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THE LEGACY OF CONTINENTAL AIRLINES V. AMERICAN AIRLINES: A RE-EVALUATION OF PREDATORY PRICING THEORY IN THE AIRLINE INDUSTRY

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A PREDATORY PRICING conspiracy is by nature speculative.”¹ The foregoing statement by Justice Powell seems to embody the current hesitancy and reluctance of legal commentators and courts to recognize the existence of predatory pricing in the contemporary marketplace.² But the need to reexamine the judicial rules addressing predatory pricing is of particular import with respect to the airline industry after the outcome of the recent case pitting Continental and NorthWest Airlines against American Airlines.³ In this case, the plaintiffs, Continental and NorthWest Airlines, accused their competitor, American Airlines, of pricing its fares below cost to drive competitors out of business. After less than three hours of deliberation, the jury followed the view expressed by Justice Powell and other

² Id. at 589.
contemporary commentators about predatory pricing suits and dismissed the charges against American.4

Unfortunately, the parties’ expenditures were not limited to the three hours of jury deliberations. They spent enormous amounts of time and money on the suit. American, for example, spent more than twenty million dollars on legal costs alone.5 In a struggling industry such as the airline industry, these legal costs are not only burdensome, but may well be crippling.6 And to what effect? In the absence of egregious conduct on the part of the defendant, predatory pricing claims have little chance of success under current law.7

In light of these considerations, one may query why a cause of action exists for predatory pricing. Using the outcome of the Continental/American suit as a benchmark, predatory pricing suits appear only to impose great burdens on the parties involved, rather than reaching to a result that is more responsive to the claims.

To explore such questions, this comment will first examine the applicable law and standards used by the courts in adjudicating predatory pricing claims. The comment will then focus on an analysis of the recent Continental/American suit. Next, the comment will analyze the effects of current predatory pricing law on large and small airlines and consumers. Finally, the comment will present alternative methods to approaching the problem of predatory pricing in the airline industry.

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4 James T. McKenna, American Cleared of Unfair Pricing, AVIATION WK. & SPACE TECH., Aug. 16, 1993, at 34.
5 Predatory Pricing Idea Unrealistic, St. Louis POST-DISPATCH, Aug. 12, 1993, at 5C.
6 As an example of the beleaguered state of the airline industry, American Airlines lost $1.4 billion between October 1990 and March 1993. Martin Zimmerman & Terry Maxon, Verdict Clears Way for Resumption of Air Fare Wars, DALLAS MORNING NEWS, Aug. 11, 1993, at 1D.
7 See, e.g., Matsushita, 475 U.S. at 574; Continental Airlines, Inc., 824 F. Supp. at 689.
II. DEFINITION & EXPLANATION OF PREDATORY PRICING

A. Predatory Pricing Defined

Predatory pricing theoretically occurs when the predator sets its prices below costs in an attempt to drive competitors out of business or to deter potential competitors from entering the market. After the predator has successfully monopolized the market, the predator raises prices to high levels to recoup its losses and reap monopoly profits.

In so doing, the predator and the victim "incur losses during the fighting, but such a theory supposes it may be a rational calculation for the predator to view the losses as an investment in future monopoly profits (where rivals are to be killed) or in future undisturbed profits (where rivals are to be disciplined)." In either case, the predator is willing to forgo immediate profits in hopes of obtaining greater future rewards.

B. Codification of Predatory Pricing—15 U.S.C § 2

In the Sherman Act of 1890, Congress statutorily protected the public against the threat of predatory pricing. Specifically, Congress prohibits predatory pricing in 15 U.S.C. § 2, which provides:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not ex-

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8 Matsushita, 475 U.S. at 585 n.8.
11 Id.
ceeding three years, or by both said punishments in the discretion of the court.  

By enacting this legislation, Congress tried to achieve several objectives. First, Congress attempted to discourage smaller businesses from forming monopolies. In other words, Congress attempted "to protect trade and commerce against unlawful restraints and monopolies." Second, Congress enacted the Sherman Act to ensure that consumers would reap the benefits of price competition by protecting their economic freedom. Third, Congress tried to distinguish the fine line between healthy competition and predatory behavior. The Supreme Court noted that "[t]he law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself. It does so not out of solicitude for private concerns but out of concern for the public interest." With this policy in mind, Congress not only attempted to protect the individual consumer through regulation, but also to further the consumer's interest by attempting to draw a line between pure competition and predation. Historically, this line between competition and predation has troubled both courts and commentators when they discuss the theory of predatory pricing.

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13 Id.
14 Laurence E. Gesell, Aviation and the Law IX-34 (1986). Congress feared that two or more firms might merge or consolidate their interests in an effort to obtain greater market share through monopolization. Id.
15 Id.
16 Brian Clewer, Inc. v. Pan Am. World Airways, 674 F. Supp. 782, 786 (C.D. Cal. 1986) (granting defendant’s motion to dismiss plaintiff’s claims that defendant airlines priced their tickets to drive a competitor affiliated with plaintiff out of business).
17 See infra notes 86-94 and accompanying text.
20 Id.
C. Elements of a Predatory Pricing Claim under Section 2 of the Sherman Act

Because the Sherman Act provides no clear rules delineating the distinction between competitive and predatory behavior, courts have developed and applied their own standard. First, the plaintiff must prove that the defendant engaged in predatory or anticompetitive behavior. Courts will look for the plaintiff to prove that the defendant’s conduct had no reasonable business justification and that the conduct was more predatory than competitive. When deciding whether the plaintiff has engaged in predatory conduct, the court may examine several factors, including whether competitors would consider the behavior to be economically rational; whether the behavior increases product efficiency; whether any existing industry conditions such as high entry barriers may augment the predatory results of the behavior; whether the defendant can increase its market share through predatory behavior; and whether an increase in market share will help to recoup the defendant’s investment in predation. If the court decides that the defendant acted in a predatory manner after examining

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21 See generally Swift & Co. v. United States, 196 U.S. 375 (1905). Justice Holmes developed the elements of an attempted monopolization cause of action in this landmark case. Specifically, the plaintiff must show: 1) specific intent to control prices or eliminate competition in some market; 2) predatory or anticompetitive conduct directed at accomplishing this unlawful purpose; and 3) a dangerous probability that the conduct, if permitted to run its course, would have created a monopoly. Id. Although the courts’ recitation of these three basic elements has not wavered since 1905, individual courts often disagree over the proper interpretation of these elements. See In re Air Passenger Computer Reservations Sys. Antitrust Litig., 694 F. Supp. 1443 (C.D. Cal. 1988), aff’d sub nom. Alaska Airlines, Inc. v. United Airlines, Inc., 948 F.2d 536 (1991), cert. denied, 112 S. Ct. 1603 (1992).


23 Predatory Pricing, supra note 9, at 44. Under this first element, a distinction must be made between actions illegal under state law, such as misrepresentation and false advertising, and attempts to monopolize. Herbert Hovenkamp, Antitrust 120 (1993). Illegal actions under state law are not predatory in nature unless the actor is capable of attaining monopoly power through the use of such action. The distinction is important because violations under state law entitle the claimant to only single damages. Id. On the other hand, a successful claimant under Section 2 of the Sherman Act is entitled to treble damages plus attorney’s fees. Id.

24 Predatory Pricing, supra note 9, at 45.
some or all of these factors, the court proceeds to the next element.

If the court finds the defendant's conduct to be predatory, it then requires the plaintiff to demonstrate the defendant's "specific intent to monopolize." Because it is difficult to obtain direct evidence of the defendant's intent to destroy competition, courts usually focus on the defendant's conduct as indirect evidence of predatory intent. Consequently, the defendant's intent is often inferred from its conduct, especially when the conduct appears to have a predatory, rather than a business, justification. Additionally, courts review subjective evidence of the defendant's intent as well as other objective market factors.

Finally, to prove a violation of Section 2 of the Sherman Act, the plaintiff must show that the defendant possessed "a dangerous probability of achieving monopoly power." Courts typically examine the defendant's market share when determining whether a dangerous probability of monopolization exists. Courts generally consider a market share of less than forty to sixty percent inadequate to estab-

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25 *Spectrum Sports, Inc.*, 113 S. Ct. at 890. Although a business in its regular course prefers to hurt or beat its competitors, courts require evidence of intent in order to analyze the underlying reasons and potential effects of the activity. Hovenkamp, *supra* note 23, at 118.

26 *Predatory Pricing*, *supra* note 9, at 44. Courts require this indirect evidence to show the defendant's intent to achieve monopoly power, not simply to show the defendant's intent to exclude competition. For example, the Ninth Circuit stated that the "mere intention... to exclude competition... is insufficient to establish specific intent to monopolize by some illegal means. ... To conclude otherwise would contravene the very essence of a competitive marketplace, which is to prevail against all competitors." William Inglis & Sons Baking Co. v. ITT Continental Baking, 668 P.2d 1014, 1028 (9th Cir.), *cert. denied*, 45 U.S. 825 (1982).

27 *Predatory Pricing*, *supra* note 9, at 44. Robert Bork stated that "[a]ntitrust law has never clearly defined what it means by predation, but the concept clearly contains an element of wrongful or specific intent...." Bork, *supra* note 10, at 144. He then warned that a more specific method of analysis is needed because inaccurate proof of intent may lead to labeling legal, competitive behavior as predatory. *Id.*

28 See *infra* notes 70-71 and accompanying text.

29 *Spectrum Sports, Inc.*, 113 S. Ct. at 890-91. The main policy behind the "dangerous probability" element is that courts wish to distinguish between ambiguous actions which may or may not be anticompetitive. Hovenkamp, *supra* note 23, at 119-20. Courts are more apt to characterize ambiguous conduct as predatory in markets conducive to monopolization. *Id.* at 120.
lish this probability. In addition to looking at the defendant's market share, courts consider other factors, including the market share of competitors; the financial stability and well-being of competitors; the existing barriers to entry; and the competitive history of the industry. If the court determines that a dangerous probability existed after considering all or some of these factors, the court may find that the defendant engaged in predatory conduct.

D. Cost Standards Used by the Courts

To prove these three elements under Section 2 of the Sherman Act, a plaintiff must also illustrate that the defendant priced below some appropriate measure of cost and that the defendant had reasonable opportunity to recoup its losses from that pricing strategy. Although commentators and courts agree that the plaintiff must prove both of these cost elements in addition to the three Sherman Act requirements, neither commentators nor courts agree upon the appropriate measure of cost or degree of recoupment.

