of products are attractive to consumers and showing that it gains efficiencies because of its large, conglomerate nature. However, antitrust law is clear that where size is used to harm competition, as Toys-R-Us clearly has been, causing the harm is a violation of the Sherman Act.[231]

The implications of the *Berkey Photo* standard for leveraging may reach further than just proving the element of recoupment for predatory pricing. In *Berkey Photo*, the court stated that the test required proof of the use of monopoly to gain a "competitive advantage."[232] The leverage could be used to offset or save costs while the predatory scheme is being acted out.[233] In effect, the

226. *Id.* at 1183.

227. Hays, *supra* note 100, at C1, C4.

228. *See generally* Feldman, *supra* note 199, at 2081-84.

229. *See id.*

230. *See id.*

231. *See generally* Sherman Antitrust Act, 15 U.S.C. § 2 (2000); Hays, *supra* note 100, at C4 (quoting a retail analyst for Citigroup as saying "How do you compete when your nearest two competitors [Wal-Mart and Target] don't have to be profitable?").

232. *See Berkey Photo*, 603 F.2d at 275 (The court specifically stated "[a]ccordingly, we must determine whether a firm violates § 2 by using its monopoly power in one market to gain a competitive advantage in another, albeit without an attempt to monopolize the second market. We hold, as did the lower court, that it does").

233. *See generally* Feldman, *supra* note 204, at 2081-84.

leverage creates the appearance of efficiencies where there is none.[234] Clearly, where a monopolistic leverage is used to decrease a predator's overall costs, courts ought to consider those fixed costs which are being covered by the illegal leverage.[235] If these fixed costs were added to marginal costs, it would raise the "appropriate measure of cost," making a finding of pricing below cost and thus predatory pricing much easier.[236]

This suggestion is no far leap from the Areeda and Turner suggestion of marginal or average variable cost as the appropriate measure of cost, because in the long run, there are no fixed costs.[237] Yet another way of looking at such a scheme is to consider how the leverage increases the staying power of the predator.[238] Assume, for instance, two companies: Predator Inc. and Prey Inc., both competing in a single geographic and product market, and both with the same fixed costs. Assume Prey Inc.'s marginal costs are lower than Predator Inc.'s, so Prey Inc. may afford to charge a lower price than Predator Inc. and is therefore more efficient.[239] Finally, assume Predator Inc. also has a monopoly in another nearby market. A price war ensues between Predator Inc. and Prey Inc. in which Predator Inc. and Prey Inc. both charge prices at Prey Inc.'s marginal cost. While Predator Inc. does this at a loss (it is below its marginal cost), it is able to afford the loss by using extra profit from its nearby monopoly.[240]

As the price competition continues, Predator Inc. can also recoup its fixed costs in the competitive market by paying them off with the profits from the nearby monopoly. However, due to the long term nature of the conflict with Predator Inc., more of Prey Inc.'s fixed costs look like marginal costs, and due to this, the formerly affordable price war with Predator Inc. becomes unaffordable, solely because Predator Inc. used its monopoly to assuage the fixed costs that both it and its more efficient competitor Prey Inc. had to deal with.

This suggests that the strict look at cost in *AMR* could be loosened where it has been proven that the below cost pricing is financed at least in part by a monopoly in another market.[241] In

234. *See id.*

235. *See, e.g., Brooke Group Ltd.*, 509 U.S. at 223.

236. *Id.*

237. Areeda and Turner, *supra* note 32, at 701-702.

238. *See id.* at 706; *see generally* Feldman, *supra* note 199, at 2081-84.

239. *See, e.g.*, Areeda and Turner, *supra* note 32, at 702.

240. *See generally* Feldman, *supra* note 199, at 2081-84; Areeda and Turner, *supra* note 32, at 700 (definition of marginal cost).

241. *See Brooke Group Ltd.*, 509 U.S. at 224; *see generally AMR Corp.*, 140 F. Supp. 2d at 1179.

AMR, the court refused to include the total cost of operation in its determination of what constituted the appropriate measure of cost.[242] However, using the theory discussed above, where the total cost is being financed by other routes in which American has a monopoly, those costs ought to be included in the analysis.[243]

Indeed, the whole question posed by the Areeda and Turner article, from which the modern predatory pricing standard was derived, was what "appropriate measure of cost" separates predatory pricing from competitive pricing.[244] Areeda and Turner proposed marginal cost because prices below marginal cost both cause the predator to lose money and waste social resources.[245] However, pricing above marginal cost or average variable cost might also meet this standard where it is proved the long term pricing is financed by a monopoly in another market.[246] One would suppose there would be an absolute lower limit on the cost to which the price is compared of the competitive price, or average total cost.[247] Arguably a manufacturer charging no lower than the highest possible variable price cannot be charged with harming competition.[248]

Unfortunately for anyone attempting to use it, the *Berkey Photo* standard is weaker today than when it was first decided.[249] In recent years, the *Berkey Photo* standard has been rejected by several appellate courts and changed to require proof that there is a dangerous probability the second market will be monopolized.[250] This has made the claim more difficult to prove, and as a result, it is unlikely to be successful when claimed alone.[251] This standard would limit the efficacy of this strategy in markets like the one in which Wal-Mart competes, where it controls only 20% of the market share.[252]

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242. *AMR Corp.*, 140 F. Supp. 2d at 1203.

