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## Universal Analytics, Inc. v. MacNeal-Schwendler Corp.: Predators by Hire?

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UNIVERSAL ANALYTICS, INC. v. MACNEAL-SCHWENDLER  
CORP.: PREDATORS BY HIRE?

VINCENT A. D'ARPINO

INTRODUCTION

Much has been written about predation and predatory conduct as a violation of federal antitrust laws.<sup>1</sup> Economists and legal scholars have developed a number of theories and standards for determining whether conduct is predatory, and courts have incorporated several of these theories into law.<sup>2</sup> Until the Ninth Circuit's recent decision in *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*,<sup>3</sup> however, cases regarding predatory conduct have centered almost exclusively on pricing practices and refusals to deal.<sup>4</sup> In that unprecedented decision, the Ninth Circuit considered a claim of an antitrust violation based on predatory hiring.<sup>5</sup> The court defined unlawful predatory hiring as the acquisition of talent or personnel "not for purposes of using that talent but for purposes of denying it to a competitor."<sup>6</sup>

This Comment analyzes the validity of a cause of action under the federal antitrust laws based on predatory hiring, examining the standard recently offered by the Ninth Circuit to determine whether a firm's hiring practices are predatory. The goal of this Comment is to present guidelines for the formulation of an objective standard on which courts can rely to determine accurately whether a firm's hiring practices violate section 2 of the Sherman Act.<sup>7</sup> Because predatory hiring is a virtually unknown cause of action, much of the analysis will be drawn by analogy from recent court decisions and legal scholarship discussing other predatory practices, and in particular, predatory pricing.

Part I of this Comment provides a brief background of the Sherman Act, specifically highlighting the methods by which predatory conduct can be proved a section 2 violation. Part II analyzes the Ninth Circuit's *Universal Analytics* decision. Part III criticizes the standard set forth by the Ninth Circuit to identify predatory hiring, concluding that it does not

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1. See, e.g., Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 720 (1975) (formulating workable test for distinguishing predatory pricing from competitive pricing by examining relationship between cost and price); Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U. Chi. L. Rev. 263, 264 (1981) (concluding that there is "no sufficient reason for antitrust law or the courts to take predation seriously"); McGee, *Predatory Pricing Revisited*, 23 J. L. & Econ. 289 (1980) (comparing various theories of predatory pricing).

2. See *infra* notes 25-30 and accompanying text.

3. 914 F.2d 1256 (9th Cir. 1990).

4. See, e.g., *Cargill, Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104 (1986) (pricing); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986) (pricing); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (refusal to deal).

5. See *Universal Analytics*, 914 F.2d at 1258.

6. *Id.*

7. 15 U.S.C. § 2 (1988).

offer a workable rule for identifying such hiring practices. Finally, Part IV offers an alternative, objective standard on which courts can rely to identify predatory hiring accurately.

## I. BACKGROUND

Congress' enactment of the Sherman Act (the "Act") in 1890 embodied the pervasive "trust-busting" attitude of the era and a growing public disdain for the increasing wave of monopolization that was sweeping through industrial America.<sup>8</sup> The Act provides that "[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor."<sup>9</sup> Thus, the language of section 2 bans not only the actual monopolization of a market but any attempt to monopolize a market as well.

### A. *Elements of a Section Two Violation*

Three elements are necessary to make out a successful monopolization claim under section 2 of the Sherman Act: (1) the defendant's possession of monopoly power in the relevant market; (2) the defendant's willful acquisition or maintenance of such power; and (3) antitrust injury caused by the defendant's actions.<sup>10</sup>

Although the definition of monopoly power is subject to some debate, it is generally accepted that such power includes the ability to control prices or exclude competition in the relevant market.<sup>11</sup> Such monopoly power results from the accumulation of a substantial share of market power.<sup>12</sup> The second element, willful acquisition or maintenance of such

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8. Presidential candidates of all three parties supported a national antitrust law during the 1888 Presidential campaign. See E. Fox & L. Sullivan, *Cases and Materials on Antitrust* 33 (1989). The Act is premised on the belief that consumers are the beneficiaries of competitive markets and these consumers are negatively affected by a reduction of competition and subsequent monopolization of an industry or market.

9. 15 U.S.C. § 2 (1988).

10. See *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1257 (9th Cir. 1990). The Ninth Circuit has always required that the first two elements be explicitly met for claims of monopolization. See *Oahu Gas Serv., Inc. v. Pacific Resources, Inc.*, 838 F.2d 360, 363 (9th Cir. 1988). Recently, the circuit made the third factor an explicit requirement as well. See *Catlin v. Washington Energy Co.*, 791 F.2d 1343, 1347 (9th Cir. 1986).