To understand fully the measure of cost that courts use to judge claims, it is necessary to analyze the different types of costs that a business entity might incur. First, variable costs are costs that fluctuate, depending on the firm's level of output. Examples of variable costs include utilities, raw

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30 Predatory Pricing, supra note 9, at 46.
31 Id. A majority of courts will not find the dangerous probability element fulfilled if the defendant does not have a large market share. Hovenkamp, supra note 23, at 120.
32 See Matsushita, 475 U.S. at 596.
33 In review, the plaintiff must show: 1) the defendant's conduct possessed no reasonable business justification; 2) the defendant had specific intent to monopolize; and 3) the defendant possessed a dangerous probability of achieving monopoly power. See supra notes 21-32 and accompanying text.
35 See infra notes 43-63 and accompanying text.
materials, and wages.\textsuperscript{37} From variable costs, courts calculate average variable cost by dividing the sum of all variable costs by the number of units produced.\textsuperscript{38}

The second type of costs are fixed costs. Fixed costs remain the same regardless of the output level.\textsuperscript{39} Courts calculate the total cost for a firm by adding all variable and fixed costs.\textsuperscript{40} Another type of cost important to predatory pricing analysis is the firm's marginal cost. Marginal cost is the cost to produce one extra unit of output, given a particular level of production.\textsuperscript{41} When pricing at their marginal cost, firms achieve maximum efficiency.\textsuperscript{42}

One influential law review article on predatory pricing declared that "the relevant cost is marginal cost."\textsuperscript{43} Areeda and Turner made this assertion based on one main assumption: since marginal cost pricing represents maximum efficiency, it serves as an ideal standard for judging whether or not the firm's pricing policies were predatory or competitive in nature.\textsuperscript{44} They contended that if a firm priced its good or service at marginal cost, it was acting in an economically rational manner and was not, therefore, engaging in

\textsuperscript{37} Id. For example, if a car manufacturer experiences a surge in car orders, it may have to hire additional workers, consume more electricity to accommodate the increased rate of production, and use more steel as more cars are being manufactured due to the increased demand. In this hypothetical case, the wages, utilities, and raw materials would be considered variable costs as they are costs that vary with output. Hovenkamp, \textit{supra} note 23, at 122.

\textsuperscript{38} Hovenkamp, \textit{supra} note 23, at 122.


\textsuperscript{40} Continental Airlines, Inc., 824 F. Supp. at 698.

\textsuperscript{41} Id.

\textsuperscript{42} Hovenkamp, \textit{supra} note 23, at 121. Firms price at marginal cost because if a firm sells below its marginal cost, it will lose money on the sale since the revenue received will be less than the cost of producing and selling the additional unit. Id.


\textsuperscript{44} Areeda & Turner, \textit{supra} note 43, at 701-02.
predatory pricing. Areeda and Turner explained that firms, in deciding whether to increase or decrease output, often consider the incremental effects on revenues and costs. Since marginal costs depend on the incremental effects on revenues and costs, the authors concluded that marginal cost was the appropriate measure of cost with which to judge claims of predatory pricing. Therefore, the authors advocated “a prohibition of prices below marginal cost.”

Areeda and Turner acknowledged, however, several problems with this theory. The main problem was the difficulty in calculating a firm’s marginal cost. The authors explained, “[t]he incremental cost of making and selling the last unit cannot readily be inferred from conventional business accounts, which typically go no further than showing observed average variable cost.” Because of the difficulty in ascertaining marginal cost, another measurement of cost must be used as a surrogate for marginal cost.

For this alternative measurement of cost, Areeda and Turner selected average variable cost because accountants can more easily ascertain its value. Thus, average va-

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45 Id. By pricing at marginal cost, firms are pricing at the exact cost to produce an additional unit.
46 Id. at 702-03.
47 Id. at 712.
48 Areeda & Turner, supra note 43, at 716. Areeda and Turner suggested this standard because pricing above or below marginal cost would not be economically rational as the firm would not be opting for maximum efficiency. Id. at 712. Rather, pricing above or below marginal cost would simply be loss or profit-maximizing. Id. at 717. Although it appears that any firm that could sell above its marginal cost would do so, Areeda and Turner theorized that firms would choose the most rational option. Id.
49 Id. at 716.
50 Areeda & Turner, supra note 43, at 716.
51 Id.
52 Id.
53 Id. For average variable cost, firms only need to add all of the variable costs and divide by total output. The individual variable costs are much more easily identifiable than the somewhat theoretical marginal cost, the cost to produce an additional unit of output. Although average variable cost is easier to determine than marginal cost, some courts still have difficulty with its calculation, especially in the differentiation between fixed and variable cost. See William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc., 668 F.2d 1014 (9th Cir. 1981), cert denied, 459 U.S. 825.
variable cost is more valid in an evidentiary context than the theoretical marginal cost. The authors also likened an average variable cost rule to that of marginal cost because it allows for a certain amount of flexibility.\textsuperscript{54} As a result, this freedom allows the defendant more room to prove that its price was equal to or above its average variable cost. For example, an average variable cost standard allows the defendant the flexibility to show expected lower costs in the future and why it lowered its prices to account for such expected decreases.\textsuperscript{55}

Some courts, however, have disagreed with the reasoning of Areeda and Turner.\textsuperscript{56} The court in \textit{Continental Airlines, Inc. v. American Airlines, Inc.} stated that "[marginal cost] includes only increments of additional cost, while [average variable cost] includes all variable costs for all units of output."\textsuperscript{57} Because of the differences between the two types of costs, marginal cost was not an ideal substitute for average variable cost.\textsuperscript{58} Nevertheless, the court qualified its prior statements by saying that in certain circumstances, average variable cost may serve as a substitute for marginal cost.\textsuperscript{59}

In addition to courts, commentators expressed concern with Areeda and Turner's average variable cost standard.\textsuperscript{60}

\textsuperscript{54} Areeda & Turner, supra note 43, at 716.
\textsuperscript{55} Id. at 716-17.
\textsuperscript{57} 824 F. Supp. at 698.
\textsuperscript{58} Id.
\textsuperscript{59} Id. The court seemed to say that average variable cost may serve as a substitute for marginal cost when it is impossible to determine marginal cost from an examination of the firm's records. Id.

(1982). The Ninth Circuit refrained from using a "laundry list" prepared by Areeda and Turner to differentiate between fixed and variable costs. Instead, the court decided that the determination of whether a particular cost is fixed or variable must be made on a case-by-case basis. \textit{Id.}
For example, former director of the Bureau of Economics for the Federal Trade Commission F.M. Scherer argued that even if a firm sets its price below its average total cost, it may still be predatory even though its price is above its average variable cost.\(^6\) Thus, some commentators believe that Areeda and Turner's average variable cost standard may not cover all forms of predatory pricing.

In spite of the concern over Areeda and Turner's article, most courts have accepted the average variable cost standard.\(^6\) Courts generally use the following standard in determining whether a particular price is predatory:

1. Prices above average total cost are legal per se.
2. At prices above average variable cost the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive.
3. At prices below average variable cost, the burden of showing non-predation falls on the defendant.\(^6\)

In addition to considering this cost based standard, courts also examine other factors that may affect competi-

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\(^6\) See Scherer, supra note 60. Areeda and Turner acknowledged but dismissed this fact in their article. Areeda & Turner, supra note 43, at 704. As an example, they stated that when firms price below total cost but above average variable cost, "[u]nless acting irrationally or out of ignorance, the firm is likely to be charging the lower price in order to preserve or enhance its market share by deterring rivals." Areeda & Turner, supra note 43, at 704. While this pricing behavior may not seem predatory on its face, Areeda and Turner admitted that such behavior should be presumed to be non-predatory only when the prices equal or exceed average total cost. Id.

\(^6\) See, e.g., Chillicothe Sand & Gravel v. Martin Marietta Corp., 615 F.2d 427 (7th Cir. 1980); AT&T v. FCC, 602 F.2d 401, 410 n.49 (D.C. Cir. 1979); Pacific Eng'g & Prod. Co. of Nev. v. Kerr-McGee Corp., 551 F.2d 790, 797 (10th Cir. 1977), cert. denied, 434 U.S. 879 (1977), reh'g denied, 434 U.S. 977 (1977); International Air Indus. v. American Excelsior Co., 517 F.2d 714 (5th Cir. 1975), reh'g denied, 521 F.2d 815 (5th Cir. 1975), cert. denied, 424 U.S. 943 (1976); see also William C. Holmes, ANTITRUST LAW HANDBOOK 380-83 (1993) (stating that while a strict version of the formula had been "uniformly rejected," most courts adopted a variation of the formula).

tion within the industry. For example, courts may weigh entry barriers within an industry. If barriers within an industry are low, new competitors may freely enter the market in spite of the predator's pricing scheme. When the predator increases its prices, new entrants will flood the market and drive the predator's price back to a competitive level. As a result, if barriers are low, courts presume that no predatory pricing exists, as the predator would be acting irrationally.

Courts may also examine competitors' abilities to match or counteract the predator's below-cost pricing scheme with similar or greater price decreases of their own. If competitors can match the predator's prices either through a similar price reduction or decrease in production, the predator would again be acting irrationally as its prices would have no effect, other than incurring unnecessary losses. Courts may therefore presume that no predatory pricing exists because such behavior by the predator would not be economically rational.

In addition, courts may look to subjective evidence of the defendant's intent, as well as to objective market factors, when the defendant's prices fall between its average variable cost and its average total cost. In looking at these cost and objective standards, courts are trying to differentiate

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HOLMES, supra note 62, at 382. A barrier to entry is an industry factor that allows already established firms the opportunity to operate at costs that are less expensive than those of a new entrant. Hovenkamp, supra note 23, at 125.

See HOLMES, supra note 62, at 382.

See American Academic Suppliers v. Beckley-Cardy, 922 F.2d 1317 (7th Cir. 1991) (holding that a firm can only engage in predatory pricing in markets with high entry barriers).

Id. at 1321.

Id.

Id.

