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Judicial Tests to Determine Predatory Pricing Before and After *Matsushita*

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CASE COMMENT

Judicial Tests to Determine Predatory Pricing Before and After *Matsushita*

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I. INTRODUCTION

In a predatory pricing action, a firm claims that it has suffered an antitrust injury because the defendant has priced its goods so low that the plaintiff firm is forced out of the market. Antitrust law does not, however, require firms to price their goods so as to allow their competitors a share of the market. On the contrary, the very competition that antitrust law is designed to protect demands that firms try to underbid each other in order to ultimately benefit the consumer.¹ Distinguishing illegal predatory pricing from aggressive competitive pricing is a definitional task that the courts have not yet adequately resolved.

In 1975, Phillip Areeda and Donald F. Turner published an article in which they defined predatory pricing in such a way as to allow efficient firms to give consumers the advantage of efficiency through low prices, yet prevent firms from using their mere size or financial

1. "The antitrust laws, however, were enacted for 'the protection of competition, not competitors.'" *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)).

resources to drive out competitors.² Prior to 1975, predatory pricing claims were very rare,³ but following the publication of the Areeda-Turner test, the incidence of predatory pricing claims rose dramatically.⁴

Moreover, following the publication of the Areeda-Turner article, many jurisdictions adopted a cost-based analysis of predatory pricing claims.⁵ This type of analysis relies exclusively on a defendant's cost and pricing without regard to other factors (such as a defendant's intent or barriers to market entry). The United States Court of Appeals for the First Circuit adopted this cost-based analysis with little variation.⁶ Other courts adopted a modification of the cost-based analysis,⁷ and still other jurisdictions began using a cost-based analysis to allocate the burdens of proof and production.⁸ These cost-determinative approaches establish overwhelming obstacles to suits alleging predatory behavior. The Areeda-Turner test, for example, requires a plaintiff to prove that the alleged predator charged prices below its average variable cost.⁹ As applied by the Sixth and Eleventh Circuits, the modified test requires a plaintiff to show that the defendant's prices were below its average cost.¹⁰ Even the Ninth Circuit, which does not require a plaintiff to prove that the defendant's prices were below average total cost, requires a plaintiff to prove by clear and convincing evidence that the defendant engaged in anticompeti-

2. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697, 698 (1975).

3. See Liebler, *Whither Predatory Pricing? From Areeda & Turner to Matsushita*, 61 N.D.L. REV. 1052 (1986) (Prior to 1975, there appeared to have been only one significant predatory pricing case.).

4. See Liebler, *supra* note 3, at app. A (collecting 55 federal predatory pricing decisions between January 1, 1975 and April 30, 1986). The increased incidence of predatory pricing is ironic because Areeda and Turner apparently intended to discourage predatory pricing claims by creating a stricter definition of predatory pricing than had been previously applied. *Id.* at 1053; see also *infra* notes 18-28 and accompanying text.

5. See, e.g., *Clamp-All Corp. v. Cast Iron Soil Pipe Inst.*, 851 F.2d 478 (1st Cir. 1988); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

6. See *Barry Wright v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

7. See *Northeastern*, 651 F.2d at 76; *International Air*, 517 F.2d at 714.

8. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988); *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

9. See *Barry Wright*, 724 F.2d at 236.

10. See *McGahee*, 858 F.2d at 1496; *Langenderfer*, 729 F.2d at 1058. Under this test, it is easier to establish predatory pricing because average cost is always greater than average variable cost. *Transamerica*, 698 F.2d at 1384-85.

tive conduct if the defendant's prices were above average total cost.¹¹

The Seventh and Tenth Circuits, however, purportedly do not make the cost-price analysis determinative. These courts neither judge the legality of a challenged price by analyzing it against some measure of cost, nor do they allocate the burdens of proof or production based upon such analysis. Rather, these courts examine predatory pricing claims by focusing on all of the circumstances surrounding a defendant's pricing practices.¹² Among the factors that courts consider are price, the defendant's subjective intent, barriers to market entry, and the ability of the defendant to restrict output and reap monopoly profits.¹³ Even in these circuits, however, the test—as applied—seems to emphasize cost as the determinative factor.

The various approaches adopted by the United States Courts of Appeals have one thing in common: they all utilize one element or another of the Areeda-Turner cost-based approach. This test, even in its most flexible application,¹⁴ places an inordinate burden on a plaintiff and lacks the flexibility needed to analyze properly alleged violations. Courts summarily dismiss or defeat antitrust claims due to plaintiffs' failure to show that defendants' prices were below some suggested measure of cost.¹⁵ In those jurisdictions that use measures of cost to allocate the burden of proof or production, the evidentiary burden resulting from a finding that prices are higher than either average total cost or average variable cost is so great that a plaintiff's chances of success are only slightly higher than in those jurisdictions utilizing the cost-based analysis. Even in those jurisdictions that purport to examine the "totality of the circumstances," the emphasis on cost is in most cases determinative. Furthermore, all of the circuits uniformly fail to give appropriate weight to factors which are essentially as important as the cost-price analysis; these factors include the existence of barriers to market entry, the number of competitors in

11. See *Transamerica*, 698 F.2d at 1388.

12. See *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980); *Pacific Eng'g & Prod. Co. v. Kerr-McGee Corp.*, 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977).

13. See *Pacific*, 551 F.2d at 797 (citing Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 HARV. L. REV. 869 (1976)).

14. The most flexible approach is that of the Tenth and Seventh Circuits, which purports to examine the totality of the circumstances in analyzing a predatory pricing claim. See *Chillicothe*, 615 F.2d at 432; *Pacific*, 551 F.2d at 797.

15. See, e.g., *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*, 615 F.2d 427 (7th Cir. 1980).

the market, and the market strength and subjective intent of the alleged predator.

This Comment provides both a historical and critical analysis of the present methods that the courts use to determine the existence of predatory pricing. Section II of this Comment focuses on the Areeda-Turner test, which many courts have adopted in one form or another as the method by which to resolve predatory pricing claims. Section III focuses on those cases decided after the creation of the Areeda-Turner test but prior to the United States Supreme Court decision in *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹⁶ a case some thought signalled an end to successful antitrust actions predicated upon allegations of predatory pricing. Section IV focuses on the Supreme Court decision in *Matsushita*, as well as its expected effect on subsequent predatory pricing claims. Section V focuses on those predatory pricing claims decided after *Matsushita* and analyzes whether *Matsushita* has had the expected effect, or any effect, on the tests used to determine predatory pricing or on the courts' attitudes towards predatory pricing claims.

II. THE AREEDA-TURNER TEST

An analysis of predatory pricing cases, as well as the tests used to determine the existence of predatory pricing, must begin with an analysis of the predatory pricing test that professors Phillip Areeda and Donald F. Turner established in 1975.¹⁷ The article that introduced this test questioned the viability of a predatory pricing scheme, and the motivation of a firm to attempt such a scheme.¹⁸ The authors believed that the fears that large firms would be inclined to engage in predatory pricing were exaggerated.¹⁹ "The prospects of an adequate future payoff," they stated, "will seldom be sufficient to motivate predation."²⁰ Areeda and Turner further concluded that, because of this, proven cases of predatory pricing had been extremely rare.²¹ It would be expected that the federal courts adopting the Areeda-Turner test would similarly adopt its inherent skepticism.

The Areeda-Turner test established guidelines to determine the legality of a firm's pricing practices. The authors stated that prices

16. 475 U.S. 574 (1986).

17. Areeda & Turner, *supra* note 2.

18. *See id.* at 698-99.

19. *Id.* at 698.

20. *Id.* at 699.

21. This conclusion was based upon a 1971 study. Koller, *The Myth of Predatory Pricing—An Empirical Study*, 4 ANTITRUST L. & ECON. REV. 105 (1971); *see also* Areeda & Turner, *supra* note 2, at 699 n.7.

above average total cost²² should be deemed nonpredatory.²³ They argued that this rule should apply even when: (1) a firm charges less than the profit-maximizing price in order to destroy rivals; or (2) a firm initially charges the profit-maximizing price, but then lowers its prices when rivals appear in the market, and subsequently raises its prices when the rivals are destroyed.²⁴ As to prices below the profit-maximizing price, the authors stated that “[s]uperior products or service, successful innovation, or other effective competition on the merits always tends to exclude rivals.”²⁵ As long as the prices are at or above average total cost, Areeda and Turner believed that the social benefits of lower prices, higher output, and fuller use of a firm’s productive capacity outweighed the speculative limitation on market participation.²⁶ The authors also found short-term price reductions permissible under the Sherman Act.²⁷ They concluded that temporary price reductions are even less exclusionary than permanently low prices because market entrants may have the staying power to meet a monopolist’s temporarily low price.²⁸

The authors did, however, recognize some problems inherent in applying a rule that permits prices to be set at or above average cost. Although average cost includes a “normal” return on investment, this return is not easily ascertainable.²⁹ The authors nonetheless concluded that the benefit of such a rule is that it disposes of those cases in which an alleged predator’s rate of return is normal by any reasonable test.³⁰

The Areeda-Turner guidelines also provided that prices above average variable cost,³¹ a surrogate for marginal cost,³² should be deemed to be nonpredatory, whereas prices below average variable cost should be deemed to be predatory.³³ Defenses are available, how-

22. Average total cost per item produced is defined as the sum of fixed costs and total variable costs divided by total output. Areeda & Turner, *supra* note 2, at 700.

23. *Id.* at 705.

24. *Id.*

25. *Id.*

26. *Id.* at 705-06.

27. *Id.*

28. *Id.* Professors Areeda and Turner also discussed the administrative problems involved in adequately monitoring and controlling temporary price reductions. *Id.* at 707.

29. *Id.* at 709.

30. *Id.*

31. Average variable cost is defined as the sum of all variable costs divided by the total output. *Id.* at 700.

32. Marginal cost is the increment to total cost resulting from the production of an additional unit of output. *Id.*

33. *Id.* at 733.

ever, to a firm with no substantial market share.³⁴ Such a firm may counter a predatory pricing allegation by showing that it lowered prices to meet the prices of a competitor or to conduct a special promotion.³⁵ Areeda and Turner commented that a business with substantial market power would have no motivation to meet competitors' prices or to conduct promotional ventures; therefore, the authors determined that these defenses should not be available to such a firm.³⁶

III. CASES IMMEDIATELY PRECEDING *MATSUSHITA*

The United States Courts of Appeals have used various tests in the past to determine whether a firm has engaged in predatory pricing. The First, Second, and Fifth Circuits have utilized various forms of the the Areeda-Turner cost-determinative test. The Sixth, Ninth, and Eleventh Circuits have used a slightly more flexible approach in which they considered, in addition to economic factors, other circumstantial evidence of price predation. In these circuits, the courts have utilized the relationship between cost and price to allocate the burdens of proof and production. The Seventh and Tenth Circuits, on the other hand, purported to examine predatory pricing claims by focusing on all of the circumstances surrounding a defendant's pricing practices. This Section will examine the differences among these three approaches, as well as the internal differences within each of the three modalities.

A. *Circuits Utilizing the Areeda-Turner Test and Other Cost-Determinative Tests*

The First, Second, and Fifth Circuits utilized the Areeda-Turner test with only slight variation. In these circuits, the relationship between a defendant's cost and price was determinative: These circuits refused to consider other circumstantial evidence of price predation.

