

# Comments on Legal Panel Presentations

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# Disclaimers

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My opinions are my own and are not necessarily shared by my colleagues at Georgetown or CRA, or by any clients with whom I have provided economic consulting. This short deck and the associated brief presentation are designed to stimulate discussion and so cannot reflect my full analysis of these issues

## Disagreement with Some Presenters' Conclusions

- The law cannot rely on “competition for the contract.” Because of the monopolist’s “exclusion value” and the entrant’s “coordination/externality problems” there often can be no effective competition for the contract.”
- Price/cost comparisons are not the only objective evidence. Showing that the entrant lacks a rational economic incentive to try to outbid incumbent also is objective evidence and is more reliable.
- Such an entrant is *not* “lazy or incompetent,” but is “rational” in the face of effective exclusionary conduct by the monopolist.
- If the entrant is a “less efficient rival,” that fact does not make the entrant “lazy or incompetent.” Entry by such rivals into a dominant firm market can increase competition and consumer welfare.

## Disagreement with some Presenters' Views that Courts Should Rely Mainly Or Entirely on IR<IC (EER) Test.

- CPPs raise greater exclusionary concerns than predatory pricing because it is more profitable to the monopolist; and there are fewer short-run consumer benefits, if any.
- The IR<IC (EER) test is not simple or reliable to administer. It is often difficult to estimate the “contestable” and “incontestable” sales. And, for “cliff pricing,” there is *always* a range where IR<IC.
- As noted, the entrant often has no rational economic incentive to try to outbid the incumbent, which leads to false negatives. False positives also can occur. The net result likely is under-deterrence.
- Thus, CPPs should entail a more intrusive legal rule than predatory pricing. “Creeping Brookism” in the form of the IR<IC (EER) standard is *not* the way to maximize consumer welfare or maintain the competitive process.

## Disagreement With Presenters Who Suggest that IR<IC Test is Necessary for Effective Counseling

- The IR<IC test is not easy to administer, so a counselor can not easily or accurately rely on it. And there are alternatives for counseling.
- Counselors have long been advising clients with respect to exclusive dealing (and tying) programs. Basing advice on the assumption that the CPP will lead to effective exclusive dealing (or tying) can be a useful starting point.
- Harm to competition is less likely if one firm uses CPPs and that firm lacks market power. It is most likely if the firm is a monopolist or dominant firm.
- The fraction of distributors and their sales also often is a relevant fact, as is knowing the distribution requirements of viable entrants.
- My main presentation also had several slides listing other relevant evidence related to harm to competition.
- Examining the firm's true rationale for adopting the CPP also can be helpful.