McGahee v. North Propane Gas Co., 858 F.2d 1487, 1496 (11th Cir. 1988); see also HOLMES, supra note 62, at 383. Holmes commented that courts do not rely on subjective evidence alone to prove predatory pricing but instead require the subjective evidence to be supported by objective market evidence. HOLMES, supra note 62, at 383.
between aggressive, procompetitive behavior and predatory pricing.\footnote{Holmes, supra note 62, at 383-84.}

While courts and commentators generally agree that Areeda and Turner's average cost standard should be followed, victims of alleged predatory pricing schemes find that meeting this standard is very difficult.\footnote{See, e.g., Isae Wada, AAL Verdict Lifts Cloud Over Pricing Tactics, Travel Wkly., Aug. 16, 1993, at 1.} As a spokesperson for an unsuccessful plaintiff in a predatory pricing suit commented, "[t]oday's outcome only demonstrates how hard it is for the underlying facts to percolate through the sometime monotonous but requisite testimony about economic theory and pricing analysis."\footnote{Id.} Almost all plaintiffs have difficulty in overcoming the view that aggressive behavior is often simply competitive and not predatory.\footnote{Id.}

Courts sometimes acknowledge the alleged victims' criticisms about the high standard of proof required in predatory pricing suits.\footnote{See, e.g., Brook Group v. Brown & Williamson Tobacco, 113 S. Ct. 2578, 2589 (1993); see also Spectrum Sports v. McQuillan, 113 S. Ct. 884, 890-91 (1993).} For example, the Supreme Court in \textit{Brook Group v. Brown & Williamson Tobacco} stated that "[t]hese prerequisites to recovery are not easy to establish, but they are not artificial obstacles to recovery; rather, they are essential components of real market injury."\footnote{Brook Group, 113. S. Ct. at 2589.} While courts have recognized that such a high standard serves as a bar to many potentially valid actions, many have commented that the standard is necessary as "[i]t would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high."\footnote{Id. at 2590.} Thus, courts have acknowledged the difficulty in meeting such a standard while they also have recognized that such a standard is required to differentiate between pure competition and predatory pricing.\footnote{Id.}
Because of the high standard involved, courts have rarely found evidence sufficient to hold the defendant liable for predatory pricing. In fact, the Supreme Court has stated that "predatory pricing schemes are rarely tried, and even more rarely successful." In the eyes of the court, predation rarely occurs, if at all. A study of court decisions on predatory pricing confirmed the suspicion that courts rarely find predatory pricing to exist. Due to the relative infrequency in which courts find predatory pricing, questions arise as to the rationale for bringing a cause of action for predatory pricing.

E. ARGUMENTS FOR AND AGAINST THE EXISTENCE OF PREDATORY PRICING

Questions regarding the existence of predatory pricing stem from both the high standard and the low frequency of finding its existence. After all, it may be irrational for firms to expose themselves to the risks inherent in a predatory pricing scheme. These inherent costs and risks give

79 See Roger Parloff, Fare's Fair: Why the Predatory Pricing Case Against American Airlines Got to Trial—And No Further, Am. Law., Oct. 1993, at 61. American Airlines' attorney, Finis Cowan, said in his opening statement to the jury that "[n]o one, unless it's Dr. Strangelove . . . could believe he could monopolize the airline industry." Id.
82 See generally Roland H. Koller, The Myth of Predatory Pricing: An Empirical Study, 4 Antitrust L. & Econ. Rev. 105 (1971). In this study, the author probed alleged predatory pricing examples during the past 100 years. He classified predatory pricing as an instance in which: 1) the alleged predator priced below cost; 2) it possessed predatory intent; and 3) it succeeded in defeating the competitor. Id. at 111. Although Dr. Koller found 95 convictions of predatory pricing, he stated that only 26 of the cases involved a record sufficient to meet his three elements. He then analyzed these 26 cases in light of two facts: whether the predator profited from the aggressive behavior; and whether the market was more inefficient and imperfect after the predator priced below cost. Id. at 111-12. After this second round of analysis, Dr. Koller found only five cases of pure predatory pricing. Thus, he concluded that predatory pricing happened infrequently, if at all, as only five cases had arisen over the past 100 years. Id. at 112.
83 See infra notes 84-108 and accompanying text.
84 See, e.g., MCI Communications v. AT&T, 708 F.2d 1081 (7th Cir. 1988) (Cudahy, J.); Bork, supra note 10, at 145; Posner, supra note 60, at 184-96.
85 See, e.g., Bork, supra note 10, at 145.
rise to several arguments supporting the theory that predatory pricing does not exist in the modern marketplace.

First, questionable behavior may not be predatory at all, but rather pure competition.\textsuperscript{86} Professor John S. McGee, for example, doubted that predatory pricing ever existed.\textsuperscript{87} By labeling some competitive behavior as predatory, a predatory pricing claim may cause more harm than good, especially to the competitive process.\textsuperscript{88} Construing competitive behavior as predatory conflicts with the purpose of the Sherman Act, which is to protect competition, not impede it.\textsuperscript{89} The Supreme Court stated that "cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences . . . are especially costly because they chill the very conduct the antitrust laws are designed to protect."\textsuperscript{90} The difficulty with predatory pricing theory is differentiating between competition and predatory pricing.\textsuperscript{91} In accord with its statement in \textit{Matsushita},\textsuperscript{92} the Supreme Court recently stated that its reluctance to recognize a cause of action for predatory pricing stemmed from the chance that such suits would "dampen the competitive zeal of a single aggressive entrepreneur."\textsuperscript{93} Such a view, coupled with the lack of enforcement of predatory pricing provisions, demonstrates that both commentators and courts question the existence of a true predatory pricing claim.\textsuperscript{94}

In addition to the potential for injuring competition, predatory pricing claims also seem irrational because efficient firms will not want to subject themselves to such liability.\textsuperscript{95} In creating a pricing scheme, why would a rational

\begin{footnotes}
\item[86] Id.
\item[88] Id.
\item[90] \textit{Matsushita}, 475 U.S. at 594.
\item[91] BORK, \textit{supra} note 10, at 145.
\item[92] \textit{Matsushita}, 475 U.S. at 594.
\item[94] Id.
\item[95] BORK, \textit{supra} note 10, at 146-47.
\end{footnotes}
firm want to incur the great costs inherent in a predatory pricing scheme that have only a marginal chance of being recouped? Judge Frank H. Easterbrook answered this question by finding it quite unlikely that a firm would choose the more risky return of predatory pricing over more stable alternatives. In order to recoup their costs from predatory pricing, firms must gain enough market share to cover their debts. To do so, predators must at least neutralize, if not eliminate, their competitors. Judge Easterbrook concluded that the predation-recoupment theory did not make economic sense. As a result, the existence of predatory pricing is also questionable because of the unlikelihood that a predator will recoup its losses.

Predatory pricing theory is also questioned because even if the predator can recoup its costs, it must also consider the time value of money in making its decision whether or not to price its product or service in a predatory manner. Specifically, the predator must compare the value of the money it loses while engaged in predatory pricing with the present value of the money recouped in the long run. To be economically rational, the future profits, appropriately discounted, must exceed the present size of the losses. In other words, the predator will need to recoup more than it originally lost. Because of the difficulty in recouping even its initial losses, the predator may not recoup the value lost from the interest on those losses.

Finally, predatory pricing theory is questioned because of the difficulty firms experience in maintaining monopoly

96 Id.
97 Easterbrook, supra note 81, at 275. Easterbrook stated that a profitable return may only be available in certain infrequent events such as "no stockpiling, no long-term contracts, certain death for the inefficient victim, [or] no new entry for 10 years." Id. The author calls the chance of experiencing such events as "implausible" at best. Id.
98 Matsushita, 475 U.S. at 589.
100 Id.
101 Bork, supra note 10, at 145.
102 Id.
103 Id.
104 Id.
power over a long period of time.\textsuperscript{105} To be successful, a predatory pricing scheme must exclude or neutralize a competitor for a period of time that is long enough for the predator to recoup its losses as well as reap some additional gain sufficient to cover lost interest.\textsuperscript{106} A predator's incentive may be lessened because monopoly pricing may encourage eager new competitors to enter a market that appears to be full of excess profits.\textsuperscript{107} As a result, predatory pricing is debated on the somewhat irrational belief that monopoly power can be sustained for a sufficient amount of time.\textsuperscript{108}

Although the existence of predatory pricing is sometimes questioned, valid claims may exist and should not be precluded from legal attention.\textsuperscript{109} After the verdict in their case against American Airlines, Richard Hirst, NorthWest's senior vice president and general counsel, said that "[g]iven the same circumstances, we would pursue the same course today."\textsuperscript{110} This statement illustrates that some people believe that predatory pricing may exist and that the behavior in question is monopolistic predation, not healthy competition.\textsuperscript{111} Even though all claims may not prove to be valid, some verifiable instances of predatory pricing may ex-

\textsuperscript{105} See Bork, supra note 10, at 145.
\textsuperscript{106} Matsushita, 475 U.S. at 589.
\textsuperscript{107} See Bork, supra note 10, at 145.
\textsuperscript{108} Id.
\textsuperscript{110} McKenna, supra note 4, at 34. In addition, Hirst stated that he was still convinced that American had engaged in predatory pricing in spite of the unfavorable jury verdict. \textit{Id}.
\textsuperscript{111} See Cudahy, supra note 109, at 11. Judge Cudahy stated that in the past he was willing to accept aggressive behavior as non-predatory in order to promote economic efficiency and fairness. \textit{Id}. Now, he has re-evaluated his commitment to economic efficiency and increasingly recognizes anticompetitive behavior to be more pervasive than before due to the discriminatory effects of predatory behavior. \textit{Id}. But see Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (depicting economic competition as a "bruising rivalry" that does not have to include ideas of fairness).
ist and these instances should not be denied adjudication.\textsuperscript{112}

Additionally, to support the contention that predatory pricing exists, voluminous materials have been written on the subject, which may lend additional credit to its importance and credibility.\textsuperscript{113} So much material has been written that it is hard to dispute the concern over this topic. If predatory pricing does not exist, then why are so many commentators writing on the subject? In addition, the theory that predatory pricing exists seems to be bolstered by many skeptics who question its existence, and who at the same time also acknowledge its potential.\textsuperscript{114} For example, Judge Robert Bork stated that predatory pricing allegations are "foolish" and that they rest "upon the often-exploded recoupment fallacy."\textsuperscript{115} Later, however, Bork admitted that predatory pricing was not inherently impossible and that the "issue is the probability of the occurrence of predation and the means available for detecting it."\textsuperscript{116} Thus, Bork, who frequently questions the existence of true predatory pricing, nevertheless commented that the issue does not concern its existence, but its frequency of occurrence and difficulty of verification.\textsuperscript{117} As a result, questions concerning the existence of predatory pricing seem to be misguided. Rather, questions regarding predatory pricing theory should concern its frequency in the contemporary marketplace.

\section*{F. History of Predatory Pricing Suits in the Airline Industry Since 1978}

Since deregulation in 1978, primary antitrust enforcement authority has been in the hands of both the Civil Aeronautics Board (CAB) and the Department of

\begin{footnotes}
\item Cudahy, \textit{supra} note 109, at 11.
\item See Easterbrook, \textit{supra} note 81, at 263 n.1. This particular note points to more than 15 sources discussing the topic of predatory pricing. \textit{Id.}
\item Bork, \textit{supra} note 10, at 144-45.
\item \textit{Id.}
\item \textit{Id.}
\item \textit{Id.}
\end{footnotes}
Transportation. Throughout these years, the CAB and the Department of Transportation have been lax in enforcing antitrust violations. Moreover, they have placed greater emphasis on competition rather than predation.

