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PREDATORY PRICING LEGISLATION— IS IT NECESSARY?

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The past decade has seen several efforts to amend Section 3 of the Robinson-Patman Act,¹ the primary federal price discrimination statute. Section 3 proscribes general price discrimination, geographic price discrimination utilized to destroy competition, and sales at "unreasonably low prices" employed to destroy competition or eliminate a competitor.²

This article will be largely concerned with the "unreasonably low prices" provision of Section 3 of the Robinson-Patman Act. In order

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¹ 15 U.S.C. § 13a (1970). Section 3 provides:

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to be a party to, or assist in, any transaction of sale, or contract to sell, which discriminates to his knowledge against competitors of the purchaser, in that, any discount, rebate, allowance, or advertising service charge is granted to the purchaser over and above any discount, rebate, allowance, or advertising service charge available at the time of such transaction to said competitors in respect of a sale of goods of like grade, quality, and quantity; to sell, to contract to sell, goods in any part of the United States at prices lower than those exacted by said person elsewhere in the United States for the purpose of destroying competition, or eliminating a competitor in such part of the United States; or, to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.

² The Robinson-Patman Bill, H.R. 8442, 74th Cong., 2d Sess. (1936), was bitterly opposed at the time of its passage. Representative Emanuel Celler contended that the bill was "intended, under cover of devious but innocent appearing wording, to assure profitable business to a trade regardless of the efficiency of service rendered the consumer" H.R. Rep. No. 2287, 74th Cong., 2d Sess. 26-27 (1936). Representative Celler also argued that the bill would "result in price raising and, in some cases, actual price fixing." 80 Cong. Rec. 8109 (1936). Section 3 was introduced by Senators Borah and Van Nuys as a compromise.

to provide an understanding of the bases of the criticism directed at section 3 and the attempts to amend that section, the article will begin with a discussion of the current debate over predatory pricing practices. Suggested statutory alternatives to section 3 will then be analyzed. Finally, the article will provide a brief description of a possible alternative to current enforcement standards suggested by judicial decisions interpreting the unreasonably low prices provision of section 3.

There are several reasons for current interest in the unreasonably low prices provision of section 3 and the attempts to amend that section. First, the Supreme Court, in *Nashville Milk Co. v. Carnation Co.*,³ held that section 3 is not a part of the antitrust laws as defined in Section 1 of the Clayton Act;⁴ accordingly the private-action sanctions of the Clayton Act are not applicable to the "unreasonably low" pricing conduct prohibited by section 3. Section 3, the Court ruled, "contains only penal sanctions for the violation of its provisions . . . [and] in the absence of a clear expression of congressional intent to the contrary, these sanctions should . . . be considered exclusive, rather than supplemented by civil sanctions of a distinct statute."⁵ Scrutinizing the Robinson-Patman Act's legislative history, the Court reasoned that Congress did not intend Section 3 of that Act to become part of the Clayton Act, and that the section was not intended to carry more than criminal sanctions. The Court did, however, state that price discriminations, "to the extent that they were common to both that section and § 2 of the Clayton Act, were also understood to carry, *under the independent force of the Clayton Act*, the private remedies provided in §§ 4 and 16 of the Clayton Act."⁶

³ 355 U.S. 373 (1958).

⁴ 15 U.S.C. § 12 (1970) designates as part of the "antitrust laws" the Sherman Act, 15 U.S.C. §§ 1 et seq. (1970); parts of the Wilson Tariff Act, 15 U.S.C. §§ 8 et seq. (1970); an act amending the Wilson Tariff Act, 15 U.S.C. § 11 (1970); and the Clayton Act, 15 U.S.C. §§ 12-27, 44, and 29 U.S.C. §§ 52-53 (1970).

⁵ 355 U.S. at 377. The Court seemed to be heavily influenced in its decision by the possibility of abuse inherent in a private cause of action created by what it considered a rather vague provision—"unreasonably low prices." *Id.* at 378.

⁶ *Id.* at 380. The conference report on the bill noted that

[t]he provisions of section 2 of the House bill were agreed to without amendment by the Senate [I]t appears in the conference report as section 2 of the bill itself, rather than as part of the amendment to section 2 of the Clayton Act which is provided for in section 1 to the present bill.

. . . .

Subsection (h) of the Senate amendment . . . appears in the conference report as section 3 of the bill itself. It contains the operative and penal provisions of what was originally the Borah-Van Nuys bill (S. 4171). While they overlap in some respects, they are in no way inconsistent with the *provisions of the Clayton Act amendment provided for in Section 1*. Section 3 authorizes nothing which that amendment prohibits, and takes nothing from it. On the contrary, where only civil remedies and liabilities attach to violations of the *amendment provided in section 1*, section 3 sets up special prohibitions as to the particular

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Whether or not the majority opinion is correct,⁷ it appears that *Nashville Milk* vitiated the unreasonably low prices provision of section 3 as far as the private plaintiff is concerned. It should be noted, first, that the Court's denial of recovery for damages imposed upon the plaintiff by the illegal acts of the defendant stands in sharp contrast to the growing trend in public policy to expand recovery rights of persons injured by violations of statutes intended to provide protection from economic wrongdoing.⁸ The decision specifically prohibits a plaintiff, allegedly injured by sales at unreasonably low prices, from bringing a private suit against an alleged violator of section 3. Therefore, since the section must be treated solely as a criminal statute, enforcement is entrusted to the Department of Justice;⁹ and it should be noted that during the quarter-century existence of the Robinson-Patman Act prior to *Nashville Milk*, the number of suits instituted by private plaintiffs greatly exceeded those brought by the Department.¹⁰ To say that the Department had been less than enthusiastic about enforcing section 3 prior to the *Nashville Milk* decision would not be an inaccurate statement.¹¹

Since *Nashville Milk*, then, the balance of power has appeared to be weighted in the favor of the predator. The decision has been responsible in part for several attempts to enact legislation which would adjust that balance¹² by making the practice of selling at unreasonably

offenses therein described and attaches to them also the criminal penalties therein provided.

H.R. Rep. No. 2951, 74th Cong., 2d Sess. 8 (1936) (emphasis added).

⁷ Justice Douglas, dissenting, was not moved by the majority's logic and was of the opposite opinion as to Congress' intentions regarding § 3 and private actions. He was not convinced that suits for treble damages should be allowed only for price discrimination suits brought under § 2 of the Clayton Act and not for those brought under § 3 of the Robinson-Patman Act. His conclusion was that "there is no suggestion that any such line was being drawn by the Congress. The emphasis on the restrictive effect of § 3 relates simply to its criminal sanctions, not to the remedial provisions with which we are presently concerned." 355 U.S. at 384.