In *Barry Wright Corp. v. ITT Grinnell Corp.*,³⁷ the United States Court of Appeals for the First Circuit formally adopted a test closely resembling the Areeda-Turner cost-based test.³⁸ In *Barry Wright*, the

34. *Id.* at 713-16.

35. *Id.* at 715-16.

36. *Id.*

37. 724 F.2d 227 (1st Cir. 1983).

38. *Id.* at 232-33. The First Circuit used the terms "avoidable" or "incremental" costs and defined them as "the costs that the firm would save by not producing the additional product it can sell at that price." *Id.* at 232. These terms are essentially the same as the "marginal" costs referred to in the Areeda-Turner article, costs for which average variable cost

plaintiff, a manufacturer of snubbers (a shock absorber used in building pipe systems for nuclear power plants), alleged that Pacific, a co-defendant, had predatorily priced its snubbers in granting ITT Grinnell 25% and 30% discounts.³⁹ The United States District Court for the District of Massachusetts found that the prices charged, although lower than normal, generated revenues that were more than sufficient to cover the total cost of producing the goods.⁴⁰ As such, the court entered judgment for the defendant.⁴¹

On appeal, the plaintiffs argued that price cutting by a firm with a substantial market share⁴² might still prove to be unlawful even if prices remained above average total cost.⁴³ The plaintiff also suggested that the court look to the subjective intent of the defendant to determine whether it had engaged in predatory pricing.⁴⁴ The court of appeals rejected both of these arguments; because the defendant's prices exceeded both the incremental (marginal) cost and the average total cost, the First Circuit affirmed the decision of the trial court.⁴⁵

The First Circuit's decision in *Barry Wright* exemplifies the deficiencies inherent in an analysis of predatory pricing claims based solely on the relationship between price and cost. The defendant's pricing policies should have been subject to the strictest scrutiny; at the time of the alleged violations, it controlled from 83% to 94% of the relevant market.⁴⁶ Additionally, no firm other than the plaintiff had competed with the defendant in the snubber market.⁴⁷ The defendant had every motivation to price its snubbers in such a way as

is a surrogate under the Areeda-Turner test. The First Circuit, however, reserved deciding whether average variable cost is an appropriate surrogate for "avoidable" or "incremental" costs. *Id.* at 233.

39. *Id.* at 229-30. At the time of the appeal, Pacific was the sole defendant. ITT Grinnell Corporation, the buyer of the snubbers, had settled with the plaintiff. *Id.* at 230.

40. *Barry Wright Corp. v. ITT Grinnell Corp.*, 555 F. Supp. 1264, 1269 (D. Mass.), *aff'd* 724 F.2d 227 (1st Cir. 1983).

41. *Barry Wright*, 724 F.2d at 228.

42. Pacific sold 47% of all snubbers in 1976; its market share increased to 94% by 1979. *Id.* at 229.

43. The plaintiff argued for the standard used by the Ninth Circuit, whereby a plaintiff can prevail even if prices exceed average total cost if the plaintiff proves by clear and convincing evidence that the defendant's pricing policy was predatory. *Id.* at 233. The court acknowledged that, although the Fifth and Ninth Circuits have accepted this standard, the First Circuit did not. *Id.* at 234. For a discussion of the Fifth and Ninth Circuits' approaches, see *infra* notes 64-73 & 83-92 and accompanying text.

44. *Barry Wright*, 724 F.2d at 232. The court refused to consider the defendant's subjective intent and instead opted for a cost-based analysis. The court stated that the suggested standard was too vague and that evidence of such an intent would most likely be nonexistent. *Id.*

45. *Id.* at 232-36.

46. *Id.* at 229.

47. *Id.*

to destroy its only market rival. Still, the First Circuit did not consider evidence of subjective intent nor did it consider other evidence of possible predation, namely that the prices charged were lower than normal. In refusing to do so, the court may have circumvented the very purpose behind the Sherman Act—the promotion of competition.

The United States Court of Appeals for the Second Circuit also adopted a variation of the Areeda Turner cost-based test in *Northeastern Telephone Co. v. AT&T*.⁴⁸ The Second Circuit's approach, however, went further in protecting market leaders from predatory pricing claims by allowing a firm with substantial market power to justify below-cost pricing practices. In dicta, the Second Circuit stated that a defendant is entitled to justify pricing below marginal cost by proving that an acceptable business justification for its pricing practices existed.⁴⁹ In light of the fact that AT&T was firmly entrenched in the market and possessed substantial market power, this position contravenes that of Professors Areeda and Turner. Areeda and Turner would not allow such a defendant the opportunity to justify its prices and, in such circumstances, would find the price to be unlawful per se.⁵⁰ Presumably, because the First Circuit adopted the Areeda-Turner test in its unaltered form, it would do likewise.

In *Northeastern*, a supplier of telephone terminal equipment brought an action against AT&T under both Section 1 and Section 2 of the Sherman Act, alleging, among other claims,⁵¹ that AT&T had predatorily priced its public branch exchanges and key telephones.⁵² *Northeastern*, a small supplier, was challenging an entity that had enjoyed a federally approved monopoly for many years.⁵³ As the court of appeals stated, "[m]etaphorically, *Northeastern* was a mosquito challenging an elephant."⁵⁴ A jury rendered a verdict for the plaintiff and awarded damages in excess of five million dollars,⁵⁵ which the trial court trebled pursuant to Section 4 of the Clayton

48. 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982).

49. *See id.* at 91 n.24.

50. *See supra* notes 34-36 and accompanying text.

51. The plaintiff also alleged that the defendant had conspired with others to monopolize the market in Connecticut in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1988), and had engaged in other anticompetitive conduct in its advertising, marketing, introduction of new products, and other technological tactics designed to impede competition. *Northeastern*, 651 F.2d at 80-81.

52. *Northeastern*, 651 F.2d at 80.

53. *Id.* at 79-80.

54. *Id.* at 80.

55. *Id.* at 82.

Act.⁵⁶

Surprisingly, the Second Circuit reversed the trial court without considering any of the relevant aforementioned factors. In a case that warranted the strictest scrutiny given the vastly greater market share and regulatory advantages of the defendant, the court explicitly adopted the Areeda-Turner test⁵⁷ and its inherent skepticism of the viability of predatory pricing schemes.⁵⁸ The court stated: "There is considerable evidence, derived from historical sources and from economic teaching, that predation is rare."⁵⁹ Accordingly, the court of appeals found that there was no evidence which supported the plaintiff's predatory pricing claim.⁶⁰ The court stated that, because the defendant's prices were above the average variable cost of the equipment, the pricing of the equipment was not predatory.⁶¹ The court seemed to ignore the relative discrepancy in the market strength of the two rivals, and it refused to accept a measure of cost different from that proposed by Areeda and Turner.⁶² This inflexibility may have resulted in diminished competition in the affected market.⁶³

56. *Id.* (applying 15 U.S.C. § 15 (1988)).

57. *Id.* at 88. The court stated that this test should apply in the general case, at least, but it did not delineate what would constitute an exception. *Id.*

58. For a discussion of the skepticism inherent in the Areeda-Turner test, see *supra* notes 18-21 and accompanying text.

59. *Northeastern*, 651 F.2d at 88 (citing McGee, *Predatory Pricing Revisited*, 23 J.L. & ECON. 289, 290-300 (1980)). However, the court implicitly stated that predatory pricing is more likely to occur where market barriers make market entry difficult or where the defendant firm is a multi-product firm. *Id.* at 88-89.

60. *Id.* at 91. The plaintiff urged the court to use fully distributed cost as the measure below which predatory pricing would be presumed. *Id.* Fully distributed cost is "the marginal or incremental cost of supplying a particular good or service [plus] some portion of the unattributable costs (i.e., indirect costs)." *Id.* at 89 n.20.

61. *Id.* at 92.

62. *Id.* at 89-91.

63. In *Broadway Delivery Corp. v. United Parcel Service of America, Inc.*, 651 F.2d 122 (2d Cir.), *cert. denied*, 454 U.S. 968 (1981), a case decided just seven days after *Northeastern*, the Second Circuit again analyzed the sufficiency of evidence required to sustain a predatory pricing claim. The plaintiffs, various firms which transported goods in New York City, did not demonstrate price predation to the court's satisfaction because they had not introduced evidence that would have permitted a jury to assess carefully the relationship between the prices charged for delivery services and the costs of such delivery. *Id.* at 131. The plaintiffs' evidence combined all of the defendant's traffic in one category, all of its revenues in another, and all of its profits in a third. *Id.* The court stated that an expert in cost accounting may have been able to discern the relevant information for purposes of a predatory pricing analysis, but no expert testimony was presented. *Id.* Additionally, the defendant had introduced uncontradicted evidence that it had earned substantial profits in the contested years. *Id.* Accordingly, the court affirmed the trial court's dismissal of the plaintiffs' complaints. *Id.* at 132. The court stated that, at most, the plaintiffs' evidence established that the defendant's prices were lower than the prices charged by some of the plaintiffs. *Id.* at 131.

Although the *Broadway* court's cost-based analysis of the predatory pricing claim can be criticized, its conclusion cannot. The analysis of all relevant factors indicates the

The United States Court of Appeals for the Fifth Circuit has also utilized a cost-determinative approach, with one important variation. In *International Air Industries, Inc. v. American Excelsior Co.*,⁶⁴ the court of appeals stated that, as a general rule, a plaintiff must prove that a defendant is charging prices below its average variable cost.⁶⁵ If the barriers to market entry are high, however, the plaintiff can prevail by showing that the defendant charged prices below its short-run profit-maximizing price.⁶⁶ This approach differs from the approaches utilized by both the First and Second Circuits, which exclusively adhered to the Areeda-Turner average variable cost guidelines irrespective of barriers to market entry.

In a subsequent case, *Adjusters Replace-A-Car v. Agency Rent-A-Car*,⁶⁷ the Fifth Circuit reiterated its commitment to a cost-based economic analysis of predatory pricing claims. In that case, however, the court of appeals expressly stated that the subjective intent of the defendant was also an important factor in analyzing a predatory pricing claim.⁶⁸ Citing *International Air*, the court stated: "We were unwilling, in an attempted monopolization case, to relegate the intent element to the status of an automatic and irrebuttable inference."⁶⁹ Accordingly, the court stated that it did not accept the per se approach suggested by Professors Areeda and Turner.⁷⁰

The Fifth Circuit, like the Sixth,⁷¹ expressly stressed the importance of the intent factor. In analyzing the predatory pricing claim, however, the *Adjusters* court concentrated not on intent, but on price

implausibility of a predatory pricing scheme in this case. For example, the defendant's rates were subject to the approval of the Interstate Commerce Commission. *Id.* at 131. Additionally, the defendant could not have substantially raised its prices without losing customers to its chief competitor, the United States Postal Service. *Id.* The court also found that the plaintiffs had failed to present evidence that would permit a reasonable jury to find that the defendant possessed monopoly market power, a requisite element of a claim arising under Section 2 of the Sherman Act. *Id.* at 126-31. These factors warranted the dismissal of the complaint.

64. 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

65. *Id.* at 724.

66. *Id.*

67. 735 F.2d 884 (5th Cir. 1984), *cert. denied*, 469 U.S. 1160 (1985).

68. *Id.* at 890.