Prior to January 1, 1985, the CAB acted as the primary antitrust regulatory body for the airline industry. From 1978 to 1985, the CAB was predisposed to find against claims of predation. With this predisposition in mind, the CAB investigated alleged claims of predatory pricing only if the alleged behavior met the following four characteristics:

1. Did the competition set fares below marginal cost in any city-pair at any time?
2. If so, did the competition persist in losing money after the fares had been shown to be unprofitable?
3. Could the competition reasonably have hoped to attain and maintain a position of monopoly power?
4. Did the competition accompany its fare reductions with increased flight schedules in order to gain market share?

If the CAB decided that the behavior met this set of criteria, only then would it begin investigating the claim. More times than not, investigation did not guarantee enforcement.

After the CAB initiated an investigation, it would enforce sanctions only if the predator and its behavior met another four-part test. This test placed great emphasis on the effects of the predation on competitors, the harm to consumers by the predation, and the effect on consumers and

119 Id. at 2667. Robert Pitofsky, an antitrust expert with the law firm of Arnold & Porter in Washington, said that antitrust law “was sluggish if not dead” during the 1980’s, probably due to this lax enforcement. Id.
120 Patricia M. Barlow, Aviation Antitrust: The Extraterritorial Application of the United States Antitrust Laws and International Air Transportation 34 (1988).
122 Id. at 295.
123 Id.
124 Id. at 297.
125 Id. at 296.
competitors if the CAB suspended the predatory practice.\textsuperscript{126} If the CAB found that the predation was not too harmful to competitors and consumers and that it was competitive in nature, the Board was reluctant to sanction the predator even if it behaved with more aggression than reasonable competition required.\textsuperscript{127}

Because of the CAB's predisposition against finding predatory pricing, complainants found it difficult to make out a case of predation strong enough to warrant investigation.\textsuperscript{128} In fact, the CAB's predisposition was so controlling that only once did it investigate, much less enforce, sanctions against a predator.\textsuperscript{129} In short, the CAB was lenient on predatory pricing claims and placed much greater emphasis on competition, rather than predation.\textsuperscript{130}

On January 1, 1985, the CAB relinquished its antitrust regulatory power to the Department of Transportation.\textsuperscript{131} The federal government continued the lenient stance toward antitrust claims.\textsuperscript{132} Alfred Kahn, former director of the Civil Aeronautics Board under President Carter, stated that the Department of Transportation treated its enforcement powers as if antitrust law did not exist.\textsuperscript{133} This practice of relative non-enforcement continues up to the

\textsuperscript{126} Berger & Mitchell, \textit{supra} note 121, at 296.
\textsuperscript{127} \textit{Id.} at 297.
\textsuperscript{128} \textit{Id.}
\textsuperscript{129} \textit{Id.} In this case, Airwest was found guilty of predatory pricing when it attempted to push a small, up-start airline, Cochise, out of one of its only two markets. \textit{Id.} The CAB seemed to focus on the fact that this market was vital to Cochise's existence and that Airwest was recouping its losses on its price scheme by raising prices on its more profitable routes. \textit{Ibid.;} see Hughes Airwest, Competitive Fares 74 C.A.B. 926 (1977).
\textsuperscript{130} See Moore, \textit{supra} note 118, at 2666. The Civil Aeronautics Board's complacency may have been due to what Moore refers to as the Reagan and Bush administrations' "distaste for regulation and preference for free-market economics." \textit{Id.}
\textsuperscript{131} Barlow, \textit{supra} note 120, at 34. As part of the deregulation of the airline industry, the deregulators wanted to destroy regulation altogether and they saw the CAB as just another bureaucratic link in the chain of federal regulation. \textit{Id.} As a result, they ordered the CAB to be completely liquidated. \textit{Id.} See Civil Aeronautics Board Sunset Act of 1984, Pub. L. No. 99-443, 98 Stat. 1703 (codified as amended at 49 U.S.C. § 1551(b)(1)(C) (1988)).
\textsuperscript{132} See Moore, \textit{supra} note 118, at 2666.
present day. Professor Paul S. Dempsey, a transportation law expert, stated that "[t]he regulated oligopoly which existed under regulation has simply been replaced with unregulated oligopoly, free to exert its market power with impunity." Thus, it appears that current practices will continue indefinitely unless the Clinton Administration alters the regulatory framework of the airline industry.

III. ANALYSIS OF CONTINENTAL AIRLINES, INC. V. AMERICAN AIRLINES, INC.

A. OVERVIEW

In Continental Airlines, Inc. v. American Airlines, Inc., plaintiffs Continental and Northwest Airlines alleged that defendant American Airlines engaged in predatory pricing. In support of their allegations, the plaintiffs pointed to the defendant's "Value Pricing" plan, which they alleged was an attempt to illegally restrain trade. American's Value Pricing Plan cut full coach fares by thirty-eight percent and eliminated most discounts. A few months after implementation, American cut advance-purchase ticket prices by fifty percent. One view of the net effect of the plan was that it "filled planes over the summer while it emp-

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134 Id.
135 Id.
136 See infra notes 300-312 and accompanying text.
139 Id. at 12-13.
141 Id. American stated that it made this additional price cut only in response to the NorthWest's fare promotion, which allowed an adult and child to travel for the price of the adult's ticket. Plaintiffs' Amended Complaint, supra note 138, at 22. Plaintiffs stated, however, that American's action went much further than necessary and American instead "offered ruinous, uneconomic discounts for a far greater number of passengers and incurred substantially larger revenue losses to itself, which were avoidable if it had merely matched NorthWest's limited promotional fares." Id. at 22.
tied more than one billion dollars from the pockets of the airline companies."\textsuperscript{142}

In general, the plaintiffs alleged that American was trying to drive its competitors from the market by pricing below cost in accordance with its Value Pricing Plan.\textsuperscript{149} The plaintiffs alleged that after its competitors were eliminated, American planned on charging supracompetitive prices to recoup its losses.\textsuperscript{144}

In questioning the legality of this plan, plaintiffs made several specific allegations. First, plaintiffs alleged that American had tried to persuade its competitors to charge higher prices.\textsuperscript{145} As evidence of this allegation, plaintiffs pointed to the fact that United and Delta had decided to implement a plan similar to that of American's Value Pricing plan.\textsuperscript{146} Because of the similarity of the pricing plans, the plaintiffs believed that United and Delta had accepted American's invitation to invoke predatory prices.\textsuperscript{147}

Second, plaintiffs contended that American had restrained price competition.\textsuperscript{148} Plaintiffs argued that, because American set its prices so low, it would be able to deny its competitors the opportunity to compete without also incurring huge losses.\textsuperscript{149} Ultimately, plaintiffs believed that American's competitors would be driven from the market.\textsuperscript{150}

Third, plaintiffs argued that American had tried to discipline its competitors that refused to follow its price signals.\textsuperscript{151} Plaintiffs believed that by setting its prices so low,

\textsuperscript{142} Solomon, \textit{supra} note 140, at 37. The Plaintiffs added that American's revenues dropped over $500 million in the second and third quarters due to the implementation of the Value Pricing scheme. \textit{See Plaintiff's Amended Complaint, supra} note 138, at 15. The Plaintiffs noted that American's loss in the third quarter of 1992 was its first third quarter loss in its history. \textit{Id.}

\textsuperscript{143} \textit{Continental Airlines, Inc.}, 824 F. Supp. at 693.

\textsuperscript{144} \textit{Id.}

\textsuperscript{145} \textit{Id.}

\textsuperscript{146} \textit{See Plaintiff's Amended Complaint, supra} note 138, at 16.

\textsuperscript{147} \textit{Id.} at 20.

\textsuperscript{148} \textit{Continental Airlines, Inc.}, 824 F. Supp. at 693.

\textsuperscript{149} \textit{See Plaintiff's Amended Complaint, supra} note 138, at 13.

\textsuperscript{150} \textit{Id.}

\textsuperscript{151} \textit{Continental Airlines, Inc.}, 824 F. Supp. at 692.
American could easily identify those competitors that failed to implement similar plans and follow its predatory pricing scheme. As the plaintiffs argued, American would then discipline these disagreeable competitors through the use of "other anticompetitive tactics."

In response to these allegations, defendant American Airlines presented its own arguments. American pointed out that predatory pricing is very rare and that "predatory pricing claims should be viewed with suspicion." In addition, American claimed that the plaintiffs' claims of predatory pricing caused much harm to free enterprise by discouraging price competition.

With that in mind, American then stated that their conduct was not really predatory, but competitive in nature. American asserted that its Value Pricing Plan was merely an attempt to "simplify consumer choices" and that their decision to implement the plan resulted only from their attempt to stay afloat in an extremely competitive, difficult industry. Because of the high level of competitiveness,

152 Id. at 693.
153 Id. The plaintiffs failed to state in their pleadings what they meant by "other anticompetitive tactics." Id.
154 See generally American's Motion for Summary Judgment, supra note 19.
155 Continental Airlines, Inc., 824 F. Supp. at 697. The court agreed with American's defense with supporting language from Matsushita. Id. Specifically, the court restated the often-quoted phrase that "predatory pricing schemes are rarely tried, and even more rarely successful." Id.; see Matsushita, 475 U.S. at 589. American added that NorthWest, in defense to a similar predatory pricing suit, asserted that predatory pricing infrequently occurs and even stated that "it just can't happen" in the airline industry. American's Motion for Summary Judgment, supra note 19, at 3.
156 American's Motion for Summary Judgment, supra note 19, at 2. American warned that the Plaintiffs' case would chill "aggressive price competition and the low prices that result" from such competition. Id.
158 Id. at 693. The court supported American's view of the competitive nature of the airline industry when it stated that "[c]riticism [of the airline industry] led to deregulation by 1980 of pricing and entry on domestic routes, and the industry saw intense rivalry along with bankruptcy of poorly managed airlines." Id. at 697 n.13 (quoting PAUL A. SAMUELSON & WILLIAM P. NORDHAUS, ECONOMICS 75 (14th ed. 1992)). Plaintiffs, on the other hand, contended that Value Pricing was designed "to put weak carriers out of business and redistribute their shares to [American] and, perhaps, other strong carriers." See Plaintiffs' Amended Complaint, supra note 138, at 18. But an earlier comment by NorthWest's Chief Executive Officer seems to completely contradict NorthWest's statements in the Amended Complaint. See Amer-
American believed that "any attempt to engage in predatory pricing [was] doomed from the outset." Thus, American argued that business necessity, not predatory intent, drove its decision to implement the pricing scheme.

In addition, American argued that plaintiffs' claim of predatory pricing was "utterly baseless." In particular, American pointed to the fact that no economically rational reason existed to implement a predatory pricing scheme. To support this statement, American claimed that it would not be able to recover its losses and make a profit because it could not maintain supracompetitive prices for a long enough period of time. Thus, American contended that no incentive existed to implement a predatory pricing scheme because it would only result in huge losses with no hope of recoupment.

