Loyola of Los Angeles Law Review

Volume 54 | Number 3 Article 2

Spring 5-1-2021

A Storm is Brewing: How Federal Ambivalence Regarding Below-Cost Pricing Turns a Blind Eye to Monopoly Risk in the Beer Market

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A STORM IS BREWING: HOW FEDERAL AMBIVALENCE REGARDING BELOW-COST PRICING TURNS A BLIND EYE TO MONOPOLY RISK IN THE BEER MARKET

*Daniel Croxall**

Large beer manufacturers, known colloquially as "Big Beer," have been steadily losing market share to small, independent craft breweries. Big Beer wants it market share back, and in some cases will go to great lengths to try to defend its dominance—even anticompetitive conduct. Below-cost pricing is one avenue that presents a risk to independent craft breweries. This Article examines how Big Beer can manipulate the beer market in its favor by engaging in predatory pricing. Further, this Article proposes a solution that could be implemented on a nation-wide scale to curtail Big Beer's anticompetitive activities with respect to pricing.

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I. INTRODUCTION

Beginning in 1890, the United States began a nearly fifty-year campaign against big business that waged war on two fronts: antitrust and prohibition.[1] Regarding antitrust, the federal government passed a series of legislation that created liability for anticompetitive behaviors.[2] During this same period, the United States also amended the Constitution to prohibit—then later permit—the manufacture, sale, and transportation of alcohol within the country.[3] These two battles have a great deal of overlap because they had the same purpose—to prevent a large company from monopolizing a market and, consequently, harming consumers.[4] Today, the war rages on—129 years after it began. Large companies, especially in the beer market, employ creative means to develop monopolies; the judiciary does not have a prevailing method to evaluate these activities, and the federal government's approach to some monopolistic practices is reactionary—not preventative.

Large companies have a litany of tools available that give them a market advantage over smaller competitors. One such method, which can create a monopoly by strangling smaller manufacturers from the market, is predatory pricing.[5] The United States Supreme Court defined predatory pricing as "pricing below an appropriate measure of cost for the purpose of eliminating competitors . . . and reducing competition in the long run."[6] Below-cost pricing, also known as loss-leader pricing, is an amorphous concept because the Supreme Court never defined the phrase "an appropriate measure of cost."[7] This phrase's fluid definition has resulted in each circuit court developing

1. *See The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws (last visited Feb. 21, 2021) (noting that the Sherman Antitrust Act was enacted in 1890); U.S. CONST. amend. XXI (ratified on Dec. 5, 1933).

2. *See The Antitrust Laws*, *supra* note 1 (explaining that Congress enacted the Sherman Antitrust Act in 1890, the Clayton Act in 1914, and the Robinson-Patman Act in 1936).

3. *See* U.S. CONST. amend. XVIII (completing ratification on Jan. 29, 1919), *repealed by* U.S. CONST. amend. XXI (ratified on Dec. 5, 1933).

4. MARKETING LAWS SURVEY, STATE LIQUOR LEGISLATION 20, 22, 25 (1941).

5. Louis D. Brandeis, *Cutthroat Prices: The Competition That Kills*, HARPER'S WEEKLY, Nov. 15, 1913, at 10 ("[Price cutting] has been the most potent weapon of monopoly—a means of killing the small rival to which the great trusts have resorted most frequently.").

6. Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986).

7. *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1501 (11th Cir. 1988) ("The Court recognized the debate among the Circuit Courts of Appeals and among academics concerning 'measure of cost' but did not indicate what 'measure of cost' or 'cost' was appropriate.").

its own distinct—but similar—approach to decide below-cost pricing lawsuits.[8]

There are two overarching views regarding below-cost pricing in the United States. First, the executive branch—through the Federal Trade Commission (FTC)—has taken a reactionary approach to below-cost pricing and believes the practice is not anticompetitive.[9]

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8. *See* Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc., 777 F.3d 756, 761 (5th Cir. 2015) ("The 'appropriate measure' of cost has been the subject of much scholarly and judicial debate. The debate is settled in our court, however, as we use average variable cost."), *cert. denied*, 577 U.S. 816 (2015); Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 319 (6th Cir. 2015) ("This circuit applies a burden-shifting framework to determine the 'appropriate measure of a rival's cost.' Specifically: . . . . 'If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a *prima facie* case of predatory pricing . . . .'" (quoting Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 938 (6th Cir. 2005))); United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001) ("[T]he antitrust laws do not condemn even a monopolist for offering its product at an attractive price . . . free of charge[,] or even at a negative price."); Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 344 (8th Cir. 1995) (adding a third element to the *Brooke Group* test—a plaintiff must establish the relevant geographic market); Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1549 n.5 (10th Cir. 1995) ("Unfortunately for litigants, neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one, although we have spoken of marginal and average variable costs as being relevant."), *cert. denied*, 516 U.S. 1044 (1996); Liggett Grp. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992), *aff'g* 748 F. Supp. 344, 362 n.42 (M.D.N.C. 1990) ("This court used average variable cost because Liggett's evidence of predatory pricing centered on this measure; average variable cost is a conservative measure unlikely to penalize the competitive pricing activities of a more efficient competitor . . . ."), *aff'd sub nom.* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993); *McGahee*, 858 F.2d at 1503 (using the same test as Areeda and Turner prescribed but substituting short run marginal cost for average variable cost); Morgan v. Ponder, 892 F.2d 1355, 1360 (8th Cir. 1989) ("At prices above average variable cost the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive. At prices below average variable cost, the burden of showing non-predation falls on the defendant."); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233, 236 (1st Cir. 1983) (discussing how average variable cost is a standard but not adopting a standard because "the Sherman Act does not make unlawful prices that exceed both incremental and average costs"); Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 92–94 (3d Cir. 1982) ("[T]he court must decide precisely what constitutes the 'cost' against which the price is to be measured. . . . For purposes of this appeal, we shall assume, without deciding, the correctness of the district court's position that the average-variable-cost standard offers the preferred way to approach a claim of predatory pricing."); Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981) (agreeing with Areeda and Turner and presuming prices below average variable cost are predatory while prices above marginal cost are not), *cert. denied*, 455 U.S. 943 (1982); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1035–36 (9th Cir. 1981) (using average variable cost as an appropriate measure of cost when deciding predation), *cert. denied*, 459 U.S. 825 (1982); Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980) (accepting Areeda and Turner's use of marginal cost or average variable cost as a factor but allowing for the flexibility to consider other evidence of predation).

9. *See* Note from U.S. Directorate for Fin. & Enter. Affs. Competition Comm., Roundtable on Resale Below Cost Laws and Regulations 2 (Oct. 7, 2005), https://www.ftc.gov/sites/default/files/attachments/us-submissions-oecd-and-other-international-competition-fora/resalepricemaintenance.pdf

Second, the judicial branch has attempted to decipher what the legislative branch intended in the Sherman Antitrust Act, Clayton Act, and Robinson-Patman Act (RPA).[10] Although the Supreme Court acknowledged below-cost pricing is a problem, it has refused to clarify the meaning of its own words.[11] Consequently, each circuit has developed its own unique solution to the below-cost pricing issue.[12]

The FTC's ambivalence, coupled with the absence of a consistent judicial standard, created the perfect storm in favor of "Big Beer."[13] The FTC does not believe that Big Beer, by effectively pricing independent brewers out of the market, is attempting to monopolize the brewing industry.[14] Supreme Court caselaw is foreboding because, as one Justice noted, "predatory pricing schemes are rarely tried, and even more rarely successful."[15] In the end, Big Beer can rest easy knowing the FTC fervently believes below-cost pricing encourages competition—not monopolies—and there is no single, judicial standard to try the practice.[16]

II. THE HISTORY OF ANTITRUST AND BELOW-COST PRICING

Two of the most notorious names in antitrust history are John D. Rockefeller and Standard Oil. Rockefeller—and his company—dominated the oil industry in the late 1800s through his predatory business practices, which included pricing competitors out of the market.[17] Standard Oil, created by Rockefeller in 1863, controlled 90–

[hereinafter Roundtable on Resale Below Cost Laws] ("While federal antitrust law prohibits predatory pricing, there is no specific federal prohibition on below-cost sales."); *id.* at 7 ("[Below-cost pricing] laws are likely to have an adverse effect on consumer welfare by discouraging firms from competing as vigorously on price than they otherwise would and by protecting high-cost firms from competition from more efficient rivals.").

10. *See Brooke Grp.*, 509 U.S. at 219–30 (examining both the plain language of the statute as well as subsequent caselaw that interprets it); *see generally McGahee*, 858 F.2d at 1496–1500 (performing a detailed analysis of the legislative history of the Clayton and Robinson-Patman Acts).

11. *See McGahee*, 858 F.2d at 1501 (acknowledging that there is a circuit split with regard to the measure of cost and that the Supreme Court has failed to provide clarification).

12. *Id.*

13. *See* Blair Anthony Robertson, *As Craft Beer Flourishes, Big Beer Continues to Buy in and Blur the Lines*, SACRAMENTO BEE (Dec. 2, 2016, 8:00 AM), https://www.sacbee.com/food-drink/beer/article118258943.html (defining "Big Beer" as Anheuser-Busch InBev, MillerCoors, Constellation Brands, and Heineken).

14. Roundtable on Resale Below Cost Laws, *supra* note 9, at 7–8.

15. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986).

16. *McGahee*, 858 F.2d at 1501; Roundtable on Resale Below Cost Laws, *supra* note 9, at 7–8.

17. *See Antitrust 1: Standard Oil*, NPR (Feb. 15, 2019, 4:15 PM), https://www.npr.org/templates/transcript/transcript.php?storyId=695130695 ("In 1872, Rockefeller had about 30 rivals, these other refineries in Cleveland. He basically said to them, you can either join me, get in on this

95 percent of the oil industry by 1880.[18] At the same time, public concern regarding the emergence of trusts like Standard Oil prompted legislators to begin passing state antitrust laws in 1880.[19] Antimonopoly sentiments were so pervasive that both presidential candidates called for anticompetition legislation during the 1888 election.[20]

Before Prohibition, large beer manufacturers dominated the brewing industry by using practices similar to Rockefeller's—integrating vertically and horizontally to control production and distribution.[21] These behaviors prompted the federal government to prohibit companies from controlling individual markets by harming competition.[22] Both the FTC and the Supreme Court observed that Congress enacted antitrust laws to protect consumers—not market participants.[23]

Section A discusses the history of congressional action against monopolies.[24] Section B explains Phillip Areeda and Donald Turner's below-cost pricing framework.[25] Section C presents the judiciary's early approaches to below-cost pricing lawsuits under the Sherman Act and the RPA.[26]

A. Legislative History

Three laws predominantly impact a corporation's ability to adversely impact trade. Subsection 1 explains the Sherman Act and its

amazing Standard Oil stock, or you have to compete with me. And if you don't sell to me, I'm going to lower my prices more than you can. And I will crush you.").

18. *Standard Oil*, ENCYC. BRITANNICA, https://www.britannica.com/topic/Standard-Oil (last visited Feb. 21, 2021).

19. James May, *The Story of Standard Oil Co. v. United States*, *in* ANTITRUST STORIES 7, 11 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

20. *Id.*

21. *Compare Antitrust 1: Standard Oil*, *supra* note 17 (documenting that Rockefeller fixed prices, leveraged railroads against his competitors, and purchased both competitors and pipeline distributors), *with* MARKETING LAWS SURVEY, *supra* note 4, at 20 ("[L]arge liquor interests controlled, through vertical and horizontal integration, the productive and distributive channels of the industry.").

22. *See The Antitrust Laws*, *supra* note 1 ("[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers . . . .").

23. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history illuminates congressional concern with the protection of *competition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition."); *The Antitrust Laws*, *supra* note 1 ("[T]he antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers . . . .").

24. *See infra* Section II.A.

25. *See infra* Section II.B.

26. *See infra* Section II.C.

flaws.[27] Subsection 2 discusses how the Clayton Act expanded the Sherman Act.[28] Subsection 3 describes the RPA and how it resolved a legislative oversight in the Clayton Act.[29]

1. The Sherman Antitrust Act of 1890

Congress created antitrust laws to protect consumers by promoting healthy competition.[30] In 1890, Congress enacted the Sherman Act,[31] which contained two major provisions. Congress sought to prohibit contracts and mergers created for the purpose of preventing competition and enhancing profits in the Sherman Act's first provision.[32] The second provision penalized people and corporations for monopolizing, or attempting to monopolize, "any part of the trade or commerce among the several States."[33]

For seven years, purposivism prevailed as courts looked to Congress's intent when applying the Sherman Act's first provision.[34] In 1897, the Supreme Court pivoted and began interpreting the law using textualism.[35] Then-President Theodore Roosevelt's lament best illustrates the law's flaw, which the court's literal reading emphasized. Roosevelt said, "It is unfortunate that our present laws should forbid all combinations instead of sharply discriminating between those combinations which do good and those combinations which do evil."[36] In short, a literal reading of the Sherman Act declared all interstate and foreign contracts illegal.[37] The Supreme Court explained, "Congress

27. *See infra* Subsection II.A.1.

28. *See infra* Subsection II.A.2.

29. *See infra* Subsection II.A.3.

30. *See The Antitrust Laws*, *supra* note 1 ("[F]or over 100 years, the antitrust laws have had the same basic objective: to protect the process of competition for the benefit of consumers . . . .").

31. Sherman Antitrust Act, Pub. L. No. 51-647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7).

32. Gilbert Holland Montague, *The Defects of the Sherman Anti-Trust Law*, 19 YALE L.J. 88, 88 (1909).

33. 15 U.S.C. §§ 2, 7 (2018).

34. Montague, *supra* note 32; *see Purposivism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine that texts are to be interpreted to achieve the broad purposes that their drafters had in mind; specif., the idea that a judge-interpreter should seek an answer not only in the words of the text but also in its social, economic, and political objectives . . . .").

35. Montague, *supra* note 32; *see Textualism*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("The doctrine that the words of a governing text are of paramount concern and that what they fairly convey in their context is what the text means.").

36. Montague, *supra* note 32, at 98 (quoting President Theodore Roosevelt, State of the Union Address (Dec. 3, 1906)).

37. *See* 15 U.S.C. § 1 ("Every contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.").

is the body to amend [the law], and not this court, by a process of judicial legislation wholly unjustifiable."[38]

Congress never amended the first provision of the Sherman Act, but instead relied on the second provision to protect consumers from monopolies.[39] Despite its vagueness, the second provision is still in effect today.[40] Although the second provision prohibits attempts to monopolize trade, its vague phrasing left room in the law for companies to argue that some predatory activities are innocuous.[41] This legislative ambiguity remained unaddressed until Congress enacted the Clayton Act in 1914.[42]

2. The Clayton Act of 1914

Within twenty-five years of enacting the Sherman Act, Congress realized the law did not address many monopolistic practices that threatened trade.[43] One particular practice Congress discussed is when a large company prices its goods below production costs to harm trade.[44]

Congress noted that some states took it upon themselves to address these practices, and the federal government should supplement those state laws.[45]

In 1914, Congress enacted the Clayton Act[46] to address price discrimination and prevent manufacturers from harming competitors

38. United States v. Trans-Mo. Freight Ass'n, 166 U.S. 290, 340 (1897).

39. *See* Montague, *supra* note 32, at 89 ("The reasons why the Act has not yet been amended are involved with the most important political and financial developments of the past thirteen years.").

40. *See* 15 U.S.C. § 2.