69. *Id.* (citing *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976)). In a prior decision, *Malcolm v. Marathon Oil Co.*, 642 F.2d 845 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981), the Fifth Circuit acknowledged the importance of the intent element. In that case, the court stated that predatory pricing differs from healthy pricing in its motive and intent. *Id.* at 853-54. Still, the court refused to depart from prior precedent and instead adhered to the cost-based analysis. *Adjusters*, 735 F.2d at 890.

70. *Adjusters*, 735 F.2d at 890.

71. For a discussion of the Sixth Circuit's approach, see *infra* notes 93-109 and accompanying text.

as it related to cost. Although the court stated that it did not adopt the per se approach suggested by Areeda and Turner, the cost-based analysis seemed to have been determinative. The court stated that the plaintiff had not established that the defendant's prices were below its average variable cost; the plaintiff therefore lacked an actionable predatory pricing claim.⁷² This application suggests that the Fifth Circuit's position was that prices above average variable cost were conclusively lawful, unless the plaintiff could prove that there were high barriers to market entry. Moreover, the court's actions seemed to contradict the statements it made rejecting the Areeda-Turner per se approach.

In both cases, the Fifth Circuit accepted the Areeda-Turner definition of predatory pricing as the "deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition."⁷³ Like others employing a cost-determinative test for predatory pricing, the Fifth Circuit refused to acknowledge that a firm can practice predatory pricing under this definition even if its goods are priced above its average variable costs. Although these courts concentrate on the relationship between cost and price, they are missing what they themselves have defined as the real issue: Whether the benefit of defendant's pricing structure hinges upon forcing competitors out of the market.

B. *Circuits Utilizing Measures of Cost to Allocate the Burden of Proof*

The Sixth and Ninth Circuits⁷⁴ have utilized a test for predatory pricing in which the relationship between cost and price is used to allocate the burden of proof.⁷⁵ The Ninth Circuit approach, however, differed from that of the Sixth Circuit in one major respect: In the Sixth Circuit, prices above average total cost were conclusively

72. *Adjusters*, 735 F.2d at 891. In *Adjusters*, the plaintiff relied upon the defendant's admission that, in the challenged markets, the defendant's rental offices operated at a net loss during the time of the alleged predatory pricing. *Id.*

73. *Id.* at 889 (citing *International Air*, 517 F.2d at 723).

74. After *Matsushita*, the Eleventh Circuit also adopted a test in which the relationship between cost and price was used to allocate the burden of proof. See *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487 (11th Cir. 1988).

75. See *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*, 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984); *D.E. Rogers Assocs., Inc. v. Gardener-Denver Co.*, 718 F.2d 1431 (6th Cir.), *cert. denied*, 467 U.S. 1242 (1984); *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

deemed to be lawful,⁷⁶ whereas a plaintiff in the Ninth Circuit could prove such prices unlawful by showing clear and convincing evidence of predatory intent.⁷⁷ In both circuits, however, if a defendant's prices were below average total cost but above average variable cost, the plaintiff bore the burden of proving predatory pricing.⁷⁸ If, however, the plaintiff proved that the defendant's price was below the average variable cost, the plaintiff had then met his burden of production, and the burden then shifted to the defendant to justify its prices.⁷⁹ Other factors such as subjective intent, market barriers, possible motive, and circumstantial evidence are accepted as proof of predation.⁸⁰ This burden-shifting approach would seem to be beneficial to a plaintiff who does not have the relevant price and cost figures of his rival, or who is in a situation where such figures indicate a price greater than some measure of cost.

The weakness in this approach, however, is that too much emphasis is placed upon the cost-price analysis and too little on the other factors. If a defendant's prices were above average total cost, the plaintiff must prove by clear and convincing evidence that the defendant's pricing practices were anticompetitive. Such a burden realistically makes the cost-price analysis determinative.⁸¹ Additionally, the presumption raised when a defendant's price is above its average variable cost has been difficult to overcome.⁸² Still, this approach allows for more flexibility in analyzing alleged price violations than did the strict cost-based approaches of the First, Second, and Fifth Circuits.

The United States Court of Appeals for the Ninth Circuit formally adopted this approach in two steps. In *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*,⁸³ the Ninth Circuit enunciated the standard as it pertained to prices which were above average variable cost but below average total cost.⁸⁴ The court stated that,

76. See *Langenderfer*, 729 F.2d at 1058.

77. See *Transamerica*, 698 F.2d at 1377.

78. See *Rogers*, 718 F.2d at 1431; *Transamerica*, 698 F.2d at 1377.

79. See *Rogers*, 718 F.2d at 1431; *Transamerica*, 698 F.2d at 1377.

80. See *Marsann Co. v. Brammall, Inc.*, 788 F.2d 611 (9th Cir. 1986).

81. See *Transamerica*, 698 F.2d at 1386-89.

82. *Id.*

83. 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

84. *Id.* at 1034-36. Although the Ninth Circuit did not expressly limit the application of its test to this classification of prices, a subsequent decision in the United States District Court for the Northern District of California construed the *Inglis* holding as doing such. *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965 (N.D. Cal. 1979). On appeal, the Ninth Circuit clarified its position and stated that its test, whereby the cost-price analysis is utilized to allocate the burden of proof, also applied to those prices above average total cost. *Transamerica*, 698 F.2d at 1386-89.

although average variable cost is generally a reliable indicator, there are market situations where a rational firm would find it wise to sell below such cost.⁸⁵ Alternatively, the court acknowledged that a firm selling above average variable cost could, in some circumstances, be guilty of predation.⁸⁶ The court stated: “[T]o establish predatory pricing a plaintiff must prove that the anticipated benefits of [a] defendant’s price depended on its tendency to discipline or eliminate competition and thereby enhance the firm’s long term ability to reap the benefits of monopoly power.”⁸⁷ Accordingly, the price of an item was not determinative, but it was relevant in allocating the burdens of proof and production.⁸⁸

In *Transamerica Computer Co. v. IBM*,⁸⁹ the Ninth Circuit took the final step and clearly established that the cost-price analysis was not determinative even in instances in which a defendant’s prices were above the average total cost of its goods.⁹⁰ The Ninth Circuit clarified its holding in *Inglis*, stating that “the uncertainty and imprecision in determining ‘costs’ counsel against basing conclusive presumptions on the relation between prices and costs.”⁹¹ The court further stated that the cost-determinative tests foreclosed the consideration of other significant factors—intent, market power, market structure, and long-term behavior.⁹²

The United States Court of Appeals for the Sixth Circuit later purported to adopt the Ninth Circuit’s approach to the resolution of predatory pricing claims in *D.E. Rogers Associates, Inc. v. Gardner-Denver Co.*⁹³ In *Rogers*, a small manufacturer of ratchet wrenches brought an antitrust action against the largest manufacturer of ratchet wrenches in the United States.⁹⁴ In considering the plaintiff’s predatory pricing claim, the Sixth Circuit considered the relative merits of an objective cost-based analysis.⁹⁵ The court concluded that the Ninth Circuit’s approach, which allowed for the additional considera-

85. *Inglis*, 668 F.2d at 1035.

86. *Id.*

87. *Id.*

88. *Id.* at 1035-36. Thus, under the Ninth Circuit’s approach, if a defendant’s prices are below average total cost but above average variable cost, the plaintiff bears the burden of proving predatory pricing. If, however, the plaintiff proves that the defendant’s prices were below average variable cost, the plaintiff has met its burden of production, and the burden shifts to the defendant to justify its prices. *Id.*

89. 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

90. *Id.* at 1386-88.

91. *Id.* at 1387.

92. *Id.*

93. 718 F.2d 1431 (6th Cir.), *cert. denied*, 467 U.S. 1242 (1984).

94. *Id.* at 1433.

95. *Id.* at 1436.

tion of other factors indicative of predation, had more merit.⁹⁶ In applying this more flexible approach to the facts of the case, however, the court still found that the plaintiff had not presented any viable evidence—either direct or indirect—of predatory pricing.⁹⁷

In *Arthur S. Langenderfer, Inc. v. S.E. Johnson Co.*,⁹⁸ a case decided approximately five months later, the Sixth Circuit retreated somewhat from the position taken by the Ninth Circuit in *Transamerica*, which was decided after the Sixth Circuit had decided *Rogers*. The Sixth Circuit differed with the Ninth Circuit's opinion in *Transamerica* and held that prices above average total cost are presumptively lawful.⁹⁹ If a defendant's prices are below its average total cost, however, the Ninth Circuit test would be used to allocate the burden of proof through the use of the cost-price analysis.¹⁰⁰ In effect, the Sixth Circuit utilizes a test which is a hybrid of the two approaches. Cost is determinative if a plaintiff cannot show that a defendant's prices are below average total cost. Yet, if the plaintiff can meet this requirement, the court is willing to consider other factors in analyzing a predatory pricing claim. Accordingly, the Sixth Circuit standard elaborated in *Rogers* was still viable in analyzing those predatory pricing claims in which a defendant's prices were below average total cost.

The apparent conflict between these two cases, decided only months apart, was due to the Sixth Circuit's misinterpretation of the Ninth Circuit's approach. In *Rogers*, where the defendant's prices were below average total cost, the Sixth Circuit interpreted the Ninth Circuit's decision in *Inglis* as limiting the use of circumstantial evidence of predation to those cases where a defendant's prices are below its average total cost. Although the Ninth Circuit did not explicitly limit its holding in *Inglis* in this way, a district court within that circuit interpreted the *Inglis* decision in much the same way.¹⁰¹ Subsequently, the Ninth Circuit clarified its position and held that predation could still be proved—albeit under a higher burden of proof—where a defendant's prices are above average total cost.¹⁰² In such a case, however, the plaintiff has the burden of proving predatory intent by clear and convincing evidence. In *Langenderfer*, the

96. *Id.* at 1437.

97. *Id.*

98. 729 F.2d 1050 (6th Cir.), *cert. denied*, 469 U.S. 1036 (1984).

99. *Id.* at 1056-58.

100. *Id.*

101. See *In re IBM Peripheral EDP Devices Antitrust Litig.*, 481 F. Supp. 965 (N.D. Cal. 1979), *aff'd sub nom.*, *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

102. See *Langenderfer*, 729 F.2d at 1056-58.

Sixth Circuit refused to accept what it deemed to be an extension of the *Inglis* standard.

In *Langenderfer*, the Sixth Circuit also purported to adopt the Fifth Circuit's position that "motive or intent is the distinguishing characteristic of predatory pricing."¹⁰³ The court stated that "predatory pricing differs from healthy competitive pricing in its motive: 'a predator by his pricing practices seeks to impose losses on other firms not garner gains for itself.'"¹⁰⁴ Accordingly, the plaintiff in *Langenderfer* argued that predatory pricing could be found solely on the basis of a seller's intent.¹⁰⁵

The *Langenderfer* court rejected this argument. Instead of considering the subjective intent of the defendant—a factor the Sixth Circuit stated was the distinguishing characteristic of predatory pricing—the court relied only upon a cost-price analysis and vacated the lower court judgment entered for the plaintiff upon a jury verdict.¹⁰⁶ This decision ignored compelling evidence that the defendant's activities were motivated by the desire to eliminate the competition and dominate the market.¹⁰⁷ Additionally, evidence was introduced that the defendant had sacrificed profits in construction bids in order to eliminate the competition.¹⁰⁸ The court also refused to consider evidence of the defendant's market power; Johnson did roughly 76% of the turnpike paving in the relevant market and had successfully bid on well over 50% of the government contracts available in the Ohio market.¹⁰⁹ In refusing to consider these factors, the Sixth Circuit summarily dismissed the predatory pricing claim without adequately considering anything other than the relationship between the defendant's costs and its prices. A more flexible approach would have been better suited to analyze the merits of the plaintiff's claim, but the court implicitly sanctioned anticompetitive pricing as long as a predator's price exceeds its average total cost.