11. See *United States v. E.I. duPont de Nemours & Co.*, 351 U.S. 377, 389 (1956).

12. The market share required to constitute monopoly power, however, has not been clearly defined. Various courts have used different shares of market power when determining whether monopoly power existed. See, e.g., *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 424 (2d Cir. 1945) (90% market share sufficient to constitute monopoly power); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295, 307, 352 (D. Mass. 1953) (75% market share constitutes monopoly power). But see *Twin City Sport-service, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1274 (9th Cir. 1975) (50% market share insufficient to constitute monopoly power); *Aluminum Co.*, 148 F.2d at 424 (60% market share probably not enough to constitute monopoly power). There does not

power, is concerned with questionable business practices as distinguished from superior business acumen.<sup>13</sup>

The elements of an attempt-to-monopolize violation differ from those of an actual monopolization violation. Through the evolution of case law, two elements of attempted monopolization claims have emerged: (1) the defendant must possess a specific intent to injure competition and (2) the offending acts must create "a dangerous probability that the attempt to monopolize will be successful."<sup>14</sup> To prove specific intent, the plaintiff must show that the defendant sought to destroy competition.<sup>15</sup> Specific intent, however, can be proved by inference from conduct; that is, anti-competitive conduct may be a manifestation of a specific intent to injure competition.<sup>16</sup> To prove a dangerous probability of success, the plaintiff must prove that, at the time the anti-competitive acts occurred, the defendant already had enormous market power.<sup>17</sup>

### B. *The Goals of Section Two*

Section 2's ban on monopolization and attempted monopolization was enacted to protect and further competition.<sup>18</sup> It was passed with consumers and small business interests in mind.<sup>19</sup> The rationale behind federal antitrust laws is the guarantee of the highest quality at the lowest possible prices. Lower prices, however, may not always be the result of competition, and may not always be in consumers' best interest. Business entities may actually lower prices in the short term to accomplish long-term anti-competitive objectives. As federal courts have been willing to recognize, the lowering of prices in certain situations may be an anti-competitive attempt to monopolize.<sup>20</sup>

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seem to be any clear-cut percentage of market share that all courts will use to distinguish monopoly power from non-monopoly power.

13. See *Oahu Gas*, 838 F.2d at 363.

14. See *United States v. American Airlines, Inc.*, 743 F.2d 1114, 1118 (5th Cir. 1984), cert. dismissed, 474 U.S. 1001 (1985). But see *United States v. Aluminum Co. of Am.*, 148 F.2d 416, 432 (2d Cir. 1945) ("In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any 'specific' intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.").

15. See *American Airlines*, 743 F.2d at 1118.

16. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981).

17. "When evaluating the element of dangerous probability of success, [the court does] not rely on hindsight but examine[s] the probability of success at the time the [anti-competitive] acts occur[ed]." *Id.* See also *American Airlines*, 743 F.2d at 1118; *Transsource Int'l, Inc. v. Trinity Indus.*, 725 F.2d 274, 282 (5th Cir. 1984).

18. See Bork, *The Role of the Courts in Applying Economics*, 54 Antitrust L.J. 21, 24 (1985).

19. See *id.*

20. "Although antitrust law is not usually concerned with setting a limit on price competition, under certain conditions low prices may have anti-competitive effects." P. Areeda & D. Turner, *Antitrust Law* 11a. (1978).

### C. *Predatory Pricing as a Section Two Violation*

A firm that attempts to drive out competitors by setting unremunerative prices is not acting in a pro-competitive manner but, rather, is engaging in behavior that is predatory.<sup>21</sup> Eleanor Fox and Lawrence Sullivan, noted commentators on antitrust law, have defined predatory behavior as "any course of conduct by a dominant firm designed to drive out, discipline, or set back competitors by acts that, but for their anti-competitive impact, would not be economically sensible for the dominant firm."<sup>22</sup> The United States Supreme Court has categorized pricing tactics designed to forgo short-term profits in the hope of eliminating long-term competition as illegal attempts to monopolize in violation of section 2.<sup>23</sup>

Specifically, predatory pricing is the lowering of prices below present cost to drive out competition with the hope of recouping the resulting losses in the future by charging monopoly prices. A classic example of predatory pricing exists where a dominant firm<sup>24</sup> prices consumer goods below the average costs incurred to produce such goods, thereby forgoing profits. The firm, willing to suffer initial losses so that smaller competitors will collapse under disproportionate price competition, eventually drives smaller competitors from the market. Later, the dominant firm recoups past losses by charging higher monopoly prices in an unchallenged market. The resulting monopoly leads not only to higher prices, but to fewer choices for consumers and often inferior products.

The identification of such predatory conduct has posed problems, however. Various scholars have proposed standards to help courts identify predatory pricing. Although no consensus exists among courts or economists regarding precisely what criteria are relevant for identifying predation,<sup>25</sup> several commentators have suggested various standards for determining whether a firm's pricing practices are predatory.<sup>26</sup> The most

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21. *See id.*

22. E. Fox & L. Sullivan, *Cases and Materials on Antitrust* 211 (1989).

23. *See Standard Oil Co. v. United States*, 221 U.S. 1, 12 (1911).

24. A dominant firm is one that possesses a lion's share of a given market and is considered to be the industry leader.

25. *See* 3 Von Kalinowski, *Antitrust Laws and Trade Regulations* § 10.03[6] (1986).