41. *Id.*; United States v. Am. Tobacco Co., 221 U.S. 106, 155 (1911) ("[A]rguments made by both sides at bar . . . involve a conflict as to the application and effect of §§ 1 and 2 of the Anti-trust Act . . . ."); Standard Oil Co. v. United States, 221 U.S. 1, 68–69 (1911) ("So far as the objections of the appellants are concerned . . . . Many arguments are pressed in various forms of statement which in substance amount to contending that the statute cannot be applied under the facts of this case without impairing rights of property and destroying the freedom of contract or trade . . . .").

42. *See infra* Subsection II.A.2.

43. H.R. REP. NO. 63-627, pt. 1, at 7–8 (1914) (explaining that the Sherman Antitrust Act is flawed because it only applies to interstate and foreign commerce, and the Clayton Act would broaden the law to apply to "all places under the jurisdiction of the United States").

44. *Id.* at 8–9.

45. *See id.* at 9 ("The necessity for such legislation is shown by the fact that 19 States have enacted laws forbidding this particular form of discrimination within their borders. . . . It is important that these State statutes be supplemented by additional legislation by Congress . . . .").

46. Clayton Antitrust Act of 1914, Pub. L. No. 63-212, 38 Stat. 730 (codified as amended at 15 U.S.C. §§ 12–27; 29 U.S.C. §§ 52–53).

through predatory pricing.[47] Under the Clayton Act, a manufacturer cannot lower its prices in a particular area of the country to reduce competition.[48] Although legislators discussed powerful corporations "lower[ing] prices of their commodities . . . below the cost of production," Congress did not address that practice in the law.[49]

3. The Robinson-Patman Act of 1936

In 1935, the FTC reported the results of its six-and-a-half-year study and asked Congress to amend section 2 of the Clayton Act.[50] The FTC hoped Congress would eliminate some advantages that only larger manufacturers could utilize, which the Clayton Act permitted.[51] Both the House of Representatives and the Senate took up bills on the subject, which culminated in a five-day conference committee that consolidated three bills into the RPA.[52]

Although the RPA[53] accomplished what the FTC requested, it also included one hotly debated change—section 3 of the act.[54] Most notably, the act's third section made it illegal for a person to sell goods "at unreasonably low prices for the purpose of destroying competition."[55] This prohibition seemingly addressed Congress's post-Clayton Act concerns; however, it used vague language—leaving

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47. H.R. REP. NO. 63-627, pt. 2, at 8 ("It is expressly designed with the view of correcting and forbidding a common and widespread unfair trade practice whereby certain great corporations . . . render unprofitable the business of competitors by selling their goods, wares, and merchandise at a less price in the particular communities where their rivals are engaged in business than at other places throughout the country.").

48. *See* 15 U.S.C. § 13(a) (2018) ("It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination . . . .").

49. H.R. REP. NO. 63-627, pt. 2, at 8.

50. *See* Newell W. Ellison, *Robinson-Patman Act: Its Political and Commercial Background, Its Legislative History*, *in* CONFERENCE PROCEEDINGS ON ROBINSON-PATMAN ANTI-DISCRIMINATION ACT 5 (1936) (noting that the Senate had commissioned the FTC to conduct the survey in 1928, and the FTC had already requested the amendment).

51. *Id.*

52. *See id.* at 6–11 (consolidating the Patman Bill, Robinson Bill, and the Borah-Van Nuys Bill into the RPA).

53. Robinson-Patman Act of 1936, Pub. L. No. 74-692, 49 Stat. 1526 (codified as amended at 15 U.S.C. § 13).

54. *See* Thurlow M. Gordon, *Robinson-Patman Anti-Discrimination Act—The Meaning of Sections 1 and 3*, 22 A.B.A. J. 593, 600 (1936) (labeling section three an "exceedingly dangerous prohibition" and including common questions about the clause, such as "What Are Unreasonably Low Prices?").

55. 15 U.S.C. § 13a (2018).

the law open to the judiciary's interpretation.[56] Like the legislature that passed the Clayton Act, the 1936 Congress discussed below-cost pricing in its deliberations but failed to explicitly prohibit below-cost pricing in the RPA.[57]

B. The Areeda-Turner Framework (1975)

The discussion of below-cost pricing and antitrust continued in 1975 when Professors Areeda and Turner published what would become the baseline analytical framework for modern predatory pricing lawsuits.[58] Areeda and Turner sought to address the "vague formulations" enacted by the 1914 and 1936 Congresses.[59] The

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56. *See, e.g.*, Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230–31 (1st Cir. 1983) ("[Barry] argues that Pacific's discounted prices were unreasonably low. This argument founders, however, on the district court finding that these prices, while lower than normal, nonetheless generated revenues more than sufficient to cover the total cost of producing the goods to which they applied. Barry does not attack that finding; but, instead, it argues that price cutting by a monopolist may still prove unlawful, even if prices remain above total cost. While some circuits have accepted a form of Barry's argument, we do not."); 80 CONG. REC. 8,228 (1936) ("Not only is that very indefinite as to what is an unreasonably low price but, in addition to that, it will also have to be shown that it was sold at an unreasonably low price for the purpose of destroying a competitor.").

57. *Compare* H.R. REP. NO. 63-627, pt. 2, at 8 (1914) (discussing how large companies "lower prices of their commodities, oftentimes below the cost of production in certain communities and sections where they had competition, with the intent to destroy and make unprofitable the business of their competitors"), *and* 80 CONG. REC. 8,235 ("One of the objects of the bill is to get around that phrase and prevent the large corporate chains from selling below cost in certain localities, thus destroying the independent merchants, and making it up at other places where their competitors have already been destroyed."), *with* 15 U.S.C. § 13a ("It shall be unlawful for any person engaged in commerce, in the course of such commerce . . . to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor.").

58. Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438, 459 (2009) (Breyer, J., concurring); Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221–40 (1993); Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 119 n.15 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589–91 (1986); Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc., 777 F.3d 756, 761–63 (5th Cir. 2015); A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1400–04 (7th Cir. 1989); Morgan v. Ponder, 892 F.2d 1355, 1363 (8th Cir. 1989); McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1493–96 (11th Cir. 1988); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 230–40 (1st Cir. 1983); Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 92–96 (3d Cir. 1982); O. Hommel Co. v. Ferro Corp., 659 F.2d 340, 348–53 (3d Cir. 1981); Hanson v. Shell Oil Co., 541 F.2d 1352, 1358 (9th Cir. 1976); Fisherman's Wharf Bay Cruise Corp. v. Superior Ct., 7 Cal. Rptr. 3d 628, 639 (Ct. App. 2003); Cel-Tech Commc'ns, Inc. v. L.A. Cellular Tel. Co., 973 P.2d 527, 554–55 (Cal. 1999). *See generally* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (proposing an analytical framework for below-cost pricing in their 1975 law review article).

59. *See* Areeda & Turner, *supra* note 58, at 698 ("Indeed, the classically-feared case of predation has been the deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.").

professors proposed two elements that must be present to support a finding of predation: financial superiority and recoupment.[60] Finally, the professors noted that precedent created an impracticable standard, and their article would "formulate meaningful and workable tests" to distinguish between "predatory and competitive pricing."[61]

Areeda and Turner delved deeper into pricing than Congress had in its Clayton Act and RPA discussions by integrating economic principles with law to delineate between competition and predation. First, the pair examined the legality of a business that prices a product at or above average cost.[62] In this instance, Areeda and Turner concluded that this behavior is non-predatory because price exceeds cost.[63]

Next, Areeda and Turner broke pricing below average cost into two categories: pricing below average cost but above marginal cost and pricing below marginal cost.[64] The professors explained marginal cost is the ideal standard to use when evaluating below-cost pricing claims, but it is difficult to calculate.[65] Therefore, Areeda and Turner concluded that average variable cost (AVC) is a viable alternative to marginal cost.[66] Subsection 1 summarizes Areeda and Turner's view regarding a manufacturer that prices its goods between average total cost (ATC) and AVC.[67] Subsection 2 describes Areeda and Turner's explanation of below-AVC pricing.[68]

1. Marginal-Cost Pricing: Below ATC but Above AVC

Under the Areeda-Turner framework, there are instances where a manufacturer prices its goods below ATC but above AVC—a practice known as "marginal-cost pricing."[69] By pricing goods in this range, a

60. *Id.*

61. *Id.* at 699.

62. *Id.* at 700–01 (defining average cost as the sum of fixed costs, variable costs, and returns on investment—where fixed costs continue without output and variable costs vary with output and include labor, materials, utilities, licensure, etc.).

63. *See id.* at 705–09 (concluding that pricing above average cost is non-predatory when it is a temporary or permanent price reduction or when used as a barrier of entry into the market).

64. *Id.* at 700 ("Marginal cost is the increment to total cost that results from producing an additional increment of output.").

65. *See id.* at 716 ("The primary administrative impediment to enforcing that prohibition is the difficulty of ascertaining a firm's marginal cost. The incremental cost of making and selling the last unit cannot readily be inferred from conventional business accounts . . . .").

66. *Id.* at 718.

67. *See infra* Subsection II.B.1.

68. *See infra* Subsection II.B.2.

69. Areeda & Turner, *supra* note 58, at 710.

manufacturer with financial superiority might accomplish two monopolistic objectives leading to recoupment—destroy and discourage competition.[70] Areeda and Turner also reasoned that a fixed price floor above AVC would permit the survival of less-efficient manufacturers and discourage more efficient manufacturers from joining the market.[71] Ultimately, the professors concluded that marginal-cost pricing is "the competitive and socially optimal result" because it leads to "proper resource allocation and is consistent with competition on the merits."[72]

2. Below-AVC Pricing

After discussing pricing over ATC and pricing between ATC and AVC, Areeda and Turner turned their attention to the final scenario—a manufacturer that prices goods below AVC.[73] Under this pricing model, a manufacturer prices its goods below the cost to manufacture and sells "at an out-of-pocket loss."[74] According to the professors, below-AVC pricing carries an increased likelihood that a manufacturer's competition will cease to exist for reasons unrelated to efficiency.[75] Areeda and Turner concluded courts should presume a manufacturer that priced below AVC "engaged in a predatory or exclusionary practice."[76]

Areeda and Turner explained substantive issues under the Sherman Act and the RPA are identical in primary-line cases so long as a manufacturer prices above AVC.[77] They established that AVC is the hard line between competition and predation. Under their framework, courts should make two presumptions based on AVC.[78] First, a manufacturer that prices its goods above AVC has done so lawfully.[79] Second, a manufacturer that prices its products below AVC is doing so unlawfully.[80]

70. *Id.*
71. *Id.* at 711.
72. *See id.* at 711–12.
73. *Id.* at 712.
74. *Id.*
75. *Id.*
76. *Id.*
77. *See id.* at 726–27 (defining primary-line injury as "injury to competition between the discriminating seller and [its] competitors").
78. *Id.* at 733.
79. *Id.*
80. *Id.*

C. Adopting the Areeda-Turner Framework

In the years following Areeda and Turner's article, the judiciary incorporated the professors' views into common law.[81] In 1986, the Supreme Court adopted Areeda and Turner's predatory pricing analytical framework.[82] Later that year, the Court reiterated its acceptance of Areeda and Turner's framework in *Cargill, Inc. v. Monfort of Colorado, Inc*.[83] Finally, in 1993, the Supreme Court used the Areeda-Turner framework extensively when it created its uniform approach to discriminatory pricing in *Brooke Group v. Brown & Williamson Tobacco Corp*.[84] Despite repeatedly using the Areeda-Turner framework, the Supreme Court continually declined to adopt the AVC standard "because it was unnecessary to do so to decide the cases at bar."[85]

III. THE HISTORY OF THE BREWING INDUSTRY

After repealing Prohibition, the federal government commissioned a survey of state alcohol regulations.[86] This survey classified state alcohol legislation into three categories: licensing, monopoly, and prohibition.[87] In addition to these categories, the study observed a common ground among all three regulatory schemes—the purpose of beer regulations was to prevent monopolistic behaviors that were pervasive before Prohibition.[88] On December 5, 1933, the United States brewing industry started anew with the goal to create an industry free of monopolies.[89]

The brewing industry's landscape and the price of beer experienced great change after Prohibition ended.[90] Section A discusses the changes in the brewing industry from Prohibition to

81. James R. McCall, *Private Enforcement of Predatory Price Laws Under the California Unlawful Practices Act and the Federal Antitrust Acts*, 28 PAC. L.J. 311, 319 (1997).

82. *See* Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588–91 (1986).

83. 479 U.S. 104, 117 n.12 (1986) (adapting Areeda and Turner's explanation of predatory pricing and acknowledging the debate on an appropriate measure of cost).

84. 509 U.S. 209, 219–30 (1993) (citing Areeda and Turner five times and discussing many of the same principles that they discussed in their article).

85. McCall, *supra* note 81, at 319; *see id.* at 319 n.59.

86. *See* MARKETING LAWS SURVEY, *supra* note 4, at 21 (indicating that the primary purpose of the survey was to analyze all state laws directly affecting marketing goods and reporting on the liquor industry in particular).

87. *Id.*

88. *Id.* at 20.

89. *See* U.S. CONST. amend. XXI (permitting the manufacture and sale of alcohol in the United States).

90. *See infra* Part III.

today.[91] Section B analyzes how the development of the craft brewing industry created healthy competition and benefitted consumers by decreasing the price of beer.[92] Section C presents evidence of Big Beer's legislative efforts to reestablish its former market share.[93] Last, Section D highlights Big Beer's antitrust activities that are increasing its current market share back to pre-craft brewing levels.[94]

A. Industry Change in the Post-Prohibition Era

The craft brewing industry did not exist at the end of Prohibition. In fact, the number of breweries did not experience significant growth until after 1990.[95] After Prohibition ended, longstanding beer manufacturers like Anheuser-Busch resumed production, and the number of brewers in the United States reached nearly one thousand.[96] This number was nowhere near pre-Prohibition levels, but it was the most breweries in the country between 1941–1995.[97] By 1961, the number of breweries had dwindled and there were only 230 in operation—only 140 of which were independent breweries.[98] In 1983, the United States saw the lowest number of breweries operating in the twentieth century at eighty.[99] Fifty-one parent companies owned those eighty breweries and the six largest companies—Anheuser-Busch, Miller, Heileman, Stroh, Coors, and Pabst—produced 92 percent of all beer in the United States.[100]

Something changed in the late 1980s—the craft brewing industry was in its infancy. The number of breweries exploded between 1985–1998—it jumped to one thousand in 1996 and fifteen hundred in 1998.[101] Since 1985, the number of craft breweries in the United States has continued to climb and only contracted during the Great Recession.[102] Year 2005 was the last year that the number of breweries

91. *See infra* Section III.A.
92. *See infra* Section III.B.
93. *See infra* Section III.C.
94. *See infra* Section III.D.
95. *Mapping the American Brewing Renaissance*, VINEPAIR, https://vinepair.com/map-american-craft-brewing-history/ (last visited Feb. 21, 2021).
96. *Id.*; *History of American Beer*, BEER ADVOC., https://www.beeradvocate.com/beer/101/history_american_beer/ (last visited Feb. 21, 2021).
97. *Mapping the American Brewing Renaissance*, *supra* note 95.
98. *History of American Beer*, *supra* note 96.
99. *Id.*
100. *Id.*
101. *Mapping the American Brewing Renaissance*, *supra* note 95.
102. *Id.*

declined—by 2016, the number of breweries in the United States surpassed five thousand.[103]

The brewing industry vastly changed between 1983–2016, as the number of brewers increased by 6,250 percent.[104] During the same period, Big Beer's market share dropped from producing 92 percent of all beer in 1983 to 72 percent in 2018.[105] Craft brewers' market share increased from 8 percent to 28 percent over the same period.[106] Today, Big Beer still earns more than half of the industry's retail sales, but it no longer dominates the market like it once did.[107]

B. The Retail Price of Beer in the Post-Prohibition Era

After Congress ended Prohibition, the number of brewers fluctuated until its population exploded in the late 1980s.[108] Through the industry's early expansions and contractions, the price of beer—adjusted for inflation—remained relatively constant.[109] From 1950–1980, the price of beer averaged around $5.50 per pint.[110] After 1980, the price of a pint demonstrated what economists have long postulated—price is negatively correlated to competition.[111] A pint dropped to $4.07 by 1990—the year the number of brewers peaked before the Great Recession.[112]

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103. *Id.*

104. *Id.*

105. *Compare History of American Beer*, *supra* note 96 (observing that Big Beer controlled 92 percent of production in 1983), *with* DEP'T OF THE TREASURY, ALCOHOL AND TOBACCO TAX AND TRADE BUREAU, NUMBER OF BREWERS BY PRODUCTION SIZE—CY 2018 (Apr. 4, 2019), https://www.ttb.gov/images/pdfs/statistics/production_size/2018_brew_prod_size_ttb_gov.pdf [hereinafter NUMBER OF BREWERS REPORT] (reporting that large breweries—or breweries that produced over six million barrels a year—produced 72 percent of all U.S. beer in 2018).

