

NOTES

ANTITRUST DAMAGES FOR A MONOPOLIST'S CUSTOMERS AFTER *BERKEY PHOTO, INC. v.* *EASTMAN KODAK CO.*

The private treble damage action,¹ historically considered the appropriate remedy for damages occasioned by violations of the prohibitions against monopolies,² faces growing criticism.³ The Second Circuit in

1. Clayton Act § 4, 15 U.S.C. § 15 (1976) provides:

Any person who shall be injured in his business or property by reasons of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained. . . .

2. The Statute of Monopolies in 1623 provided:

That if any person shall be hindered, grieved, or disquieted . . . by occasion or pretext of any monopoly . . . or any matter or thing tending as aforesaid, and will sue . . . he shall have his remedy for the same at common law . . . ; wherein every such person, which shall be so hindered or grieved . . . shall recover three times so much as damages which he sustained by such hinderance, etc., and double costs

21 Jac. 1, c.3 (1623) reprinted in BACON'S ABRIDGEMENT 24 (1856) ("An act concerning monopolies and dispensations with penal laws and the forfeitures thereof."). See H. THORELLI, THE FEDERAL ANTITRUST POLICY—ORIGINATION OF AN AMERICAN TRADITION 26 (1955) (The Statute of Monopolies primarily declared existing principles in the field).

The treble damage remedy was a part of the original Sherman Act, ch. 647, § 7, 26 Stat. 210 (1890) (current version at 15 U.S.C. § 15 (1976)). Current law does not prohibit monopolies, only monopolizing conduct. Sherman Act § 2, 15 U.S.C. § 2 (1976) provides in part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce . . . shall be deemed guilty of a felony. . . ."

3. See 3 P. AREEDA & D. TURNER, ANTITRUST LAW ¶¶ 311-13, 331, 630c (1978) (treble damages have negative consequences and should be reserved for well defined offenses); J. BURNS, ANTITRUST DILEMMA: WHY CONGRESS SHOULD MODERNIZE THE ANTITRUST LAWS 90-101 (1969) (treble damages are a tremendous burden on business, major antitrust questions should not be decided in suits by private parties); Austin, *Negative Effects of Treble Damage Actions: Reflections on the New Antitrust Strategy*, 1978 DUKE L.J. 1353 (risk conscious defendant may give plaintiff business advantage because of ambiguities in the antitrust law); Bernard, *The Actions of the Antitrust Plaintiff: Law, Policy and a Modest Proposal*, 16 DUQ. L. REV. 307 (1978) (permitting plaintiff with unclean hands to sue permits plaintiff to tolerate antitrust violations in order to seek treble damages later); Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 340-44 (1974) (filing of nuisance claims creates a "misinformation effect" harmful to conducting business); Ferber, *Introductory Comments, The Effectiveness of the Private Treble Damages Action as an Antitrust Enforcement Mechanism*, 8 SW. U.L. REV. 505, 508 (1976) (diverse opinions on treble damage action include suggestions that more effective government prosecution and more carefully considered criminal penalties should be substituted for private action); Littman & Van Buskirk, *The "Dogmas" of Antitrust Actions: A New Perspective*, 24 ANTITRUST BULL. 687, 763-66 (1979) (many aspects of private action undesir-

*Berkey Photo, Inc. v. Eastman Kodak Co.*⁴ fashioned a measure of damages that incorporates current criticism of private treble damage actions, and may prevent the customer of a monopolist from recovering for injury suffered as a result of the monopolist's unlawful behavior.⁵

Eastman Kodak's simultaneous introduction of the 110 Pocket Instamatic camera and Kodacolor II film⁶ was the focal point of an action alleging numerous antitrust violations,⁷ and resulting in an \$87 million treble damage award to Berkey Camera, one of Kodak's purchasers.⁸ Finding Kodak guilty of monopolizing the film market in violation of section 2 of the Sherman Act, the district court awarded Berkey the difference between the price it paid for Kodak film and the price that

able such as no right of contribution); Wheeler, *Antitrust Treble Damage Actions: Do They Work?*, 61 CALIF. L. REV. 1319 (1973) (evidence does not indicate treble damages deter or compensate—treble damages need to reach individual officers to be effective); Note, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1055-62 (1952) (treble damages unduly harsh in light of uncertainty in law).