26. Areeda and Turner's test of predatory pricing, based on marginal cost and/or average variable cost, concludes that a price below reasonable anticipated average variable cost should be conclusively presumed unlawful. *See Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 Harv. L. Rev. 679, 732-33 (1975). Another test for identifying predatory practices such as pricing has been cast by Judge Posner. According to Posner, predatory pricing should include only pricing at a level calculated to exclude from the market an equally or more efficient competitor. *See* R. Posner, *Antitrust Law: An Economic Perspective* 184, 188 (1976). These are by no means the only tests offered for the purpose of identifying predatory pricing. Some scholars propose a case-by-case analysis to determine whether there was predation or maximum theoretic consumer benefit. *See* Scherer, *Predatory Pricing and the Sherman Act: A Comment*, 89 Harv. L. Rev. 901, 903 (1976). Others propose a structural diagnosis for analyzing predatory behavior. Factors indicative of the market structure and the dynamic effects of competition are most important to these scholars. *See* Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing*, 89 Yale L. J. 213, 222-40

noted standard for identifying predatory pricing has been put forth by Philip Areeda and Donald Turner.<sup>27</sup> Areeda and Turner base liability under section 2 on pricing tactics that fall below a firm's marginal or average variable cost for producing the unit.<sup>28</sup> Most other standards proposed by commentators have been variations on the Areeda and Turner standard.<sup>29</sup> Courts have applied variations of the suggested standards in their determination of whether a firm's pricing practices are predatory.<sup>30</sup>

#### D. Supreme Court Guidance in Predation Cases

The Supreme Court offered yet another standard for identifying predation in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*<sup>31</sup> Although the predatory practice at issue in *Aspen*<sup>32</sup> involved the refusal to deal with a competitor,<sup>33</sup> which differs somewhat from predatory pricing and hiring practices, the Court nonetheless provided a helpful framework for analyzing all instances of predation.

The test formulated in *Aspen* called for an objective analysis of both the predator and the competing victim of the act, as well as of the effect the predation has on consumers.<sup>34</sup> In analyzing the refusal-to-deal claim, the Court concluded that three questions must be asked before characterizing conduct as exclusionary and predatory: (1) what effect does the conduct have on consumers?; (2) what effect does it have on smaller rivals?; and (3) what is the effect on the "predatory" actor itself?<sup>35</sup>

In *Aspen*, the Court emphasized that the most significant inquiry was

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(1979). See generally, McGee, Predatory Pricing Revisited, 23 J. L. & Econ. 289 (1980) (comparative look at the merits and shortcomings of various proposed models to analyze predation).

27. See Areeda & Turner, *supra* note 26, at 725.

28. A price below reasonable anticipated average variable cost should be conclusively presumed lawful. See *id.*

29. See 3 Von Kalinowski, Antitrust Laws and Trade Regulations § 10.03[6] (1986).

30. See, e.g., *Henry v. Chloride*, 809 F.2d 1334, 1344 (8th Cir. 1987) (applying Areeda and Turner's test, and holding that if defendant's prices are below short run marginal cost, then there is presumption of predation); *Indian Coffee Corp. v. Proctor & Gamble Co.*, 752 F.2d 891, 896 (3d Cir.) (same), *cert. denied*, 474 U.S. 863 (1985); *Adjusters Replace-A-Car, Inc. v. Agency Rent-A-Car, Inc.*, 735 F.2d 884, 887 (5th Cir.), *cert. denied*, 469 U.S. 1160 (1984) (prices below average variable cost conclusively establish plaintiff's prima facie case of predation); *Northeastern Tele. Co. v. AT&T*, 651 F.2d 76, 91 n.4 (2d Cir. 1981), *cert. denied*, 455 U.S. 943 (1982) (same).

31. 472 U.S. 585 (1985).

32. *Id.*

33. See *id.* at 587. Exclusionary practices, such as refusals to deal, have long been held predatory and in violation of section two of the Sherman Act. See *Lorain Journal Co. v. United States*, 342 U.S. 143, 153 (1951).

34. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1984). In *Aspen*, a large ski resort refused to issue and honor tickets in conjunction with a smaller resort in an arrangement that had proved mutually beneficial to both parties in the past and attractive to consumers who enjoyed having a choice of skiing at either resort. See *id.* at 589-91.

35. *Id.* at 605.

into the effect of the predatory act on the actor itself.<sup>36</sup> As the Court observed, when the challenged actions do not maximize the actor's present efficiency or profits, but instead serve the sole purpose of reducing long-term competition without competing on the merits, the behavior may be classified as predatory.<sup>37</sup>

The Supreme Court's objective analysis for identifying predatory practices in *Aspen* has proved an effective development in antitrust law. By concentrating on objective criteria such as the defendant's profitability, the effects on competitors, and the effects on consumers, courts have been able to determine more accurately whether particular actions are predatory. Relying on *Aspen*, the Ninth Circuit in *Universal Analytics* recently expanded the concept of predation as a violation of the Sherman Act to include hiring practices.<sup>38</sup> In *Universal Analytics*,<sup>39</sup> the Ninth Circuit failed, however, to follow the Supreme Court's emphasis on objective analysis in offering a standard for identifying predatory hiring.