Finally, American argued that it had no intent to conspire with competitors Delta and United. American Revamps Air Fares; Others Follow Suit, MINNEAPOLIS STAR TRIBUNE, April 1, 1992, at 1A, 15A. Specifically, the Northwest CEO stated that American's "new fare structure will be simpler, fairer and more understandable for our customers and will allow them to fly for less." Id.

Continental Airlines, Inc., 824 F. Supp. at 703. The court again agreed with defendant when the court stated that American's "contention [was] supported by [plaintiffs'] allegations that defendants [had] unsuccessfully tried for over ten years to raise prices above competitive levels." Id.

American's Motion for Summary Judgment, supra note 19, at 9. American Airlines' counsel, Robert Cooper, stated that American was just acting with business acumen and that it was simply matching its competitors' prices. Parloff, supra note 79, at 63. In his opening statement, Cooper stated that "[w]hen [American] matched [prices], that can't be predatory." Id.

McKenna, supra note 4, at 34. American also claimed that the plaintiffs were using their bankruptcy status to seek "special advantages of different kinds" to aid them in a struggling industry. Id. American criticized Continental's use of the federal bankruptcy laws to "lower its costs and protect itself from competition" and criticized NorthWest as a company that "piled debt after debt after debt on what was one of the most consistently profitable airline companies." Id.

American's Motion for Summary Judgment, supra note 19, at 3. American stated that the Plaintiffs' claims rested "on the inherently implausible notion that a rational business enterprise will deliberately lose huge sums of money on a speculative hope that it thereby will succeed in destroying all of its competitors and then will be able to recoup its losses quickly." Id. at 2-3.


American's Motion for Summary Judgment, supra note 19, at 3.

stated that even if it had conspired with United and Delta, it would not have been able to recoup its losses.\textsuperscript{166} American theorized that if United, Delta, and American had succeeded in driving all other competitors from the market because of a predatory pricing scheme, the remaining competitors would have a strong incentive to cheat.\textsuperscript{167} This cheating would prevent any of the competitors from recouping its losses and would result in yet another level of pricing schemes.\textsuperscript{168} Thus, American based its final argument again on economic theory and argued that the irrationality of implementing a predatory pricing scheme negated the inference that American had acted with predatory, rather than competitive, intent.\textsuperscript{169}

B. THE COURT HELD IN FAVOR OF AMERICAN AIRLINES

Before the jury went into deliberations, the judge instructed the jury that they had to be certain that American had tried to control the airline industry through predatory pricing.\textsuperscript{170} After less than two hours of deliberation, the jury reached a verdict in favor of the defendant, American Airlines.\textsuperscript{171} The jury found that American’s predatory pricing scheme, as alleged by plaintiffs, would be “extraordinarily expensive and have no realistic chance of success.”\textsuperscript{172} Although a Continental spokesperson stated that plaintiffs were confident about their chances of a successful ap-

\textsuperscript{166} American’s Motion for Summary Judgment, \textit{supra} note 19, at 6-7.
\textsuperscript{167} \textit{Continental Airlines, Inc.}, 824 F. Supp. at 703.
\textsuperscript{168} American’s Motion for Summary Judgment, \textit{supra} note 19, at 33.
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Wada, supra} note 72, at 1.
\textsuperscript{171} \textit{Id.} After U.S. District Judge Samuel Kent lifted the gag order on jurors, one of the 12 jurors stated that she still believed that American was guilty of predatory pricing. Richard A. Oppel Jr., \textit{Lone Juror Believed American Airlines Guilty}, \textit{Dallas Morning News}, Aug. 18, 1993, at 2D. She said she cast her vote after she decided that none of the other 11 jurors would even consider American guilty and that an attempt at persuasion would be totally useless. \textit{Id.} She stated, “[i]t would have been over within 15 minutes if I hadn’t dragged my feet.” \textit{Id.}
\textsuperscript{172} \textit{Predatory Pricing Idea Unrealistic, supra} note 5, at 5c.
both Continental and NorthWest decided not to appeal the district court's decision.\textsuperscript{174}

II. EFFECTS OF CONTINENTAL AIRLINES, INC. V. AMERICAN AIRLINES, INC.

A. NEGATIVE EFFECTS ON PARTIES TO A PREDATORY PRICING SUIT

The size and complexity of a predatory pricing suit negatively affects the parties to the suit in several ways. First, the costs to the parties of bringing or defending against a predatory pricing claim can be staggering.\textsuperscript{175} It is no surprise that predatory pricing cases have been extraordinarily costly to litigate.\textsuperscript{176} For example, American spent at least $20 million defending against the plaintiffs' claims.\textsuperscript{177} Robert Crandall, American's CEO, stated that this $20 million did not include the fees of any of the defense attorneys or the time of the senior executives who devoted long hours to the defense.\textsuperscript{178} Judging from Crandall's statements, not only do such suits deplete the economic resources of the companies involved, such suits also adversely affect the personnel of the companies.\textsuperscript{179} As one editorial stated, "[t]here's something seriously awry when financially ailing

\textsuperscript{174} Wada, supra note 72, at 1.

\textsuperscript{175} Briefing, DALLAS MORNING NEWS, Sept. 17, 1993, at 10D. Continental and NorthWest weighed the cost of pursuing an appeal with the extreme difficulty of winning on appeal due to the stringent legal standards. Id. Judging from their decisions, it appears that Continental and NorthWest concluded that the large cost burden greatly outweighed the minimal opportunity for a favorable outcome. Id.

\textsuperscript{176} Easterbrook, supra note 81, at 336.

\textsuperscript{177} Id. at 334. Easterbrook arrived at this conclusion after reviewing the annual defense costs of AT&T; the company reported that it spent an estimated $100 million defending against claims of predation. Id.

\textsuperscript{178} McKenna, supra note 4, at 34.

\textsuperscript{179} Id. Crandall failed to state what this $20 million did include. Id. Crandall noted that American's senior marketing executive spent several weeks prior to trial and the weeks during trial in Galveston, preparing for the defense. Id. Thus, the total cost to American seems to be almost incalculable, considering the senior executives' foregone opportunity costs. Id.
companies throw away millions battling over dubious charges. 180

The concern over the company's well-being sheds light on the second negative effect of a predatory pricing suit: such claims distract attention away from the everyday operation of the business. 181 The parties involved would have been much better off if the $20-30 million spent in the case had been used to help the ailing airline industry, instead of going toward payment of legal fees. 182 Robert Crandall complained that the large monetary and time resource expenses of defending against the suit "threatened the very existence of the company." 183 Crandall seemed pleased, however, that after the jury verdict American executives could return their full attention to the company, which lost $1.4 billion between October 1990 and March 1993. 184 With such large losses, any further prolonged distraction could cripple the parties involved, as well as the industry as a whole. 185 American was not the only party to the suit that could not afford the legal distractions; Continental and Northwest are both in bankruptcy. 186 Surely, such a costly distraction only hindered the two plaintiffs' attempts to re-organize and regain profitability.

B. EFFECTS ON MAJOR AIRLINES

In addition to affecting the parties involved, the case greatly affected other major airlines as well. The greatest effect may be that parties will be more reluctant to bring such suits in the future. 187 While Continental and North-West seemed overtly confident about their chances of a suc-

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181 McKenna, supra note 4, at 34.
182 Legal Feud: Courts Aren't the Answer to Airline Woes, DALLAS MORNING NEWS, Aug. 15, 1993, at 2J.
183 McKenna, supra note 4, at 34.
184 Zimmerman & Maxon, supra note 6, at 1D. Incidentally, American showed a $47 million profit for the second quarter of 1993. Id.
185 Id.
186 McKenna, supra note 4, at 34.
187 Telephone Interview with Andy Steinberg, Counsel for American Airlines (Nov. 3, 1993) (notes on file with author) [hereinafter Steinberg Interview].
cessful appeal, they nevertheless chose not to appeal the district court’s decision.\textsuperscript{188} Because potential claimants of predatory pricing violations may have observed the overwhelming costs to the parties involved and the extremely high burden of proof required, such future claimants may reconsider their decision to file such a claim.\textsuperscript{189} As a result, this case may serve to decrease the number of predatory pricing suits filed not only within the airline industry but within other industries as well.\textsuperscript{190}

In addition to warning potential claimants of predatory pricing of the negative aspects of such a suit, the case may have also affected the major airlines’ views of how they will price their flights in the future. Disagreement exists upon the net effect of this case on airline pricing strategies. Some analysts believe that the case will encourage airlines to become more aggressive with their pricing policies.\textsuperscript{191} Others believe that the case will have no effect and that airlines’ pricing strategies will remain the same after the suit as they were before the verdict.\textsuperscript{192} Some analysts believe that the case will actually encourage airlines to cut prices and will initiate new fare wars.\textsuperscript{193} Julius Maldutis, an analyst with Salomon Brothers Inc., stated that the “lawsuit had a chilling effect and essentially delayed any major fare promotions,” but projected that airlines would now pursue pricing initiatives as they seem to be relatively free of legal sanctions.\textsuperscript{194} Maldutis also projected that fare reductions and wars would begin as soon as one week after the jury rendered its verdict.\textsuperscript{195} Because of the airlines’ seeming judicial immunity, some analysts believe that airlines may be even more likely to initiate price wars after the verdict.\textsuperscript{196}

\textsuperscript{188} Briefing, supra note 174, at 10D.
\textsuperscript{189} Steinberg Interview, supra note 187.
\textsuperscript{190} Id.
\textsuperscript{191} Zimmerman & Maxon, supra note 6, at 1D.
\textsuperscript{192} Id.
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Zimmerman & Maxon, supra note 6, at 1D.
\textsuperscript{196} Id.; see also Valujet Charges Delta with Predatory Pricing, AVIATION DAILY, Dec. 23, 1993, at 460. As an example of an airline that aggressively priced its flights after the
In contrast, others believe that the case will not affect the airline pricing strategies and that major airlines will continue with business just as they did before the initiation of the suit.\textsuperscript{197} Robert Crandall may have summarized this view most effectively when he stated that the “lawsuit has not had an impact on the willingness of people to reduce fares. It has not inhibited our willingness to set our fares where we thought they should be.”\textsuperscript{198} Some analysts believe that airlines price their flights in response to supply and demand, rather than the threat of litigation; as long as there is an over-supply of aircraft and an under-supply of consumer demand, airlines will price aggressively.\textsuperscript{199} Crandall added that “[i]n a very competitive industry, [American Airlines] must match the lowest price established by rivals.”\textsuperscript{200} As an example of the airlines’ relative disregard for the outcome of the case, Delta went so far as to launch a fare war a week before the jury rendered its verdict.\textsuperscript{201} Thus, it appears that airlines will continue to aggressively price their flights even though competitors may accuse them of predatory pricing.\textsuperscript{202}

\textsuperscript{197} Zimmerman & Maxon, supra note 6, at 1D.

\textsuperscript{198} Id.