Nashville Milk was only the culmination of a number of cases concerning this question. As early as 1942, a contrary conclusion had been reached by a district court that held that § 3 was part of the antitrust laws, and that a private civil action could be brought for an alleged violation of the section. *Atlantic Brick Co. v. O'Neal*, 44 F. Supp. 39 (E.D. Tex. 1942). See also *Myers v. Shell Oil Co.*, 96 F. Supp. 670 (S.D. Cal. 1951); *Spencer v. Sun Oil Co.*, 94 F. Supp. 408 (D. Conn. 1950); and *Balian Ice Cream Co. v. Arden Farms Co.*, 94 F. Supp. 796 (S.D. Cal. 1950).

⁸ See, e.g., § 130 of the Consumer Credit Protection Act, 15 U.S.C. § 1640 (1970), allowing civil suits by private individuals allegedly injured by violations of that Act's disclosure provisions.

⁹ See F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 468 (1962).

¹⁰ *Id.* at 468-70.

¹¹ "Section 3 has seldom if ever been utilized by the Government . . ." C. Austin, *Price Discrimination and Related Problems Under the Robinson-Patman Act* 4 (1953). See also F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 469 (1962).

¹² See, e.g., S. 1494, 91st Cong., 1st Sess. (1969). The hearings on S. 1494 were opened by Senator Hart with this statement:

low prices or selling below cost,¹³ for the purposes of destroying competition or eliminating a competitor, the basis of a private cause of action. The most recent such attempt is S. 1457,¹⁴ a bill introduced by Senator Sparkman in April 1971. The bill was aimed at eliminating the evils inherent in below-cost selling and the use of "loss leaders"¹⁵ by incorporating as part of the anti-trust laws the statutes proscribing these predatory pricing activities, in order to give to those injured by such practices an opportunity to file suit in federal courts in their own behalf, without awaiting relief through governmental action.

Another judicial decision, *United States v. National Dairy Products Corp.*,¹⁶ has also focused attention on Section 3 of the Robinson-Patman Act. In *National Dairy*, the constitutionality of that section's provision of penal sanctions for the practice of selling goods at "unreasonably low prices for the purpose of destroying competition or eliminating a competitor" was challenged. The defendant argued that the section was unconstitutionally vague and indefinite as applied to sales made *below cost*. The Supreme Court upheld the statute, reasoning that since section 3 had given the defendants adequate notice that sales below cost with the intent to destroy competition were unlawful, they were well aware that their conduct was proscribed. Given this awareness, the Court concluded, the defendants could not be heard to

The present proposal would make section 3 of the Robinson-Patman Act part of the antitrust laws by repealing that section and reenacting it as section 3A of the Clayton Act. It eliminates altogether the first two provisions of the present section 3—which have been continuously labeled as redundant—and also would eliminate the present criminal sanctions.

However, the bill would enable private parties suffering damages by reason of violations of the third provision of section 3 [sales at unreasonably low prices] to bring treble damage actions against the violator and would authorize the United States to bring injunctive proceedings to restrain violations of the new section 3A.

Hearings on S. 1494 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 1 (1970).

¹³ "Cost" has been defined as "fully distributed cost, which includes the cost of producing or acquiring or processing the product, plus the additional allocated delivery, selling and administrative costs involved in doing business." S. 1457, 92d Cong., 1st Sess. § 3A (1971). In this context, see *United States v. National Dairy Products Corp.*, 372 U.S. 29, petition for rehearing denied, 372 U.S. 961 (1963); *National Dairy Products Corp. v. United States*, 350 F.2d 321 (8th Cir. 1965), vacated and remanded, 384 U.S. 883 (1966), reversed and remanded on procedural grounds, 384 F.2d 457 (8th Cir. 1967), cert. denied, 390 U.S. 957 (1968).

¹⁴ 92d Cong., 1st Sess. (1971).

¹⁵ "Loss leading" is a retailing practice whereby a particular item, usually a popular one, is sold at a loss in order to build up store traffic. In *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 334 (1959), the Court observed that "[t]he selling of selected goods at a loss in order to lure customers into the store is deemed not only a destructive means of competition; it also plays on the gullibility of customers by leading them to expect what generally is not true, namely, that a store which offered such an amazing bargain is full of other such bargains." *Id.* at 340.

¹⁶ 372 U.S. 29, petition for rehearing denied, 372 U.S. 961 (1963).

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complain that section 3 was "void for vagueness."¹⁷ *National Dairy*, then, is significant in that the Court left no doubts as to the propriety of utilizing Section 3 of the Robinson-Patman Act to proscribe predatory pricing practices such as sales at unreasonably low prices or sales below cost. Any doubts raised by *Nashville Milk* as to the legal effect of section 3 were largely dispelled by *National Dairy*.

The issues raised in *Nashville Milk* and *National Dairy*, however, are only one facet of a widespread debate. Inasmuch as legislation proscribing sales at unreasonably low prices has attracted numerous critics and detractors, it is necessary to discuss and evaluate the two main criticisms directed at the legislation—first, that it is not necessary because the alleged practices do not exist; and secondly, that in light of the existence of other legislation dealing with predatory pricing practices, laws concerned with sales at unreasonably low prices are redundant.¹⁸ In order to understand either argument, the context in which they arise—a context in which the very existence of predatory pricing is questioned—must first be examined.

I. THE NECESSITY OF PROHIBITIONS AGAINST SALES AT UNREASONABLY LOW PRICES

The question recurs whether such practices as price discrimination or sales below cost in fact exist, and, if they do exist, whether they have the requisite anticompetitive impact to justify governmental interference. There has long been opposition to the public policy expressed by laws incorporating the "conduct" approach to anticompetitive behavior, that is, to laws such as those proscribing predatory pricing practices. Some critics have steadfastly denied even the existence of such trade practices as sales at unreasonably low prices or predatory price discrimination. Others have taken the position that although practices injurious to competition might exist, their harmful results are relatively insignificant and could be eliminated by altering the structure of the affected industry.¹⁹

¹⁷ 372 U.S. at 37. As *National Dairy* indicates, one of the chief objections to previous efforts to enact sales below cost legislation in general, and to § 3 specifically, is that the phrase "unreasonably low prices" is vague. With respect to sales below cost, Senator Sparkman's bill overcomes this objection by explicitly defining the concept in the language of *National Dairy*. S. 1457, 92d Cong., 1st Sess. § 3A (1971).

¹⁸ Objection has also been made to the criminal provision of § 3 of the Robinson-Patman Act on the ground that it is unconstitutionally vague. However, as *National Dairy* indicates, the United States Supreme Court has dismissed these objections. In any case, our concern lies with the civil aspects of the provision in § 3 regarding sales at unreasonably low prices.