## II. UNIVERSAL ANALYTICS, INC. V. MACNEAL-SCHWENDLER CORP.

In *Universal Analytics*, the plaintiff and the defendant were both engaged in the production and development of NASTRAN,<sup>40</sup> a computer software program used in the aerospace field. The defendant, with a ninety percent market share, was the dominant firm in the NASTRAN market, while the plaintiff, with a five percent market share, was its primary competitor.<sup>41</sup> The plaintiff alleged that the defendant attempted to illegally obtain and/or maintain a monopoly in the NASTRAN market by engaging in a series of predatory acts.<sup>42</sup>

The thrust of the plaintiff's action centered on a fifteen month period during which five of the six NASTRAN technicians employed at the plaintiff's firm departed and went to work for the defendant.<sup>43</sup> The plaintiff, in bringing suit under sections 1 and 2 of the Act, claimed that the departures had a detrimental effect on the plaintiff's ability to develop further its version of NASTRAN and to compete effectively with the defendant.<sup>44</sup> The district court granted the defendant's motion for summary judgment,<sup>45</sup> relying on the fact that several of the employees

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36. See *id.* at 608.

37. See *id.* at 610-11.

38. See *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990).

39. 914 F.2d 1256 (9th Cir. 1990).

40. These programs were initially developed by the National Aeronautics and Space Administration for use in the field of aerospace technology. See *id.* at 1257. Both the district court and the court of appeals defined the relevant market for the purposes of deciding this antitrust litigation as NASTRAN programs. See *id.*

41. See *Universal Analytics*, 914 F.2d at 1257.

42. See *id.*

43. See *id.*

44. See *id.*

45. See *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 707 F. Supp. 1170, 1182 (C.D. Cal. 1989).

who left the plaintiff firm for employment at the defendant firm were dissatisfied with conditions at the plaintiff firm, and that the defendant did not initiate contact with the employees.<sup>46</sup> It also found that the employees were put to use by the defendant in NASTRAN related tasks.<sup>47</sup> Accordingly, the district court dismissed the plaintiff's predatory hiring claim.<sup>48</sup>

On appeal, the Ninth Circuit concluded that a private antitrust action claiming predatory hiring as a violation of section 2 of the Sherman Act could be maintained as a valid cause of action.<sup>49</sup> The court's definition of predatory hiring was based on Areeda and Turner's description of the offense:

Unlawful predatory hiring occurs when talent is acquired not for purposes of using that talent but for purposes of denying it to a competitor. Such cases can be proved by showing that the hiring was made with predatory intent, i.e., to harm competition without helping the monopolist, or by showing a clear non-use in fact. Absent either of these circumstances . . . employment should not be held exclusionary.<sup>50</sup>

Significantly, the court seemingly deferred to Areeda and Turner's view that predatory hiring claims based on exclusionary employment could be identified only by a clear showing that the predator intended to deny a competitor talented employees.<sup>51</sup> Accordingly, the court held that employment should not be held exclusionary absent a finding that the "monopolist" subjectively intended to hire preclusively or a finding of "clear non-use in fact."<sup>52</sup>

In *Universal*, the plaintiff claimed that it met the subjective intent requirement by offering into evidence an inter-office memo from the defendant firm stating that those hired from the plaintiff's firm would "wound" the plaintiff's business.<sup>53</sup> Nonetheless, the Ninth Circuit found that the "wound memo" was insufficient to find the requisite elements of

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46. *See id.* at 1176.

47. *See id.*

48. *See id.* at 1176-77. The court rejected the plaintiff's claim that the defendant had refused to hire these same employees when they had sought employment in the past. Instead, the plaintiffs claimed, the defendant waited for the plaintiff to train the employees and then offered them positions. *See id.*

49. *See Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990).

50. *Universal Analytics*, 914 F.2d at 1258; *see also* P. Areeda & D. Turner, *An Analysis of Antitrust Principles and Their Application* 2c (1978)[hereinafter *Antitrust Law*]. Areeda and Turner did not formulate a viable test for identifying predatory hiring practices, however. *See id.* They believe that it is highly likely that a firm would use important talent once acquired, and that courts should not attempt to judge whether the acquired talent was put to the most efficient use. In their view, such judgments would be difficult to make and remedies would be difficult to formulate because of the interests of society in allowing employees to move freely from employer to employer. *See id.*

51. *See Universal Analytics*, 914 F.2d at 1258.

52. *See id.*; *see also* *Antitrust Law*, *supra* note 50, at 2c.

53. *See Universal Analytics*, 914 F.2d at 1258-59.



predatory conduct.<sup>54</sup> By rejecting such proof, the court suggested that it will be difficult for plaintiffs to meet their burden of proving that the defendant firm possessed the subjective, predatory intent required for the judicial identification of predatory hiring.<sup>55</sup>

In addition, the court invoked the legitimate-business-purpose test of *Aspen Skiing* in concluding that the memo did not evince sufficient proof of predatory intent.<sup>56</sup> Specifically, the court found that the memo did not undermine the defendant's "legitimate business reasons for hiring much needed and competent computer programmers."<sup>57</sup> The court reasoned that the legitimate purpose test set forth in *Aspen*<sup>58</sup> could be satisfied in cases of predatory hiring by a showing that the hires are put to some use in their new place of employment.<sup>59</sup>

Accordingly, the court concluded that the facts in *Universal Analytics*<sup>60</sup> did not support a cause of action for predatory hiring. The court did, however, specifically endorse future applications of a cause of action for predatory hiring. In so doing, the Ninth Circuit, while breaking ground for a cause of action based on predatory hiring, seemingly blocked its application by setting forth an elusive standard that offers little guidance in identifying predatory hiring.