\textsuperscript{199} Id.

\textsuperscript{200} Wada, supra note 72, at 1. Ironically, Crandall also stated that American “probably won’t be attempting that type of leadership again.” \textit{Id.} So while Crandall seems to downplay the effects of the case, he also agrees that American will not pursue the same course of action after the suit as it did before it. \textit{Id.}

\textsuperscript{201} Zimmerman & Maxon, supra note 6, at 1D.

\textsuperscript{202} Id. Wide agreement exists as to the hypothetical effects on airlines’ pricing strategies if the jury had rendered its verdict for the plaintiffs instead. \textit{Id.} Such a verdict would have convinced the airlines to make much more conservative decisions. \textit{Id.} An analyst with Avmark Inc. stated that “[i]f you start lowering fares, you have to think whether you’re going to be accused by someone of predatory pricing.” \textit{Id.} Thus, airlines would be much less likely to price aggressively if the verdict had gone the other way. \textit{Id.}
C. EFFECTS ON SMALLER AIRLINES

In addition to affecting the major airlines, the outcome of the Continental versus American case and predation in general greatly affected small airlines. Because of their relatively small size and minor share of the market, small airlines lack the leverage necessary to compete with many of their larger rivals.

Although a small airline was not a party to the suit involving Continental and American, small airlines may feel the effects of the suit nevertheless. The outcome of the suit may actually encourage the large airlines to match the prices of their smaller rivals, even if such a price cut reduces their prices below average variable cost. Prior to the suit, the larger airlines may have felt some apprehension in cutting their prices to such a low level. Now, larger airlines may feel more comfortable with making aggressive pricing decisions because they may feel as if they are free from legal constraints.

The outcome of the suit may affect the tendency of smaller airlines to file predatory pricing suits against their larger rivals. Small airlines may wonder how they can bring a predatory pricing claim if a large airline with the financial resources of Continental cannot successfully bring such a claim. As a result, the suit may deter smaller air-

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204 See Plaintiffs' Amended Complaint, supra note 138, at 42. Plaintiffs noted that AMR's market dominance enhanced the already substantial barriers to entry into the market. Id. Plaintiffs listed several specific barriers, which included frequent flyer programs, noise regulation, and investment capital. Id. Although they listed several barriers, Plaintiffs failed to connect the barriers with any wrongdoing on the part of American.
205 Steinberg Interview, supra note 187.
206 Id. Large airlines may be willing to take such an economic hit if they foresee the possibility of driving their smaller competitors from the market.
207 Id.
208 Id.
209 Steinberg Interview, supra note 187. See also Edward L. McKenna, American Airlines Pricing Verdict May Auger New Round of Fare Wars, INSIDE DOT & TRANSP. WK., Aug. 13, 1993, at 32.
210 Steinberg Interview, supra note 187. Patrick Murphy, president and CEO of AvSOLUTIONS, an aviation-consulting firm, projected that the verdict will make
lines from resorting to legal action when a larger airline matches their prices in the future.\footnote{211}

In addition to the possible deterrent effect on future suits, predation in general greatly affects the smaller carriers in other ways. Predation often prevents small “up-start” airlines from even entering the market.\footnote{212} Because the airline industry requires such a large initial capital outlay, many prospective airlines cannot recover costs as prices are driven down by their larger competitors.\footnote{213} Because of the larger airlines’ economies of scale, many prospective small carriers feel the effects of predation even before they make the decision to enter the market.\footnote{214}

After entering the market, small airlines then experience even greater effects of predation. Small airlines cannot afford to stay in business unless their flights are full and, with predatory pricing, many of their flights are less than full.\footnote{215} As a result, many small carriers are pushed out of business because they can no longer compete.\footnote{216} For example, UltraAir, a start-up airline based in Houston with just 200 employees,\footnote{217} stopped flying after just six months of

\footnote{211 Steinberg Interview, \textit{supra} note 187.}

\footnote{212 Kahn, \textit{Deregulatory Schizophrenia}, \textit{supra} note 109, at 1063. Although Kahn states that predation blocks entry for many up-starts, Kahn also admits that the difficulty of entering the market as an up-start may be due to the success of the incumbent carriers at reducing their own costs. \textit{Id.}}

\footnote{213 See Plaintiffs’ Amended Complaint, \textit{supra} note 138, at 42. Plaintiffs stated that barriers to entry within the airline industry are “substantial” and include “significant economies of scale and scope.” \textit{Id.} Plaintiffs also named the following as barriers to entry: frequent flyer promotions; “limits on access to gate facilities and take off and landing rights” at major airports; “the limited availability of investment capital for entry” into the airline industry; and “predatory conduct” by American Airlines. \textit{Id.}}

\footnote{214 \textit{Id.}}

\footnote{215 Kahn, \textit{Thinking about Predation—A Personal Diary}, \textit{supra} note 109, at 141 n.6.}

\footnote{216 \textit{Id.}}

\footnote{217 Jane Baird, \textit{Staying Airborne: Despite Industry Slump, Many Think Start-up Carriers Have Good Chance}, \textit{Houston Chron.}, May 23, 1993, at B1. While the author portrayed the outlook for up-starts as bright, she nevertheless quoted an analyst who stated that “[m]ost entrants will fail, as they do in any industry, let alone the savagely competitive airline industry.” \textit{Id.}}
Barney Kogen, co-founder of UltrAir, blamed the company's demise on predatory pricing efforts by competitor Continental Airlines. Even if small airlines are fortunate enough to overcome the high entry barriers in the airline industry, they may be driven out of business by their larger, predatory competitors.

D. EFFECTS ON CONSUMERS

The Continental versus American case and predatory pricing in general have also affected consumers to the extent that airlines withheld favorable pricing actions from the consumer during the trial. Specifically, the plaintiffs, Continental and NorthWest Airlines, withheld pricing actions while the suit was pending. Thus, consumers may be deprived of price discounts and promotions from the time predatory pricing actions are filed until parties no longer wish to pursue the matter. As a result, consumers will be forced to pay higher prices.

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219 Ott, supra note 203, at 34. In response to these accusations, a Continental spokesperson said, "Continental's fare actions in this competitive environment were totally lawful. To imply that our actions were illegal and taken for any other reason is ludicrous and clearly without merit." Id. In addition, the spokesperson stated that UltrAir's predatory pricing claims against Continental could not be compared to Continental's claims against American. Id. The spokesperson did not state the basis for this inability to compare the two sets of claims. Id. Incidentally, UltrAir dropped its charges against Continental after Department of Transportation officials were unable to procure any evidence to substantiate the charge. Id.

220 But see Baird, supra note 217. In her article, Baird presented an optimistic outlook for small airlines' chances for success in spite of their larger rivals. As an example, Baird pointed out that Southwest Airlines "is considered the one airline to have successfully taken advantage of deregulation to grow into a major airline." Id. But Baird's optimism is contradicted by her own statement that Southwest is the one successful upstart. Id. [emphasis added].
221 Steinberg Interview, supra note 187.
222 Id. At the time of the interview, approximately three months after the verdict, NorthWest offered tickets at a discount of 40% off the face-value of the ticket. Id. Presumably, the consumer would have been able to take advantage of the 40% discount while the suit had been going on as if the suit had never been filed. Id.
223 Id. This may be caused in part by the fact that any pricing actions taken during this time may be scrutinized to a greater extent because of the presumption that such actions may be predatory. Id.
224 Steinberg Interview, supra note 187.
The consumer will also be directly affected by the suit because society will have to absorb the cost of the expensive, time-consuming litigation.\textsuperscript{225} The parties to the suit will have to charge higher airfare to pay for the resource-draining litigation,\textsuperscript{226} thus passing the cost on to society as a whole because air travelers are from all segments of the economy. Second, society will have to bear the costs of apprehending and prosecuting the supposed violator.\textsuperscript{227} This particular suit lasted for over one year and required many hours of judicial resources.\textsuperscript{228}

Consumers are not just affected while predatory pricing claims are being pursued. Rather, they are also continuously affected in several ways by predatory pricing in general. In the short run, predatory, aggressive pricing actions by airlines are a boon for consumers,\textsuperscript{229} who have many bargains from which to choose.\textsuperscript{230} Because predatory pricing necessarily involves cutting prices below a certain level, airlines that price aggressively push their prices down in an attempt to drive their competitors out of business.\textsuperscript{231} In response, competitors also lower their prices out of business necessity to match the predator's prices.\textsuperscript{232} As a result, consumers are able to choose between different airlines that have practically the same low prices due to the fare war.\textsuperscript{233} Thus, predation saves the consumer money by reducing airfares in the short term.\textsuperscript{234}

While the consumer benefits from predation in the short run, the consumer pays for those benefits in the long run as well.\textsuperscript{235} Consumers and society will have to bear the cost of the expensive, time-consuming litigation.\textsuperscript{236} The parties to the suit will have to charge higher airfare to pay for the resource-draining litigation,\textsuperscript{237} thus passing the cost on to society as a whole because air travelers are from all segments of the economy. Second, society will have to bear the costs of apprehending and prosecuting the supposed violator.\textsuperscript{238} This particular suit lasted for over one year and required many hours of judicial resources.\textsuperscript{239}

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run.\textsuperscript{235} Pierre Jeanniot, director-general of the International Air Transport Association, stated that his "main concern about price wars is that they are sending a wrong message to travelers—that air fares can continue to go down indefinitely."\textsuperscript{236} Unfortunately for the consumer, fares cannot continue to decrease while airlines move closer to bankruptcy by losing billions of dollars annually.\textsuperscript{237} To recoup their losses and to run more efficiently, airlines will be forced to raise prices in the future.\textsuperscript{238} As a result, the predatory and aggressive behavior of airlines, which seemed attractive to the consumer in the short run, will undoubtedly catch-up to consumers in the long run through higher prices.\textsuperscript{239}

\section*{III. ALTERNATIVE SUGGESTIONS TO THE PRESENT SITUATION}

\subsection*{A. Introduction}

Judging from their effects on airlines and consumers, certain airline pricing actions, whether they are termed predatory or simply aggressive, can be relatively damaging to those groups.\textsuperscript{240} The laissez-faire attitude toward airlines' pricing actions imposes huge costs on the airlines as well as the consumer. If these pricing actions place so much hardship on the airlines and consumers, the question then becomes what should be done about the present situation to help alleviate some of these negative effects? The answer to this question ranges from maintaining the airline industry's current deregulated state to the other extreme of a return to intense government involvement and regulation.