¹⁹ For a discussion of market "structure" and market "conduct," see R. Caves, *American Industry: Structure, Conduct, Performance* (1964). The principal elements of market structure are concentration, product differentiation and barriers to the entry of new firms. *Id.* at 16. Market conduct consists of three major areas: policies regarding

Two relatively recent additions to an increasing number of statements denying a need for further legislation prohibiting price discrimination are the Neal²⁰ and the Stigler²¹ reports. Both reports conclude that there is no need today for many of the present price discrimination statutes including, presumably, those statutes concerning sales at unreasonably low prices and sales below cost.²² This conclusion, the Stigler Report argues, is supported by the fact that "[t]here is now an impressive body of literature arguing the improbability that a profit-maximizing seller, even one with monopoly power, would or could use below-cost selling to monopolize additional market."²³ Further, both reports are opposed to any great degree of Robinson-Patman Act enforcement.²⁴ It is significant to note, however, that both reports, as well as the many studies critical of the Robinson-Patman Act and its enforcement, are generally devoid of any empirical data in support of the conclusions reached.²⁵

setting prices, policies regarding setting the quality of the product, and policies aimed at coercing rivals. *Id.* at 37.

²⁰ White House Task Force Report on Antitrust Policy, BNA Antitrust & Trade Reg. Rep., No. 411, May 21, 1969, Pt. II [hereinafter cited as Neal Report].

²¹ President's Task Force Report on Productivity and Competition, 5 CCH Trade Reg. Rep. ¶ 50,108, at 55,129 (1969) [hereinafter cited as Stigler Report].

²² The Neal Report, for example, argued that

[m]any of the reasons for price discrimination are related to the improved functioning of the competitive system. Price discrimination has an adverse effect on competition only in exceptional cases. Therefore, a statute restricting price discrimination should be narrowly drawn, to avoid losing the important benefits of price discrimination in an excessive effort to curb limited harm.

Neal Report, *supra* note 20, at 10. The Stigler Report concludes that "a prohibition against price discrimination may preclude the kind of competition that is most likely to lead to lower prices in oligopolistic industries." Stigler Report, *supra* note 21, at 55,137.

²³ Stigler Report, *supra* note 21, at 55,132. It should be noted that the Stigler Report assumes that it is possible to predict accurately the working of "the forces of competition." Any prediction of how a profit-maximizing seller will behave must rest on the assumption that the seller has almost perfect knowledge of the relevant factors concerning his market and that he acts on the basis of this knowledge. Obviously, such perfect knowledge is not generally available, and decisions are invariably based on imperfect knowledge. More important, whether the profit-maximizing seller will act logically and rationally depends on a variety of circumstances. Therefore it is not at all clear whether the actions of a profit-maximizing seller can be as readily predicted as the Report suggests.

²⁴ The Neal Report states that the Robinson-Patman Act "tended to focus attention of courts and enforcement agencies upon the plight of individual competitors rather than the state of competition in the line of commerce affected. Efforts to preserve individual competitors sometimes seriously restricted the forces of competition." Neal Report, *supra* note 20, at 19. The Stigler Report viewed the "Federal Trade Commission's tendency in recent times to relax the enforcement of the [Robinson-Patman] Act as desirable, but so long as private treble damage actions are available, an inadequate reform." Stigler Report, *supra* note 21, at 55,137.

²⁵ See Posner, Dissenting View: Do We Really Need an FTC? 3 Antitrust Law & Econ. Rev. 65 (Spring 1970). Other commentators, referring to criticism of the antitrust laws in general—criticism analogous to that made of the Robinson-Patman Act—observed that "[t]he amazing thing about the vociferous new criticism of the antitrust laws is the paucity of evidence it has offered to show that antitrust decisions have actually

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Rather, the experiences of the Federal Trade Commission, Congress and the courts dictate a conclusion which conflicts with that of the Stigler and Neal reports.²⁶ Indeed, there exists an "impressive body of literature" supporting the proposition that sales at unreasonably low prices have been, and continue to be, a serious problem for the businessman.²⁷ Judging from the number of complaints which the Commission receives alleging sales at unreasonably low prices, the problem would appear to be far from non-existent.²⁸ Some complaints included charges that predatory pricing practices had such disastrous effects on small business firms that many were not expected to survive. Witnesses testifying before a subcommittee of the Senate Judiciary Committee said that this result has already occurred in the dairy industry, which has witnessed the disappearance of thousands of independent firms.²⁹ The testimony adduced at these hearings included allegations that predatory price discrimination practices in the form of unreasonably low prices had accounted for the disappearance of many of the independent firms.³⁰

The dairy industry is not the only vivid example of the impact of

had or even threatened to have the awful economic consequences that they predict so freely." J. Dirlam & A. Kahn, *Fair Competition, The Law and Economics of Antitrust Policy* 260 (1954).

²⁶ The conclusion of those reports has been "refuted by hundreds of cases brought by the Department of Justice and the Federal Trade Commission. . . ." Hearings on Small Business and the Robinson-Patman Act Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business, 91st Cong., 1st Sess., pt. 1, at 196 (1969).

²⁷ Professor Robert C. Brooks, Jr., has compiled a list of such a "body of literature," which appears in the Hearings on S. 1494 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 158 (1970) [hereinafter cited as 1969 Price Discrimination Hearings]. His compilation includes the following sources: J. Bain, *Industrial Organization* 422-23 (2d ed. 1968); J. Dirlam & A. Kahn, *Fair Competition, The Law and Economics of Antitrust Policy* 212-216, 234 (1954); Brooks, *Injury to Competition Under the Robinson-Patman Act*, 109 U. Pa. L. Rev. 777 (1961); Stocking, *The Attorney General's Committee's Report: The Businessman's Guide Through Antitrust*, 44 Geo. L.J. 1 (1955). As to the potential impact of price discrimination in general, see W. Shepherd, *Market Power & Economic Welfare* (1970), where the author concludes that

IBM appears to have gained and held its market share mainly via substantial and pervasive price discrimination of several sorts. This is possible because IBM probably has large amounts of overhead or floating costs in its development and sales support activities. Accordingly, IBM is inherently able and induced by rational profit-maximizing to engage in systematic price discrimination on a larger scale.

Id. at 227.

²⁸ See Statement by A. Everette MacIntyre Before the Master Photo Dealers' and Finishers' Ass'n, *A Look at Unfair Methods of Competition*, Chicago, April 21, 1971.

²⁹ See 1969 Price Discrimination Hearings, *supra* note 27, at 107-08.