4. 603 F.2d 263 (2d Cir. 1979), cert. denied, 444 U.S. 1093 (1980) (Rehnquist & Powell, J.J., dissenting).

5. See notes 104-05 *infra* and accompanying text.

6. 603 F.2d at 268.

7. Berkey claimed that Kodak willfully acquired and maintained a monopoly in the camera, film, and color paper markets in violation of § 2 of the Sherman Act; attempted to monopolize the camera market; conspired with flashlamp manufacturers in violation of § 1 of the Sherman Act; and was guilty of violations of the Robinson-Patman Act. *Id.* at 267-68.

8. *Id.* at 268. See Petitioners Brief for Certiorari at 180a, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 444 U.S. 1093 (1980). The jury specifically found that Kodak had:

1. monopolized the camera, film and color print markets;
 2. used its monopolization in film to foreclose competition in six other markets;
 3. unlawfully attempted to monopolize the conventional amateur camera market;
- and
4. was a party to a contract, combination or conspiracy with Sylvania and General Electric which unreasonably restrained trade. *Id.* at 180a-87a.

The court of appeals reversed the jury award in every significant aspect, summarizing the decision as follows:

DISTRICT COURT HOLDING	COURT OF APPEALS HOLDING
1. Awarded Berkey \$47,750,000 treble damages for lost profits on 110 cameras.	Reversed.
2. Awarded Berkey \$167,100 treble damages for lost photofinishing profits.	Reversed and remanded for a new trial.
3. Awarded Berkey \$57,000 treble damages for excessive prices paid for photofinishing equipment.	Reversed and remanded for a new trial.
4. Awarded Berkey \$34,500,000 treble damages for excessive prices paid for film.	Reversed and remanded for a new trial.
5. Granted judgment n.o.v. to Kodak on Berkey's claim for damages for excess prices	Reversed and remanded for a new trial.

Berkey would have paid in a competitive market.⁹ The court of appeals reversed and held that the proper measure of damages for a monopolist's purchaser is not the excess of its price over a competitive price, but merely the increment attributable to its anticompetitive conduct.¹⁰

This Note will explore one aspect of the *Berkey* decision—the proper measure of damages for a monopolist's purchaser.¹¹ The Note begins with a discussion of the elements necessary to establish a cause of action in a private antitrust suit. A brief mention of the problems and controversy surrounding the private treble damage action will precede discussion of the *Berkey* case. The Note will explore the reasoning of both the trial court and the court of appeals to conclude that the court of appeals, in fashioning the measure of damages, departed from established principles of law and adopted a substantively unsound measure of damages.

I. TREBLE DAMAGES—THE PRIVATE ANTITRUST SUIT

A. Purpose

Section 4 of the Clayton Act provides an award of triple damages to persons injured in their business or property as a result of conduct pro-

DISTRICT COURT HOLDING

paid for color print paper (\$8,803,000, pre-trebling, awarded by the jury).

6. Held that Kodak has violated § 1 of the Sherman Act by conspiring with Sylvania and General Electric in the introduction of the magicube and flip-flash systems.

7. Awarded Berkey \$990,000 treble damages for lost camera sales in 1970 resulting from the magicube conspiracy.

COURT OF APPEALS HOLDING

Affirmed. Because the flip-flash conspiracy was not made a separate subject of damages at the first trial, a retrial is necessary to determine the resultant damages.

Affirmed.

603 F.2d at 309.

9. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 422 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

10. 603 F.2d at 297.