To properly analyze this question and to arrive at an appropriate solution, it is necessary to recognize, appreciate,
and understand the competing interests involved. The first interest is that of the major airlines, which push for little regulation of pricing actions and encourage measures that stimulate competition. Smaller airlines, on the other hand, call for the imposition of greater restraints on their larger rivals. At the same time, however, these smaller airlines want to avoid pervasive regulation that could hinder their own pricing actions. The third group, consumers, seems to have dual, competing interests as well. On one hand, consumers favor little regulation of the airline industry because they want inexpensive flights. Yet on the other hand, consumers also want some type of airline regulation to promote the safety and efficiency of the industry. The fourth and final group, the government, has the most difficult choice of all four groups as it must juggle the competing regulatory and deregulatory interests of large airlines, small airlines, and consumers.

Because of these four sets of competing interests, the answer to the question of what should be done to remedy the present situation regarding pricing is very difficult. No clear solution exists, and the interests or one of more groups may be impaired by the final outcome. But a decision must be made soon as airlines continue to attempt, legally or illegally, to drive competitors out of business and, in so doing, escalate costs to the consumer. To arrive at a possible solution to the present situation, it is necessary to analyze alternatives.

B. MAINTAIN CURRENT Deregulated STATUS OF THE AIRLINE INDUSTRY

The first alternative is not really an alternative at all. It is simply an argument to maintain the status quo of deregulation and to do nothing to remedy the present situation.241 Strongly supporting this alternative is the fact that the fine line between competition and predation is often too diffi-

241 See generally Scherer, supra note 60.
The difficulty, of course, is distinguishing highly competitive pricing from predatory pricing. A firm that cuts its prices or substantially reduces its profit margin is not necessarily engaging in predatory pricing. It may simply be responding to new competition, or to a downturn in market demand. Indeed, there is a real danger in mislabeling such practices as predatory, because consumers generally benefit from the low prices resulting from aggressive price competition.

Because of the fear of "mislabeling" healthy competition as predatory, the present situation may be best left as it is.

Following the Eighth Circuit's view, if any action is taken to alter the present situation, such action may have a deleterious effect on competition. The Supreme Court noted that "[w]e must be concerned [with] a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior [that] end[s] up by discouraging legitimate price competition." By discouraging price competition, courts feel that an attempt to change the present situation would "render illegal any decision by a firm to cut prices in order to increase market share." Thus, airlines may be fearful of cutting prices and the consumer may be hurt since consumers benefit from healthy price competition. Because airlines and consumers may be injured by altering present attitudes toward pricing decisions, the system may be best left as it is, as any attempt to alter the situation may only discourage and possibly even stifle healthy price competition.

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242 Id.
243 Morgan v. Ponder, 892 F.2d 1355, 1358-59 (8th Cir. 1989).
244 See generally Scherer, supra note 60.
245 Id.
248 See generally Scherer, supra note 60.
249 Id.
C. INCREASE REGULATION OF AIRLINE PRICING ACTIONS

The second alternative to the present situation advocates greater regulation of the airline industry's pricing policies. Because deregulation may be seen as actually having damaged competition, a return to some form of regulation may be likely. One way to increase airline pricing regulation would be to increase judicial and legal regulation of the airline industry by lowering the difficult predatory pricing standard to allow for more successful claims of predatory pricing. In other words, a predatory pricing claimant's burden of proof would be lowered, allowing the plaintiff to bring such a claim more easily.

Although this alternative may be facially simple to implement, hidden costs may result. First, if major airlines were forced to maintain higher prices due to increased regulation, the public would pay the cost differential. Second, increased regulation of aggressive airlines would encourage inefficient airlines to enter or remain in the market. Because of these costs to the competitive marketplace, ques-

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251 Cudahy, supra note 109, at 15. Cudahy stated that the government intervention will be termed something other than "regulation," to avoid the negative connotation of the word. Id. at 13 n.51. Although many commentators feel that regulation is necessary, they fail to suggest areas or types of regulation needed. Id. Judge Cudahy admitted that he would not try to define the type or scope of regulation necessary to help the airline industry. Id. at 14. Cudahy specified only that the regulation should not be all-encompassing or overly protective, but rather commonsensical. Id. at 15.


253 Id. Joskow and Klevorick worried that lowering the standard would test the "institutional competence" of courts attempting to apply a lower standard. Id. Specifically, Joskow and Klevorick were concerned with what "courts can do well, what kind of information they can possess, and what issues are 'too speculative' for judges or juries to decide." Id. In addition, Joskow and Klevorick raised questions about the "capability of administrative agencies," such as the Department of Transportation, to cope with a lower standard. Id.

254 Joskow & Klevorick, supra note 252, at 223.

255 Id. Joskow and Klevorick noted that this alternative would increase "the cost of production of the product above the efficient level and [would result] in a waste of scarce resources and hence in a loss of social welfare." Id.
tions arise as to the rationale and viability of this alternative.256

D. ELIMINATE THE CAUSE OF ACTION FOR PREDATORY PRICING ALTOGETHER

The third alternative to the present situation calls for the elimination of the predatory pricing cause of action altogether.257 This alternative is based on the belief that predatory pricing does not exist in the marketplace.258 A predatory pricing cause of action may be considered foolish because it may be unlikely for a major airline to sacrifice revenue just to hurt a smaller competitor.259 Instead, the aggressive airline is more likely acting competitively rather than in a predatory manner.260 As a result, it may be unwise to "construct rules about a phenomenon that probably does not exist or which, should it exist in very rare cases, the courts would have grave difficulty distinguishing from competitive price behavior."261

Despite these concerns, valid reasons exist to maintain such a cause of action. Although some behavior may be

256 Joskow and Klevorick stated that this alternative may be appealing if it "leads a sufficient number of firms to enter or to mature so that monopoly pricing is eliminated more quickly than it would have been otherwise." Id. at 223-24.

257 See, e.g., PHILLIP AREEDA, PREDATORY PRICING 899 (1988); BORK, supra note 10, at 144; POSNER, supra note 60, at 189; see also A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1401-02 (7th Cir. 1989) (Easterbrook, J.), cert. denied, 494 U.S. 1019 (1990).

258 See BORK, supra note 10, at 144. Bork stated that many people view "firms in the market as if they were thugs in a dark alley; evidently a large firm has more muscle and can beat smaller firms to death." Id. Bork believes that such views "do not reflect theory but are only foolishly inapposite metaphors that ignore the constraints the market places upon firm behavior." Id.

259 See id.

260 Id.

261 McGee, supra note 87, at 317 (summarizing Robert H. Bork's views on predatory pricing). McGee acknowledged, however, that the likelihood of abolishing the cause of action for predatory pricing is unlikely because:

[...] like it or not, we have and are likely to continue to have some kind of legal 'rules' to punish predation. Firms will continue to fear and actually to be beset by costly complaints that they are predators. As a practical matter, I am afraid that the best we can do is to resist the worst rules and work to achieve as good rules as we can.

Id.
mistakenly considered predatory, some actual predatory pricing may occur in the marketplace, and legal recourse against predatory firms may be necessary to protect competitors and consumers alike. For example, Alfred Kahn, former director of the Civil Aeronautics Board under President Carter, stated that predatory pricing does exist and that major airlines may act rationally by choosing to forgo profits, hoping to reap future gains. Kahn thinks that a predatory pricing strategy would be a "worthwhile price to pay for snuffing out the upstarts" and restricting competitors. Because of his belief that predatory pricing may be an option for a firm, Kahn feels that a cause of action for predatory pricing is required to protect competitors and consumers from actions that may be seen as rational.

Because of the concern over the need to protect consumers and competitors, rules regulating this type of behavior are likely to persist. "From the beginning, antitrust [law] has been concerned with predation. . . ." Because of this concern, the contemporary marketplace is "unlikely to have no rule at all" to guard against predatory pricing.

E. REQUIRE COMPETITIVELY RESPONSIVE FARES TO REMAIN IN EFFECT FOR A LONG PERIOD OF TIME

A fourth alternative would involve placing greater restrictions on prices set by aggressive airlines. Specifically, aggressive airlines could be required to maintain their low fares for a certain amount of time. While director of the

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262 See, e.g., Cudahy, supra note 109, at 6.
263 Id.
264 Id.
265 See id.
266 McGee, supra note 87, at 317 (summarizing Robert H. Bork's views on predatory pricing).
267 Id.
268 Id.
269 See id.; William J. Baumol, Quasi-Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing, 89 Yale L.J. 1 (1979); Joskow & Kleverick, supra note 252, at 255.
270 McGee, supra note 87, at 317 (summarizing Robert H. Bork's views on predatory pricing).
Civil Aeronautics Board, Kahn suggested such a proposal and asked that airlines be required to maintain aggressive fares for three to five years.\textsuperscript{271} By requiring airlines to maintain prices over a specified period of time, aggressive airlines may reconsider their pricing decisions after thinking about the long-term effects of their decision.\textsuperscript{272}

Although this appears to be a viable alternative, some questions arise as to its validity. Which prices would need to be maintained? How long would the prices need to be maintained? Most importantly, price reductions are a normal, promotional business activity and any discouragement of such behavior may be very damaging to the competitive marketplace.\textsuperscript{273}

Due to these concerns, a modified version of this alternative may be more realistic. For example, a cost-cutting airline could be required to maintain its low prices for six months to one year, as opposed to the three to five years suggested by Kahn. By doing so, major airlines may be encouraged to cut only those prices they intend to maintain.

F. REGULATE AIRLINES' PUBLISHING OF RATES

As another alternative to the present situation, airlines could be encouraged through regulation to change the ways they promote their cheap fares. Currently, all air fare changes are entered into a database that serves all airlines.\textsuperscript{274} After the change is entered into the database, the

\textsuperscript{271} Cudahy, supra note 109, at 6. Although his proposal was never implemented, this view is still supported by some commentators today. See e.g., Joskow & Klevorick, supra note 252, at 255. Incidentally, Joskow and Klevorick proposed a period of two years. Id.

\textsuperscript{272} Joskow & Klevorick, supra note 252, at 255. Joskow and Klevorick explained that this alternative would help "to ensure that dominant firm price reductions subsequent to a rival's entry are competitive actions and thus sustainable, rather than predatory moves principally aimed at cementing monopoly power." Id.

\textsuperscript{273} See Spectrum Sports, Inc., v. McQuillan, 113 S. Ct. 884, 890 (1993) (stating that antitrust regulation of a firm's pricing activities will "dampen the competitive zeal of a single aggressive entrepreneur").