³⁰ *Id.* at 107-08, 115, 120. See also Hearings on Small Business Problems in the Dairy Industry Before a Special Subcomm. of the House Select Subcomm. on Small Business, 86th Cong., 2d Sess., pt. V, at 769 (1959). For testimony relating to the petroleum industry, see 1969 Price Discrimination Hearings, *supra* note 27, at 162-63, 165.

predatory pricing behavior. In 1967, a highly profitable twenty-seven store food chain from New Jersey, specializing in private brands and discount prices, planned to open a dozen or more stores in the Washington, D.C. area. Its price structure was about four percent below the price level prevailing in the Washington area market. When the chain opened three stores, the three major chains already operating in the area met the new competition by offering allegedly below-cost prices in the stores that they operated in the immediate vicinity of the new entrant's stores. The New Jersey chain was forced to withdraw.³¹ Subsequently, in 1970, a California-based discount food chain opened two large discount centers in the Maryland and Virginia suburbs of Washington. The pricing practices of the centers caused a marketing shift to general discounting by area food stores, resulting in a consumer benefit of approximately \$40 million a year. The California food chain, unlike its New Jersey counterpart, was not met with below-cost pricing by the three major chains. Perhaps an FTC investigation prompted by the 1967 episode had had a prophylactic effect.³²

Congressional experience similarly indicates the continued existence of predatory pricing practices. When Senator Hart commenced price discrimination hearings in 1969 he observed:

Another popular myth among some of the antitrust academicians is that predatory pricing does not exist. I am not sure what sort of empirical data they have gathered to prove this point, but I suggest they go out into the marketplace and talk to some independent businessmen. These men know that they are being destroyed, not by inefficiency nor by honest competition in all cases, but by unfair predatory acts. Then I would suggest these same experts read the detailed testimony of these businessmen who have talked to this Congress giving chapter and verse for the past 10 years.³³

During the course of the hearings that followed, considerable evidence was introduced to support Senator Hart's observations.³⁴ A representative incident was related by one witness concerning a two-hundred outlet discount supermarket chain that used milk as a continuing loss leader in a particular market.³⁵ The chain purchased milk for thirty-nine cents per half gallon and sold it at the same price instead of the

³¹ Hearings on Small Business and the Robinson-Patman Act Before the Special Subcomm. on Small Business and the Robinson-Patman Act of the House Select Comm. on Small Business, 91st Cong., 2d Sess., pt. 3, at 725 (1970).

³² For the particulars of this investigation, see Staff Report to the Federal Trade Commission, *Discount Food Pricing in Washington, D.C.* (1971).

³³ 1969 Price Discrimination Hearings, *supra* note 27, at 2.

³⁴ *Id.* at 102-20.

³⁵ *Id.* at 107.

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normal retail price, which would include a markup of ten cents. Present judicial opinions categorize this practice as a "sale below cost."³⁰ The end result of such a practice must be an adverse effect on competition due to the weakening or elimination of competitors. In this case, for example, one immediate result of sales below cost was the demise of home delivery by local dairy processors, with a corresponding loss of sales by those processors.³⁷ Admittedly, home delivery may not be the most efficient method of getting milk into the hands of the consumer at the lowest possible price. Many consumers, however, prefer this method of distribution to retail store purchases, and it appears likely that in this case home delivery would have survived absent predatory pricing.

Another excellent illustration of predatory pricing behavior in-

³⁰ The outer boundaries of what constitutes a sale below cost have been established in *National Dairy Products Corp. v. United States*, 350 F.2d 321 (8th Cir. 1965), where the court held that sales need not be below *direct* cost to be sales below cost; rather, they can be classified as sales below cost if they are made somewhere below *fully distributed* cost, which includes the cost of production plus the delivery, selling and administrative costs. *Id.* at 330. Earlier, the Supreme Court held in *United States v. National Dairy Products Corp.* that "[w]hether 'below cost' refers to 'direct' or 'fully distributed' cost or some other level of cost computation cannot be decided in abstract." 372 U.S. 29, 34 (1963). In other words, the seller's intent is considered as at least as important as theoretical cost considerations. As the court observed in *Ben Hur Coal Co. v. Wells*, 242 F.2d 481 (10th Cir.), cert. denied, 354 U.S. 910 (1957): "In the final analysis, the question resolves itself into one of intent and purpose, not a choice of accounting methods." *Id.* at 486. See also F. Rowe, *Price Discrimination Under the Robinson-Patman Act* 466 (1962). There are, of course, instances in which the requisite predatory intent is lacking and where sales below cost are perfectly justified, as when they are made for a legitimate commercial objective such as liquidation of excess, obsolete or perishable merchandise. *United States v. National Dairy Products Corp.*, 372 U.S. 29, 37 (1963).

³⁷ 1969 Price Discrimination Hearings, *supra* note 27, at 107. The use of loss leaders and its possible adverse effect on competition has been described by the National Commission on Food Marketing as follows:

While price specials constitute price competition for the few people who shop by items, most shoppers buy a group of items. The supermarket is spending considerable time and ingenuity in pricing its mix of merchandise to appear competitive and remain profitable. For this reason, the advertised specials do not give the housewife many clues concerning alternate offerings for her shopping list. Since she cannot determine at which store the price (for her list) is lower, it is hard to say the price is the primary focus of competition. The *price special and the supermarket efforts at pricing the mix are not examples of authentic price competition, and they do not assure the kind of performance that price competition is expected to encourage*. Price specialing by supermarkets, however, may result in competitive injury to retail operations specialized in a few lines. Retail home delivery of dairy products is an example. Consumers may value the convenience of home delivery enough to pay the difference between store costs and delivery costs. If fluid milk were specialied so intensely that the supermarket's selling price fell below cost, dairy delivery operation might be hurt significantly.

National Comm'n on Food Marketing, *Organization and Competition in Food Retailing* 176-77 (1966) (emphasis added). See also *Safeway Stores, Inc. v. Oklahoma Retail Grocers Ass'n, Inc.*, 360 U.S. 344 (1959).

volving sales below cost is *National Dairy Products Corp. v. FTC*.³⁸ The Kraft Foods Division of National Dairy, the largest producer of fruit spreads in the United States and the only nationwide seller of a full line of different flavored spreads, was not satisfied with its sales volume in the Baltimore, Washington, D.C., Richmond and Norfolk market areas.³⁹ To expand its share of the market in these areas, Kraft embarked upon a one-for-one promotion—for each case bought during January 16, 1961, and February 10, 1961, one case would be delivered free. The response was overwhelming and, since there was no restriction on quantities, retailers bought to the limit of their financial abilities.⁴⁰ Thus, while in 1960 Kraft had sold 168,977 cases in these four trade areas, during the 1961 twenty-six day promotion period 400,803 cases were sold.⁴¹ Both the FTC⁴² and, on appeal, the United States Court of Appeals for the Seventh Circuit, found that the program constituted sales below cost and violated Section 2(a) of the Robinson-Patman Act.⁴³

Of greater significance, for the purpose of this discussion, was the court's finding that Kraft's sales below cost resulted in "great and damaging" injury to competition.⁴⁴ During the promotion, the court

³⁸ 412 F.2d 605 (7th Cir. 1969). The case was brought by the FTC under § 2(a) of the Robinson-Patman Act as a geographic price discrimination case.

³⁹ In 1960, Kraft had an annual sales volume of \$475,129 in the four market areas, a total comparable to the combined sales volume of its leading independent regional competitors. Kraft had achieved this sales volume in only four years, notwithstanding the fact that its prices were higher than those of its leading independent competitor. *Id.* at 609 n.2.

⁴⁰ To finance even larger purchases, retailers converted the product to cash by selling the spreads at half price to the consumer. This development caused Kraft to cancel plans for its own retail promotional activities which had been scheduled in addition to the one-for-one promotion in order to move the spreads. *Id.* at 609.

