

David Lee

*The Lack of Guidance for Proving the  
Pricing-Below-Cost Element of Predatory Pricing and a  
Call for a Revised Approach to Predatory Pricing Analysis*

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Abstract by Raymond R. Janairo

In modern antitrust jurisprudence, the pricing-below-cost element is a dispositive factor in proving anticompetition claims. Antitrust agencies such as the Federal Trade Commission (FTC) or the Department of Justice (DOJ) must establish pricing-below-cost as the first step in proving a claim of predatory pricing. Commentators have criticized the courts inconsistent treatment of this dispositive factor. Courts have dismissed a number of antitrust cases because the FTC/DOJ is unable to get past the pricing-below-cost element. As this comment suggests, although courts properly dismissed some of these cases, in effect, due to the pricing-below-cost element, courts have also dismissed colorable claims against anticompetitive behavior.

This Comment analyzes the uncertainty in calculating this element of a predatory pricing case. The DOJ's experience in pursuing antitrust enforcement in the airline industry illustrates this uncertainty. Specifically, the author discusses *United States v. AMR Corp.* In his recommendations, the author argues that antitrust agencies should propose a new method for analyzing predatory pricing cases. Today's common law does not allow for a complete analysis of a particular pricing strategy due to the pricing-below-cost element. Instead, the author proposes a structured rule of reason to evaluate an entity's pricing strategy. The first step in the analysis would determine whether the pricing strategy is a barrier to entry for other competitors. If barriers to entry exist, the analysis should then determine the predator's ability to recoup lost profits. The author argues that "[i]f there is prima facie evidence of recoupment, a rebuttable presumption of anticompetitive effect accrues that the alleged predator can refute by offering a legitimate business justification for its pricing decision or efficiencies coming from its pricing conduct." The pricing-below-cost would become a probative factor in the analysis "when claims are ambiguous or not clear-cut in favor of either finding or dismissing the claim after the [previous] analysis is completed." Finally, the author concludes that such a rule of reason would provide a better balance between the concern of false positives (i.e., allowing false claims to advance) and false negatives (i.e., dismissing valid claims).