106. *Compare History of American Beer*, *supra* note 96 (noting that Big Beer produced 92 percent of all U.S. beer in 1983), *with* NUMBER OF BREWERS REPORT, *supra* note 105 (explaining that small breweries—or breweries that produced less than six million barrels a year—produced 28 percent of all U.S. beer in 2018).

107. MARKETING LAWS SURVEY, *supra* note 4, at 20, 22, 25; Thomas A. Gerhart, Comment, *Undermining the Law: How Uninformed Legislating Helps Big Beer Erode California's Tied-House Laws*, 51 U. PAC. L. REV. 25, 28 (2019).

108. *Mapping the American Brewing Renaissance*, *supra* note 95.

109. Jay Brooks, *The Price of a Beer: 1952–2016*, BROOKSTON BEER BULL. (Mar. 9, 2017), https://brookstonbeerbulletin.com/the-price-of-a-beer-1952-2016/.

110. *Id.*

111. *See* Maurice E. Stucke, *Is Competition Always Good?*, 1 J. ANTITRUST ENF'T 162, 165 (2013) ("Competition can yield . . . lower costs and prices for goods and services [and] better quality . . . .").

112. *Compare Mapping the American Brewing Renaissance*, *supra* note 95 (observing that the number of brewers increased between 1980–2017), *with* Brooks, *supra* note 109 (documenting that the price of a pint dropped from $4.63 in 1980 to $3.99 in 2016).

In 1978, President Jimmy Carter amended the Internal Revenue Code to legalize homebrewing.[113] A pint cost consumers more than five dollars just three years before homebrewing was legal, and the price of a pint has not exceeded that mark since.[114] Following the United States legalization of homebrewing, the price of a pint began to decrease at an accelerated rate. Between 1956–1976, the price fell from approximately six dollars to five dollars and from five dollars to nearly four dollars by 1985.[115] In 2013, the price per pint dipped below roughly four dollars and has stayed there ever since.[116]

C. Big Beer's Legislative Efforts to Regain Control of the Market

Facing a decreasing market share and a smaller profit line, Big Beer began to look at other ways to regain its market dominance. The Twenty-First Amendment left regulating alcohol to the individual states, so Big Beer began lobbying state legislatures to gain advantages over its competitors.[117] Regaining a foothold in California is critical for Big Beer because the state consumed the most beer by any state in 2017.[118] Additionally, competition for that market is stiff because California had more breweries than any other state in 2017—more than double the state with the second most breweries.[119]

California uses a licensing system to regulate its brewing industry.[120] Under California's regulatory system, licensees cannot perform a particular act unless a statute explicitly permits it.[121] As Big Beer's market share decreased, and the price of a pint followed suit, the number of legislative exceptions in the state began to increase.[122] The post-Prohibition era saw very few changes to California's beer

113. *See* Act of 1978, Pub. L. No. 95-458, § 2(b)(1)(e), 92 Stat. 1255 (codified as amended at 26 U.S.C. § 5042) ("[A]ny adult may, without payment of tax, produce beer for personal or family use and not for sale.").

114. *History of American Beer*, *supra* note 96; Brooks, *supra* note 109.

115. Brooks, *supra* note 109.

116. *Id.*

117. *See* U.S. CONST. amend. XXI, § 2 ("The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited."); Gerhart, *supra* note 107, at 33 (discussing various exceptions that Big Beer lobbied for in California after 1960).

118. *Mapped & Ranked: The States with the Most Craft Breweries in 2017*, VINEPAIR, https://vinepair.com/articles/map-states-most-craft-breweries-2018/ (last visited Feb. 21, 2021).

119. *Id.*

120. MARKETING LAWS SURVEY, *supra* note 4, at 20, 22.

121. *See* CAL. BUS. & PROF. CODE § 23300 (Deering 2020) ("No person shall exercise the privilege or perform any act which a licensee may exercise or perform under the authority of a license unless the person is authorized to do so by a license issued pursuant to this division.").

122. Gerhart, *supra* note 107, at 45.

laws—the state enacted two exceptions to its beer laws between 1960–1980.[123] The first exception allowed manufacturers to assist retailers in Crescent City after a natural disaster, and the second allowed retailers to hold diminutive amounts of stock in manufacturers.[124]

From 1980–2000, California's Legislature enacted eight new exceptions to its beer laws—some of which, but not all, created benefits for larger manufacturers.[125] These new exceptions permitted manufacturers to provide inducements to retailers in the form of sponsorships, replacement equipment after a natural disaster, and tickets to sporting events.[126] These pay-to-play activities are the precise thing that California's original beer laws prohibited, yet Big Beer lobbied and changed the law to gain market advantages that smaller brewers cannot afford.[127]

Finally, the uptick in legislative exceptions continued between 2000–2018, when the Legislature enacted eight new exceptions.[128] It passed AB 2573 in 2018, but Governor Brown vetoed the bill because of its pay-to-play nature.[129] A nearly identical bill emerged in the 2019–2020 legislative session, presumably because a new governor might sign it into law.[130]

D. Big Beer's Other Strategies for Market Dominance

Big Beer's attempts to recapture its place at the top of the market transcend lobbying. It has continually evolved the way that it does business to find other methods to control the industry. Unlike its

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123. *Id.* at 45 n.182.

124. CAL. BUS. & PROF. CODE § 25503.12; *see also* Act of May 18, 1964, ch. 86, § 1, 1964 Cal. Stat. 275, 275 (codified at CAL. BUS. & PROF. CODE § 25511).

125. Gerhart, *supra* note 107, at 45 n.182.

126. CAL. BUS. & PROF. CODE §§ 25503.23, 25503.27, 25511.

127. *See id.* § 25500(a)(2) (prohibiting manufacturers from giving any "thing of value" to licensed alcohol seller).

128. Gerhart, *supra* note 107, at 45 n.182.

129. *See* Letter from Jerry Brown, Governor, Cal., to Cal. State Assembly (Sept. 6, 2018) ("[T]his law creates an economic disadvantage for small beer manufactures who might not be able to provide free glassware in the same manner as the larger manufacturers.").

130. *Compare* Assemb. B. 2573, 2017–2018 Reg. Sess. (Cal. 2018) (permitting beer manufacturers to give a retailer five free cases of glassware per year but restricting a retailer to accepting no more than ten cases total per year), *with* CAL. BUS. & PROF. CODE § 25600.05 (allowing a beer manufacturer to give five cases of glassware to a retailer for free per year but limiting the amount of glassware a retailer can accept to ten cases). *See also* Assemb. B. 1133, 2019–2020 Reg. Sess. (Cal. 2019).

legislative foray, these other methods seek to stifle competition by either purchasing or harming competitors.[131]

Over the last five years, the brewing industry has seen many attempts by Big Beer to reconquer the market. These new methods include cutting off access to ingredients, dominating production, purchasing competition, and controlling distribution channels.[132] In 2017, Anheuser-Busch InBev (ABI) purchased the entire South African hops harvest to prevent craft brewers from accessing coveted hop varietals.[133] Then, ABI purchased SAB Miller in 2018 and now produces approximately 50 percent of all beer in the United States.[134] Big Beer has also purchased a slew of craft breweries and continues to market those brands as "craft beer."[135] Additionally, the United States Justice Department investigated ABI for purchasing distribution chains in an attempt to restrict market access for craft brewers.[136]

America's brewing industry has undergone many changes since Prohibition ended, and analyzing these changes reveals trends that help explain the industry today. First, the increased number of brewers resulted in increased competition after 1983, which drove down the price of beer.[137] Second, the massive increase in the number of brewers cut into Big Beer's market share.[138] Last, since the late 1970s, Big Beer has attempted to regain control over the brewing industry through both legislative and other means.[139]

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131. *Big Alcohol Buys Out Craft on Its Way to Monopoly*, ALCOHOL JUST., https://alcoholjustice.org/watchdogging-2/in-the-doghouse/1306-big-alcohol-buys-out-craft-on-its-way-to-monopoly/ (last visited Feb. 21, 2021); Jason Notte, *Opinion: Anheuser-Busch InBev Shuts Out Craft Beer Brewers by Hoarding Hops*, MARKETWATCH (May 12, 2017, 3:09 AM), https://www.marketwatch.com/story/anheuser-busch-inbev-shuts-out-craft-beer-brewers-by-hoarding-hops-2017-05-11.

132. *See infra* notes 133–136.

133. Notte, *supra* note 131.

134. Keith Gribbins, *AB InBev Purchase of SABMiller Is Finally Approved; Here Are the Important Modifications*, CRAFT BREWING BUS. (Oct. 30, 2018), https://www.craftbrewingbusiness.com/business-marketing/ab-inbev-purchase-of-sabmiller-is-finally-approved-here-are-the-important-modifications/.

135. *Big Alcohol Buys Out Craft on Its Way to Monopoly*, *supra* note 131; Alastair Bland, *Craft Beer, Brought to You by Big Beer*, NPR (July 28, 2017, 12:03 PM), https://www.npr.org/sections/thesalt/2017/07/28/539760477/craft-beer-brought-to-you-by-big-beer.

136. Diane Bartz, *Exclusive: U.S. Queries AB InBev on Distribution Incentives amid Merger Probe*, REUTERS (May 24, 2016, 10:07 PM), https://www.reuters.com/article/us-a-b-i-craftbeers-probe-exclusive-idUSKCN0YG0EG.

137. *See supra* Sections III.A–B.

138. *See supra* Section III.A.

139. *See supra* Sections III.C–D.

IV. THE FEDERAL GOVERNMENT AND BELOW-COST PRICING

Congress created antitrust laws to prevent monopolists from harming consumers by charging supracompetitive prices.[140] Technically, the FTC does not enforce the Sherman Act; however, it can bring actions under the FTC Act that resemble Sherman Act, Clayton Act, and RPA violations.[141] Although one the FTC's duties is to monitor price discrimination, it has taken the stance that pricing goods below cost "does not necessarily injure competition."[142] Rather, the commission noted the practice "may simply reflect particularly vigorous competition."[143]

The FTC has moved beyond the role of regulator and enforcer, raising doubt over whether it guards the market from below-cost pricing. In a 2005 report, the FTC categorized below-cost pricing as mere competition and explained that it openly—and sometimes successfully—discourages states from regulating the practice.[144] Labelling below-cost pricing as a "hallmark of competition" undermines the validity of statements regarding the frequency of below-cost pricing lawsuits.[145]

One way for a manufacturer to develop a monopoly is to destroy competition through unreasonably low prices—the two practices explicitly prohibited by the Sherman Act and the RPA.[146] As Areeda and Turner noted, two necessary elements to create a monopoly by predatory pricing are financial superiority and recoupment.[147] Relationships between the Sherman Act, RPA, and monopoly creation build a foundation to challenge the credibility of the FTC's position regarding below-cost pricing—that it is mere competition.[148] The

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140. *The Antitrust Laws*, *supra* note 1.

141. *See* 15 U.S.C. §§ 41–58 (2018); *The Antitrust Laws*, *supra* note 1 ("The Federal Trade Commission Act bans 'unfair methods of competition' and 'unfair or deceptive acts or practices.'").

142. *Predatory or Below-Cost Pricing*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost (last visited Feb. 21, 2021).

143. *Id.*

144. *See* Roundtable on Resale Below Cost Laws, *supra* note 9, at 2 ("[T]he FTC's competition advocacy program has tried—successfully in some cases—to persuade state legislators not to enact these laws.").

145. *Compare id.* at 5 (explaining that lowering prices, in the context of below-cost pricing, is the "hallmark of competition"), *with Predatory or Below-Cost Pricing*, *supra* note 142 ("Instances of a large firm using low prices to drive smaller competitors out of the market in hopes of raising prices after they leave are rare.").

146. 15 U.S.C. §§ 2, 13a.

147. *See* Areeda & Turner, *supra* note 58, at 698.

148. Roundtable on Resale Below Cost Laws, *supra* note 9.

FTC's position on below-cost pricing, coupled with its campaigns against state predatory pricing legislation, undermine whether the practice is as rare or innocuous as the agency purports.

V. THE JUDICIARY'S APPROACH TO BELOW-COST PRICING

Areeda and Turner's discussion of price and antitrust provided a baseline that has appeared in most modern below-cost pricing cases.[149] Despite their guidance, courts have struggled between using ATC, marginal cost, AVC, or something else when discerning whether a price was predatory.[150] Section A examines the *Brooke Group* test, which the Supreme Court created to assess predatory pricing claims under the RPA.[151] Section B investigates the various circuit splits that have emerged since Areeda and Turner published their article in 1975.[152] Section C discusses additional requirements for bringing a successful below-cost pricing claim.[153] Section D presents the final element of a primary-line predatory pricing claim under the RPA.[154] Section E explains the elements of a Sherman Act claim.[155]

A. The Brooke Group *Test*

After decades of cobbling together a quasi-workable approach to resolve predatory pricing claims, the Supreme Court created the modern standard in 1993.[156] In *Brooke Group v. Brown & Williamson*

149. *See supra* text accompanying note 58.

150. *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1503 (11th Cir. 1988) (opting to use short run marginal cost instead of AVC); Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 234 (1st Cir. 1983) (rejecting the Ninth Circuit's use of AVC); William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1035–36 (9th Cir. 1981) ("If the defendant's prices were below [ATC] but [AVC], the plaintiff bears the burden of showing the defendant's pricing was predatory.").

151. *See infra* Section V.A.

152. *See infra* Section V.B.

153. *See infra* Section V.C.

154. *See infra* Section V.D.

155. *See infra* Section V.E.

156. *Compare* Fed. Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 548 (1960) (indicating that federal courts consistently emphasize a defendant's unreasonably low prices and predatory intent), A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1405–06 (7th Cir. 1989) (discussing how *Utah Pie* applied the same standard expressed in *FTC v. Anheuser Busch, Inc.* when it held the Sherman Act permits some discrimination prohibited by the RPA), Nat'l Dairy Prods. Corp. v. United States, 350 F.2d 321, 329 (8th Cir. 1965) (analyzing the meaning of "below cost" to resolve the lawsuit), *vacated*, 384 U.S. 883 (1966), *and* Porto Rican Am. Tobacco Co. of P.R. v. Am. Tobacco Co., 30 F.2d 234, 236 (2d Cir. 1929) (using "ruinous competition" as the basis for evaluating below-cost pricing), *with* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993) (creating a concrete, two-part test that normalized the approach to Sherman Act and RPA claims).