⁴¹ Of the 400,803 cases to be delivered free, only 153,909 were actually delivered; for the balance of 246,894 Kraft reimbursed the retailer in cash amounting to \$829,005. *Id.* at 609 n.2.

⁴² *National Dairy Products Corp.*, [1967-1970 Transfer Binder] CCH Trade Reg. Rep. ¶ 18,027, at 20,412 (FTC 1967).

⁴³ 412 F.2d at 610-11. The court concluded that while intent need not be a prerequisite for a violation of § 2(a) of the Robinson-Patman Act, such design could be inferred from the fact situation in *National Dairy*. *Id.* at 618-19.

⁴⁴ *Id.* at 610, 617. The court noted that

[c]ompetition was lessened drastically for at least six months or more and thereafter to a certain extent was lessened for some time. The program not only diverted sales of competitors but made it impossible to compete with petitioner for the market. This is so because of the nature of the program as to below cost pricing, unlimited as to quantity of purchasing, and other attendant factors in the program of six months duration. Nothing prevented the trade from purchasing one month to a year or more supply of fruit spreads although a feeble and ineffective effort was made by petitioner during the 26 day period to screen orders. Strong existing competition was rendered helpless to compete with below cost pricing as the competitors were not the financial equal of the petitioner. Aside from the actual substantial lessening of competition for such a substantial period of time there was the reasonable probability based upon substantial facts that

found, supermarkets reduced the shelf space of many Kraft competitors in order to move Kraft's spreads. This preference was continued after the promotion, thereby creating a lasting effect and causing Kraft's three principal independent competitors to suffer substantial declines in sales.⁴⁶

No conclusion can be drawn from cases such as *National Dairy* but that predatory pricing practices do exist. As *National Dairy* indicates, competitive injury need not necessarily be the result of superior performance; it may also arise from the practice of selling at unreasonably low prices. The examples given above, then, strongly suggest a need for legislation enabling anyone who is injured by such practices to seek redress in his own behalf. More significantly, they demonstrate both the continued existence of predatory pricing and the continuing need for enforcement of the laws against such practices.

It should be clear that those instances of predatory pricing which are detected should be viewed as the top of an iceberg, with potential for considerable damage lying beneath the surface. That potential could well be realized if existing predatory pricing proscriptions were to be weakened or repealed altogether. Further, the existence of the legislation reduces the visibility of predatory pricing practices. Those who wish to engage in such practices successfully must do so without being detected. Hence a predator may consider elimination of a competitor too risky and may prefer only to soften the competition, that is, to use predatory pricing to prevent members of the particular industry from competing vigorously and aggressively. The predator could maintain a price structure most favorable to him under the threat of increased predation, and his competitors in the industry, eager to remain in business, might accept such an arrangement, and so make detection virtually impossible. Moreover, the weakened victim may be eventually acquired by the predator, leaving no one to complain. It appears, then,

the duration of such damage to competitors would be even greater. The timely interference of the Federal Trade Commission investigation of petitioner's program brought about a drastic change in the program five weeks later which prevented greater destruction of a substantial segment of competition in the areas.

Id. at 618.

⁴⁶ Id. at 617. For other cases involving predatory pricing see: *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967); *Forster Mfg. Co. v. FTC*, 335 F.2d 47 (1st Cir. 1964), cert. denied, 380 U.S. 906 (1965); *United States v. National Dairy Products Corp.*, 372 U.S. 29 (1963); *Volasco Products Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), cert. denied, 372 U.S. 907 (1963); *Nashville Milk Co. v. Carnation Co.*, 355 U.S. 373 (1958); *Safeway Stores, Inc. v. Vance*, 355 U.S. 389 (1958); and *Moore v. Mead's Fine Bread Co.*, 348 U.S. 115 (1954). See also *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536 (1960), and *Armour & Co. v. United States*, 402 F.2d 712 (7th Cir. 1968). For a detailed analysis of the *Anheuser-Busch* case, see 1969 Price Discrimination Hearings, *supra* note 27, at 144, and MacIntyre, *The Federal Trade Commission's Antitrust Functions: Some Practical Problems in Enforcement*, 14 U.C.L.A. L. Rev. 997 (1967).

that to conclude that the dangers of predatory pricing practices are de minimis because they may not be highly visible is a grave mistake.

The evils attendant upon predatory pricing practices extend beyond the immediate injury to competition caused by the utilization of sales at unreasonably low prices and price discrimination to force competitors out of business. It has long been concluded that such practices also foster economic concentration.⁴⁶ The proposals noted above that would limit existing laws against price discrimination have not dealt with this problem. None of them contemplates restructuring industries which have become concentrated through means other than mergers—that is, through predatory pricing practices.⁴⁷ Were these suggestions to be followed, then, no protection at all would be afforded against concentration caused by price discrimination. It would seem, therefore, that until legislation is passed permitting the restructuring of an industry concentrated through predatory pricing, the existing laws dealing with the *causes* of such concentration ought not only to be retained, but expanded in scope and enforced more diligently than they are at present.

II. WOULD INCORPORATION OF SECTION 3 WITHIN THE ANTITRUST LAWS BE REDUNDANT?

Nashville Milk revealed that the private party who considers himself injured by practices forbidden by Section 3 of the Robinson-Patman Act can do little to redress his injury. Despite the inadequacy of governmental action, the private plaintiff cannot bring a private action under section 3 specifically alleging sales at unreasonably low prices. Yet many critics of predatory pricing legislation believe that legislation incorporating section 3 within the antitrust laws, and so enabling private plaintiffs to sue for treble damages, would be redundant.⁴⁸ These critics argue that predatory pricing practices, includ-

⁴⁶ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). See also W. Shepherd, *Market Power and Economic Welfare* (1970).

⁴⁷ It should be noted that the Neal Report does make certain recommendations aimed at the reduction of industrial concentration. Neal Report, *supra* note 20, at 12-13. Legislative action thereon, however, is doubtful. See, however, J. Dirlam & A. Kahn, *Fair Competition, The Law and Economics of Antitrust Policy* (1954), where it is pointed out:

The antitrust laws cannot be turned into a statute for the structuring of all markets in the direction of power competition. Apart from the economic objections to such a program, it would be politically impossible. It is questionable if it is worth devoting the bureaucratic resources necessary to achieve a reordered structure, and it is questionable too whether the resultant discord and confusion might not impair economic performance more than the final restructuring would improve it.

Id. at 284.

⁴⁸ During the course of the 1969 Price Discrimination Hearings on S. 1494, John Bodner, on behalf of the American Bar Association, argued that

[s]uch redundancy is totally unnecessary, for it is clear that existing laws

ing sales at unreasonably low prices, are already proscribed by Section 2 of the Sherman Act and Section 2 of the Clayton Act,⁴⁹ and accordingly the private remedies provided by those statutes are available as sanctions against such practices.