C. Circuits Utilizing a Totality of the Circumstances Approach

Prior to *Matsushita*, the Seventh and Tenth Circuits purported to utilize a test in which the legality of a firm's pricing practices was determined by considering the totality of the circumstances surround-

103. *Id.* at 1057.

104. *Id.* (citing *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818 (6th Cir. 1982)).

105. *Id.*

106. *Id.* at 1058.

107. *Id.* at 1054.

108. *Id.*

109. *Id.*

ing such practices. The Tenth Circuit acknowledged the controversial nature of the cost-determinative approach in *Pacific Engineering & Production Co. v. Kerr-McGee Corp.*¹¹⁰ Among the factors that the court expressed a willingness to consider were a firm's subjective intent, barriers to market entry, and other long-run variables that help determine whether a monopolist will be able to restrict output and reap monopoly benefits.¹¹¹ In *Pacific*, the court found that the defendant's prices were always above average variable cost and marginal cost.¹¹² Additionally, the court stated that it did not intend to adopt a solely cost-based test, but there were nonetheless no other relevant factors indicating anticompetitive conduct on the part of the defendant.¹¹³ Accordingly, the court of appeals reversed the judgment for the plaintiff.¹¹⁴

In *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp.*,¹¹⁵ the United States Court of Appeals for the Seventh Circuit also adopted this approach. In *Chillicothe*, the court stated that "while [it accepted] the use of marginal or average variable cost as both a relevant and extremely useful factor in determining the presence of predatory conduct, [it was] willing to consider the presence of other factors in [its] evaluation."¹¹⁶ Still, the analysis of the plaintiff's predatory pricing claim concentrated only on the relationship between the defendant's prices and its costs,¹¹⁷ and the defendant's prices were above average variable cost and above average total cost.¹¹⁸ Consequently, the court found the defendant's pricing practices lawful.¹¹⁹

Although both the Seventh and Tenth Circuits purported to consider all of the relevant circumstances surrounding a defendant's pricing practices, their analysis does not substantiate their positions. In both cases, the court neither focused on nor emphasized factors other than the relationship between the defendant's prices and its costs.¹²⁰

110. 551 F.2d 790 (10th Cir.), *cert. denied*, 434 U.S. 879 (1977). In *Pacific*, a manufacturer of an oxidizer used in solid rocket fuel brought an action against a competitor, alleging that the competitor had engaged in predatory pricing. *Id.* at 791. The trial court entered a judgment for the plaintiff and awarded treble damages totalling over five million dollars. *Id.*

111. *Id.* at 797. These are the same variables enunciated in Scherer, *supra* note 13.

112. *Pacific*, 551 F.2d at 797.

113. *Id.*

114. *Id.*

115. 615 F.2d 427 (7th Cir. 1980).

116. *Id.* at 432. Although the court did not delineate the other factors it would be willing to consider, the court cited to *Pacific*, 551 F.2d at 797. For a discussion of the other factors, see *supra* note 13 and accompanying text.

117. See *Chillicothe*, 615 F.2d at 432.

118. *Id.*

119. *Id.*

120. Subsequent to *Matsushita*, these two courts seem to have taken quite different

Realistically, these approaches did not differ from the cost-determinative approaches utilized by the First, Second, and Fifth Circuits. As a result of the Seventh Circuit's analysis and irrespective of its dicta to the contrary, the Seventh Circuit's approach to the resolution of predatory pricing claims is essentially the same as the cost-determinative approach.

IV. THE *MATSUSHITA* DECISION

A. *Facts*¹²¹

In *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*,¹²² the United States Supreme Court addressed the issue of predatory pricing for the first time since 1967.¹²³ The Court agreed with those commentators who had concluded that predatory pricing schemes are rarely tried and, if tried, are rarely successful.¹²⁴ Consequently, some commentators believed that *Matsushita* heralded an end to successful antitrust actions predicated upon allegations of predatory pricing.¹²⁵

In *Matsushita*, two American manufacturers and sellers of television sets, Zenith Radio Corporation and National Union Electric Corporation, brought suit¹²⁶ against twenty-one corporations that manufacture and sell consumer electronic products; the plaintiffs alleged violations of federal antitrust laws.¹²⁷ The defendants included both Japanese manufacturers of electronic products and American firms, controlled by Japanese parents, that sell these Japanese-manufactured products.¹²⁸ The plaintiffs alleged that the defendants had conspired to drive them out of the electronic product market

approaches toward the resolution of predatory pricing claims; the Tenth Circuit seems to be more committed to the totality of the circumstances approach, whereas, the Seventh Circuit seems to utilize more of a cost-determinative analysis. For a further discussion of these approaches following *Matsushita*, see *infra* notes 246-65 and accompanying text.

121. As the Supreme Court noted, the facts of the *Matsushita* case are complex and lengthy. See *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 576-77 (1986). Among the facts and issues addressed are many evidentiary issues that are not pertinent to this Comment. Accordingly, this Comment will focus on those facts that were relevant to the Supreme Court's analysis of the predatory pricing claim.

122. 475 U.S. 574 (1986).

123. See *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967).

124. *Matsushita*, 475 U.S. at 588.

125. See Levine, *Predatory Pricing Conspiracies After Matsushita Industrial Co. v. Zenith Radio Corp.: Can an Antitrust Plaintiff Survive the Supreme Court's Skepticism?*, 22 INT'L LAW. 529 (1988); Liebler, *supra* note 3.

126. National Union Electric Corporation originally filed suit in New Jersey in 1970. Zenith's complaint was filed separately in Pennsylvania in 1974. The two cases were consolidated in Pennsylvania in 1974. *Matsushita*, 475 U.S. at 577 n.1.

127. *Id.* at 577.

128. *Id.*

by fixing and maintaining artificially high prices for television receivers in Japan, a practice which in turn subsidized the artificially low prices set for television receivers exported to the United States.¹²⁹ The plaintiffs further claimed that the artificially low prices set for receivers in the United States were at levels that produced substantial losses for the defendants.¹³⁰ This conspiracy was said to have begun as early as 1953 and to have been in full operation by the late 1960's.¹³¹

After several years of discovery, the defendants filed motions for summary judgment on all of the plaintiffs' claims.¹³² The district court directed the parties to file a list of all of the documentary evidence that would be introduced at trial if the case were to proceed.¹³³ After the defendants challenged the admissibility of much of the plaintiffs' evidence, the district court ruled that the bulk of the evidence upon which the plaintiffs were relying was inadmissible.¹³⁴

The district court then granted the defendants' motions for summary judgment on the claims arising under Section 1 of the Sherman Act.¹³⁵ The court found that the alleged conspiracy was unlikely and implausible because the evidence suggested that the defendants had conspired in ways that did not injure the plaintiffs.¹³⁶ As to the alleged predatory pricing conspiracy, the court found that the more plausible inference to be drawn from the price cuts was that the defendants were cutting prices to compete in the American market.¹³⁷ The court also found the claim arising under Section 2 of the Sherman Act to be indistinguishable from the Section 1 claim. Thus, it dismissed the Section 2 claim.¹³⁸

The United States Court of Appeals for the Third Circuit reversed many of the district court's evidentiary rulings, and it also reversed the order granting the defendants' motions for summary judgment.¹³⁹ In addition to other evidence of anticompetitive behavior on the part of the defendants, the plaintiffs' expert testified that the defendants' export sales had prices that produced losses as high as

129. *Id.* at 578 (citing *In Re Japanese Elec. Prods. Antitrust Litig.*, 723 F.2d 238, 251 (3d Cir. 1982)).

130. *Id.*

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.* at 579.

136. *Id.*

137. *Id.*

138. *Id.*

139. *Id.* at 580.

25%.¹⁴⁰ The court of appeals concluded that direct, as well as circumstantial, evidence existed upon which a factfinder could find a conspiracy to depress prices in the American market, a market which was subsidized by the excess profits accrued in the Japanese markets.¹⁴¹

B. *Holding*

In a five to four decision, the United States Supreme Court reversed and remanded the order of the Third Circuit, which had reversed the district court order granting summary judgment for the defendants.¹⁴² Initially, the Supreme Court found that the court of appeals had erred in considering the defendants' artificially high prices in Japan, their limited distribution agreement,¹⁴³ and their check price agreement¹⁴⁴ as direct evidence of a conspiracy that had injured the plaintiffs.¹⁴⁵ The Court stated that none of the aforementioned activities, insofar as the plaintiffs were concerned, were violative of the Sherman Act.¹⁴⁶

The Court then discussed the summary judgment standard as it related to the facts of the case. "To survive petitioners' motion for summary judgment," the Court stated, "[the plaintiffs] must establish that there is a genuine issue of material fact as to whether petitioners entered into an illegal conspiracy that caused [the plaintiffs] to suffer a cognizable injury."¹⁴⁷ Among all the allegations, the Court found that only the predatory pricing claim could have actually caused an injury to the plaintiffs.¹⁴⁸ Accordingly, only the evidence surrounding the predatory pricing claim could be considered as evidence of the alleged conspiracy.¹⁴⁹

140. *Id.* at 581 n.5.

141. *Id.* at 580-81.

142. *Id.* at 598.

143. The defendants had agreed to a rule whereby each Japanese producer was permitted to sell to only five American distributors. *Id.* at 581.

144. This term is used for the agreement in which the Japanese producers fixed minimum prices for electronic products exported to the American market. *Id.*

145. *Id.*

146. *Id.*

147. *Id.* at 585-86.

148. *Id.* at 586.

149. *Id.* The dissent, however, criticized the majority for limiting the evidence which could have been considered in analyzing the conspiracy to evidence pertaining to the predatory pricing claim; the majority stated that the plaintiffs could only recover if they proved that the "petitioners conspired to drive [plaintiffs] out of the relevant markets by (i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost." *Id.* at 601 (White, J., dissenting) (quoting *id.* at 585 n.8 (majority opinion)).

The dissent found fault with the underlying premise of the majority's conclusion, that absent proof of the two aforementioned elements, the plaintiffs could not have been harmed by

The Supreme Court provided that the issue of fact must be genuine: "[I]f the factual context renders [the plaintiffs'] claim implausible—if the claim is one that simply makes no economic sense—[the plaintiffs] must come forward with more persuasive evidence to support [their] claim than would otherwise be necessary."¹⁵⁰ The Court stated that while all inferences must be drawn in a light most favorable to the party opposing summary judgment, antitrust law limits the range of permissible inferences that can be drawn from ambiguous evidence in a Section 1 case.¹⁵¹ To survive summary judgment, a plaintiff is required to "present evidence that 'tends to exclude the possibility' that the alleged conspirators acted independently."¹⁵²

The Court then analyzed the plaintiffs' predatory pricing claims in light of the foregoing guidelines. The Court stated:

A predatory pricing conspiracy is by nature speculative. Any agreement to price below the competitive level requires the conspirators to forgo profits that free competition would offer them. The foregone profits may be considered an investment in the future. For the investment to be rational, the conspirators must have a reasonable expectation of recovering, in the form of later

the alleged conspiracy. *Id.* This reasoning, the dissent stated, ignored the conclusions of the plaintiffs' expert, who had found that the plaintiffs were harmed in two ways that were in no way connected to the defendants' pricing practices. The plaintiffs' expert, DePodwin, had submitted a report that the dissent refers to as the "DePodwin Report." This evidence was relied upon by the court of appeals, which reversed a district court ruling that the report was inadmissible. *Id.* at 601-03.