### III. A CRITICAL LOOK AT THE NINTH CIRCUIT'S METHOD OF IDENTIFYING PREDATORY HIRING

The Ninth Circuit's willingness to consider predatory hiring as a violation of antitrust law is an important and appropriate development in the law. As the court recognized, the antitrust laws were enacted for the protection of competition.<sup>61</sup> Federal antitrust laws must be administered to rectify any unfair restraints of competition that may lead to a monopoly in a given market. As many federal courts have accepted, predatory acts can have the effect of unfairly restraining competition.<sup>62</sup>

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54. See *id.* at 1259.

55. See *infra* notes 61-86 and accompanying text.

56. See *Universal Analytics*, 914 F.2d at 1258.

57. *Id.* at 1259.

58. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608-10 (1985).

59. The court stated that because the defendant put the five employees to use, the defendant's actions were in pursuit of a legitimate business purpose. See *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1259 (9th Cir. 1990).

60. 914 F.2d 1256.

61. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962). James Rill, the Assistant Attorney General in charge of the Antitrust Division, believes that the Sherman Act should operate as a "physical force in the universe of commerce" to protect the benefits of competition. N.Y. Times, Nov. 6, 1990, at A18, col. 1.

62. See *Henry v. Chloride*, 809 F.2d 1334 (8th Cir. 1987); *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 668 F.2d 1014, 1035-36 (9th Cir. 1981); *Transamerica Computer Co. v. International Business Mach. Corp.*, 481 F. Supp. 965, 987-88 (N.D. Cal. 1979), *aff'd*, 698 F.2d 1377 (9th Cir.), *cert. denied*, 464 U.S. 955 (1983).

Similarly, predatory hiring practices can have the same anti-competitive effects. As the Supreme Court recognized in *Hitchman Coal & Coke Co. v. Mitchell*,<sup>63</sup> by hiring away key employees of a competitor a firm can alter the structure of an industry and unfairly affect competition.<sup>64</sup> Predatory hiring that results in the same potential anti-competitive effects as predatory pricing should, therefore, be included within the scope of the Sherman Act.<sup>65</sup>

Although the Ninth Circuit appreciated the potential harm of such hiring practices and stood willing to recognize a cause of action for predatory hiring, the court's design for identifying such practices is problematic. The Ninth Circuit held that predatory hiring could be identified only by showing: 1) that the hiring was made with predatory *intent* or 2) that there was "clear non-use in fact."<sup>66</sup> This standard, however, does not provide courts with a useful measure for effectively determining whether a firm's hiring practice is predatory and anti-competitive.

#### A. *The Incompleteness of a Test Based Solely on Clear Non-Use*

The clear non-use prong of the Ninth Circuit's test offers little help in identifying most cases of predatory hiring. As defined by Areeda and Turner, clear non-use is the hiring of an employee without putting that employee to any use.<sup>67</sup> The hired employee serves the sole purpose of depriving a competitor of the employee's talents. This type of hiring and subsequent non-use of a competitor's employees clearly violates the pro-competitive language of federal antitrust laws and would easily be considered predatory by any judicial standard.

The problem, however, is that clear non-use rarely, if ever, exists. Few firms, if any, would actually hire an individual without putting the hire to any use whatsoever. Thus, only a rare fact pattern would implicate this standard. Consequently, a standard that identifies predatory hiring by relying on clear non-use alone will prove unhelpful in reducing a substantial amount of such predatory behavior. Under a clear non-use standard, as long as firms put the lured employee to even marginal use, they will survive a section 2 challenge to their hiring practices. Easily able to mask predatory hiring practices with evidence of employee use, these

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63. 245 U.S. 229 (1917).

64. *See id.* at 259. "Certainly, if a competing trader should endeavor to draw custom from his rival, not by offering better or cheaper goods, employing more competent salesmen, or displaying more attractive advertisements, but by persuading the rival's clerks to desert him under circumstances rendering it difficult or embarrassing for him to fill their places, any court of equity would grant an injunction to restrain this as unfair competition." *Id.*

65. Both practices, predatory pricing and hiring, can be implemented to hamper a competitor's ability to compete and lead to monopolization of a market.

66. *See Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990).

67. *See Antitrust Law, supra* note 50, at 2c.

firms will continue to stifle competition in a given market and consolidate market power in a particular industry by luring away talent.

B. *The Inaccuracies of a Test Based on the Predator's Subjective Intent*

Even more troublesome is the Ninth Circuit's requirement that subjective intent of predatory hiring be proved in order to sustain a cause of action.<sup>68</sup> Judicial use of the term "predatory intent" has often proved troublesome.<sup>69</sup> This is so because introducing subjective evidence of predatory intent provides little, if any, basis for effectively analyzing claims of predation.<sup>70</sup> Courts can better serve the goals of federal anti-trust legislation by identifying predatory types of behavior, rather than relying on the arduous practice of searching for predatory intent.<sup>71</sup>

In other contexts, including predatory pricing, courts have foregone analyses of subjective intent in favor of analyses predicated on objective factors.<sup>72</sup> Several circuits have already done so with respect to claims of

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68. In past antitrust cases involving predation, the Ninth Circuit has not always required that plaintiffs come forth with evidence of the defendant's *subjective* state of mind. In past predation cases, the court has determined that predatory behavior can be identified through the use of objective factors. See, e.g., *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1034 (1981) ("Predatory pricing may be proved by examining the relationship between defendant's prices and costs.").