The merits of this argument ought to be examined. The conclusion that Section 2 of the Sherman Act invariably applies to practices covered by Section 3 of the Robinson-Patman Act might be sustained in the abstract, if predatory pricing practices *always* constituted attempts to monopolize. In reality, however, such attempts are not necessarily involved, as the case of *Hiland Dairy, Inc. v. Kroger Co.*⁵⁰ illustrates. Kroger was a retail grocery chain, operating about 1,500 retail grocery stores in some thirty states, that had used dairy products

provide a complete remedy against all nefarious pricing practices which the proponents of the bill [S. 1494] would prohibit. Predatory pricing and sales below cost without justifying reason violate the Sherman Act. Section 2 of the Sherman Act prohibits the use of predatory pricing practices to aid integration of two corporate units, to create a monopoly, to attempt to monopolize, or to destroy competition, and provides criminal, civil, and treble damage remedies. Moreover, Section 2 liability for predatory practices does not presuppose giant corporations or monopolists, but can also reach the predatory activities by smaller firms.

....

Predatory discriminatory pricing practices which are potentially injurious to competition are prohibited by Section 2 of the Clayton Act, as amended by the Robinson-Patman Act, unless based upon cost justification or the seller's good faith meeting of a competitor's price. This provision is fully enforceable by civil proceedings, administrative proceedings, and private treble damage suits. 1969 Price Discrimination Hearings, *supra* note 27, at 100.

A similar position was expressed in the Report of the Attorney General's Nat'l Comm. to Study the Antitrust Laws (1955): "The prohibition in Section 3 of predatory pricing is legally redundant. Predatory price slashing obviously constitutes an attempt to monopolize, already rendered a crime by Section 2 of the Sherman Act, and an unfair method of competition under Section 5 of the Federal Trade Commission Act." *Id.* at 201. The Stigler Report concluded that

[w]e can conceive of no case of discrimination in which the Sherman Act would not provide an adequate remedy—adequate that is, to protect the interest in maintaining an effectively competitive economy—and so we view Robinson-Patman enforcement as inherently likely to be pushed beyond proper limits.

Stigler Report, *supra* note 21, at 55,132. Further, Assistant Attorney General Richard W. McLaren has stated that

[p]ending . . . a review of the entire subject of price discrimination, we see no compelling necessity for incorporating into the antitrust laws the prohibition against predatorily unreasonably low prices. In appropriate cases, section 2 of the Clayton Act and/or section 2 of the Sherman Act are available to both private litigants and Government for civil relief against such trade practices.

1969 Price Discrimination Hearings, *supra* note 27, at 129-30. See also Comment, Sales Below Cost Prohibitions: Private Price Fixing under State Law, 57 Yale L.J. 391, 400 (1948).

⁴⁹ 15 U.S.C. § 13 (1970). It must be noted that "sales below cost . . . with the purpose, intent, or effect of injuring a competitor or destroying competition" are proscribed by statute in 30 states and are grounds for private injunction suits in 27 states. 2 CCH Trade Reg. Rep. ¶¶ 6621-29 (1971).

⁵⁰ 274 F. Supp. 966 (E.D. Mo. 1967), *aff'd*, 402 F.2d 968 (8th Cir. 1968), cert. denied, 395 U.S. 961 (1969).

as "loss leaders," allegedly with the specific intent to monopolize trade in fluid milk and dairy products. Then, in February 1967, Kroger commenced construction of a dairy processing plant with the capacity to supply more than twenty percent of the total consumer demand for fluid milk and other dairy products in the St. Louis, Missouri area.⁵¹ At that time, Kroger was selling approximately eight percent of the fluid milk and dairy products in that market, and the new plant would have given it the capacity to sell an additional twelve percent. The complaint alleged that the prospective additional capacity to be provided by the plant under construction would permit Kroger to use loss leaders more effectively, facilitating the establishment of monopoly power in the dairy product market. The plaintiff sought an injunction against completion of the plant on the ground that it constituted an attempt to monopolize in violation of Section 2 of the Sherman Act.

The district court concluded that "the mere construction of the processing plant by Kroger will not constitute a violation of Section 2 of the Sherman Antitrust Act."⁵² The United States Court of Appeals for the Eighth Circuit unanimously agreed:

An unlawful attempt to monopolize presupposes a "dangerous probability" of monopolization if the attempt is successful Twenty percent alone of a market would be insufficient to achieve a monopoly. While size is an earmark of monopoly power . . . , a substantial part of the market must be controlled by the monopolist to enable the raising and lowering of prices and the undue restriction on competition.⁵³

Moreover, the court concluded that inasmuch as all previous judicial decisions considering the question had found violations of Section 2 of the Sherman Act only when the defendants had market shares of at least seventy percent,⁵⁴ Kroger's employment of "loss leaders" could

⁵¹ For the purpose of the case, the geographic market was defined as the geographical area within 250 miles of St. Louis, Missouri. 402 F.2d at 970.

⁵² 274 F. Supp. at 969.

⁵³ 402 F.2d at 974.

⁵⁴ See *United States v. Grinnell Corp.*, 384 U.S. 563 (1966); *American Tobacco Co. v. United States*, 328 U.S. 781 (1946); and *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). In *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945), Judge Learned Hand stated that while the defendant's ninety percent share of the market was a monopoly, "it is doubtful whether sixty or sixty-four percent would be enough; and certainly thirty-three percent is not." *Id.* at 424. In *United States v. United States Steel Corp.*, 251 U.S. 417 (1920), the Court held that a fifty percent market share did not constitute a monopoly. The lowest market share found to constitute a monopoly was seventy percent. *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948). Former Assistant Attorney General Turner, testifying before a congressional committee, stated that "Section 2 [of the Sherman Act] refers to monopolies but not to oligopolies, and it has never been found to cover a monopoly in an industry in which the leading firm accounts for less than 70 percent of the market." Hearings on the Status and Future of

not be questioned under section 2 because Kroger did not possess the requisite percentage of market share. Further, the absence of the customary elements of monopoly, i.e., the power arbitrarily to raise prices and to eliminate competitors, convinced the court that no violation of section 2 existed.⁵⁵

Although under existing precedent the decision was not incorrect, it indicates that the courts will not use Section 2 of the Sherman Act as a means of preventing *all* acts of predatory pricing. If a plaintiff must prove either a "dangerous probability" of monopolization or the existence of a monopoly, then section 2 cannot be used to deter predatory pricing practices of an alleged violator who has less than a seventy percent market share.⁵⁶ As *Hiland* demonstrates, competition and competitors can be injured by predatory pricing practices which the Sherman Act would not proscribe and, however credible may be the theory that Section 2 of the Sherman Act generally applies to predatory pricing, it is true only in those instances where the plaintiff can show that the challenged practice would lead to monopolization or create a dangerous probability thereof. Further, the argument that incorporating predatory pricing legislation within the antitrust laws is unnecessary in light of the scope of Section 2 of the Sherman Act is not more than a refinement of the argument that any predatory pricing legislation is unnecessary, an argument shown to be fallacious by the examples of mischief given above. Finally, if section 2 adequately covers predatory pricing practices, as some allege, why was it deemed necessary by Congress in 1936 to enact further legislation proscribing these practices?⁵⁷

The second argument advanced in support of the contention that

Small Business Before the Select Senate Comm. on Small Business, 90th Cong., 1st Sess. 714 (1967).