Tobacco Corp., the Supreme Court created a two-step prerequisite test for below-cost pricing claims under the Sherman Act and the RPA.[157] The Court combined earlier caselaw with the Areeda-Turner framework to create a baseline test for analyzing below-cost pricing claims.[158] Additionally, it normalized the predatory pricing analysis under the two laws when it wrote, "[the Sherman Act and the RPA's] two prerequisites to recovery remain the same."[159]

The first element places the burden on the plaintiff to "prove that the prices complained of are below an appropriate measure of its rival's costs."[160] The Supreme Court cited some of the most famous—and infamous—predatory pricing cases when it created this first prong.[161] To justify this element, the Court reasoned that low prices benefit consumers and do not threaten competition if they are above predatory levels.[162] Further, the Court reinforced its position when it explained, "below-cost prices may constitute 'unreasonably low' prices for purposes of [RPA]."[163]

Under the second element, a court should examine whether the defendant had a reasonable prospect—or a dangerous probability—of recouping its losses because of below-cost pricing.[164] Again, the Supreme Court looked to precedent when it crafted this element.[165] It distinguished a below-cost pricing scheme without recoupment from one where the "predator profits from predation."[166] To differentiate recoupment from price reduction, the Court explained "without [recoupment], predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced."[167]

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157. *Brooke Grp.*, 509 U.S. at 222–24.

158. *See generally id.* (citing below-cost pricing cases from the 1920s–1990s, Areeda and Turner's law review article, and canons of construction to craft its two-part test).

159. *See id.* at 222 (explaining the test is the same regardless of whether it is a Sherman Act or RPA claim).

160. *Id.* at 222.

161. *See id.* at 222–23 (citing Cargill, Inc. v. Monfort of Colo., 479 U.S. 104, 117 (1986); then citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 585 (1986); and then citing Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 698 (1967)).

162. *Id.* at 223.

163. *See id.* (citing United States v. Nat'l Dairy Prod. Corp., 372 U.S. 29, 37 (1963)).

164. *Id.* at 224.

165. *See id.* (citing *Cargill, Inc.*, 479 U.S. at 117; and then citing *Matsushita Elec. Indus. Co.*, 475 U.S. at 585).

166. *Id.*

167. *Id.*

B. Interpreting an Appropriate Measure of Cost: Circuit Splits

Contrary to the FTC's belief that below-cost pricing is a competitive practice, almost every circuit uses some derivative of AVC as its measure of cost.[168] A clear minority—comprised of the D.C., First, and Tenth Circuits—emerged and has not adopted a measure of cost.[169] The remaining nine circuits use some form of AVC as a measure of cost.[170] These circuits split into two camps: AVC hardliners and burden-shifting jurisdictions.[171] Subsection 1 discusses the minority's avoidance approach to measure of cost.[172] Subsection 2 explains the AVC hardline approach.[173] Subsection 3 describes the AVC burden-shifting method.[174]

1. Minority Jurisdictions

In their 1975 publication, Areeda and Turner conceptualized a standard measure of cost for below-cost pricing claims.[175] Next, the Supreme Court adopted the phrase "an appropriate measure of cost" and integrated that phrase into the *Brooke Group* test.[176] Since creating a standard dependent on an appropriate measure of cost, the Supreme Court has denied certiorari in multiple cases where it could have clarified what the phrase means.[177]

After the Supreme Court created the ambiguous cost standard, three circuits adopted the same approach by refusing to select a

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168. *See supra* note 9.
169. *See infra* Subsection V.B.1.
170. *See supra* note 8.
171. *See infra* Subsections V.B.2–3.
172. *See infra* Subsection V.B.1.
173. *See infra* Subsection V.B.2.
174. *See infra* Subsection V.B.3.
175. *See generally* Areeda & Turner, *supra* note 58, at 697 (proposing average variable cost as the basis for which courts should weigh predatory pricing claims).
176. *Compare* S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1005 (D.C. Cir. 1984) (using the phrase "an appropriate measure of cost" for the first time in the context of predatory pricing), Am. Trucking Ass'n v. United States, 755 F.2d 1292, 1299 (7th Cir. 1985) (becoming the second court to discuss appropriate measures of cost), *and* Cargill, Inc. v. Monfort of Colo., Inc., 479 U.S. 104, 117 (1986) ("Predatory pricing may be defined as pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run."), *with* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 (1993) (incorporating the phrase "an appropriate measure of cost" into the first prong of the *Brooke Group* test).
177. Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc., 777 F.3d 756, 761 (5th Cir. 2015), *cert. denied*, 577 U.S. 816 (2015); Multistate Legal Stud., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc., 63 F.3d 1540, 1549 (10th Cir. 1995), *cert. denied*, 516 U.S. 1044 (1996); McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1503 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

measure of cost and avoiding the question altogether.[178] Five years after *Brooke Group*, the D.C. Circuit explained that the Supreme Court left the measure of cost question "unresolved."[179] In 2001, the D.C. Circuit implicitly rejected the Areeda and Turner framework in *United States v. Microsoft Corp*.[180] It explained that antitrust laws do not prohibit a monopolist from "offering its product . . . free of charge or even at a negative price."[181]

In 1983, the First Circuit refused to adopt a measure of cost and has since resolved six post-*Brooke Group* below-cost pricing cases on other grounds.[182] The Tenth Circuit explicitly sided with the Supreme Court when it wrote, "neither the Supreme Court nor we have taken a position on which of various cost measures is the definitive one."[183] After aligning itself with the Supreme Court, the Tenth Circuit has side-stepped the measure of cost question in five post-*Brooke Group* below-cost pricing cases.[184]

2. Hardline Jurisdictions

Areeda and Turner grouped pricing into three categories: above-ATC pricing, marginal-cost pricing (between ATC and AVC), and below-AVC pricing.[185] The professors explained that marginal-cost pricing appears to be predatory, but it actually encourages and rewards market efficiency.[186] Ultimately, the pair concluded that AVC is the

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178. *Compare Multistate Legal Stud., Inc.*, 63 F.3d at 1549 (adopting the Supreme Court's approach of not selecting a measure of cost), *and* Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 233, 236 (1st Cir. 1983) (avoiding the question on measure of cost because the case involved pricing above total cost), *with* McCall, *supra* note 81 (explaining how the Supreme Court was able to avoid defining an appropriate measure of cost).

179. La. Energy & Power Auth. v. Fed. Energy Regul. Comm'n, 141 F.3d 364, 366 n.3 (D.C. Cir. 1998).

180. 253 F.3d 34 (D.C. Cir. 2001).

181. *Id.* at 68.

182. Am. Steel Erectors, Inc. v. Loc. Union No. 7, Int'l Ass'n of Bridge, 815 F.3d 43, 71 (1st Cir. 2016); Sterling Merch., Inc. v. Nestlé, S.A., 656 F.3d 112, 126 (1st Cir. 2011); Able Sales Co. v. Compañía de Azúcar de Puerto Rico, 406 F.3d 56, 65 (1st Cir. 2005); Bridges v. MacLean-Stevens Studios, Inc., 201 F.3d 6, 14 (1st Cir. 2000); C.B. Trucking, Inc. v. Waste Mgmt., Inc., 137 F.3d 41, 45 (1st Cir. 1998); R.W. Int'l Corp. v. Welch Food, Inc., 13 F.3d 478, 488 (1st Cir. 1994); *Barry Wright Corp.*, 724 F.2d at 233, 236.

183. *Multistate Legal Stud., Inc.*, 63 F.3d at 1549 n.5.

184. Native Am. Distrib. v. Seneca-Cayuga Tobacco Co., 546 F.3d 1288, 1299 (10th Cir. 2008); Par. Oil Co. v. Dillon Cos., 523 F.3d 1244, 1257 (10th Cir. 2008); Star Fuel Marts, LLC v. Sam's E., Inc., 362 F.3d 639, 653 (10th Cir. 2004); United States v. AMR Corp., 335 F.3d 1109, 1120–21 (10th Cir. 2003); *Multistate Legal Stud., Inc.*, 63 F.3d at 1549 n.5.

185. Areeda & Turner, *supra* note 58, at 704–15.

186. *Id.* at 711.

hardline between competition and predation—above-AVC prices are legal and below-AVC prices are illegal.[187]

In 1981, the Second Circuit adopted the AVC hardline approach[188] and has since presumed predation for below-AVC prices.[189] After Areeda and Turner published their article, the Third Circuit encountered two below-cost pricing cases.[190] It applied AVC in both instances[191] but refused to decide "the correctness of the district court's position that the [AVC] standard offers the preferred way to approach a claim of predatory pricing."[192] The Fourth Circuit affirmed the district court's adoption of the AVC hardline in 1992, and the Supreme Court created the *Brooke Group* test to affirm that decision the following year.[193]

In 2015, the Fifth Circuit acknowledged the scholarly and judicial debates regarding a measure of cost when it accepted Areeda and Turner's AVC hardline.[194] This circuit moved beyond mere acceptance and discussed the varying opinions regarding which costs are variable.[195] The Seventh Circuit also accepted the AVC hardline, but it emphasized the importance of other evidence in below-cost pricing lawsuits.[196] Last, the Eleventh Circuit prefers short-run marginal cost over AVC, but it acknowledged that AVC is a viable substitute in predation cases.[197] This circuit also explicitly distinguished its approach from the Sixth and Ninth Circuits because it rejected their burden-shifting approach to predation.[198]

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187. *Id.* at 711–12.

188. Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 88 (2d Cir. 1981).

189. *See, e.g.*, Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 404, 407 (2d Cir. 1988).

190. Indian Coffee Corp. v. Procter & Gamble Co., 752 F.2d 891, 902–03 (3d Cir. 1985); Sunshine Books, Ltd. v. Temple Univ., 697 F.2d 90, 93–94 (3d Cir. 1982).

191. *Indian Coffee Corp.*, 752 F.2d at 902–03; *Sunshine Books, Ltd.*, 697 F.2d at 93–94.

192. *Sunshine Books, Ltd.*, 697 F.2d at 93–94.

193. Liggett Grp. v. Brown & Williamson Tobacco Corp., 964 F.2d 335, 342 (4th Cir. 1992), *aff'g* 748 F. Supp. 344, 362 n.42 (M.D.N.C. 1990), *aff'd sub nom*. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24, 243 (1993).

194. Felder's Collision Parts, Inc. v. All Star Advert. Agency, Inc., 777 F.3d 756, 761 (5th Cir. 2015), *cert. denied*, 577 U.S. 816 (2015).

195. *Id.* at 761–62.

196. Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980).

197. McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1503–04 (11th Cir. 1988), *cert. denied*, 490 U.S. 1084 (1989).

198. *Id.* at 1503 n.37.

3. Burden-Shifting Jurisdictions

Three circuits adopted a burden-shifting framework, where the courts use Areeda and Turner's AVC hardline as the determining factor for who has the burden of proof.[199] If a defendant prices its goods below AVC, then the burden falls on the defendant to demonstrate there was no predation.[200] Conversely, if a defendant prices its goods above AVC, then the plaintiff must overcome a strong presumption of legality.[201] To prevail, a plaintiff must present evidence that the defendant priced in the marginal-cost range and sought to harm competition.[202]

The Sixth, Eighth, and Ninth Circuits use the framework described above to determine which party has the burden of proof in predation cases.[203] Essentially, these circuits agree with Areeda and Turner's conclusions regarding above-ATC pricing and below-AVC pricing but disagree on marginal-cost pricing.[204] Areeda and Turner consider pricing between ATC and AVC the ideal price model, but burden-shifting jurisdictions allow a plaintiff to succeed against a defendant that priced in this range.[205] The Sixth, Eighth, and Ninth Circuits employ a strong presumption of legality for above-AVC pricing and the presumption of predation for below-AVC pricing.[206]

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199. *See infra* notes 200–202.

200. Morgan v. Ponder, 892 F.2d 1355, 1360 (8th Cir. 1989).

201. *Id.*

202. Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 938 (6th Cir. 2005); *see, e.g.*, William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1025 (9th Cir. 1981) (presenting evidence that the defendant hired consultants to generate a report that would identify ways "to hasten wholesaler exit").

203. Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 319 (6th Cir. 2015); *Spirit Airlines, Inc.*, 431 F.3d at 938; *Morgan*, 892 F.2d at 1360; *William Inglis & Sons Baking Co.*, 668 F.2d at 1035–36.

204. *Compare supra* Section II.B (above ATC is legal, pricing between ATC and AVC is optimal, and below AVC is predatory), *with Superior Prod. P'ship*, 784 F.3d at 319 (using AVC as the barometer between who has the burden of proof—plaintiff or defendant) (quoting *Spirit Airlines, Inc.*, 431 F.3d at 938), *Morgan*, 892 F.2d at 1360 (placing the burden on the plaintiff to prove above-AVC predation, but placing the burden on the defendant to prove non-predation in below-cost pricing scenarios), *and William Inglis & Sons Baking Co.*, 668 F.2d at 1041 ("[U]nless the plaintiff proves that the prices were below the defendant's average variable cost, the plaintiff bears the burden of establishing that the anticipated benefits of the prices depended on their anticipated destructive effect on competition. If the plaintiff does prove pricing below average variable cost, the burden shifts to the defendant . . . .").

205. *Superior Prod. P'ship*, 784 F.3d at 319; *Morgan*, 892 F.2d at 1360; *William Inglis & Sons Baking Co.*, 668 F.2d at 1041; *see supra* Section II.B.

206. *Superior Prod. P'ship*, 784 F.3d at 319; *Morgan*, 892 F.2d at 1360; *William Inglis & Sons Baking Co.*, 668 F.2d at 1041.

C. *Additional Requirements Beyond the* Brooke Group *Test*

Although the Supreme Court created its two-pronged test in *Brooke Group*, other courts have since emphasized other parts of the decision to add new legal requirements. Areeda and Turner discussed each of these additional elements, albeit briefly, when they proposed their framework for analyzing cost in predatory pricing lawsuits.[207] Subsection 1 presents the relevant market requirement.[208] Subsection 2 examines how a rational economic motive is necessary for predatory intent.[209] Subsection 3 explains how courts consider a monopolist's market power to establish recoupment.[210] Subsection 4 describes the relationship between recoupment and barriers to entry.[211]

1. The Eighth Circuit's Relevant Market Requirement

Areeda and Turner concluded that below-cost pricing is unlawful "whether between different geographic markets or in the same market."[212] Contrary to the professors, the Eighth Circuit places a great emphasis on the *Brooke Group* test's use of the phrase "relevant market."[213] In fact, the Eighth Circuit fails many below-cost pricing lawsuits because it requires plaintiffs to "establish the relevant geographic market to recover" in a predatory pricing case.[214] According to the Eighth Circuit, a relevant market is the geographic area customers could practically buy alternative goods if the defendant's prices were too high.[215] Although the Eighth Circuit is the

207. Areeda & Turner, *supra* note 58, at 698, 733.
208. *See infra* Subsection V.C.1.
209. *See infra* Subsection V.C.2.
210. *See infra* Subsection V.C.3.
211. *See infra* Subsection V.C.4.
212. Areeda & Turner, *supra* note 58, at 733.
213. *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 226 (1993) ("Evidence of below-cost pricing is not alone sufficient to permit an inference of probable recoupment and injury to competition. Determining whether recoupment of predatory losses is likely requires an estimate of the cost of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market."); Bathke v. Casey's Gen. Stores, Inc., 64 F.3d 340, 344 (8th Cir. 1995) (requiring that a plaintiff must establish the relevant geographic market before it will consider the *Brooke Group* test).
214. *Bathke*, 64 F.3d at 344 (affirming the district court's holding that the plaintiff failed to demonstrate the relevant market); Park Irmat Drug Corp. v. Express Scripts Holding Co., 911 F.3d 505, 517 (8th Cir. 2018); Fed. Trade Comm'n v. Lundbeck, Inc., 650 F.3d 1236, 1239–40 (8th Cir. 2011); Little Rock Cardiology Clinic PA v. Baptist Health, 591 F.3d 591, 597 (8th Cir. 2009); Fed. Trade Comm'n v. Tenet Health Care Corp., 186 F.3d 1045, 1053 (8th Cir. 1999); Morgenstern v. Wilson, 29 F.3d 1291, 1296 (8th Cir. 1994).
215. *See Little Rock Cardiology Clinic PA*, 591 F.3d at 596 (explaining that the relevant market is comprised of both the product and the geographic area).

only circuit that considers relevant market separately from the other *Brooke Group* elements, craft brewers should be prepared to address the topic.[216] Until the Supreme Court clarifies the validity of this requirement, craft brewers must demonstrate that Big Beer sells the same product—in the same geographic market—below cost.