The DePodwin Report explained that the plaintiffs were harmed by the supracompetitive prices charged in Japan, prices that lowered Japanese consumption and resulted in the exportation of more goods to the United States than would have occurred had the Japanese prices been set at a competitive level. *Id.* at 601. The increased exports resulted in depressed price levels in the United States, thereby harming the plaintiffs. *Id.* at 601-04 & n.4. The dissent stated that this report alone created a genuine issue of fact as to whether or not the alleged conspiracy harmed the plaintiffs. *Id.* at 603. The dissent criticized the majority for denying a jury the opportunity to consider these factors simply because the majority's own economic theories regarded the alleged scheme as implausible. *Id.*

150. *Id.* at 587.

151. *Id.* at 588. The Court then discussed *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), in which it held that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Matsushita*, 475 U.S. at 588.

152. *Matsushita*, 475 U.S. at 588 (citing *Monsanto Co.*, 465 U.S. at 764). In dealing with the summary judgment standard, the dissent criticized the language used by the majority, wherein the majority stated that the Third Circuit "apparently did not consider whether it was as plausible to conclude that petitioners' price-cutting behavior was independent and not conspiratorial." *Matsushita*, 475 U.S. at 599-600 (White, J., dissenting) (quoting *id.* at 581 (majority opinion)). Such language, the dissent stated, implies that the trial judge hearing a summary judgment motion should decide for himself if the weight of the evidence favors the plaintiff. *Id.* Moreover, the dissent stated that such an implication undermines the traditional summary judgment doctrine, namely, that all evidence must be construed in the light most favorable to the party opposing summary judgment. *Id.* at 601.

monopoly profits, more than the losses suffered.¹⁵³

The Supreme Court further stated that a predator must make a substantial investment, in the form of lost profits, with no assurance that it will pay off.¹⁵⁴ Accordingly, the Court agreed with those commentators who had concluded that predatory pricing schemes are rarely tried, and if tried, are rarely successful.¹⁵⁵

The Court gave little weight to the expert testimony indicating that the defendants had sold their products in America at substantial losses.¹⁵⁶ The Court stated that the study upon which the testimony was based relied upon assumptions derived from the plaintiffs' costs and not from the defendants' actual cost data.¹⁵⁷ According to the Court, the "expert opinion evidence of below-cost pricing has little probative value in comparison with the economic factors . . . that suggest that such conduct is irrational."¹⁵⁸

The Court further stated that the predatory pricing claim, as alleged by the plaintiffs, was especially implausible in light of two considerations. First, the plaintiffs had alleged that a large number of firms had conspired over many years to charge less than market prices in order to attain a monopoly. Although it is difficult for a single predator firm to benefit economically from predatory pricing, the Court found that the type of conspiracy alleged by the plaintiffs was "incalculably more difficult to execute than an analogous plan

153. *Id.* at 588-89.

154. *Id.* at 589 (citing Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. CHI. L. REV. 263, 268 (1981)).

155. *Id.* (citing *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982); R. BORK, *THE ANTITRUST PARADOX* 145 (1978); Areeda & Turner, *supra* note 2, at 699; Easterbrook, *supra* note 154, at 263; Koller, *supra* note 21; McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 23 J.L. & ECON. 289, 292-94 (1980)).

156. *Id.* at 594 n.19. The district court ruled that this testimony and the study upon which it was based was inadmissible. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 505 F. Supp. 1125, 1313 (E.D. Pa. 1981). The court of appeals reversed and found the testimony admissible. *Zenith Radio Corp. v. Matsushita Elec. Indus. Co.*, 723 F.2d 238 (3d Cir. 1983).

157. *Matsushita*, 475 U.S. at 594 n.19.

158. *Id.* The dissent was critical of the majority's allegations that the Third Circuit had erred in not being sufficiently skeptical of the plaintiffs' claims that the defendants had engaged in predatory pricing. *Id.* at 605-07. (White, J., dissenting). The dissent stated that the majority had erred in considering the probative value of the plaintiffs' expert testimony indicating that the defendants had sold their electronic products in the United States at a loss. *Id.* at 606. The dissent stated:

[T]he question is not whether the Court finds respondents' experts persuasive, or prefers the District Court analysis; it is whether, viewing the evidence in the light most favorable to respondents, a jury or other factfinder could reasonably conclude that petitioners engaged in long-term, below cost sales. I agree with the Third Circuit that the answer to this question is "yes."

Id.

undertaken by a single predator."¹⁵⁹

Second, the Court also found the plaintiffs' predatory pricing claim implausible in light of the defendants' inability to attain monopoly power.¹⁶⁰ After two decades, the defendants had not attained the requisite market power to enable them to charge the supracompetitive prices (prices substantially higher than normal competitive prices) that were necessary to recoup lost profits.¹⁶¹ Even if the alleged conspiracy had been fueled by the supracompetitive prices charged in Japan, the Court stated that it would make no sense for the defendants to sustain losses absent a strong likelihood that the conspiracy would eventually pay off. The Court looked upon the failure of the conspiracy to achieve the allegedly desired ends as evidence that the conspiracy did not, in fact, ever exist.¹⁶²

Specifically, the Court stated that the court of appeals had erred in two respects: (1) it had relied on evidence which had little, if any relevance, to the predatory pricing claim;¹⁶³ and (2) it had failed to consider the implausibility of the alleged predatory pricing conspiracy in light of the lack of economic motive for such a conspiracy.¹⁶⁴ The Court found the absence of any plausible motive to be determinative of the question of whether there was a genuine issue for trial within the meaning of Rule 56 of the Federal Rules of Civil Procedure.¹⁶⁵

159. *Id.* at 590. The Court implied that a predatory pricing claim brought pursuant to Section 2 of the Sherman Act would be more plausible than the same claim brought pursuant to Section 1. *Id.* Additionally, the Court stated that successful predatory pricing conspiracies involving a large number of firms can be identified and punished once successful because such schemes require some price fixing agreement setting a minimum price in order to recoup lost profits. *Id.* at 595.

160. *Id.* at 590-91.

161. *Id.* The plaintiffs also failed to offer evidence which would show that entry into the relevant market was especially difficult. As such, the Court stated that it would have been nearly impossible for the defendants to maintain supracompetitive prices even if they had attained monopoly power. *Id.* at 591 n.15.

162. *Id.* at 592.

163. *Id.* at 595. The dissent criticized the majority for finding errors in the Third Circuit opinion where none existed. *Id.* at 604 (White, J., dissenting). The majority stated that the Third Circuit had erred in considering both the evidence of price fixing in Japan and the limited distribution agreement as direct evidence of a conspiracy that injured the plaintiffs. *Id.* at 595-96. The dissent disagreed, stating that "[t]he passage from the Third Circuit's opinion in which the [majority] locates this alleged error makes . . . a quite simple and correct observation, namely, that this case differs from traditional conscious parallelism cases, in that there is direct evidence of concert of action among petitioners." *Id.* at 604-05 (White, J., dissenting). The Third Circuit, after what the dissent considered careful deliberation, then noted that while these horizontal agreements allocating customers usually do not harm competitors, the evidence as presented would have permitted a factfinder to infer an antitrust injury to the plaintiffs. *Id.* at 605. The dissent found no error in the Third Circuit's reasoning. *Id.*

164. *Id.* at 595.

165. *Id.* at 596-97.

Specifically, the Court stated that the “[l]ack of motive bears on the range of permissible conclusions that might be drawn from ambiguous evidence: if petitioners had no rational economic motive to conspire, and if their conduct is consistent with other, equally plausible explanations, the conduct does not give rise to an inference of conspiracy.”¹⁶⁶

The Supreme Court remanded the case for a determination of whether other, less ambiguous, evidence existed that would permit a trier of fact to find the alleged conspiracy.¹⁶⁷ The Court stated that such evidence must tend to exclude the possibility that the defendants’ pricing strategies had been used merely to compete for business.¹⁶⁸ In the absence of such evidence, the Court stated that there existed no genuine issue for trial.¹⁶⁹

C. Analysis

Although the Supreme Court specifically refused to decide what measure of cost is appropriate in resolving predatory pricing claims¹⁷⁰ or what test is appropriate for the resolution of such claims, the language of *Matsushita* indicates a preference for the cost-determinative approach utilized by the First and Second Circuits. The Supreme Court defined “predatory pricing” under Section 2 of the Sherman Act as “pricing below some appropriate measure of cost.”¹⁷¹ The Court did not consider, however, whether recovery should ever be available under Section 1 when the challenged pricing is above some measure of incremental cost.¹⁷² Relying on the Areeda-Turner article, however, the Court did state that, “[a]s a practical matter, it may be that only direct evidence of below-cost pricing is sufficient to overcome the strong inference that rational businesses would not enter into conspiracies such as this one.”¹⁷³ This philosophy would probably also carry over to Section 2 claims.

The skepticism with which the Supreme Court views predatory pricing schemes is further evidence that the Court favors the cost-

166. *Id.* at 597.

167. *Id.*

168. *Id.* at 597-98.

169. *Id.* at 598.

170. *Id.* at 585 n.8. The Court stated that “[t]here is a good deal of debate, both in cases and in the law reviews, about what ‘cost’ is relevant in [Section 2] cases,” but it also found that it “need not resolve this debate here, because unlike the cases cited above, this is a Sherman Act section 1 case.” *Id.*

171. *Id.* at 585 (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232-35 (1st Cir. 1983)).

172. *Id.* at 585 n.9.

173. *Id.*

determinative approach.¹⁷⁴ This skepticism also inheres in the positions of the First and Second Circuits, which utilize a cost-determinative test. The Supreme Court agreed with those commentators who had stated that predatory pricing schemes are rarely tried and rarely successful,¹⁷⁵ and it also seemed to agree with the position that such behavior is unlikely to increase in the future.¹⁷⁶

Although some authors have speculated that *Matsushita* would signal an end to successful predatory pricing claims,¹⁷⁷ the decision can also be construed in quite a different way. The Supreme Court stated that its decision hinged upon the analysis of the conspiracy element of a Section 1 claim.¹⁷⁸ The Court also implied that allegations of predatory pricing are slightly more plausible in the context of Section 2 single-firm claims.¹⁷⁹ Accordingly, the decision has been routinely ignored in the resolution of Section 2 claims.¹⁸⁰

The analysis in *Matsushita* was also extremely fact specific. The alleged conspiracy had originated in 1953 and had been in operation without any hint of success for approximately twenty years.¹⁸¹ Additionally, it was alleged that twenty-one firms were involved in the conspiracy.¹⁸² Moreover, the plaintiffs—not the defendant firms—held the relatively larger share of the retail television market.¹⁸³ The *Matsushita* Court relied upon the aforementioned facts in deciding that the alleged scheme was implausible, but the decision was only five to four in favor of the defendants.¹⁸⁴ Had these facts not been present or had the claim been brought pursuant to Section 2, the majority may have viewed the alleged predatory behavior with significantly less skepticism.