⁵⁵ 402 F.2d at 974.

⁵⁶ The Department of Justice, in its brief as amicus curiae on *Hiland's* petition for certiorari, concluded that an

[a]ttempt to monopolize . . . is not limited to acts which, while falling short of monopolization, create a dangerous probability that it will be attained

It also reaches acts by one competitor that exclude another from the market, when the acts in themselves are so predatory, unfair, or clearly without legitimate business purpose as to be patently unreasonable restraints.

Memorandum for the United States as Amicus Curiae at 10-11, *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968 (8th Cir. 1968). Notwithstanding this conclusion, however, the Department insisted that § 2 of the Sherman Act is sufficient to deal with predatory pricing practices such as "loss leaders." *Id.* at 12.

⁵⁷ Between 1914 and 1936, four price discrimination suits brought under § 2 of the Clayton Act reached the courts. *Goodyear Tire & Rubber Co. v. FTC*, 101 F.2d 620 (6th Cir.), cert. denied, 308 U.S. 557 (1939); *Loose-Wiles Biscuit Co. v. FTC*, 299 F. 733 (2d Cir.), cert. denied, 266 U.S. 733 (1924), *National Biscuit Co. v. FTC*, 299 F. 733 (2d Cir.), cert. denied, 266 U.S. 613 (1924); *Mennen Co. v. FTC*, 288 F. 774 (2d Cir.) cert. denied, 262 U.S. 759 (1923). In each case, the Clayton Act was found not to have been violated.

providing private-action sanctions for predatory pricing legislation would be redundant rests on the assumption that all predatory practices are covered by Section 2(a) of the Clayton Act, the provision dealing with price discrimination. Section 2(a) makes it "unlawful . . . to discriminate in price between different purchasers of commodities of like grade and quality,"⁵⁸ unless such practices are necessary to "make . . . due allowance for differences in the cost of manufacture, sale, or delivery . . ."⁵⁹ or such discrimination was made "in good faith to meet an equally low price of a competitor . . ."⁶⁰ The argument would rely, then, on section 2(a)'s prohibition of price discrimination; and in so relying it ignores the fact that the practice of predatory pricing, such as selling at unreasonably low prices, need not involve concomitant price discrimination. In *National Dairy Products Corp. v. FTC*,⁶¹ for example, the Commission, alleging territorial price discrimination, relied successfully on Section 2(a) of the Clayton Act. Its reliance would have been in vain, however, had National Dairy made the one-for-one offer on a nationwide basis; there would then have been no discrimination which would have fallen within the proscription of Section 2(a) of the Clayton Act, because no competitor would have been discriminated against.

III. STRUCTURAL REMEDIES

Other critics of predatory pricing legislation, conceding the existence of predatory pricing practices and their injurious effects upon competition, have argued that the agents of antitrust enforcement should be concerned only with the result of such practices and not with the manner in which that result is achieved. These critics would ignore the price discrimination laws and would use instead legislation focused upon the *structure* of markets to eliminate predatory pricing practices and their injurious effects on competition. Those taking this position argue that if it can be shown that competition has been eliminated or curtailed as a result of the structure of a particular industry, the industry should be restructured. The Neal Report takes this approach in recommending enactment of legislation which, upon a finding

⁵⁸ 15 U.S.C. § 13(a) (1970).

⁵⁹ 15 U.S.C. § 13(b) (1970).

⁶⁰ 15 U.S.C. § 13(c) (1970).

⁶¹ 412 F.2d 605 (7th Cir. 1969). Proponents of the position which states that "[p]redatory discriminatory pricing practices which are potentially injurious to competition are prohibited by Section 2 of the Clayton Act" explicitly limited the scope of § 2 to those practices which are "discriminatory." 1969 Price Discrimination Hearings, *supra* note 27, at 100. Therefore, cases employed by those holding this view, e.g., *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), and *United States v. Borden Co.*, 370 U.S. 460 (1962), cannot be applied to practices involving only sales at "unreasonably low prices," inasmuch as those cases dealt with "discriminatory pricing" on the local level.

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of oligopoly, would limit to twelve percent the market share of the firms comprising the oligopoly.⁶²

At present, however, this approach would offer little protection from predatory pricing. Thus far, structural analysis has been applied with a degree of consistency only in the merger area.⁶³ This would mean, under present judicial standards, that structural tests would be useless against price predators who had gained their market position through means other than mergers, unless, of course, the predator achieved significant monopolization or the threat thereof. Not since the *Standard Oil*⁶⁴ and *American Tobacco*⁶⁵ cases of 1911 have there been any successful⁶⁶ efforts to apply the antitrust laws to a concen-

⁶² Neal Report, *supra* note 20, at 12-13. The proposed law would provide:

Section 1. Reduction of Industrial Concentration

(a) It shall be the duty of the Attorney General and the Federal Trade Commission to investigate the structure of markets which appear to be oligopoly industries.

(b) When, as a result of such investigation, the Attorney General determines that a market appears to be an oligopoly industry and that effective relief is likely to be available under this Act, he shall institute a proceeding in equity for the reduction of concentration, to which all firms which appear to be oligopoly firms in such oligopoly industry shall be made parties.

(c) The court shall enter a Judgment determining whether one or more markets are oligopoly industries and, if so, which of the parties are oligopoly firms in such oligopoly industries. Any party to the proceeding may appeal such Judgment directly to the Supreme Court.

(d) In order to provide an opportunity for voluntary steps looking toward reduction of concentration, no affirmative relief shall be ordered against such oligopoly firms for a period of one year following entry or affirmance of such Judgment.

(e) After such one-year period, further proceedings shall be conducted and a decree entered providing such further relief as may be appropriate, in light of steps taken or initiated during the one-year period, to achieve, within a reasonable period of time not in excess of four years, a reduction of concentration such that the market share of each oligopoly firm in such oligopoly industry does not exceed 12%.

In C. Kaysen & D. Turner's *Antitrust Policy: An Economic and Legal Analysis* (1959), oligopoly is classified as "loose" or "tight." A loose oligopoly is one in which a "very small number (eight or fewer) firms . . . [supply] 50 percent of the market, with the largest firm having a 20 percent or higher share . . ." *Id.* at 72. A tight oligopoly is one in which "a single large firm supplying 60 percent or more of the market, with no other single seller supplying a significant proportion of the demand . . ." *Id.* See also *Kennecott Copper Corp.*, 3 CCH Trade Reg. Rep. ¶ 19,619, at 21,666 (FTC 1971).

⁶³ See, for example, *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321 (1963). See also Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 Harv. L. Rev. 226 (1960); Turner, *Conglomerate Mergers and Section 7 of the Clayton Act*, 78 Harv. L. Rev. 1313 (1965).