\textsuperscript{274} Tom Incantalupo, Airlines in Price-Fixing Fight: Antitrust Suit Follows Probe by U.S. on Fares, NEWSDAY, Nov. 7, 1990, § B, at 45. This database, operated by Airline Tariff Publishing of Washington, receives thousands of fare changes daily. Id.
information is then transferred to travel agents and airline reservation agents via computer reservation systems.\textsuperscript{275}

Before rate changes are permanently entered into the database, airlines typically publish only advance notice of fare increases, not fare decreases.\textsuperscript{276} By publicizing their changes this way, airlines are able to test their competitors' reactions to fare increases.\textsuperscript{277} If an airline's competitors do not react to its fare hikes, the airline is likely to drop its increase.\textsuperscript{278} If, however, the airline's competitors seem to support the increase, the airline will maintain the increase in the reservation system.\textsuperscript{279} In other words, the issue is "whether the airline industry is practicing so-called 'price signaling,' which occurs when one carrier announces in advance that it will raise certain fares on a given date—and competing carriers match the increase."\textsuperscript{280}

Because of the concern over price signaling through the use of publicity and reservation systems, airlines could be prohibited from publicizing notice of their fare increases in advance of actually entering such increases permanently into the database.\textsuperscript{281} In addition, airlines could be limited in providing advance notice of when fare decreases will be terminated.\textsuperscript{282} If this proposal is implemented, airlines would have to enter their increases into the reservation system prior to any publicity of the increase.\textsuperscript{283}

Although this alternative may reduce price-signaling, it may also create several problems. First, it may hurt consumers because travelers will not know when, if at all, a price

\textsuperscript{275} Id.
\textsuperscript{277} Id.
\textsuperscript{278} Id.
\textsuperscript{279} Id. Competitors show support for a rival's increase if they increase their own rates to match the rival's increase. Id.
\textsuperscript{280} David Field, Air Fares Heighten Antitrust Scrutiny, WASH. TIMES, Dec. 18, 1989, at B5.
\textsuperscript{281} Hamilton, supra note 276, at E1.
\textsuperscript{282} House Aviation Subcommittee Agrees to FAA Reauthorization Bill, AVIATION DAILY, July 30, 1993, at 164.
\textsuperscript{283} See id.
increase is to be expected.\textsuperscript{284} As a result, a passenger will have to pay a higher price if the fare increases between the time the passenger reserves the ticket and when the passenger actually purchases the ticket.\textsuperscript{285} Second, this alternative presupposes that the airlines are guilty of antitrust violations.\textsuperscript{286} In response to an actual proposal of this alternative, a spokesperson for Delta said that Delta would continue to publish advance notice of its fare increases as Delta sees “nothing in our actions which violates any antitrust laws.”\textsuperscript{287}

G. PERMIT CONSUMERS TO BRING PREDATORY PRICING SUITS

As another alternative, antitrust laws could be changed to “abandon reliance on competitors’ suits to enforce the rule against predation.”\textsuperscript{288} Instead, the laws could be changed to allow consumers to bring private causes of action for predatory pricing.\textsuperscript{289} Although this alternative differs from current antitrust laws, its effect would be similar in that the proposed plaintiffs’ damages would be the same damages as offered to current plaintiffs, monopoly overcharges.\textsuperscript{290} By allowing a consumer to recover similar damages, this alter-

\textsuperscript{284} Hamilton, supra note 276, at E1.

\textsuperscript{285} Id. Paul Ruden, senior vice president of the American Society of Travel Agents, stated that he could not understand how this alternative would help the consumer. Id. Ruden said that “[t]he consumer will always be rolling the dice on the question of whether to buy now or later.” Id. Elliot Seiden, vice president of NorthWest Airlines, added, “[t]he impact on consumers is going to be the loss of information that they use every day to make decisions about whether to buy and when to buy.” Id. This alternative may seem to hit less affluent families particularly hard as such families usually cannot afford to have their money tied up in tickets purchased months in advance. Id.

\textsuperscript{286} See Hamilton, supra note 276, at E1. For example, the early publishing of rate increases by airlines suggests that the airlines are participating in a price-signaling scheme by measuring the responses of competitors prior to permanently entering the rate in the database. Id.

\textsuperscript{287} Id.

\textsuperscript{288} Easterbrook, supra note 81, at 331.

\textsuperscript{289} Id. Judge Frank H. Easterbrook identified the proper consumer to be those consumers “who buy after predation has succeeded.” Id.

\textsuperscript{290} Id. In other words, a successful consumer plaintiff would be able to recover that portion of the price above marginal cost which consumers paid after the predator had succeeded in monopolizing the market.
native would "treat the successful predator like any other unlawful monopolist." 291

In addition to providing consumers with a private cause of action, this alternative has several other benefits. First, this change may make the predator's recoupment of lost profits impossible. 292 Second, this alternative may eliminate many of the superfluous predatory pricing suits being brought by competitors "whose incentive in litigating is not simply to obtain damages but also to hinder the operation of their rivals." 293

In spite of the benefits, this alternative also has several detriments. First, this alternative does not account for the damage done by failed predation attempts. 294 Second it may not prevent undetectable predatory pricing schemes. 295

IV. CONCLUSION

At a time when the airlines should be focusing on regaining profitability and strengthening their faltering industry, some airlines also appear to be engaging in anticompetitive behavior, namely, predatory pricing. 296 Although some air-

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291 *Id.* Easterbrook also likened his alternative to current antitrust law in that the consumer would have to show the common elements of: 1) selling price greater than marginal cost; and 2) predatory intent on the seller's part. Easterbrook, *supra* note 81, at 331.

292 *Id.* Easterbrook suggested that the frequency of predatory pricing would decrease because now there would be two watchdogs, the government and consumers, to carefully scrutinize any potential predator's actions. *Id.*

293 *Id.*

294 *Id.* For instance, successful consumer plaintiffs must show monopoly overcharges, which in turn suggest that only predators who succeeded in monopolizing the market could be charged by a consumer plaintiff; would-be predators who only priced below marginal cost but who did not succeed in monopolizing the market could not be successfully sued by a consumer plaintiff. Easterbrook, *supra* note 81, at 331-32.

295 *Id.* Because consumers are not as knowledgeable about sellers' costs and expenses, the average consumer may not be able to detect predatory pricing schemes, and many such schemes may go unnoticed. *Id.*

296 See NATIONAL COMMISSION TO ENSURE A STRONG, COMPETITIVE AIRLINE INDUSTRY, CHANGE, CHALLENGE AND COMPETITION 12 (1993) [hereinafter COMMISSION REPORT]. The Commission Report describes the airlines as "heavily leveraged, financial weaklings," possibly due to the accumulation of over $35 billion in debt. *Id.*
lines appear to be acting with predatory intent, courts rarely find actual predatory pricing. Rather than disciplining an overly aggressive party, predatory pricing suits only seem to impose extraordinary costs on the parties involved. In a struggling industry like the airline industry, such legal costs can be crippling and can often detract from the airlines' attempts to operate at peak efficiency, capacity, and profitability.  

Despite rare judicial findings of predatory pricing, airlines may nonetheless implement varying measures, such as Value Pricing, which may have some anticompetitive effects, regardless of whether the behavior is actionable as predatory pricing or not. These instances of disputably anticompetitive behavior suggest the need to reevaluate the predatory pricing cause of action by either abolishing the predatory pricing theory or by allowing questionable conduct. Although many potential reformulating solutions exist, one can only surmise which is the correct or most effective option. Nevertheless, something must be done to address this situation as airlines can no longer afford to fight futile, costly predatory pricing battles in court.

Seemingly not pleased with the status quo, the Clinton Administration has taken several steps to suggest that it is at least willing "to enforce antitrust laws and curb predatory practices by the major carriers." First, President Clinton appointed a "Commission to Ensure a Strong Competitive Airline Industry," whose job was to examine the industry and prepare a report detailing a plan to ensure the industry's preservation and advancement. After researching the needs of the industry, the Commission stated that "the federal government should vigorously enforce prohibitions..."
against anticompetitive mergers and acquisitions.\textsuperscript{301} In addition, the Commission stated that the government should not seek greater regulation of the industry as such regulation would cause the airlines to be "mired in litigation," which would deny the airlines "flexibility to permit rapid response to changing conditions."\textsuperscript{302} Thus, the Commission seemed to suggest greater antitrust enforcement without greater regulation as an answer to the industry's anticompetitive problems.\textsuperscript{303}

In addition to creating the Commission, President Clinton appointed Federico F. Peña to be Secretary of Transportation.\textsuperscript{304} One author described Peña as an "activist" who has already "demonstrated a willingness to make tough calls on contentious issues."\textsuperscript{305} For example, Peña actively discouraged NorthWest Airlines from trying to drive a new up-start airline, Reno Air, from one of its southwest markets.\textsuperscript{306} As a result of Peña's involvement, NorthWest retreated and Reno Air still flies in this market.\textsuperscript{307} Thus, Peña appears to be willing to take an active stance against antitrust violations.\textsuperscript{308}

In addition to appointing Peña as Transportation Secretary, President Clinton appointed Anne K. Bingaman as As-

\textsuperscript{301} Commission Report, supra note 296, at 14.
\textsuperscript{302} Id.
\textsuperscript{303} Id.
\textsuperscript{304} Kirk Victor, Cabinet Scorecard, Nat'L J., Nov. 6, 1993, at 2642.
\textsuperscript{305} Id.; see also The DOT's New Attitude: Interview with the Department of Transportation Secretary Federico Peña, TRAFFIC MGMT., Dec. 1993, at 35. In this interview Peña stated that he has "a philosophy that is very different from [his] predecessor's. [He] will not tolerate clearly anti-competitive behavior or predatory pricing and predatory conduct. . . . Under [his] administration, [the DOT has] taken the position that where appropriate, [the DOT] will assert [its] jurisdiction." Id.
\textsuperscript{307} Knibb, supra note 306, at 24.
\textsuperscript{308} See Victor, supra note 304, at 2642-43.
sistant Attorney General for Antitrust. Sources call her "aggressive" and state that she has already "scared business with tough talk about vigorous [antitrust law] enforcement." Additionally, it appears that the Antitrust Division is covertly investigating the airline industry for possible antitrust abuses, possibly including predatory pricing violations. As a result of these appointments, it appears that the Clinton Administration is addressing the problem of predatory pricing through greater enforcement of the antitrust laws rather than through greater regulation.

The Clinton Administration's choice to pursue greater enforcement of the antitrust laws may or may not solve the problems within the airline industry due to predatory pricing and other anticompetitive behavior. The point is that the Administration appears to be concerned with this problem and appears to recognize the importance of its resolution. In contrast, over the past decade a policy of leniency and lack of enforcement has been pervasive and has resulted in much destructive competition. Whether the Clinton Administration's choice is the correct one remains to be seen, but the truth of the matter is that it is a step in the right direction. Whichever path the government and courts select to address this problem, a decision must be made immediately as airlines can no longer afford to bring or defend against futile claims of predatory pricing while pursuing profitability and attempting to restore the health of their beleaguered industry.

509 Moore, supra note 118, at 2666.
510 Id.
511 See id. One antitrust attorney stated that "antitrust, which was sluggish if not dead in the mid-1980's, is now extremely active. . . ." Id. Another attorney stated that "[i]t's fair to say that we have now completed a swing of the pendulum," as antitrust attorneys saw their business decrease during the Reagan and Bush Administrations. Id.