V. CASES FOLLOWING *MATSUSHITA*

Although some commentators have predicted the demise of successful predatory pricing claims,¹⁸⁵ this has not occurred. In fact, *Matsushita* has had little effect on those courts of appeals that view

174. *Id.* at 588-91.

175. *See supra* note 149 and accompanying text.

176. *Matsushita*, 475 U.S. at 590.

177. *See supra* note 118.

178. *Matsushita*, 475 U.S. at 585 n.9.

179. *See id.* at 590.

180. *See, e.g.,* Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co., 817 F.2d 639 (10th Cir. 1987); Marsann Co. v. Brammall, Inc., 788 F.2d 611 (9th Cir. 1986).

181. *Matsushita*, 475 U.S. at 578.

182. *Id.* at 577.

183. *Id.*

184. *Id.*

185. *See supra* notes 118 & 171.

predatory pricing claims with less skepticism than the Supreme Court.¹⁸⁶ Where courts already had been skeptical of the motivation behind predatory pricing schemes and the likelihood of their existence, however, *Matsushita* has had devastating effects on predatory pricing plaintiffs. Many cases are now summarily dismissed or defeated pursuant to the authority of *Matsushita*.¹⁸⁷ The following three subsections will examine the effect *Matsushita* has had on the cases subsequently decided under the three different approaches utilized by the United States courts of appeals.

A. *The Cost-Determinative Approach*

As of this writing, the First, Second, and Fifth Circuits have each decided one predatory pricing case after *Matsushita*. In these three cases, only one plaintiff was able to reach the jury; in that case, however, the plaintiff did in fact prevail on his predatory pricing claim.¹⁸⁸

In *Kelco Disposal, Inc. v. Browning-Ferris Industries, Inc.*,¹⁸⁹ a sanitation company brought a predatory pricing claim against a competitor under Section 2 of the Sherman Act. The plaintiff introduced evidence that the defendant had priced its disposal services below its average variable cost. The plaintiff's expert witness testified that during the relevant period, from 1982 to 1984, the defendant's average variable cost for roll-off waste services¹⁹⁰ was roughly \$104 per haul, yet the defendant charged only \$65 per haul.¹⁹¹ The defendant disputed the plaintiff's estimate of its average variable cost on the basis that fixed costs (equipment depreciation) had been considered as variable costs.¹⁹² The United States Court of Appeals for the Second Circuit stated that "the characterization of legitimately disputed costs is a question of fact for the jury."¹⁹³ Because the jury could have reasonably characterized equipment depreciation as a variable cost and because the inclusion of this item in the computation of variable cost raised the average variable cost above the \$65 charged per haul,¹⁹⁴ the Second Circuit upheld the jury verdict for the plaintiff.

186. See *infra* notes 215-19 & 245-59 and accompanying text.

187. See *infra* notes 210-16 & 267-71 and accompanying text.

188. See *Kelco Disposal, Inc. v. Browning-Ferris Indus., Inc.*, 845 F.2d 404 (2d Cir. 1988), *aff'd on other grounds*, 109 S. Ct. 2909 (1989).

189. 845 F.2d 404 (2d Cir. 1988), *aff'd on other grounds*, 109 S. Ct. 2909 (1989).

190. Roll-off waste collection is a process of waste removal, usually performed at large industrial locations. *Id.* at 406.

191. *Id.*

192. *Id.*

193. *Id.* at 408.

194. When equipment depreciation was considered to be a variable cost, the defendant's average cost per haul was \$81. *Id.*

The plaintiff also had other, non-economic proof of predatory pricing by the defendant.¹⁹⁵ In fact, the plaintiff introduced evidence that the defendant had intended to put it out of the sanitation business. The defendant's district manager was told: "Put [the plaintiff] out of business. Do whatever it takes. Squish [it] like a bug."¹⁹⁶ Although the Second Circuit did not explicitly consider the relevance of intent, this evidence may have been influential in the court's acceptance of both the jury verdict and the price characterization.

The Second Circuit's reasoning in *Kelco* did not, however, rely upon *Matsushita*. There are three possible reasons for this. First, the Second Circuit may not have considered *Matsushita* applicable to claims brought under Section 2 of the Sherman Act.¹⁹⁷ Second, the court may not have considered *Matsushita* applicable because the evidence of predatory pricing was so overwhelming in *Kelco*. The Second Circuit may have construed *Matsushita* to apply only to cases in which a defendant's motivation for a predatory pricing scheme, and the likelihood of such a scheme's success were more tenuous than in *Kelco*. Finally, the Second Circuit may have been reluctant to cite *Matsushita* because it did not support their finding of predatory pricing. In *Matsushita*, the Supreme Court had stated that the incidence of predatory pricing was rare due to economic considerations. This conclusion would not have been supportive of the Second Circuit's finding that the *Kelco* defendant did, in fact, engage in a predatory pricing scheme to put the plaintiff out of business.

Kelco was the first case in which the United States Court of Appeals for the Second Circuit affirmed a predatory pricing claim. In cases prior to *Matsushita*, the Second Circuit had consistently reversed those decisions in which predatory pricing was found.¹⁹⁸ In *Kelco*, however, the Second Circuit affirmed a jury verdict in which predatory pricing was found. This implicitly indicates that the Supreme Court's decision in *Matsushita* has had little or no effect on the Second Circuit's analysis of predatory pricing claims. Thus, the Second Circuit has not adopted the Supreme Court's skepticism.

Although the First Circuit cited *Matsushita* in *Clamp-All Corp.*

195. *Id.* at 406. In fact the jury had considered evidence of the defendant's subjective intent to drive the plaintiff out of business. *Id.*

196. *Id.*

197. Since *Matsushita* decided a predatory pricing claim brought under Section 1 of the Sherman Act, the court may have construed *Matsushita* as other courts have: that it was decided pursuant to a finding that no conspiracy could likely have existed, not that a predatory pricing scheme did not exist. See *infra* text accompanying notes 215-20.

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

v. Cast Iron Soil Pipe Institute,¹⁹⁹ it chose not to place much emphasis on the opinion. In *Clamp-All*, a pipe coupling manufacturer sued an association of coupling manufacturers alleging violations of both Sections 1 and 2 of the Sherman Act,²⁰⁰ as well as violations of Section 43 of the Lanham Act.²⁰¹ The Section 2 claim was predicated upon allegations of predatory pricing.

The plaintiff introduced evidence showing that two firms in the association had price lists reflecting that their "returns" were less than their "costs."²⁰² Additionally, witnesses testified that the president of one of these two firms, the industry price leader, had stated that the firm would not raise its prices until a competitor went out of business.²⁰³ Once the competitor actually went out of business, that firm, along with other firms in the association, raised its prices.²⁰⁴

The First Circuit, relying primarily on its decision in *Barry Wright Corp. v. ITT Grinnell Corp.*,²⁰⁵ affirmed the district court order directing a verdict for the defendant.²⁰⁶ Despite the extensive testimony offered by the plaintiff, the First Circuit adhered to the rigid cost-determinative approach established in *Barry Wright*, and stated that the plaintiff had not introduced evidence that the defendant had priced its couplings below average variable cost. The court dismissed the relevancy of the price lists by stating that no evidence had been introduced explaining the relationship between the cost and price figures on the subject price lists. Thus, no reasonable jury could have found below-cost pricing based only on such a list.²⁰⁷

The First Circuit also minimized the effect of the statements that prices would not be raised while a certain competitor remained in business. The court stated that the remark and subsequent conduct "simply shows (at best) a price increase after the demise of a competitor; it does not significantly help show that the relevant prices were unlawfully low to begin with."²⁰⁸ This treatment of the remark is especially interesting in light of the court's own definition of predatory pricing. The court stated:

"[P]redatory pricing" occurs when a firm sets its prices temporarily below its costs, with the hope that the low price will drive a

199. 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 109 S. Ct. 789 (1989).

200. 15 U.S.C. §§ 1-2 (1988).

201. 15 U.S.C. § 1125(a) (1988).

202. *Clamp-All*, 851 F.2d at 482.

203. *Id.*

204. *Id.*

205. 724 F.2d 227 (1st Cir. 1983).

206. *Clamp-All*, 851 F.2d at 478.

207. *Id.* at 483.

208. *Id.*

competitor out of business, after which the "predatory" firm will raise its prices so high that it will recoup its temporary losses and earn additional profit, all before new firms, attracted by the high prices, enter its market and force prices down.²⁰⁹

The First Circuit's analysis of the statements of the president of the alleged predator is in direct conflict with the foregoing definition. If the jury had accepted the testimony, then the jury could have reasonably concluded that the defendant had engaged in predatory pricing. The testimony indicated that the president had allegedly stated that his firm would only raise its prices after a competitor was forced out of business. Subsequently, after the competitor was forced out of business, the alleged predator firm and others in the association did indeed raise their prices. In light of this testimony, the directed verdict for the defendant was in conflict with the First Circuit's own definition of predatory pricing. A reasonable jury could have properly found that the defendant had engaged in a predatory pricing scheme.

Of the three courts of appeals utilizing a cost-determinative approach, the Fifth Circuit is the only one that summarily dismissed a predatory pricing claim pursuant to the authority of *Matsushita*. In *Stitt Spark Plug Co. v. Champion Spark Plug Co.*,²¹⁰ a manufacturer of industrial spark plugs brought a Section 2 action against a competing manufacturer, alleging predatory pricing as the predicate anticompetitive conduct. The plaintiff premised its claim upon the fact that the defendant sold spark plugs to original equipment manufacturers at prices well below the price of replacement parts, even though the products were identical.²¹¹ The plaintiff alleged that, in so doing, the defendant was hoping to capitalize on the public's desire to replace the spark plugs with the same brand as the originals.

Relying primarily upon *Matsushita*, the Fifth Circuit affirmed a directed verdict for the defendant.²¹² The court, adopting *Matsushita's* inherent skepticism of the viability of a predatory pricing scheme, stated that "economic disincentives to predatory pricing often will justify a presumption that an allegation of such behavior is implausible."²¹³ Therefore, in predatory pricing claims, the court stated that "[plaintiffs] must come forward with more persuasive evidence to support their claim than would otherwise be necessary [to

209. *Id.* (citing *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983)).

210. 840 F.2d 1253 (5th Cir. 1988).

211. *Id.* at 1255.

212. *Id.* at 1256.