69. *International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 722-23 (5th Cir. 1975). Predatory intent has never been clearly defined. Because it is difficult to distinguish a vindictive intent to harm a competitor from legitimate competitive actions that may produce the same results, courts can better eliminate acts of predation by identifying the types of behavior which violate the Sherman Act. See *id.*

70. See *Areeda & Turner, Predatory Pricing and Related Practices Under § 2 of the Sherman Act*, 88 Harv. L. Rev. 697, 699. Predatory intent provides little, if any, basis for adjudicating liability in cases of predatory pricing. See *id.*

71. See *International Air*, 517 F.2d at 722-23.

72. One area in which the courts have already concluded that an objective analysis should be applied over any subjective intent analysis includes analyses of fourth amendment claims concerning searches and warrantless arrests predicated on probable cause. See *Anderson v. Creighton*, 483 U.S. 635, 641 (1987). The determination of whether a search was legally reasonable and supported by probable cause requires examination of the information possessed by searching officials. See *id.* This determination, however, should not include an inquiry into the officials' subjective intent. See *id.* The relevant question is whether a reasonable officer would have acted in a similar manner under the existing circumstances. Subjective beliefs held by the officials surrounding a search are irrelevant. See *id.*

Likewise, the constitutional validity of a warrantless arrest depends on the existence of probable cause. See *United States v. Maher*, 919 F.2d 1482, 1485 (10th Cir. 1990). Probable cause must be measured by existing objective factors. See *id.* Thus, the existence of probable cause must be viewed in light of circumstances as they would have appeared to a "prudent, cautious, trained police officer." *Id.* at 1485-86. Where an officer has probable cause, as measured objectively, an analysis of the officer's subjective intent is irrelevant. See *id.*

Another area of law where courts have discarded inquiry into subjective intent in favor of an analysis predicated on objective factors involves fifth amendment double jeopardy claims. See *Oregon v. Kennedy*, 456 U.S. 667, 679-80 (1982) (Powell, J., concurring). Because subjective intent is often not ascertainable, courts should assess objective data

predatory pricing.<sup>73</sup> In its most recent decision on predation, the Seventh Circuit held that "intent is not a basis of liability (or a ground for inferring the existence of such a basis) in a predatory pricing case under the Sherman Act."<sup>74</sup> In addition, the Fifth Circuit has expressed its preference for condemning predatory acts rather than predatory intent.<sup>75</sup> Other circuits, however, continue to infer predatory intent from actions.<sup>76</sup> Courts should follow this lead and refrain from using subjective intent as a basis of analyzing claims of predatory hiring.

Distinguishing predatory intent from aggressive competition is difficult.<sup>77</sup> As some courts have observed, an intent to eliminate competition cannot by itself establish proof of an attempt to monopolize violation.<sup>78</sup> This is significant because the intent to outperform, or even eliminate, competition is central to a competitive market.<sup>79</sup> As one court has suggested, "if courts use the vigorous, nasty pursuit of sales as evidence of a forbidden 'intent', they run the risk of penalizing the motive forces of

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and existing circumstances when considering double jeopardy motions under the fifth amendment. *See id.*

Judges have also expressed a desire to abandon analysis of subjective intent in favor of an objective approach with respect to discrimination claims. *See Washington v. Davis*, 426 U.S. 229, 253 (1976) (Stevens, J., concurring). "Frequently the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds." *Id.*

Yet another area where courts have recognized the benefits of an objective analysis without giving regard to subjective intent has been the imposition of Rule 11 sanctions for motions filed to achieve an improper purpose. *See, e.g., In re Grantham Bros.*, 922 F.2d 1438, 1442 (9th Cir. 1991) (in a case involving imposition of Rule 11 sanctions on debtor's attorney for bringing of frivolous, improper collateral attack, court imposed objective test to determine attorney's purpose for bringing the attack, rather than searching for subjective intent). "Although the term 'improper purpose' can be construed to require an improper subjective intent, this court analyzes an allegedly improper purpose under an objective standard." *Id.* at 1443. It is important to note that this case was decided by the Ninth Circuit. *See id.* at 1438.

73. *See A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1400-02 (7th Cir. 1989); *Barry Wright Corp. v. ITT Grinnell*, 724 F.2d 227, 232 (1st Cir. 1983).

74. *A.A. Poultry Farms*, 881 F.2d at 1402. "Intent does not help to separate competition from attempted monopolization and invites juries to penalize hard competition." *Id.*

75. *See International Air Indus. v. American Excelsior Co.*, 517 F.2d 714, 722-23 (5th Cir. 1975).

76. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1027 (9th Cir. 1981).

77. *See A.A. Poultry Farms v. Rose Acre Farms*, 881 F.2d 1396, 1402 (7th Cir. 1989); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 670 (9th Cir. 1980).