2. Predatory Intent and a Rational Economic Motive

Areeda and Turner explained that "predatory pricing would make little economic sense to a potential predator" without financial staying power and a substantial prospect of recoupment.[217] In *Matsushita*[218]—a major pre-*Brooke Group* case—the Supreme Court laid the groundwork for modern below-cost pricing analysis. Specifically, *Matsushita* stressed that a plaintiff could link the defendant's predatory pricing to an intent to capture the market—if doing so made economic sense.[219] Although predatory intent was part of the unworkable pre-*Brooke Group* standard, some courts today still consider intent—to some degree.[220] After the Supreme Court explicitly moved away from subjective intent in *Brooke Group*, many courts stopped hinging predation cases upon the defendant's intent to monopolize the market.[221]

Today, courts are willing to consider a defendant's intent to harm competition as some evidence of predation—if a monopoly is economically reasonable.[222] Fortunately for craft brewers, there is tangible evidence supporting how and why Big Beer has attempted to

216. *Compare supra* note 214 (identifying multiple below-cost pricing cases within the same circuit that failed due to a plaintiff's inability to establish the relevant market), *with* Superior Prod. P'ship v. Gordon Auto Body Parts Co., 784 F.3d 311, 319 (6th Cir. 2015) (combining relevant market with the recoupment requirement), ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254, 276–77 (3d Cir. 2012) (including relevant market as part of both *Brooke Group* elements), *and* United States v. AMR Corp., 335 F.3d 1109, 1113 (10th Cir. 2003) (explaining that the relevant market requirement is for Sherman Act claims and is not part of the *Brooke Group* predatory pricing analysis).

217. Areeda & Turner, *supra* note 58, at 698.

218. 475 U.S. 574 (1986).

219. *Id.* at 587 ("[I]f the factual context renders respondents' claim implausible—if the claim is one that simply makes no economic sense—respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary.").

220. Utah Pie Co. v. Cont'l Baking Co., 386 U.S. 685, 703 (1967); Fed. Trade Comm'n v. Anheuser-Busch, Inc., 363 U.S. 536, 548 (1960); *see, e.g.*, *Superior Prod. P'ship*, 784 F.3d at 319 ("[C]ourts are more likely to infer an illegal agreement as the economic plausibility of anticompetitive conduct grows.").

221. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993); *see, e.g.*, Double H Plastics, Inc. v. Sonoco Prods. Co., 732 F.2d 351, 354 (3d Cir. 1984) (explaining that courts may infer predatory intent from below-cost pricing).

222. *See supra* note 219.

monopolize the industry.[223] From a market standpoint, craft brewers should present evidence of the increasing number of breweries in the market and the decreasing price of beer over time.[224] Regarding Big Beer's specific actions, craft brewers should present evidence of Big Beer's decreasing market share and its attempts to regain control of the market.[225]

3. Market Power

Areeda and Turner discussed how recoupment requires a would-be predator to have more "financial staying power" than its rivals and a strong prospect of recouping its losses.[226] Recoupment occurs when a manufacturer destroys competition by taking short-term losses and holding control of the market to recoup those losses in the long term.[227] The Eleventh Circuit incorporated Areeda and Turner's words into the common law, as a two-factor analysis, to help courts determine the likelihood of recoupment.[228]

First, a plaintiff must show that the defendant had "sufficient market power to set supracompetitive prices."[229] If a predator is unable to set high prices after removing competition, then there can be no recoupment. The second factor depends on whether a defendant can sustain the elevated prices "long enough to recoup its losses."[230] The absence of these two factors substantially decreases a manufacturer's likelihood of recouping losses. Here, a craft brewer could demonstrate Big Beer's market power by showing its vertical and horizontal integration, dominance in market production, and control over distribution.[231]

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223. *See supra* Part III.
224. *See supra* Sections III.A–B (discussing how the number of breweries has increased over 6,000 percent since 1983 and that the price of beer has dropped by more than $1.50 in the last forty years).
225. *See supra* Sections III.C–D (citing evidence of Big Beer's attempts to restrict market access, limit access to ingredients, and pass pay-to-play legislation after the emergence of the craft beer industry).
226. Areeda & Turner, *supra* note 58, at 698.
227. *Id.*
228. *See* Bailey v. Allgas, Inc., 284 F.3d 1237, 1245 (11th Cir. 2002).
229. *Id.*
230. *Id.*
231. *See supra* Part III.

4. Barrier to Entry into the Market

A barrier to entry is an economic condition "that makes it difficult for a business to enter a market and compete with existing businesses."[232] Barriers to entry result in higher costs for new businesses than for existing businesses.[233] Areeda and Turner explained that a barrier to entry is helpful for a predator seeking to regain the losses it incurred by selling below cost.[234] The Ninth Circuit analyzed barriers to entry in a predatory pricing context and concluded market power is essential for establishing that a barrier exists.[235]

It may seem difficult to prove a barrier exists in the brewing industry because of the post-1983 expansion, but courts believe barriers are a byproduct of market power.[236] Big Beer has significant market power because it produces over 70 percent of all beer in the United States.[237] Additionally, Big Beer has been trying to regain lost market power through vertical and horizontal integration.[238] Big Beer's dominant market share, coupled with its efforts to regain lost market power, will help craft brewers establish the existence of a barrier to entry for the brewing industry.

D. Primary-Line RPA Claims

Primary-line injury occurs when a business "hinders or seeks to hinder" its competition.[239] A plaintiff may bring an RPA claim for primary- or secondary-line injury, but this Article focuses on primary-line injury—which is the impact of predatory pricing on direct competitors.[240] Although the *Brooke Group* test is the prerequisite for a predatory pricing claim, a plaintiff must prove one additional element to bring an RPA claim—direct competition.[241] The *Brooke*

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232. *Barrier to Entry*, BLACK'S LAW DICTIONARY (11th ed. 2019).
233. *See id.* (quoting RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 227 (2d ed. 1977)).
234. Areeda & Turner, *supra* note 58, at 699, 725.
235. Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1432, 1448 (9th Cir. 1995) ("The combined lack of market share and entry barriers, the court said, indicated that ARCO lacked the power to charge prices above competitive levels as a means of recouping predatory losses.").
236. *Id.* at 1434; *see supra* text accompanying note 104.
237. *See supra* Section III.A.
238. *See supra* Section III.D.
239. *Primary-Line Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019); *cf. Secondary-Line Injury*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("Under the price-discrimination provisions of the [PRA], the act of hindering or seeking to hinder competition among a seller's customers by selling substantially the same products at favorable prices to one customer, or a select group of customers, to the detriment of others.").
240. *Primary-Line Injury*, *supra* note 239.
241. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 220–24 (1993).

Group test requires a plaintiff to show pricing below "an appropriate measure of its *rival's* costs" and "that the *competitor* had a reasonable prospect of recouping its investment in below-cost prices."[242] Therefore, a plaintiff must show that the defendant is a direct competitor, and satisfy the two-prong *Brooke Group* test, to bring a successful RPA claim.

E. Sherman Act "Attempt" Elements

Courts have held that a manufacturer can violate the Sherman Act by engaging in predatory pricing.[243] A plaintiff must prove different elements if he or she wishes to file a Sherman Act claim in addition to an RPA claim.[244] A Sherman Act predatory pricing claim is the more stringent version of an RPA claim.[245] In the realm of an individual manufacturer engaging in predatory pricing, a plaintiff would file an "attempt" claim under section two of the Sherman Act.[246] This section prohibits a person from attempting to monopolize any part of a trade.[247]

Although the Sherman Act does not contain an explicit framework, courts have developed three elements that a plaintiff must prove in order to prevail.[248] Subsection 1 contrasts predatory conduct and competition on the merits.[249] Subsection 2 explains the specific intent to monopolize.[250] Subsection 3 explains how a defendant must have a high likelihood of achieving a monopoly.[251]

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242. *Id.* at 210 (emphasis added).

243. *E.g.*, Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vt., Inc., 845 F.2d 404, 406, 411 (2d Cir. 1988) (affirming the district court's ruling for the plaintiffs in a predatory pricing lawsuit), *aff'd*, 492 U.S. 257 (1989).

244. *See Brooke Grp.*, 509 U.S. at 222 ("There are, to be sure, differences between the two statutes. . . . We interpret [section] 2 of the Sherman Act to condemn predatory pricing when it poses 'a dangerous possibility of actual monopolization,' whereas the [RPA] requires only that there be a 'reasonable possibility' of substantial injury to competition . . . .") (first quoting Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 455 (1993); and then Falls City Indus., Inc. v. Vanco Beverage, Inc., 460 U.S. 428, 434 (1983)).

245. *Id.*

246. *Compare id.* at 251 (Stevens, J., dissenting) (applying to individual persons, which includes businesses), *with* 15 U.S.C. § 2 (2018) (prohibiting contracts and trusts from restraining trade).

247. 15 U.S.C. § 1.

248. *Spectrum Sports, Inc.*, 506 U.S. at 456.

249. *See infra* Subsection V.E.1.

250. *See infra* Subsection V.E.2.

251. *See infra* Subsection V.E.3.

1. Element One: Predatory Conduct

First, a plaintiff must prove the defendant engaged in predatory or anticompetitive conduct.[252] Courts will delineate hypercompetitive conduct, which Areeda and Turner found to be the ideal scheme, from conduct that unfairly destroys competition.[253] While hypercompetitive conduct drives prices down in a lawful manner, anticompetitive conduct includes unfair competition, peace agreements between competitors, and practices such as below-cost pricing.[254] This element identifies conduct that is inconsistent with competition on the merits—meaning competition "on the basis of product or service innovation, quality, and value."[255]

Here, Big Beer has engaged in a multitude of activities that could destroy competition and is inconsistent with competition on the merits.[256] Big Beer engaged anticompetitive conduct when it limited its competitors' access to ingredients, controlled distribution chains, and priced its products below AVC.[257] These practices are inconsistent with competition on the merits because they stifle competition without consideration of innovation, quality, or value. Instead, Big Beer's actions curtail craft brewers' access to ingredients and markets—which impedes smaller manufacturers' ability to produce, innovate, or improve their products.

2. Element Two: Specific Intent

Next, a plaintiff must prove the defendant's "specific intent to destroy competition or build [a] monopoly."[258] While some courts have moved away from requiring specific intent for RPA claims, the Supreme Court reaffirmed this element within its modern explanation

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252. *Spectrum Sports, Inc.*, 506 U.S. at 456.

253. *Compare id.* at 458–59 (discussing that the purpose of this distinction is not to chill competition), *with* Areeda & Turner, *supra* note 58, at 711 (concluding that prices at or above AVC are the "competitive and socially optimal result").

254. *See* Areeda & Turner, *supra* note 58, at 712 ("[M]arginal-cost pricing leads to a proper resource allocation and is consistent with competition on the merits."); Rudolf Callmann, *The Essence of Anti-Trust*, 49 COLUM. L. REV. 1100, 1112–13 (1949) ("Warfare between competitors may be waged by means unlawful *per se* such as boycotts, selling below cost, discriminatory practices, or by means which may be justified in the ordinary course of business such as patents, trade-marks, exclusive dealing agreements and the like.").

255. Harry S. Gerla, *Competition on the Merits—A Sound Industrial Policy for Antitrust Law*, 36 U. FLA. L. REV. 553, 554 (1984).

256. *See supra* Sections III.C–D.

257. *See supra* Section III.D; *see infra* Part VII.

258. Times-Picayune Publ'g Co. v. United States, 345 U.S. 594, 626 (1953); *Spectrum Sports, Inc.*, 506 U.S. at 456.

of the Sherman Act's elements.[259] A defendant's desire to prevail over its rivals falls short of the required intent; rather, the defendant must exhibit "something more than an intent to compete vigorously."[260] The question of intent asks whether the challenged conduct is exclusionary, anticompetitive, or predatory.[261]

Big Beer's actions fall into all three of these categories. Cutting off access to hops and purchasing distribution chains is exclusionary because it prevents competition from producing beer or entering a wider market.[262] Purchasing competitors and lobbying for legislation that creates pay-to-play activities is anticompetitive and exclusionary because it favors larger businesses.[263] Pricing below AVC is predatory because it allows Big Beer to leverage its superior market power and resources to outlast its competition in a below-cost pricing battle.[264] Also, pricing below AVC is anticompetitive because, as Areeda and Turner explained, it moves away from competition on the merits.[265] Finally, none of the practices in this section constitute product-based competition.

3. Element Three: Probability of Achieving a Monopoly

Finally, a plaintiff must prove that the defendant had a dangerous probability of achieving an actual monopoly.[266] There are a series of factors that a plaintiff may utilize when attempting to satisfy this element, but two factors weigh heavier than the rest.[267] First, plaintiffs who are successful in proving the probability element demonstrate that

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259. *E.g.*, *Spectrum Sports, Inc.*, 506 U.S. at 456 ("[I]t is generally required that to demonstrate attempted monopolization a plaintiff must prove (1) that the defendant has engaged in predatory or anticompetitive conduct with (2) a specific intent to monopolize and (3) a dangerous probability of achieving monopoly power."); *see* Double H Plastics, Inc. v. Sonoco Prods. Co., 732 F.2d 351, 354 (3d Cir. 1984) ("In order to establish a violation of section 2(a) [of the RPA], the plaintiff must show that the price discrimination either injured or threatened to injure competition. The plaintiff may do this either by market analysis or by proof of predatory intent. Here the plaintiff has offered no market analysis and instead has relied on evidence of predatory intent. Predatory intent may be shown either by express evidence or by inference from below-cost pricing.").

260. *Spectrum Sports, Inc.*, 506 U.S. at 459.

261. Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 602 (1985).

262. *See supra* Section III.D.

263. *See supra* Sections III.C–D.

264. *See supra* Subsection V.C.3; *see infra* Part VII.

265. Areeda & Turner, *supra* note 58, at 715.

266. Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993).

267. *See* AM. BAR ASS'N, ANTITRUST LAW DEVELOPMENTS 312–17 (Jonathan M. Jacobson et al. eds., 6th ed. 2007) [hereinafter ANTITRUST LAW DEVELOPMENTS] (including other factors that courts consider when examining the third element to Sherman Act attempt claims).

the defendant's conduct occurred in the relevant market.[268] Second, successful plaintiffs often show that the defendant possessed significant market power.[269] However, it is possible that a plaintiff already addressed these factors because some jurisdictions include relevant market and/or market power as elements of an RPA claim.[270] Consequently, a plaintiff in these jurisdictions may simultaneously satisfy this element for both RPA and Sherman Act claims.[271]

Today, Big Beer produces 72 percent of all beer in the United States, and its products are present in virtually every market.[272] Big Beer has integrated horizontally by purchasing craft breweries and integrated vertically by controlling distribution chains.[273] Despite its declining market power, Big Beer still earned nearly three times more money in retail sales than all of its craft competitors in 2017.[274] Under the current market conditions, Big Beer still maintains market superiority and its pervasiveness makes it a competitor in nearly every United States market.