243. *See id.* at 1183.

244. *Id.* at 1198 (stating that "[f]ollowing *Brooke Group,* the marginal or average variable costs test advocated by Professors Areeda and Turner has found widespread acceptance").

245. *See* Areeda and Turner, *supra* note 32, at 712.

246. *See id.* at 698-699 (discussing the effects of staying power).

247. *See id.* at 701 (The statement "all costs are variable over the long run" implies that the highest measure of variable cost is also total cost).

248. *See id.* at 701-702.

249. *See* Clarke-Smith, *supra* note 195, at 179-180.

250. *See id.* at 185-186.

251. Joseph Kattan, *The Decline of the Monopoly Leveraging Doctrine,* 9-FALL ANTITRUST 41, 44 (1994).

252. Hays, *supra* note 100, at C4.

D. *Predation by Reputation*

Post-Chicago scholars also advocate a wider view of *how* recoupment is possible.[253] This is evident in the *AMR* case where the government claimed predation by reputation in addition to classical predatory pricing theory.[254] The basis of this theory is that an "entry barrier" is created by the irrational reputation of the predator for pricing below cost, functioning to keep fearful competitors out of the market.[255] This definition also satisfies the definition of monopoly power which is the power to raise prices or exclude competition.[256] As with other facets of Post-Chicago theory, a finding of predation by reputation would require a highly fact-intensive analysis.[257]

The Department of Justice had a hard time proving the recoupment element in *AMR*.[258] The district court refused its "predation by reputation" claim because the proffered standard had "no principled basis for distinguishing between a reputation for predation, and a reputation for lawfully vigorous competition."[259] However, there is no reason to believe a reputation for predation could not be utilized as at least partial evidence of a barrier to entry into the predator's market.[260] As discussed in the leveraging section, monopolistic effects can take place across several markets,[261] and harm to competition in any of the markets in which the predator may gain advantages from a bad reputation ought to be taken into consideration when determining if predatory conduct violates the Sherman Act.[262]

IV. CONCLUSION

Asserting predatory pricing as a claim under federal antitrust statutes appears to occur less and less frequently because a successful claim has become too complicated to prove. In an era where gigantic companies offering thousands of products operate across many markets and nations, predatory pricing is at once both too simplistic when applied to modern

253. *See* Bolton, *supra* note 2, at 2248-49.

254. *AMR Corp.*, 140 F. Supp. 2d at 1183.

255. *See* Bolton, *supra* note 2, at 2302.

256. *United States v. Grinnell Corp.*, 384 U.S. 571 (quoting *United States v. E.I. du Pont De Nemours & Co.*, 351 U.S. 377, 391 (1956)).

257. *See* Feldman, *supra* note 199, at 2086.

258. *AMR Corp.*, 140 F. Supp. 2d at 1214-1215.

259. *Id.* at 1215.

260. *See id.*

261. *See Berkey Photo*, 603 F.2d at 267.

262. *See AMR Corp.*, 140 F. Supp. 2d at 1183.

sophisticated businesses and too complicated to prove across the diverse geographic and product markets where these businesses operate.[263]

The current direction of the predatory pricing claim is not supported by other areas of antitrust case law nor common sense. In other Section 2 cases, courts not applying the current, strict predatory pricing standard have been willing to look at such factors as market saturation, intent to monopolize, proximate placement of goods and services to a competitor, and recoupment from markets besides the primary relevant market and in other forms such as recoupment through a reputation for predation.[264] Due to the wide variety of schemes for monopolizing markets that can be put into place, the Supreme Court ought to drop the strict *Brooke Group* standard for predatory pricing because it requires pricing below cost combined with recoupment inside the relevant market. The Court should replace this standard with a multi-factored balancing test which looks at intent to monopolize, saturation of the market, excess capacity, and recoupment in a variety of markets and through a variety of means such as predation by reputation, while continuing to look for pricing below cost and traditional recoupment.

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263. *See generally* Harris, *supra* note 4, at 637.

264. *See, e.g.*, *Berkey Photo*, 603 F.2d at 274; *see generally Photovest Corp.*, 606 F.2d at 711–716.