213. *Id.* at 1255.

avoid summary judgment].”²¹⁴ The court adjudged the predatory pricing claim implausible because the plaintiff had never proved that the defendant’s recoupment of losses on sales below cost depended upon it being forced from the market.²¹⁵ Accordingly, the court stated: “Without an economically plausible theory of anticompetitive effect, [the plaintiff] was not entitled to reach the jury on the predatory-pricing.”²¹⁶

It is apparent that the Fifth Circuit will utilize *Matsushita* as a tool to summarily dismiss predatory pricing claims. The Fifth Circuit interpreted *Matsushita* to mean that, generally, allegations of predatory pricing are implausible due to economic disincentives.²¹⁷ The court further requires an economically plausible theory of anticompetitive effect before it will allow a plaintiff to reach the jury. When juxtaposed, these positions will justify the Fifth Circuit’s pretrial dismissal of predatory pricing claims unless a plaintiff can meet an elevated burden of proof.²¹⁸ The exact nature of this added burden is unknown to potential plaintiffs, and it will continue to be unknown until the Supreme Court or the Fifth Circuit clarify their respective positions. Accordingly, there is a lack of any meaningful guidance to potential litigants, in addition to a blatant deviation from accepted Supreme Court guidelines governing summary judgments. In the Fifth Circuit in particular, *Matsushita* has significantly affected a predatory pricing plaintiff’s right to a jury trial. In light of the many criticisms as to the economic inaccuracies of the Areeda-Turner test,²¹⁹ this is sure to result in the dismissal of perfectly valid predatory pricing claims.

B. *Circuits Utilizing the Cost-Price Relationship to Allocate the Burden of Proof*

Matsushita has had little effect on the predatory pricing test implemented by the Ninth and Eleventh Circuits. At the time of this

214. *Id.* (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)).

215. *Id.* at 1256. The court also stated that the plaintiff had not presented sufficient evidence of the defendant’s pricing practices at both market levels—the original market and the replacement market. *Id.* Accordingly, the court stated that it was unable to analyze properly the relationship between price and cost. *Id.*

216. *Id.* at 1255.

217. *Id.*

218. The Fifth Circuit stated that in predatory pricing claims, a plaintiff must come forward with more persuasive evidence than would otherwise be necessary to avoid summary judgment. *Id.* (citing *Matsushita*, 475 U.S. at 587.).

219. See, e.g., *McGahee v. Northern Propane Gas Co.*, 858 F.2d 1487, 1495-96 (11th Cir. 1988).

writing, the Eleventh Circuit has decided one predatory pricing claim subsequent to *Matsushita*, and the Ninth Circuit has decided three such claims. The Sixth Circuit, however, has not yet had the opportunity to address the issue in light of *Matsushita*. The Ninth and Eleventh Circuits continue to take a more objective view of allegations of predatory pricing than do the circuits utilizing the cost-determinative approach. The Areeda-Turner skepticism and the Supreme Court's presumptions in *Matsushita* that economic disincentives make predatory pricing schemes implausible have not been determinative. Specifically, the Ninth Circuit has limited *Matsushita* as applying only to the conspiracy element of a Section 1 claim.²²⁰ Consequently, a plaintiff in the Ninth and Eleventh Circuits has a much greater chance of prevailing than a plaintiff in the First, Second, or Fifth Circuits.

As previously mentioned, the Ninth Circuit has not adopted the Supreme Court's skepticism. In *Marsann Co. v. Brammall, Inc.*,²²¹ the Ninth Circuit distinguished *Matsushita* and maintained its pre-*Matsushita* position that a predatory pricing plaintiff need not prove pricing below any measure of cost in order to survive summary judgment.²²² Earlier, the United States District Court for the Northern District of California granted summary judgment for the defendant due to the plaintiff's inability to prove the existence of prices below average variable cost.²²³ The Ninth Circuit reversed, stating that *Matsushita* did not undermine prior Ninth Circuit precedent allowing a plaintiff to prevail even if evidence of below-cost pricing was not introduced.²²⁴ The court stated: "The Supreme Court's opinion discusses only the amount of evidence required to allow a factfinder to infer the existence of a conspiracy punishable under section 1 of the Sherman Act This case, of course, arises under section 2" ²²⁵ The Ninth Circuit's reading of *Matsushita* thus limits its application to the less common Section 1 claims for multiple-firm pricing rather than to the single-firm claims under Section 2. ²²⁶

220. See *infra* text accompanying notes 221-25.

221. 788 F.2d 611 (9th Cir. 1986).

222. *Id.* at 613 n.1.

223. *Id.* at 613.

224. See, e.g., *Transamerica Computer Co. v. IBM*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014 (9th Cir. 1981), *cert. denied*, 459 U.S. 825 (1982).

225. *Marsann*, 788 F.2d at 613 n.1.

226. In a subsequent case, *Medic Air Corp. v. Air Ambulance Authority*, 843 F.2d 1187 (9th Cir. 1988), the Ninth Circuit again ignored the Supreme Court's skepticism and reversed a summary judgment in favor of the defendants. In *Medic*, an air ambulance service brought an antitrust claim against a competitor, hospitals, and the county under both Sections 1 and 2 of the Sherman Act. *Id.* The defendant argued that its conduct was authorized by the state and was consequently immune from the antitrust laws. *Id.* at 1188-89. The Ninth Circuit

The Eleventh Circuit formally adopted an approach similar to that of the Ninth Circuit in *McGahee v. Northern Propane Gas Co.*²²⁷ The Eleventh Circuit's approach, however, is slightly different than that utilized by the Ninth Circuit. Whereas the Ninth Circuit is willing to consider other circumstantial evidence of predatory pricing in addition to the cost-price analysis,²²⁸ the only additional evidence that the Eleventh Circuit will consider is the subjective intent of the defendant. Additionally, the Eleventh Circuit's approach differs from the Ninth Circuit's in that the Eleventh Circuit holds that prices above average total cost are conclusively deemed to be lawful.

In *McGahee*, a small propane gas distributor sued a competitor, who was also his former employer, alleging predatory pricing.²²⁹ The plaintiff (Floyd McGahee) introduced evidence that the defendant's district manager had referred to him in internal documents as "Floyd the S.O.B."²³⁰ and had set a goal to "[c]ontribute to Floyd's financial problems."²³¹ The plaintiff also introduced undisputed evidence that the defendant had sold propane gas at prices below its average total cost. Moreover, the plaintiff contended that the defendant's own documents indicated that, in some months, the defendant had sold propane at prices below its average variable cost.²³²

The district court applied the Areeda-Turner cost-determinative

found no such immunity and stated that "[a] triable issue of fact exists as to whether [the defendants] engaged in such [predatory] behavior." *Id.* at 1190.

In *Taggart v. Rutledge*, 852 F.2d 1290 (9th Cir. 1988), decided approximately three months later, the plaintiffs attempted to prove predatory pricing by showing that the defendant, a retail competitor and wholesale distributor of gasoline, sold gasoline at retail prices that were lower than the wholesale price he charged the plaintiffs. *Id.* The plaintiffs never attempted to provide any evidence of the defendant's cost, however, nor did they attempt to show that the defendant had sacrificed profits or incurred losses in order to drive them out of the market. Accordingly, a district court order granting summary judgment for the defendant was affirmed. *Id.*

It is interesting to note that the Ninth Circuit did not refer to *Matsushita* in affirming the summary judgment in *Taggart*. The trilogy of cases decided after *Matsushita* clearly and conclusively indicate that the Supreme Court decision has had no effect on subsequent Ninth Circuit predatory pricing decisions. The Ninth Circuit has construed *Matsushita* as being applicable to summary judgment motions attacking the conspiracy element of Section 1 claims. It has not had any effect upon the Ninth Circuit's analysis of Section 2 predatory pricing claims.

227. 858 F.2d 1487 (11th Cir. 1988). Prior to *McGahee*, the Eleventh Circuit had utilized the same approach as the Fifth Circuit. For a discussion of the Fifth Circuit's approach, see *supra* notes 79-102 and accompanying text.

228. See text accompanying note 92.

229. *McGahee*, 858 F.2d at 1492.

230. *Id.*

231. *Id.*

232. *Id.* The Eleventh Circuit stated that the evidence of prices below average variable cost was not persuasive. *Id.* at 1492 n.5.

test as enunciated by the Fifth Circuit in *International Air Industries, Inc. v. American Excelsior Co.*²³³ Initially, the district court found that the propane market had no significant barriers to entry.²³⁴ Upon this finding and a finding that the plaintiff had not introduced any evidence that the defendant had sold below its average variable cost, the district court granted the defendant's motion for summary judgment.²³⁵ The court ignored evidence of the defendant's subjective intent, stating that "the Court cannot and need not divine the intent behind defendant's pricing policy."²³⁶

The Eleventh Circuit, addressing the issue as a matter of first impression, reversed the trial court order granting the defendant's motion for summary judgment.²³⁷ The court focused on the antitrust statutes and their legislative history,²³⁸ as well as on judicial precedents, in deciding that the test for predatory pricing must consider evidence of subjective intent as well as evidence of the defendant's prices as they relate to cost.²³⁹ The Eleventh Circuit fashioned the following test: If the defendant's prices were above average total cost,²⁴⁰ then there is no predatory pricing and no circumstantial evidence of predatory intent.²⁴¹ If the defendant's prices were below average total cost, then there is circumstantial evidence of predatory intent.²⁴² To survive summary judgment, however, a plaintiff must present other evidence, either subjective or objective, of predatory intent.²⁴³ If the defendant's prices were below average variable

233. 517 F.2d 714 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976), *discussed supra* in notes 64-66 and accompanying text. This approach utilizes the Areeda-Turner guidelines, but provides for an exception in those markets with high barriers to market entry. In those markets, a plaintiff can prevail by showing that the defendant's prices were below the short-run profit-maximizing price. For a complete discussion of the former Fifth Circuit approach, see *supra* notes 64-70 and accompanying text.

234. *McGahee v. Northern Propane Gas Co.*, 658 F. Supp. 189, 195 (N.D. Ga. 1987), *rev'd*, 858 F.2d 1487 (11th Cir. 1988).

235. *Id.* at 197.

236. *Id.* at 192.

237. *McGahee*, 858 F.2d at 1507.

238. The court examined the legislative history surrounding discriminatory pricing under the Clayton Act and arrived at the conclusion that subjective intent was a relevant factor in determining anticompetitive conduct. *Id.* at 1498.

239. *Id.* at 1496.

240. The court stated that average total cost should be measured by long-run marginal cost, but further stated that fully distributed cost is acceptable as a surrogate in appropriate cases. *Id.* at 1503. For definitions of these measures of cost, see *supra* notes 22, 31 & 32. The court did not explain what constituted "appropriate cases."

241. *McGahee*, 858 F.2d at 1503.

242. *Id.*

243. *Id.* The court further stated that the closer a defendant's price is to average total cost, the stronger the other evidence must be for the plaintiff to avoid summary judgment. *Id.*

cost,²⁴⁴ a rebuttable presumption of predatory intent is raised.²⁴⁵ If other evidence of intent, subjective or objective, is sufficiently probative of predatory intent, then that element of a claim for attempted monopolization under Section 2 is satisfied.²⁴⁶

The Eleventh Circuit held that the plaintiff in *McGahee* had introduced evidence from which a factfinder could infer predatory intent.²⁴⁷ Initially, the court noted that the defendant had not argued that its prices were above average total cost. Accordingly, there was circumstantial evidence of predatory intent.²⁴⁸ The plaintiff nonetheless presented other evidence of predatory intent. The "other evidence" consisted of the defendant's investigation of the plaintiff's financial position, the defendant's policy of providing its customers with rent-free gas tanks in order to take advantage of the plaintiff's poor financial position, and the internal memorandum declaring the "contribution to [the plaintiff's] financial problems" as a regional goal.²⁴⁹ Additionally, the court considered evidence that, if accepted by the trier of fact, showed that the defendant had sold gas at prices below its average variable cost.²⁵⁰ As a result of the foregoing evidence, summary judgment for the defendant was inappropriate under the circuit's newly-established test.