VI. STATE-LEVEL BELOW-COST PROHIBITIONS

The Supremacy Clause established that the Constitution and federal laws are "the supreme Law[s] of the Land."[275] Expanding upon this concept, the Tenth Amendment allows states to exercise powers that are "not delegated to the United States by the Constitution."[276] These two foundational principles create an interesting dichotomy

268. *See Spectrum Sports, Inc.*, 506 U.S. at 456 (observing that all circuit courts, except for the Ninth Circuit, adhere to these three elements for Sherman Act § 2 claims); Lessig v. Tidewater Oil Co., 327 F.2d 459, 474 (9th Cir. 1964) (noting that relevant market is not in issue "[w]hen the charge is attempt (or conspiracy) to monopolize, rather than monopolization"), *abrogated by* Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447 (1993).

269. *Spectrum Sports, Inc.*, 506 U.S. at 456 ("In order to determine whether there is a dangerous probability of monopolization, courts have found it necessary to consider the relevant market and the defendant's ability to lessen or destroy competition in that market.").

270. *See supra* Section V.C.

271. *See* ANTITRUST LAW DEVELOPMENTS, *supra* note 267 (discussing how market share and barriers to entry are the two most important factors for this element).

272. NUMBER OF BREWERS REPORT, *supra* note 105; *see also* Cat Wolinski, *The Cost of a Case of Beer in Every State*, VINEPAIR (Feb. 7, 2019), https://vinepair.com/booze-news/cost-of-beer-case-24-pack-every-state/ (reporting on the average price of Bud Light and Miller Light in all fifty states).

273. *See supra* Section III.D.

274. Gerhart, *supra* note 107.

275. U.S. CONST. art. VI, cl. 2.

276. U.S. CONST. amend. X.

with respect to antitrust because individual states passed the first antitrust laws, which prompted the federal government to act.[277]

The federal government did not simply follow the states' lead, but it explained that its role is to reinforce state laws.[278] Nearly one hundred years after Congress set out to supplement state laws, the FTC stated its position that federal law prohibits predatory pricing, but predation and below-cost pricing are different.[279] Section A discusses how numerous states have prohibited below-cost pricing in the absence of federal enforcement.[280] Section B explains the various circumstances where states permit a manufacturer to price its goods below cost.[281]

A. Below-Cost Pricing Prohibitions

The states' approach to below-cost pricing mirrors struggles on the federal level because states disagree on the meaning of the word "cost."[282] For example, most states interpret cost to be a combination of fixed and variable costs, but some states incorporate a markup to offset incurred costs.[283] One way that state below-cost pricing laws differ from federal laws is that some states explicitly look at how the practice impacts competitors—not just competition.[284] In 2005, the FTC explained that eleven states do not have any below-cost pricing prohibitions, and the remaining states have two types of below-cost pricing laws: general and specific.[285]

General below-cost pricing prohibitions ban selling any retail merchandise below its cost.[286] In total, there are twenty-two states that

277. *See supra* Part II.

278. H.R. REP. NO. 63-627, pt. 2, at 9 (1914).

279. *See id.* (documenting Congress's discussion on May 6, 1914 concerning supplementing state antitrust law); *see also* Roundtable on Resale Below Cost Laws, *supra* note 9, at 2 ("While federal antitrust law prohibits predatory pricing, there is no specific federal prohibition on below-cost sales.").

280. *See infra* Section VI.A.

281. *See infra* Section VI.B.

282. Roundtable on Resale Below Cost Laws, *supra* note 9, at 2.

283. *Id.* at 2–3.

284. *Id.* at 3.

285. *See id.* at 2, 9–10 (omitting Alaska, Arizona, Connecticut, Illinois, Michigan, New Mexico, Oregon, Texas, Vermont, and Virginia from its list of states with general or specific below-cost pricing prohibitions); UTAH CODE ANN. § 13-16-4 (repealed 2012) (prohibiting below-cost pricing for gasoline); UTAH CODE ANN. § 13-5-7 (repealed 2008) (barring below-cost pricing in general).

286. Roundtable on Resale Below Cost Laws, *supra* note 9, at 2.

currently have general below-cost pricing prohibitions.[287] By prohibiting all below-cost retail sales, these states prevent businesses from pricing staple goods—e.g., milk and bread—below cost to lure in shoppers who then purchase other goods.[288]

Specific pricing bans prohibit selling particular goods, such as "gasoline, cigarettes, alcoholic beverages, or milk" below cost.[289] Thirty-two states, including the District of Columbia, have enacted specific prohibitions on below-cost pricing.[290] Fourteen of those states also have a general ban on pricing all goods below cost.[291]

In recent years, some states without gasoline-specific below-cost pricing laws entertained the idea of prohibiting below-cost gasoline sales.[292] Between 2003–2005, four states sought to prohibit selling gasoline below cost.[293] A fifth state, Wisconsin, asked the FTC to review its below-cost pricing law.[294] Although Congress charged the FTC with enforcing laws that prohibit unfair competition, the FTC intervened in the state-legislative process by arguing against the passage of below-cost pricing laws.[295] In the end, four states

287. *Compare id.* at 9–10 (identifying Arkansas, California, Colorado, Hawaii, Idaho, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Mississippi, Montana, Nebraska, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, Utah, West Virginia, Wisconsin, and Wyoming as having general prohibitions), *with* MISS. CODE ANN. § 75-23-7 (West, Westlaw through 2020 Reg. Sess.) (regulating below-cost pricing for only cigarettes), OHIO REV. CODE ANN. § 1333.12 (West, Westlaw through File 12 of the 134th Gen. Assemb. (2021–2022)) (pertaining only to cigarettes), *and* UTAH CODE ANN. § 13-5-7 (repealed 2008) (rendering below-cost pricing for all merchandise impermissible).

288. *See* Chris Fleisher, *Loss-Leaders: Predatory or Practical?*, AM. ECON. ASS'N (Mar. 24, 2017), https://www.aeaweb.org/research/loss-leading-bans-retail-competition (labeling businesses that price staple goods low to lure in other business "loss leaders").

289. Roundtable on Resale Below Cost Laws, *supra* note 9, at 2.

290. *See id.* at 9–10 (identifying Alabama, Delaware, Florida, George, Indiana, Iowa, Kansas, Missouri, Nevada, New Hampshire, New Jersey, New York, North Carolina, South Dakota, and Washington as states with specific bans on below-cost pricing only); MISS. CODE ANN. § 75-23-7 (creating a specific ban on below-cost pricing for cigarettes); OHIO REV. CODE ANN. § 1333.12 (prohibiting below-cost sales for cigarettes only); UTAH CODE ANN. § 13-16-4 (repealed 2012) (prohibiting below-cost sales for motor fuel).

291. Roundtable on Resale Below Cost Laws, *supra* note 9, at 9–10 (observing that Arkansas, Colorado, Kentucky, Maine, Maryland, Massachusetts, Minnesota, Montana, Nebraska, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Utah have both general and specific below-cost pricing prohibitions); UTAH CODE ANN. § 13-16-4 (repealed 2012); UTAH CODE ANN. § 13-5-7 (repealed 2008). *But see* MISS. CODE ANN. § 75-23-7; OHIO REV. CODE ANN. § 1333.12 (creating a specific prohibition of below-cost sales of cigarettes only).

292. Roundtable on Resale Below Cost Laws, *supra* note 9, at 7.

293. *Id.*

294. Letter from the U.S. Fed. Trade Comm'n, to Shirley Krug, State Representative, Wis. (Oct. 15, 2003) (on file with author).

295. Roundtable on Resale Below Cost Laws, *supra* note 9, at 7.

succumbed to the FTC's arguments and did not prohibit below-cost pricing—but Wisconsin's prohibition remains intact.[296]

B. Below-Cost Pricing Exceptions

Most of the twenty-five states that prohibit general below-cost pricing allow the practice under certain circumstances.[297] Some states treat permissible instances of below-cost pricing as an exception to the statute, but others consider these scenarios a defense to a prima facie case of predation.[298] Similarly, statutes such as California's Unfair Practices Act classify permissible below-cost pricing as an "exclusion," while the Oklahoma Unfair Sales Act labels these circumstances "exempted sales."[299] No matter the label, states that situationally permit below-cost pricing generally do so under the same few scenarios.

Only two of the twenty-two states with general below-cost pricing prohibitions do not have exceptions in their statutes.[300] A third state created five exceptions that are completely distinct from every other states' exemptions.[301] The remaining nineteen states each allow between five and nine different exceptions, many of which are substantively the same.[302] Thirteen of these nineteen states have

296. *Id.*

297. *Id.* at 2.

298. *Id.* at 3–4.

299. CAL. BUS. & PROF. CODE §§ 17000, 17050 (Deering 2019); OKLA. STAT. ANN. tit. 15 §§ 598.1, 598.6 (West, Westlaw through 2020 Legis. Sess.).

300. *See generally* NEB. REV. STAT. ANN. §§ 59-801 to -831 (West, Westlaw through the end of the 2d Reg. Sess. of the 106th Leg. (2020)) (prohibiting below-cost pricing generally, but not creating any exceptions to the law); S.C. CODE ANN. §§ 39-3-110 to -200 (West, Westlaw through the 2020 Sess.) (barring its manufacturers from pricing goods below cost, but not creating instances where they may price their goods below cost).

301. IDAHO CODE ANN. § 48-107 (West, Westlaw through Chapter 305 of the First Regular Session of the Sixty-Sixth Idaho Legislature, which convened on Monday, January 11, 2021).

302. ARK. CODE ANN. § 4-75-209 (West, Westlaw through laws passed by the 2021 Regular Session of the 93rd Arkansas General Assembly effective through May 1, 2021, and changes made by the Arkansas Code Revision Commission received through April 15, 2021); CAL. BUS. & PROF. CODE § 17050; COLO. REV. STAT. ANN. § 6-2-110 (West, Westlaw through the 2020 Extraordinary Sess. and the Nov. 3, 2020 election); HAW. REV. STAT. ANN. § 481-6 (West, Westlaw through the end of the 2020 Reg. Sess.); KY. REV. STAT. ANN. § 365.040 (West, Westlaw through 2020 Reg. Sess. and the Nov. 3, 2020 election); LA. STAT. ANN. § 51:426 (West, Westlaw through 2020 2d Extraordinary Sess.); ME. REV. STAT. ANN. tit. 10, § 1203 (West, Westlaw through the 2019 2d Reg. Sess. of the 129th Leg.); MD. CODE ANN., COM. LAW § 11-402 (West, Westlaw through 2020 Reg. Sess. of the Gen. Assemb.); MASS. GEN. LAWS ANN. ch. 93, § 14G (West, Westlaw through Ch. 226 of the 2020 2d Ann. Sess.); MINN. STAT. ANN. § 325D.06 (West, Westlaw through 2020 Reg. Sess. and 1st through 7th Spec. Sess.); MONT. CODE ANN. § 30-14-213 (West, Westlaw through 2019 Sess.); N.D. CENT. CODE ANN. § 51-10-07 (West, Westlaw through 2019 Reg. Sess. of the 66th Legis. Assemb.); OKLA. STAT. ANN. tit. 15, § 598.6 (West, Westlaw through 2d Reg.

between one and three unique exceptions, which appear in very few other states' exception lists.[303]

The nineteen states that situationally permit below-cost pricing have all codified the same four exceptions. These states permit a business to price below cost when hosting a clearance sale, preventing loss due to perishable goods, marking down damaged products, or selling by court order.[304] The second most common exception permits a business to sell its goods below cost to match a competitor who is selling lawfully priced goods.[305] Seventeen states have enacted this exception, which recognizes that production costs vary between manufacturers.[306]

The remaining three exceptions are also very common, but not as widely accepted as the others. Twelve states permit a business to sell its goods below cost when contracted with a government entity.[307] Eleven states allow below-cost pricing when a business sells its goods to a charitable agency or for disaster relief purposes.[308] Finally, ten

Sess. of 57th Leg.); 73 PA. STAT. AND CONS. STAT. ANN. § 216 (West, Westlaw through 2020 Reg. Sess. Act 95); 6 R.I. GEN. LAWS ANN. § 6-13-5 (West, Westlaw through Ch. 79 of the 2020 2d Reg. Sess.); TENN. CODE ANN. § 47-25-204 (West, Westlaw through the end of the 2020 2d Extraordinary Sess. of the 111th Tenn. Gen. Assemb.); W. VA. CODE ANN. § 47-11A-8 (West, Westlaw through 2020 Reg. Sess.); WIS. STAT. ANN. § 100.30 (West, Westlaw through 2019 Act 186); WYO. STAT. ANN. § 40-4-110 (West, Westlaw through 2020 Budget Sess. of Wyo. Leg.).

303. *See, e.g.*, OKLA. STAT. ANN. tit. 15, § 598.6(8) (permitting below-cost pricing at any bona fide auction); HAW. REV. STAT. ANN. § 481-6(5) (creating an exception for below-cost pricing as it pertains to service stores for the United States military); LA. STAT. ANN. § 51:426(9) (allowing a manufacturer to sell its merchandise below cost).

304. *See, e.g.*, ARK. CODE ANN. § 4-75-209(f)(1) (permitting below-cost pricing when a merchant is closing out its stock); MINN. STAT. ANN. § 325D.06(1) (allowing a manufacturer to price perishable goods below cost—if doing so would prevent loss); 73 PA. STAT. AND CONS. STAT. ANN. § 216(c) (establishing an exception for businesses to sell damaged goods below cost); TENN. CODE ANN. § 47-25-204(9) (sanctioning below-cost pricing if done so because of a court order).

305. *E.g.*, LA. STAT. ANN. § 51:426(7) ("Where merchandise is sold in good faith to meet that competition which permits a competitor to sell at a lesser price where such competitor is able to do so without violating the terms and conditions of this Subpart . . . .").

306. ARK. CODE ANN. § 4-75-209(f)(4); CAL. BUS. & PROF. CODE § 17050(d); COLO. REV. STAT. ANN. § 6-2-110(1)(d); HAW. REV. STAT. ANN. § 481-6(4); KY. REV. STAT. ANN. § 365.040(4); LA. STAT. ANN. § 51:426(7); ME. REV. STAT. ANN. tit. 10, § 1203(8); MD. CODE ANN., COM. LAW § 11-402(8); MASS. GEN. LAWS ANN. ch. 93, § 14G(h); MINN. STAT. ANN. § 325D.06(4); MONT. CODE ANN. § 30-14-213(6); N.D. CENT. CODE ANN. § 51-10-07(7); 73 PA. STAT. AND CONS. STAT. ANN. § 216(g); TENN. CODE ANN. § 47-25-204(8); W. VA. CODE ANN. § 47-11A-8(e); WIS. STAT. ANN. § 100.30(6)(a)(7); WYO. STAT. ANN. § 40-4-110(a)(iv).

307. LA. STAT. ANN. § 51:426(6); ME. REV. STAT. ANN. tit. 10, § 1203(7); MD. CODE ANN., COM. LAW § 11-402(6); MASS. GEN. LAWS ANN. ch. 93, § 14G(g); MONT. CODE ANN. § 30-14-213(7); N.D. CENT. CODE ANN. § 51-10-07(6); OKLA. STAT. ANN. tit. 15, § 598.6(6); 73 PA. STAT. AND CONS. STAT. ANN. § 216(f); 6 R.I. GEN. LAWS ANN. § 6-13-5(7); TENN. CODE ANN. § 47-25-204(7); W. VA. CODE ANN. § 47-11A-8(h); WIS. STAT. ANN. § 100.30(6)(a)(6).