78. *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1028 (9th Cir. 1981) "Direct evidence of intent to vanquish a rival in an honest competitive struggle cannot help to establish an antitrust violation." *Id.*

79. "The mere intention of [defendant] to exclude competition . . . is insufficient to establish a 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." *Blair Foods*, 610 F.2d at 670 (citation omitted). *See also Buffalo Courier Express, Inc. v. Buffalo Evening News*, 601 F.2d 48, 54 (2d Cir. 1979) (intent by itself is not sufficient to find an attempt to monopolize violation of § 2 of the Sherman Act).

competition.”<sup>80</sup> Objective evidence of unfair conduct is indispensable to show that the defendant sought victory through unfair or predatory means.<sup>81</sup>

Most firms, if not all, possess an intent to capture as much market share as possible. This intent to outperform competitors is what keeps markets competitive. Courts, in their search for predatory intent, should not risk outlawing behavior that has contributed to a competitive spirit in a given market. After all, a desire to extinguish a rival or competitor is the essence of competition.<sup>82</sup>

Requiring proof of subjective intent also complicates litigation.<sup>83</sup> Plaintiffs will be forced to search for evidence of overly aggressive, as opposed to competitive, behavior in an effort to convince the judge or jury that the defendant's actions were in fact predatory.<sup>84</sup> Such a requirement will increase the costs of discovery and litigation without increasing the accuracy of the court's decisions.<sup>85</sup>

If courts are using the term “predatory intent” to refer to a set of objective economic criteria that allow them to infer the requisite intent from overt conduct, then “we can slice [the intent requirement] away” and concentrate on the objective factors themselves in analyzing claims of predation.<sup>86</sup>

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80. *A.A. Poultry*, 881 F.2d at 1402. See also *Barry Wright Corp. v. ITT Grinnell*, 724 F.2d 227 (1st Cir. 1983) (“‘Intent to harm’ without more offers too vague a standard in a world where executives may think no further than ‘Let’s get more business’ and long-term effects on consumers depend in large measure on competitors responses.”).

81. See *William Inglis*, 668 F.2d at 1028.

82. *Id.*

83. The court in *Harlow v. Fitzgerald* warned that “[j]udicial inquiry into subjective motivation . . . may entail broad-ranging discovery and the deposing of numerous persons, including . . . professional colleagues.” *Harlow v. Fitzgerald*, 457 U.S. 800, 817 (1982). See also *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (“Lawyers will rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury. Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions.”).

84. See *A.A. Poultry*, 881 F.2d at 1402.

85. As previously discussed, drawing a distinction between subjective, predatory intent and hard, aggressive competition creates great difficulty for the court. See *supra* notes 53-55 and accompanying text. Even where evidence indicative of an intent to harm a competitor is found, it may not be strong enough to qualify as evincing a predatory intent. In *Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 912 F.2d 1256 (9th Cir. 1990) the plaintiff presented evidence of an internal memo from the defendant firm which stated that these hires would wound the plaintiff, and the court found that this “wound memo” was insufficient to establish an existence of predatory intent. See *id.* at 1259.

86. *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983).

IV. OBJECTIVE CRITERIA SHOULD BE USED TO DETERMINE  
WHETHER A FIRM'S HIRING PRACTICES VIOLATE FEDERAL  
ANTITRUST LAWS

A. *The Necessity For an Objective Analysis*

Rather than struggling to find or discern subjective intent, courts should apply a more practical approach to identifying predatory behavior. A review of the legislative history of the Sherman Act and federal antitrust case law suggests that this approach should concentrate on objective criteria.

Although Congress did not provide enforcement agencies with definite quantitative or qualitative tests for gauging violations of the Sherman Act, Congress indicated that a company's actions "had to be functionally viewed, in the context of its *particular industry*."<sup>87</sup> Broad and flexible objective standards by which to evaluate the purposes of business behavior most accurately identifies predatory practices. Such standards would avoid the evils of both over-inclusion and over-exclusion. Courts must formulate tests for identifying predatory behavior in such a way as to avoid being over-inclusive, thereby punishing aggressive competition. At the same time, proper precautions must be taken to avoid the pitfalls of an over-exclusive test that would permit predatory behavior to remain undetected.<sup>88</sup> Incorrectly labeling predatory behavior as non-predatory will also result in substantial long-run welfare losses if the behavior deters entry to or induces exit from the market and will result in the concentration of a monopoly power.<sup>89</sup>

Because a profit-maximizing firm will only depart from short-run maximizing behavior if the firm fully expects that the move will lead to greater long-run profits, the most accurate way to determine whether present behavior is predatory is to analyze objective market factors and expected effects on the market in the long run.<sup>90</sup> The Supreme Court has stated that it is senseless to consider charges of predation if the structure of the industry makes future recoupment of present losses suffered in furtherance of the predation unlikely.<sup>91</sup> This results-oriented analysis supports the contention that objective criteria should be considered over subjective intent in identifying predation.<sup>92</sup> Use of objective criteria will

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87. *Brown Shoe Co. v. United States*, 370 U.S. 294, 321-22 (1962) (emphasis added).

88. See *William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1031 n.18 (9th Cir. 1981).

89. See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 Yale L.J. 213, 229 (1979). An under-inclusive test will allow predatory behavior to stand, thus enabling the predator to drive out competition and achieve monopoly status and harming long-run consumer welfare. See *id.* at 222-23.

90. See *id.*

91. See *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986).

92. See *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1401 (7th Cir. 1989).

make it possible to determine the likelihood of future success of the predation.