The Eleventh Circuit, like the Ninth, did not seem to place much reliance upon *Matsushita* even though it was deciding the validity of a summary judgment motion. Similarly, the Eleventh Circuit did not adopt the Supreme Court's skepticism. Of the two courts of appeals that have decided predatory pricing claims after *Matsushita* by utilizing the cost-price relationship to allocate the burden of proof, neither seem to have been influenced in any way by the *Matsushita* decision. An analysis of the result of the four cases decided by these courts subsequent to *Matsushita* bears this out. In only one of the four cases was the plaintiff unable to reach the jury.²⁵¹

C. Circuits Utilizing a Totality of the Circumstances Approach

Matsushita has had a different effect on the Seventh Circuit than

244. The court stated that average variable cost can be used as a surrogate for short-run marginal cost. *Id.* at 1504. For a definition of average variable cost, see *supra* note 35.

245. *McGahee*, 858 F.2d at 1504.

246. *Id.*

247. *Id.*

248. See *supra* note 235 and accompanying text.

249. *McGahee*, 858 F.2d at 1504.

250. *Id.*

251. In one of those, the plaintiff had a misguided notion of predatory pricing law and what was required to establish a violation. *Taggart v. Rutledge*, 852 F.2d 1290 (9th Cir. 1988).

it has had on the Tenth Circuit. Each of these courts of appeals has decided one predatory pricing case subsequent to *Matsushita*, but each has taken a different approach. Although the Tenth Circuit had committed itself to an approach which considers all of the circumstances surrounding a defendant's pricing practices, thereby giving a plaintiff a fair opportunity to present a predatory pricing claim, the Seventh Circuit has adopted the Supreme Court's skepticism regarding the viability of predatory pricing claims, along with what seems to be a cost-determinative approach.

In *Instructional Systems Development Corp. v. Aetna Casualty & Surety Co.*,²⁵² a competitor in the driver simulator market sued the developer of various driving simulation systems and a manufacturer of driver simulation devices under Sections 1 and 2 of the Sherman Act. The plaintiff alleged that the equipment manufacturer named as a defendant had undertaken predatory pricing in order to achieve a monopoly in the simulator market.²⁵³ The district court granted this defendant's motion for summary judgment, due in large part to the finding that its prices were above average variable cost.²⁵⁴

The United States Court of Appeals for the Tenth Circuit reversed the trial court's order granting summary judgment.²⁵⁵ The court reiterated its prior position that "sales above average variable cost do not preclude a finding of predatory pricing if other factors are present indicating unreasonably anticompetitive behavior."²⁵⁶ The court found that the plaintiff had presented sufficient evidence, as a whole, to create a factual issue on whether the defendant-manufacturer had engaged in short-term price cutting to secure long-term monopoly profits.²⁵⁷

Indeed, the plaintiff had introduced substantial evidence that the defendant-manufacturer had engaged in predatory pricing. Between the time that a chief competitor of this defendant had left the market and the time that the plaintiff entered the market—a period during which the defendant was the only manufacturer—the market price of simulators increased dramatically.²⁵⁸ After the plaintiff entered the market, however, the defendant's prices underwent an immediate and dramatic drop.²⁵⁹ After the plaintiff went out of business, these prices

252. 817 F.2d 639 (10th Cir. 1987).

253. *Id.* at 647-48.

254. *Id.*

255. *Id.* at 640.

256. *Id.* at 648.

257. *Id.* at 649 (citing *Pacific Eng'g & Prod. Co. v. Kerr*, 551 F.2d 790 (10th Cir. 1977)).

258. *Id.*

259. *Id.*

once again rose sharply.²⁶⁰ The plaintiff's expert testified that this pricing pattern was of a predatory character.²⁶¹

The plaintiff also introduced evidence showing that when the defendant-manufacturer bid against the plaintiff, it priced its product below the minimum price established in its pricing book.²⁶² Additionally, the defendant's national sales manager had stated in a deposition that his goal was to put the plaintiff out of business.²⁶³ A field supervisor of the main purchaser of simulator equipment also testified that this defendant's national sales manager had admitted that he was going to set a price below the level at which the defendant could make a profit, thereby taking business away from the plaintiff. Further, this sales manager added that the defendant could outlast the plaintiff in an underbidding business environment.²⁶⁴

Although the Tenth Circuit considered this substantial evidence, other courts would have routinely dismissed the plaintiff's predatory pricing claim. Had this action been brought in the First, Second, or Fifth Circuits, the pricing practices at issue would have been deemed lawful because the prices were above average variable cost. In the Sixth, Ninth, and Eleventh Circuits, the burden of proof established by the cost-price analysis may well have been too difficult for the plaintiff to have overcome. Yet, when the facts of the case are analyzed in accordance with the Fifth and Sixth Circuits' accepted definition of predatory pricing,²⁶⁵ it is clear that there was predatory pricing of the simulator equipment. The defendant-manufacturer's prices fluctuated dramatically. When it was the only manufacturer in the market, the price was exorbitantly high; if it was competing with other manufacturers, the price was extraordinarily low. This case, more than any other, exemplifies the inherent deficiencies of other approaches. Thus, only the Tenth Circuit's approach provides the plaintiff with a fair review of alleged violations.

Interestingly, the Tenth Circuit did not consider *Matsushita* in deciding the predatory pricing claim. It did consider *Matsushita* applicable, however, in deciding the claim arising under Section 1 of the Sherman Act. Like the Ninth Circuit, the court construed the decision in *Matsushita* as governing summary judgment in Section 1 conspiracy claims, not Section 2 predatory pricing claims. A Section

260. *Id.*

261. *Id.*

262. *Id.*

263. *Id.* at 647.

264. *Id.* at 649.

265. For a discussion of the Sixth Circuit's definition, see *supra* notes 98-99 and accompanying text.

1 plaintiff, according to the Tenth Circuit's interpretation of *Matsushita*, "must present evidence that tends to exclude the possibility that the alleged conspirators acted independently."²⁶⁶ Accordingly, the *Matsushita* decision has not affected the Tenth Circuit's analysis of predatory pricing claims.

In *Indiana Grocery, Inc. v. Super Valu Stores, Inc.*,²⁶⁷ the Seventh Circuit took an approach quite different from the Tenth Circuit's approach towards allegations of predatory pricing. In *Indiana Grocery*, a retail grocery company sued a competitor alleging predatory pricing in the Indianapolis retail grocery market.²⁶⁸ Relying on *Matsushita*, the Seventh Circuit affirmed the district court's order granting the defendant summary judgment.²⁶⁹ The court stated that the plaintiff had not met the burden established in *Matsushita*, a burden that requires an antitrust plaintiff opposing a motion for summary judgment to present evidence that tends to exclude the possibility that the defendant's conduct was as consistent with competition as with illegal conduct.²⁷⁰ The court found that the more plausible inference to be drawn from the evidence of a price reduction was that the defendant's prices had been lowered in an effort to compete with other retail grocers in the area.²⁷¹ Although the Seventh Circuit will continue to examine predatory pricing claims by focusing on the totality of the circumstances, it will do so within the more rigid guidelines established in *Matsushita*.

VI. CONCLUSION

After *Matsushita*, the United States Courts of Appeals are still divided regarding the most appropriate test with which to analyze antitrust actions predicated upon allegations of predatory pricing. The Supreme Court decision in *Matsushita* refused to specifically address this issue and, as a result, did not resolve the split among the courts of appeals.²⁷² Consequently, a plaintiff bringing a predatory pricing claim in the Tenth Circuit has a much better chance of success than a similar plaintiff bringing a similar claim in the First, Second, or Fifth Circuits.²⁷³ Additionally, the approaches differ among these

266. *Instructional Sys.*, 817 F.2d at 649 (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986)).

267. 864 F.2d 1409 (7th Cir. 1988).

268. *Id.* at 1412.

269. *Id.* at 1421.

270. *Id.* at 1412-13.

271. *Id.*

272. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.8 (1986).

273. *See, e.g., Instructional Sys. Dev. Corp. v. Aetna Casualty & Sur. Co.*, 817 F.2d 639

courts of appeals. For example, the Second Circuit would allow a monopolist to present evidence that its below-cost pricing was promotional or that its prices were set in an effort to meet a competitor's price. The First and Fifth Circuits would not allow such a defense. Furthermore, the Fifth Circuit provides that a plaintiff need not produce evidence that a price is below average variable cost if it can be shown that there are high barriers to relevant market entry. The First and Second Circuits do not allow such an exception. The same discord is also evident among those courts utilizing measures of cost to allocate the burden of proof. While the Eleventh Circuit holds that prices above average total cost are lawful, the Ninth Circuit would allow a plaintiff to recover even if the defendant's prices were above average total cost, but only upon a showing of clear and convincing evidence of predatory intent.

Although the Supreme Court has not specifically considered the relative merits of the various tests, the language of *Matsushita* implicitly indicates that the Court will adopt the cost-determinative approach utilized by the First and Second Circuits. The Supreme Court has adopted the Areeda-Turner skepticism regarding predatory pricing, as have those courts of appeals that utilize the cost-determinative approach. While this approach is administratively efficient, it does not provide a proper framework within which to analyze predatory pricing claims. On the other hand, the totality of the circumstances approach utilized by the Tenth Circuit provides a comprehensive framework within which to analyze predatory pricing claims. Although total cost is relevant in the analysis, it is not determinative. Other relevant factors²⁷⁴ are given equal considerations. The benefits inherent in such a system far outweigh any administrative problems which may arise. In addressing the administrative questions, it is important to note that the cost-determinative approach has not precluded claims wherein a plaintiff has no evidence that the defendant's prices are below average variable cost.²⁷⁵ Moreover, there is no evidence that there are a greater number of predatory pricing claims in those courts of appeals which utilize a totality of the circumstances approach than there are in those courts utilizing other

(10th Cir. 1987). Had this claim been brought in the First, Second, or Fifth Circuits, the defendant would have prevailed because there was no evidence of pricing below average variable cost.

274. For a discussion of the other factors, see text accompanying note 92.

275. See, e.g., *Barry Wright v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983); *Northeastern Tel. Co. v. AT&T*, 651 F.2d 76 (2d Cir. 1981), cert. denied, 455 U.S. 943 (1982); *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976).

approaches. Consequently, there is no support for the claim that the cost-determinative approach limits litigation or that a totality of the circumstances approach fosters litigation.

In claims arising under Section 2 of the Sherman Act, claims wherein the predicate act is predatory pricing, many courts seem to believe that a plaintiff is not entitled to a jury trial. Jury verdicts are casually ignored as directed verdicts or judgments notwithstanding the jury verdict are granted. This may be due in part to the self-fulfilling prophecy adopted by many courts. Because some authorities believe that predatory pricing schemes are rarely tried and rarely successful, courts routinely find that the scheme at issue did not exist. Unfortunately, courts are paying too much attention to cost-price relationships and scholarly predictions and not enough attention to other relevant factors indicative of predatory pricing. If this skepticism and method of analysis continues, the courts will essentially be sanctioning the very conduct that the antitrust laws were meant to curtail.

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