308. LA. STAT. ANN. § 51:426(5); ME. REV. STAT. ANN. tit. 10, § 1203(6); MD. CODE ANN., COM. LAW § 11-402(5); MASS. GEN. LAWS ANN. ch. 93, § 14G(f); N.D. CENT. CODE ANN. § 51-

states permit a business to sell below cost during its final liquidation to mitigate additional financial hardship that it would incur otherwise.[309] This list is not exhaustive, but it contains the most common below-cost pricing exceptions. No other exception appears as consistently as the items in this list.

VII. BRINGING A BELOW-COST PRICING CLAIM

The FTC believes Big Beer's pricing practices are good for consumers and do not constitute steps toward creating a monopoly under the Sherman Act or the RPA.[310] Contrary to the FTC, twenty-two states have enacted general below-cost pricing prohibitions to protect competition and consumers from the early stages of a monopoly.[311] Circuit courts have discussed how below-cost pricing may harm consumers—a monopolist eradicates competition by pricing below cost and raises prices to recoup its losses.[312] Circuit-by-circuit caselaw has established a jurisdictional quagmire where would-be plaintiffs must satisfy a litany of evolving requirements to meet an indefinite standard.[313] Without Supreme Court intervention, it is unclear whether a craft brewer can succeed in a below-cost pricing lawsuit against Big Beer under the Sherman Act or the RPA.

A craft brewer must make multiple considerations before it looks to jurisdictional measures of cost.[314] First, a craft brewer should be selective in who it names as a defendant because Big Beer is

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10-07(5); OKLA. STAT. ANN. tit. 15, § 598.6(5); 73 PA. STAT. & CONS. STAT. ANN. § 216(e); 6 R.I. GEN. LAWS ANN. § 6-13-5(6); TENN. CODE ANN. § 47-25-204(6); W. VA. CODE ANN. § 47-11A-8(g); WIS. STAT. ANN. § 100.30(6)(a)(5).

309. LA. STAT. ANN. § 1:426(4); ME. REV. STAT. ANN. tit. 10, § 1203(5); MD. CODE ANN., COM. LAW § 11-402(4); MASS. GEN. LAWS ANN. ch. 93, § 14G(e); N.D. CENT. CODE ANN. § 51-10-07(4); OKLA. STAT. ANN. tit. 15, § 598.6(4); 73 PA. STAT. AND CONS. STAT. ANN. § 216(d); 6 R.I. GEN. LAWS ANN. § 6-13-5(5); TENN. CODE ANN. § 47-25-204(5); WIS. STAT. ANN. § 100.30(6)(a)(4).

310. *See* Roundtable on Resale Below Cost Laws, *supra* note 9, at 7–8.

311. *See supra* Part VI.

312. *See, e.g.*, William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1035 (9th Cir. 1981) ("Predation exists when the justification of these prices is based, not on their effectiveness in minimizing losses, but on their tendency to eliminate rivals and create a market structure enabling the seller to recoup his losses."); Ne. Tel. Co. v. Am. Tel. & Tel. Co., 651 F.2d 76, 89 (2d Cir. 1981) ("Thus it is not enough that the predator survive his own predatory prices; he must be able to earn monopoly profits in the not-too-distant future.").

313. *See supra* Part V.

314. *See supra* Section V.C (identifying four non-*Brooke Group* factors—relevant market, rational economic motive, market power, and barrier to entry—that courts use to dismiss predatory pricing cases).

comprised of four different large companies.[315] Next, a craft brewer-plaintiff must be sure that the defendant is a direct competitor because there can be no RPA claim without competition.[316] Finally, a plaintiff must show that it can satisfy the four non-*Brooke Group* requirements.[317]

A craft brewer-plaintiff should only bring a below-cost pricing claim if it can satisfy the criteria above. The next step to determine the viability of a potential claim is to examine jurisdictional measures of cost. Section A discusses predatory pricing claims in minority jurisdictions.[318] Section B examines how hardline and burden-shifting jurisdictions would approach Big Beer pricing below AVC.[319] Section C applies the hardline and burden-shifting approaches to a fact pattern where Big Beer prices are at marginal cost.[320] Section D explains why the burden-shifting approach is the most adaptable and comprehensive answer to the measure of cost predicament.[321]

A. Minority Jurisdiction Analysis

Minority jurisdictions avoid adopting a measure of cost, dismiss predation cases using jurisdiction-specific requirements, and even permit below-cost pricing.[322] Here, the only thing a craft brewer can do is ensure it satisfies all of the non-*Brooke Group* requirements.[323] The D.C., First, and Tenth Circuits will continue to operate without guidance so long as the Supreme Court avoids selecting a measure of cost.

The First and Tenth Circuits are entirely unpredictable because, without a defined measure of cost, they are free to change their approach to predation at any moment. As a consequence, cost uncertainty should discourage a craft brewer from filing a below-cost pricing claim under the Sherman Act or the RPA in these circuits. State law may be the better avenue to recovery for craft brewers in the First

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315. *See* Robertson, *supra* note 13 (indicating that Anheuser-Busch InBev, MillerCoors, Constellation Brands, and Heineken comprise "Big Beer").

316. Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993).

317. *See supra* Section V.C.

318. *See infra* Section VII.A.

319. *See infra* Section VII.B.

320. *See infra* Section VII.C.

321. *See infra* Section VII.D.

322. *See supra* Subsection V.B.1.

323. *See supra* Section V.C.

and Tenth Circuits because the outcomes are currently unpredictable under federal law.[324]

Outcomes are more predictable in the D.C. Circuit because that court explained below-cost pricing is legal—even when done by a monopolist.[325] This circuit's views on below-cost pricing make it almost impossible for a craft brewer to bring a successful below-cost pricing claim. A craft brewer should only bring a below-cost pricing claim in the D.C. Circuit if its sole objective is to reach the Supreme Court. Reaching the Supreme Court should be the craft brewer's goal for two reasons. First, the D.C. Circuit rejects the idea that below-cost pricing violates the Sherman Act and the RPA.[326] Second, the District of Columbia has one state-level below-cost pricing prohibition that only applies to cigarettes.[327] Without Supreme Court intervention, craft brewers in the District of Columbia cannot prevail at the state or federal level in an antitrust lawsuit predicated on below-cost pricing.

B. Below-AVC Pricing Analysis

The following fact pattern illustrates a below-AVC pricing scenario; suppose the following facts are true. Producing one barrel of craft beer and generating a profit in today's market has an AVC of $180. Big Beer has purchased numerous craft breweries and markets those brands as "craft" beer.[328] Further, Big Beer sells its craft-like beer for **$150** per barrel—**$30** below AVC. Lastly, suppose there is no evidence that Big Beer intends to harm competition or establish a monopoly.

Both hardline and burden-shifting jurisdictions would treat this scenario as predation for the purpose of bringing a lawsuit under the RPA—even without evidence of predatory intent.[329] Big Beer is

324. *Compare* COLO. REV. STAT. ANN. § 6-2-105(1)(a) (West, Westlaw through the 2020 Reg. Sess. and the Nov. 3, 2020 election) ("It is unlawful . . . to sell, offer for sale, or advertise for sale any product or service for less than the cost of the product or service with the intent to both injure competitors and destroy competition."), *and* ME. REV. STAT. ANN. tit. 10, § 1204-A (West, Westlaw through the 2019 2d Reg. Sess. of the 129th Leg.) ("It is unlawful . . . to sell such merchandise at less than the cost thereof to such vendor with the purpose or intent to injure competitors or destroy competition."), *with supra* note 8 (noting the First Circuit avoided adopting a standard measure of cost and the Tenth Circuit stated "the Supreme Court nor we have taken a position on which of various cost measures is the definitive one").

325. United States v. Microsoft Corp., 253 F.3d 34, 68 (D.C. Cir. 2001).

326. *Id.*

327. D.C. CODE ANN. § 28-4522 (West, Westlaw through Dec. 8, 2020).

328. Bland, *supra* note 135.

329. *See supra* Section V.B.

pricing its craft products **$30** below AVC, which is the predation threshold in both hardline and burden-shifting jurisdictions.[330] Therefore, every circuit—except the D.C., First, and Tenth Circuits—would presume the plaintiff has established a prima facie case of predation.[331] The burden of proof falls on the defendant to overcome a strong presumption of predation and explain why its behavior was not predatory.

C. Marginal-Cost Pricing Analysis

To set the stage for marginal-cost pricing, assume all of the facts below are true. First, the most efficient brewer can produce one barrel of beer and generate profit for the AVC of **$180**. Again, Big Beer has purchased craft competitors and sells those brands as craft beer.[332] Instead of Big Beer selling its product for **$150** per barrel, it is now selling the beer for **$181** per barrel—$1 above AVC. Also, assume that Big Beer conducted a market study and learned its competitors would go out of business if the price of beer was **$181** per barrel. This fictional study revealed that the least efficient competitors would go out of business within six months at this price point, and the most efficient brewers would only last one year.[333] Finally, assume that the plaintiff possesses a memorandum from the defendant communicating its plan to destroy all competition within one year by pricing just above AVC.[334]

This scenario is where hardline and burden-shifting jurisdictions diverge because Big Beer is pricing its products in the marginal-cost range.[335] Hardline jurisdictions are generally rigid in applying the AVC threshold and would focus on Big Beer pricing its products in

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330. *See supra* Section V.B.2–3.

331. *See supra* Section V.B.

332. Bland, *supra* note 135.

333. *See* McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1491–92 (11th Cir. 1988) ("[The defendant] obtained a copy of McGahee's SBA loan documents and other documents related to his financial position.")

334. *See id.* at 1504 (discussing how the plaintiff presented evidence that the defendant circulated an "internal memorandum declaring 'contribute to [plaintiff's] financial problems' to be a goal for [defendant's] local office").

335. *Cf. id.* at 1502, 1504, 1507 (relying heavily on *Utah Pie*, a highly controversial decision, to infer predatory intent from the defendant's below marginal-cost pricing—not the memorandum calling for contributing to the plaintiff's financial problems—to reverse the district court's decision for the defendant); *see* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 221 (1993) ("[*Utah Pie*] has been criticized on the grounds that such low standards of competitive injury are at odds with the antitrust laws' traditional concern for consumer welfare and price competition.").

Areeda and Turner's "competitive and socially optimal" range.[336] Despite the strong evidence of predatory intent, hardline jurisdictions would likely find that Big Beer did not engage in predation because the defendant priced above AVC.[337]

Unlike below-AVC pricing—where the defendant has the burden of proof—burden-shifting jurisdictions place the burden on the plaintiff to show the defendant behaved predatorially.[338] The Sixth, Eighth, and Ninth Circuits allow a plaintiff to rebut the presumption of innocuous competitive pricing—which addresses Areeda and Turner's observation that marginal-cost pricing can be predatory.[339] Under these facts, the plaintiff has an excellent case for predation in a burden-shifting jurisdiction because the report and memorandum are strong evidence of predation.

D. What Is an Appropriate Measure of Cost?

If all facts heavily favored a craft brewer-plaintiff in a below-AVC pricing claim, the case's outcome would depend solely on geography—not precedent or any judicial standard. Using each circuit court's adopted measure of cost to predict how it would decide plaintiff-favoring facts, the circuits would likely split nine to three for the plaintiff.[340] Minority jurisdictions are likely to avoid a decision that would select an appropriate measure of cost, while hardline and burden-shifting jurisdictions would likely find for the plaintiff.[341]

Unfortunately, below-AVC pricing is only part of the problem. Marginal-cost pricing with predatory intent is the other issue because it could fall within the RPA's "unreasonably low prices for the purpose of destroying competition."[342] A clear majority recognizes AVC as the line between competition and predation, but discrepancies still exist that produce different results along jurisdictional lines. It is the Supreme Court's role to reconcile this judicial discrepancy,

336. Areeda & Turner, *supra* note 58, at 711.

337. *See, e.g.*, Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980) ("In selling at a level which was above its average variable cost Martin Marietta acted in an economically rational manner, derived immediate economic benefit from its sales, and did not engage in the 'deliberate sacrifice of present revenues for the purpose of driving rivals out of the market and then recouping the losses through higher profits earned in the absence of competition.'" (quoting Areeda & Turner, *supra* note 58, at 698)).

338. *See supra* Subsection V.B.3.

339. Areeda & Turner, *supra* note 58, at 710–11; *see supra* Subsection V.B.3.

340. *See supra* Section V.B.

341. *See supra* Section V.B.

342. 15 U.S.C. § 13a (2018).

provide guidance as to the appropriate measure of cost, and align the circuit courts. Without a clearly defined judicial standard, an RPA claim produces results that are far less-consistent than the National Football League's tie-breaking procedures—which can end in a coin toss.[343]

Nine different circuit courts have built up an extensive body of caselaw showing AVC is a reasonable threshold for predatory pricing.[344] Regardless of whether these circuit courts ascribe to the hardline or the burden-shifting approach, they consider pricing below-AVC to be predatory.[345] Circuit courts that follow the hardline approach more closely align with Areeda and Turner, while the burden-shifting courts diverge from the professors.[346] The Supreme Court must answer three questions to provide sufficient guidance on this matter. First, it must determine if AVC is the appropriate measure of cost. Second, it should explain whether there are scenarios when below-cost pricing is permissible. Last, the Supreme Court must decide whether the hardline or burden-shifting approach best serves the RPA's objectives.

To thoroughly answer these questions, the Supreme Court should balance practicality, purposivism, state law, and the Areeda-Turner framework. Subsection 1 explains why AVC is the appropriate threshold between competition and predation.[347] Subsection 2 explains why courts should not foreclose all instances of below-cost pricing, simply because Areeda and Turner did not discuss them.[348] Subsection 3 discusses why the burden-shifting approach better aligns with why Congress enacted the RPA.[349]

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343. *See NFL Tiebreaking Procedures*, NAT'L FOOTBALL LEAGUE, https://www.nfl.com/standings/tiebreakingprocedures (last visited Feb. 21, 2021) ("If, at the end of the regular season, two or more clubs in the same division finish with identical won-lost-tied percentages, the following steps will be taken until a champion is determined. . . . 1. Head-to-head (best won-lost-tied percentage in games between the clubs). 2. Best won-lost-tied percentage in games played within the division. 3. Best won-lost-tied percentage in common games. 4. Best won-lost-tied percentage in games played within the conference. 5. Strength of victory. 6. Strength of schedule. 7. Best combined ranking among conference teams in points scored and points allowed. 8. Best combined ranking among all teams in points scored and points allowed. 9. Best net points in common games. 10. Best net points in all games. 11. Best net touchdowns in all games. 12. Coin toss.").

344. *See supra* note 8; *supra* Subsections V.B.2–3.

345. *See supra* Subsections V.B.2–3.

346. *See* Areeda & Turner, *supra* note 58, at 710–11 (arguing that courts should consider above-AVC pricing non-predatory).

347. *See infra* Subsection VII.D.1.

348. *See infra* Subsection VII.D.2.

349. *See infra* Subsection VII.D.3.

1. AVC: An Uncontested, Universal Measure of Cost

Areeda and Turner first discussed a universal measure of cost in 1975, and courts first used the term "appropriate measure of cost" in 1984.[350] Since then, circuit courts have all taken a unique approach to resolving cases centered on the ever-changing cost concept. Today, each circuit offers its own flavor of the appropriate measure of cost, but there are three general views on the matter.[351] By selecting an appropriate measure of cost, the Supreme Court would resolve this discrepancy and create a nationwide standard for federal courts.

In 1975, Areeda and Turner recommended that courts use AVC as the measure of cost for economic reasons.[352] According to the professors, pricing above AVC is the best form of competition whereas pricing below AVC is not competition on the merits.[353] Essentially, if a business prices its goods below AVC, price controls the competition—not the product—and wealthier businesses gain an unfair advantage.