### B. *Objective Factors Have Been Used in Identifying Predatory Pricing*

Objective analysis has been applied regularly in cases involving predation.<sup>93</sup> Such analysis has produced more predictable and accurate results. Certain objective criteria, such as market characteristics, can be most helpful in assessing claims of predatory pricing.

Market characteristics considered most important in analyzing predatory pricing fall into three basic categories.<sup>94</sup> The first category includes factors indicative of short-run monopoly power. Such factors include: an examination of the dominant firm's market share; the number and size distribution of firms already in the market; the stability of market shares over time; and historical evidence of profits earned by a dominant firm.<sup>95</sup>

The second category consists of factors relating to the conditions of entry into the market. Certain structural characteristics of a market affect entry conditions and the ability of potential competition to provide an effective constraint on the pricing behavior of a dominant firm. These include: the amount of capital required for a new firm to enter at minimum efficient scale; whether the dominant firm has successfully established significant brand preferences in the eyes of consumers by being first; the ease with which productive resources or assets can be transferred from one form to another; the nature of the entry process in the particular market; and the nature of information flows in the market, in particular the availability of information concerning the perceptions of risks of entry.<sup>96</sup>

The third category involves the dynamic effects of competitors or entrants on the costs of production and the quality of products offered to consumers. Questions to be asked include: (1) Has the dominant firm been the primary source of technological innovations or have smaller firms and entrants been the innovators?; (2) Is the market/industry growing or is it in a state of decline?; and (3) Do prices change with cyclical changes in supply and demand?<sup>97</sup>

### C. *Objective Factors Best Suited For Identifying Predatory Hiring*

This objective approach to analyzing predation should be extended to cover claims of predatory hiring as well. In the area of predatory hiring,

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93. See *Cargill*, 479 U.S. 104; *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986); *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396 (7th Cir. 1989); *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983).

94. See Joskow & Klevorick, *A Framework for Analyzing Predatory Pricing*, 89 Yale L.J. 213, 224 (1979).

95. See *id.* at 225-27.

96. See *id.* at 227-31.

97. See *id.* at 231-34.

what is needed is an objective approach that can accommodate important market differences such as the characteristics of firms, the probability of error in characterizing practices predatory, the costs of such errors, and the implementation costs of alternative policy approaches.<sup>98</sup>

Courts can use many of the same objective factors that have been advocated for use in claims of predatory hiring.<sup>99</sup> Factors indicative of short-run monopoly power, the potential for new entrants to enter the market successfully, and the effects existing competition has had on the industry are as crucial in an analysis of predatory hiring as they are in analyzing other acts of predation. In addition, the uniqueness of a claim of predatory hiring requires an analysis of additional objective criteria to answer the three questions above successfully.

Courts should consider the availability of qualified personnel within the industry, and the cost and time required to train new personnel, when analyzing the structure of an industry. Such an analysis will aid in accurately gauging the barriers to entry in a given industry.

In addition, the salary structure and profit margins of the industry should be considered to determine whether the predator is paying exorbitant salaries and foregoing profits with the hope of monopolizing the market. An analysis of this information will more accurately gauge the intentions of the defendant than will a messy search for a subjective intent of predation. Business entities can be expected to act in a profit-maximizing manner. Any objective evidence to the contrary may spur further judicial inquiry into claims of predation.

Courts should also analyze the internal structure of the predator when analyzing a claim of predatory hiring. The manner in which a firm has conducted staffing in the past may prove enlightening in determining whether the hiring in question is in line with the firm's normal course of business, or whether the new staffing appears excessive. Similarly, inquiries into whether the defendant has trained its own employees in the past or has always hired trained personnel may help in the determination of whether a specific hire is predatory.

Courts can also look to the profitability and efficiency of the hiring in question when making a judgment on predation. If the hire will prove unprofitable but will eliminate competition, courts may well conclude that the hiring was predatory.<sup>100</sup>

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98. *See id.* at 218.

99. *See supra* notes 72-75.

100. Closely related to this point is how the "predator" puts the new hire to use. *Cf. Universal Analytics, Inc. v. MacNeal-Schwendler Corp.*, 914 F.2d 1256, 1258 (9th Cir. 1990) (clear non-use of a new hire may be considered predatory hiring). An analogy to a professional sports franchise may illustrate this point. If a baseball team with six healthy starting pitchers acquires a divisional rival's "ace" starter through free-agency and then makes little or no use of the player (*i.e.*, he is not inserted into the starting rotation and is only used occasionally in middle relief), deductive reasoning leads to the conclusion that the pitcher was only acquired to deny the talent to the competitor.



## CONCLUSION

The Ninth Circuit's willingness to recognize predatory hiring as an antitrust violation should be commended. The court's reliance on subjective intent, in the absence of clear non-use, to identify the predatory practice, however, does not provide a workable standard for determining whether such a violation actually exists. Courts should place more emphasis on objective factors to determine whether a firm has violated the antitrust laws through predatory hiring. Clear non-use is but one factor that can be relied upon in analyzing claims of predatory hiring. Reliance on objective factors, such as market structure, available talent, and salary structure in conducting such analyses will produce more accurate and predictable outcomes in the courts and provide more useful guidelines to business entities.