⁶⁴ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

⁶⁵ *United States v. American Tobacco Co.*, 221 U.S. 106 (1911).

⁶⁶ Successful in the sense of transforming a monopoly into an oligopoly. Unsuccessful attempts were, for example, *United States v. U.S. Steel Corp.*, 251 U.S. 417 (1920), and *United States v. Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945). The *Alcoa* case must be considered unsuccessful in this context since the final decree did not

trated industry, or to one that is on the way to becoming concentrated, when such concentration was not the result of merger or acquisition.⁶⁷ It is evident, therefore, that reliance on a structural test, to the exclusion of any prohibitions on predatory behavior, would leave unprotected those businesses which operate in non-monopolistic markets.

IV. ANTITRUST ENFORCEMENT AND PREDATORY PRICING— A SUGGESTION FOR STANDARDS⁶⁸

Considerable confusion has been introduced in antitrust case law and literature by such pronouncements as "diversion of business cannot be equated with injury" and "antitrust is concerned with competition and not competitors."⁶⁹ An uncritical acceptance and application of these slogans not only would conflict with the spirit of predatory pricing legislation, but would prove the slogans false as well. It cannot be overemphasized that predatory pricing can create a significant degree of business diversion sufficient to hinder effective competitor perfor-

provide for dissolution. Competition in the industry was to come from new entries which had been made as a result of World War II and after the time the proceeding was initiated.

Concerning the possibility of using the antitrust laws in an oligopoly situation, Assistant Attorney General Donald F. Turner testified before a Senate Committee as follows:

[A]lthough it has not yet been done, it may be possible to apply the Sherman Act to oligopolies. The courts have tended to expand the application of this Act as they have interpreted it during the past 75 years; there is a tenable theory under which it could be used to attack oligopolistic concentration. It might be argued that any firm which has achieved a position in a tightly oligopolized industry, at least in part through substantial merger or unnecessarily exclusionary behavior, violates the individual monopolization provisions of section 2 because it has acquired individual shared monopoly power; it shares, with one or two other firms in the industry, the power to raise prices above a competitive level. While action to correct such situations would be economically desirable, the legal theory does raise serious questions of proper statutory interpretations.

Hearings on the Status and Future of Small Business Before the Select Senate Comm. on Small Business, 90th Cong., 1st Sess., pt. 1, at 714 (1967).

⁶⁷ In merger cases, a structural test has been utilized only when a case was brought under § 7 of the Clayton Act, 15 U.S.C. § 18 (1970). A violation of this section is established upon a merger of two corporations if the effect of the merger "may be substantially to lessen competition, or to tend to create a monopoly" in any line of commerce. In *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966), the Supreme Court upheld a challenge to a merger under § 7, because the two firms together accounted for about eighty percent of the market. This, the Court concluded, evidenced a trend toward concentration. *Id.* at 277.

⁶⁸ The ideas presented in this section were developed to a greater extent in MacIntyre, *The Federal Trade Commission's Antitrust Functions: Some Practical Problems in Enforcement*, 14 U.C.L.A. L. Rev. 997 (1967).

⁶⁹ For a typical source of such generalizations, see *Lloyd A. Fry Roofing Co. v. FTC*, 371 F.2d 277 (7th Cir. 1966), where the court pointed out that "[i]njury to a competitor is not the test; the test is injury to competition." *Id.* at 281.

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mance, thus injuring competition, especially if the predator has substantial market power.⁷⁰

Yet at present antitrust sanctions are available only when predatory pricing practices involve monopoly or attempts to monopolize or price discrimination. If these sanctions are to be made more broadly applicable, as this paper proposes, current standards of antitrust law must be adapted to measure all predatory pricing activities. Construction of a test for determining the possible impact of such practices on competition, i.e., for determining what degree of business diversion will retard competitor performance, is absolutely essential. This test could employ criteria analogous to those utilized in antitrust merger litigation under Section 7 of the Clayton Act,⁷¹ and would emphasize a "viability of competition" standard as opposed to a competitor standard.⁷² Further, the test must not consist of absolutes, but must encompass considerations of competitor market power, market structure, and the number of adversaries on the market.⁷³ In industries not marred by heavy concentration or excessive entrance barriers, business diverted from a few competing sellers would probably be insignificant. However, a significant degree of business division in highly concentrated industries could effectively hinder competitor performance and injure competition.⁷⁴ The proposed test must therefore be sufficiently flexible to reflect such distinctions.

CONCLUSION

In considering the need for predatory pricing legislation, one factor should be kept firmly in mind—any change in existing laws must be

⁷⁰ MacIntyre, *supra* note 68, at 1018. See also Burns, Antitrust and Robinson-Patman Act Problems: IntraCorporate Problems, 7 Antitrust Bull. 689 (1962), and Celler, Facts About Antitrust Myths, 9 Antitrust Bull. 607 (1964).

⁷¹ 15 U.S.C. § 18 (1970). Section 7 provides in part:

No corporation engaged in commerce shall acquire . . . the whole or any part of the stock . . . or the whole or any part of the assets of another corporation . . . where in any line of commerce in any section of the country, the effect of such acquisition may be *substantially to lessen competition*, or to tend to create a monopoly.

15 U.S.C. § 18 (1970) (emphasis added). See also MacIntyre, *supra* note 68, at 1019.

⁷² In *United States v. E. I. Du Pont de Nemours & Co.*, 353 U.S. 586 (1957), the Supreme Court stressed a "viability of competition" standard when it held that "any acquisition by one corporation of all or any part of the stock of another corporation, *competitor or not*, is within the reach of . . . [§ 7 of the Clayton Act] whenever the reasonable likelihood appears that the acquisition will result in a restraint of commerce." *Id.* at 592 (emphasis added). The Court further concluded that "the market affected must be substantial," and that proof must be affirmed which would show a "likelihood that *competition may be 'foreclosed in a substantial share of . . . [that market].'*" *Id.* at 595 (emphasis added).

⁷³ MacIntyre, *supra* note 68, at 1019.

⁷⁴ *Id.*

based on a solid foundation of convincing evidence that such a change is in fact warranted. The outstanding characteristic of past proposals aimed at weakening or eliminating predatory pricing laws has been their lack of supporting empirical data. In contrast, there exists a wealth of material revealing the need for legislation to combat predatory pricing practices. It may well be that a thorough analysis of available data will reveal that a change in the law would be justified and, in light of the current barrage of criticism directed at the price discrimination laws, this would appear to be an appropriate time to conduct such an evaluation. Meanwhile, until this task is undertaken, it must be recognized that proposals for change are grounded in speculation.

Moreover, the argument that incorporation of predatory pricing legislation within the antitrust laws would be redundant in light of other antitrust laws is based on an incomplete analysis of these laws. To fill the void in the present antitrust enforcement scheme, a test for measuring the injury to competition caused by predatory pricing practices must be created so that the antitrust laws may be used against such injury.