Since Areeda and Turner's article, nine out of twelve circuit courts have adopted AVC as a measure of cost.[354] The remaining three circuits do not reject AVC on any basis other than the Supreme Court's refusal to adopt a standard measure of cost.[355] In fact, the measures of cost at play in the United States are completely binary—a jurisdiction either uses AVC or nothing.[356] Jurisdictions that have adopted a measure of cost separate into two categories, both of which utilize AVC as the measure of cost for predation.[357] Therefore, the Supreme Court can continue on its current path—which has produced jurisdictional disarray—use AVC as a baseline measure of cost for predatory pricing claims, or implement a different standard altogether. The Supreme Court should adopt AVC as the measure of cost because many prominent legal scholars, economic scholars, and courts have vetted its appropriateness and there are no other alternatives.

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350. Areeda & Turner, *supra* note 58, at *passim* (discussing ATC, AVC, and marginal-cost pricing to help courts select a measure of cost by which to judge predatory pricing); S. Pac. Commc'ns Co. v. Am. Tel. & Tel. Co., 740 F.2d 980, 1005 (D.C. Cir. 1984).

351. *See supra* Section V.B.

352. Areeda & Turner, *supra* note 58, at 711.

353. *Id.* at 711–12.

354. *See supra* Subsections V.B.2–3.

355. *See supra* Subsection V.B.1.

356. *See supra* Section V.B.

357. *See supra* Subsections V.B.2–3.

2. Integrating Common-Sense Exceptions with the Areeda-Turner Framework

Time, experience, and innovation have demonstrated that there are circumstances where the law should allow a business to sell its goods below cost.[358] The complexities of state below-cost pricing exceptions show that the Areeda-Turner framework, albeit comprehensive, is not flawless.[359] States with general below-cost pricing prohibitions have identified valid reasons for a business to price its goods below cost, which Areeda and Turner declined to discuss.

It is neither reasonable nor equitable to prevent a business from mitigating loss by marking down goods that are damaged or approaching an expiration date. These exceptions are two of the most common circumstances where states permit a manufacturer to price goods below cost.[360] These exceptions to below-cost pricing highlight bona fide reasons for a business to price its goods below AVC.[361] Courts and legislatures that fail to recognize these exceptions—which prevent loss without harming competition or competitors—are forcing a rigid, unforgiving system on businesses in their jurisdiction.[362]

In the absence of clearly defined statutory exceptions, the Supreme Court should approach below-cost pricing using the state's focus on equitability. The Sherman Act and the RPA have complementary objectives, which include protecting competition and consumers.[363] While below-cost pricing related to liquidation, spoilage, or damage may briefly inconvenience market rivals, courts have uniformly held that antitrust laws do not protect competitors.[364]

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358. *See supra* Section VI.B (discussing how states permit below-cost pricing to liquidate a business, have a clearance sale, prevent loss from spoilage, and meet competition).

359. *Compare supra* Section VI.B (identifying multiple exceptions where pricing below cost proves beneficial—such as preventing loss due to spoilage or in a final liquidation), *with* Areeda & Turner, *supra* note 58, at 712–16 (explaining that promotional pricing and meeting competition are the two allowable exceptions to below-cost pricing).

360. *See supra* text accompanying note 300 (noting that nineteen of twenty-two states that have general below-cost pricing prohibitions permit below-cost selling in these instances).

361. *See supra* Section VI.B.

362. *Compare, e.g.*, LA. STAT. ANN. § 51:426(4) (West, Westlaw through 2020 2d Extraordinary Sess.) (allowing a business that is closing to sell below cost to liquidate its inventory), *with* CAL. BUS. & PROF. CODE § 17050 (Deering 2019) (permitting a business to sell goods below cost during a clearance sale but not when liquidating its inventory).

363. *See The Antitrust Laws*, *supra* note 1 (observing that antitrust laws protect competition, which benefits consumers).

364. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962) ("Taken as a whole, the legislative history illuminates congressional concern with the protection of competition, not

Therefore, the Supreme Court should permit below-cost pricing exceptions that do not contravene the spirit of the antitrust laws—such exceptions protect non-predatory businesses from loss without impacting competition.

3. Burden-Shifting: Clear Definitions with Flexibility

The RPA made it unlawful "to sell, or contract to sell, goods at unreasonably low prices for the purpose of destroying competition or eliminating a competitor."[365] In 1936, Congress explained that it intended to "prevent the large corporate chains from selling below cost in certain localities" from destroying competition.[366] Nevertheless, Areeda and Turner explained that courts should allow marginal-cost pricing, without qualification or exception, despite the fact that this practice can eliminate small-but-efficient competitors.[367]

The Areeda-Turner framework laid the foundation for the hardline approach because it declared above-AVC prices legal and below-AVC prices illegal.[368] However, the burden-shifting approach addresses the issue of pricing to destroy competition—a problem that both Congress and the Areeda-Turner framework discussed.[369] Although AVC may be the hardline between competition and predation, predatory pricing can still occur in the marginal-cost range.[370] Maintaining AVC as the threshold between competition and predation, while prohibiting predatory pricing at marginal cost, is the precise problem that the burden-shifting framework addresses.[371]

If the Supreme Court adopted the Areeda-Turner framework outright, it would overlook a business's ability to sell at marginal cost with the intent to destroy competition.[372] Manufacturers with sufficient market power can still destroy small, efficient competitors

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competitors, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition.").

365. 15 U.S.C. § 13a (2018).

366. 80 CONG. REC. 8,235 (1936).

367. Areeda & Turner, *supra* note 58, at 710–11.

368. *Compare id.* at 711–12 (explaining AVC to be the threshold between competition and predation), *with supra* Subsection V.B.2 (rejecting the burden-shifting approach by holding everything above AVC to be competition and everything below it to be predation).

369. Areeda & Turner, *supra* note 58, at 711–12; *see supra* text accompanying notes 44, 57 (discussing various predatory practices, including below-cost pricing, in legislative sessions before enacting the Clayton Act and the RPA).

370. Areeda & Turner, *supra* note 58, at 710–11.

371. *See supra* Subsection V.B.3.

372. *See* Areeda & Turner, *supra* note 58, at 710–11 (indicating that courts should permit pricing at marginal cost—even if it destroys competition).

by pricing in the marginal-cost range under the hardline approach.[373] The burden-shifting framework neither diverges from AVC as the measure of cost nor limits the law's ability to prevent monopolistic activities in the marginal-cost range.[374] It reinforces the idea that AVC is the threshold between competition and predation by imposing presumptions of illegality for below-AVC pricing and legality for above-AVC pricing.[375] This framework provides courts with a static definition for an appropriate measure of cost and remains flexible enough to prevent above-AVC pricing intended to destroy competition.

VIII. CONCLUSION

Currently, a craft-brewer plaintiff could bring identical below-AVC claims in multiple circuits and receive different verdicts—despite the circuit courts applying the same law to the same facts. Construing pleadings "so as to do justice," a craft brewer should be able to prevail in below-AVC pricing claims based on notions of justice and equitability—not geography.[376] Unfortunately, without Supreme Court intervention, geography becomes an important factor in below-cost antitrust claims.[377] This failure of the American legal system does not fall squarely on the shoulders of the Supreme Court; however, the Supreme Court can remedy the problem.[378]

Three factors contribute to the lack of uniformity in below-cost pricing lawsuits. First, the FTC fails to recognize that below-cost pricing can be a precursor to a monopoly.[379] Second, the FTC actively interferes with states that are seeking to pass below-cost pricing prohibitions.[380] Finally, the Supreme Court has avoided the measure

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373. *Id.*

374. *See* Morgan v. Ponder, 892 F.2d 1355, 1360 (8th Cir. 1989) ("At prices above [AVC] the plaintiff must overcome a strong presumption of legality by showing other factors indicating that the price charged is anticompetitive. At prices below [AVC], the burden of showing non-predation falls on the defendant.").

375. *See supra* Subsection V.B.3.

376. FED. R. CIV. P. 8(e).

377. *See, e.g.*, *supra* Section VII.A (observing that, under the RPA, craft brewers cannot recover for below-AVC pricing claims in some jurisdictions but may be able to recover in jurisdictions that have adopted the AVC hardline approach).

378. *See, e.g.*, United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 340 (1897) ("[C]ongress is the body to amend [the law], and not this court, by a process of judicial legislation . . . .").

379. *See supra* Part IV.

380. *See supra* Part IV.

of cost question—which created a legal nightmare that has discouraged plaintiffs from filing below-cost pricing claims.[381]

Businesses can bring federal below-cost pricing claims under the Sherman Act, Clayton Act, or the RPA. A link between these laws is that Congress enacted them to protect markets from dominance by large businesses.[382] These acts' legislative histories show that Congress was concerned with protecting competition and consumers from monopolistic, anticompetitive business practices.[383] One such activity involves a large manufacturer pricing its goods below cost in an attempt to remove competitors from the market. The RPA explicitly forbids pricing below cost to destroy competition, but it does so without defining cost.[384]

Federal below-cost pricing claims are rare and unlikely to succeed because they are stuck in a catch-22. This paradoxical loop requires a plaintiff to reach the Supreme Court, in an unstable system that produces inconsistent outcomes, before the Court will create a uniform standard. Judges understand the difficulties of succeeding in a federal below-cost pricing lawsuit—there are numerous cases where the judge discusses this fact.[385] The uncertainty around an appropriate measure of cost casts doubt over the viability of any below-cost pricing lawsuit. Additionally, the Supreme Court has repeatedly evaded defining a measure of cost—which would bring stability—and that avoidance further propagates the chaos.[386]

The *Brooke Group* test was a good first step toward resolving federal below-cost pricing claims, but the Supreme Court's sole contribution has proved insufficient by itself. Since its creation, the *Brooke Group* test has provided structure to below-cost pricing analyses, but circuit courts have developed their own interpretation of the test.[387] Circuit courts split nine to three, with the majority adopting AVC as the measure of cost and the minority waiting for the Supreme Court's verdict on the matter.[388] Although the nine-circuit majority

381. *See supra* Subsection V.B.1.

382. *See supra* Part II.

383. *See supra* Section II.A.

384. *See supra* Subsection II.A.3.

385. *See, e.g.*, Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 589 (1986) ("[P]redatory pricing schemes are rarely tried, and even more rarely successful.").

386. *See supra* notes 8, 177 (identifying multiple cases where the Supreme Court could have declared a measure of cost, but it denied certiorari instead).

387. *See supra* note 8; *see also supra* Sections V.A–B (examining the *Brooke Group* test and the various circuit splits that emerged after the publication of the Areeda-Turner framework).

388. *See supra* Section V.B.

adopted AVC as a measure of cost, these circuits are internally divided and approach predatory pricing in two distinct ways.[389] Today, the *Brooke Group* test is not the largest hurdle for a craft brewer to overcome—it is the jurisdictional minutiae.[390]

Courts require a plaintiff to prove numerous things in a below-cost pricing lawsuit, and some weigh heavier than others. Some of the most important factors require a defendant to have reason to monopolize, sufficient market power, taken steps to monopolize, and a likelihood of succeeding.[391] The brewing industry's history provides evidence to support a claim of below-cost pricing against Big Beer.[392] Prior to President Carter legalizing homebrewing, Big Beer enjoyed market dominance and high beer prices.[393] The market began to shift over the past forty years, which saw the price of beer fall by 17 percent and Big Beer's market share drop by 20 percent.[394] Today, Big Beer produces 72 percent of all domestic beer; however, that number has been declining since 1983 and large brewers are continually attempting to regain their 92 percent market share.[395]

Although Big Beer's behavior has created favorable facts for a below-cost pricing claim, courts' non-uniform application of the RPA discourages would-be plaintiffs from bringing a claim. The FTC's stance on below-cost pricing buttresses this unfavorable scenario and may have a chilling effect on craft brewers seeking justice in federal court. Until federal courts begin to apply antitrust laws as Congress intended—to supplement state laws—select states are a better venue for below-cost pricing lawsuits.[396]

Without uniform application of federal laws that prohibit unreasonable pricing to destroy competition, twenty-two states offer the best chance of recovery for craft brewers.[397] These states have taken it upon themselves to enact prohibitions that are nearly identical to the federal laws the FTC refuses to enforce.[398] Most states with

389. *See supra* Subsections V.B.2–3.
390. *See supra* Part V.
391. *See supra* Part V.
392. *See supra* Sections III.C–D.
393. *See supra* Sections III.A–B.
394. *See supra* Sections III.A–B.
395. *See supra* Section III.A.
396. *See supra* Section II.A.2; Part V.
397. *See supra* Section VI.A.
398. *Compare supra* Section VI.A (discussing twenty-two states that prohibit below-cost pricing for all goods sold within their borders), *with supra* Part V (explaining how a majority of the circuit courts interpret the RPA to prohibit selling goods below AVC).

general below-cost pricing prohibitions have delved deeper than the federal government and carved out exceptions where below-cost pricing is legal.[399] In addition to advancing the below-cost pricing discussion, these exceptions are unlikely to impede a craft brewer filing a claim against Big Beer. In fact, Big Beer's anticompetitive activities fall outside of these state-level exceptions because they harm competition—not meet competition or prevent loss.[400] States that prohibit general below-cost pricing offer the best venue for craft brewers because these states are unencumbered by the FTC or jurisdictional nuances.

As Professor James McCall noted, the Supreme Court has never encountered a case that required it to decide what an appropriate measure of cost means.[401] Without a universal federal standard, the circuit courts will continue developing their individual, cumbersome approaches—which produce inconsistent, circuit-line outcomes.[402] If the courts continue to apply non-uniform standards, the debate over what constitutes an appropriate measure of cost will continue. Victims of predatory pricing will continue to encounter jurisdictional variance regarding the legality of marginal-cost pricing.[403]

Without a definite standard, there is no guarantee that circuit courts will produce the same result under federal law. Although the *Brooke Group* test appears simple, jurisdictional requirements have produced a morass that makes it nearly impossible to achieve a positive result.[404] Further, legal uncertainty will impede litigation so long as the Supreme Court refuses to define an appropriate measure of

399. *See supra* Section VI.B.

400. *Compare supra* Part III (highlighting how Big Beer has purchased competitors; restricted access to ingredients, distribution, and markets; and successfully lobbied for pay-to-play activities), *with supra* Section VI.B (identifying eight pervasive, bona fide exceptions—including preventing loss from spoilage, damaged goods, or final liquidation; selling goods on clearance, for charity, to government, or on court order; or pricing goods below cost to meet lawful competition).

401. *See* Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222 n.1 (1993); *see* McCall, *supra* note 81, at 319 n.59 (discussing that the Supreme Court never resolved the cost-standard issue).

402. *See supra* note 8 (identifying nine circuit courts that utilize some variety of AVC and two circuits that have not selected a measure of cost).

403. *See* Morgan v. Ponder, 892 F.2d 1355, 1360 (8th Cir. 1989) (explaining that prices above AVC have a strong presumption of legality); *see* William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1041 (9th Cir. 1981) ("A plaintiff may establish the required effects on competition in a primary-line case even though the defendant's prices were shown to be above marginal cost."); *see also supra* Subsection II.B.1 (explaining the practice known as marginal-cost pricing).

404. *See supra* Section V.B.

cost.[405] Until something changes at the federal level, states with general below-cost pricing prohibitions are the best forum for craft brewers seeking to bring a predatory pricing lawsuit against Big Beer.[406]

405. *See Brooke Grp.*, 509 U.S. at 222–24.

406. *Compare supra* Parts IV–V (noting that the FTC does not believe that below-cost pricing creates monopolies and that the courts have conflicting views on how to address below-cost pricing claims), *with supra* Part VI (observing that twenty-two states have enacted general below-cost pricing prohibitions).