11. For a discussion of the controversial predisdisclosure issue, see Comment, *Antitrust Law—Sherman Act, Section 2—A Monopolist Has No Duty to Predisdisclose Information on Innovations*, 55 NOTRE DAME LAW. 554 (1980); Note, *Berkey Photo, Inc. v. Eastman Kodak Co.: The Predisdisclosure Requirement—A New Remedy for Predatory Marketing of Product Innovations*, 10 RUT.-CAM. L.J. 395 (1979); 93 HARV. L. REV. 408 (1979).

hibited by the antitrust laws.¹² The private treble damage action, an integral part of the antitrust laws, provides compensation for those injured by a defendant's antitrust violations.¹³ More importantly, the private treble damage action deters future violations and enhances effective enforcement of the antitrust laws by encouraging private suits.¹⁴

At common law, private actions, as opposed to government prosecutions, were the primary means to redress restraints of trade.¹⁵ The Statute of Monopolies of 1623 awarded the successful private plaintiff triple damages and double costs.¹⁶ The framers of the Sherman Act intended the private right of action to be a federal codification of the common law.¹⁷ The purpose of the private action with its treble damage provision "was not only to provide redress for private wrongs but also to build into the act the feature of self-enforcement that had been

12. Clayton Act § 4, 15 U.S.C. § 15 (1976), *quoted in part in note 1 supra*.

13. *See, e.g., Pfizer, Inc. v. India*, 434 U.S. 308, 312-15 (1978); *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 n.10 (1977); E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* § 3.01 (1965). *See also Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979).

14. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (consumers have standing to sue which encourages private challenges and supplements resources of justice); *Pfizer, Inc. v. India*, 434 U.S. 308, 315 (1978) (foreign government permitted to sue so deterrent effect of treble damages not lessened); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745-46 (1977) (increasing costs would impair this important enforcement weapon which permits direct purchasers to recover the full amount of the overcharge and better serves legislative purpose to create "private attorney general"); *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 262 (1971) (Congress chose treble damages to encourage private suits); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 130-31 (1969) (treble damages serve "high purpose of enforcing antitrust laws"); *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 139 (1968) (law encourages private suits to favor overriding policy in favor of competition); LEGISLATIVE REFERENCE SERVICE, *HOUSE SELECT COMM. ON SMALL BUSINESS, 89TH CONG., 2D SESS., CONGRESS AND THE MONOPOLY PROGRAM—HISTORY OF CONGRESSIONAL ACTION IN THE ANTITRUST FIELD, 1890-1966* at 239 (1967).

At the time of enactment of the Sherman Act, the major emphasis was upon methods of enforcement, and it was believed that the most effective method, in addition to the imposition of penalties by the United States, was to provide for private treble damage suits. It was originally hoped that this would encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the government time and money.

Id. But see Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 485, 486 & n.10 (1977) (treble damages deter but are primarily remedial; House debates saw as means of enforcing the law; Senate virtually no discussion on issue).

15. H. THORELLI, *supra* note 2, at 12. *See Dyer's Case*, Y.B. 2 Hen. V. vol. 5 (1415), *cited in* L. SCHWARTZ & J. FLYNN, *ANTITRUST AND REGULATORY ALTERNATIVES, FREE ENTERPRISE AND ECONOMIC ORGANIZATIONS* 3 n.4 (1977).

16. *See note 2 supra*.

17. H. THORELLI, *supra* note 2, at 228 (ample evidence that bill finally passed was intended by sponsors primarily as a federal codification of the common law of England and the several states).

typical in cases of restraint of trade at common law."¹⁸

The judiciary strongly supports the private antitrust action to achieve the social and economic goals of the antitrust laws.¹⁹ The treble damage provision fosters and stimulates the interest of private persons in maintaining a free and competitive economy. The courts generally hold that the efficacy of the private antitrust action should not be weakened by judicial construction.²⁰

B. *Elements of a Cause of Action*

To recover under the Clayton Act the private plaintiff first must prove damage. Proof of damage requires a showing of injury to one's business or property²¹ resulting from defendant's violation of the antitrust laws.²² In addition, the private plaintiff must prove the amount of damage resulting from defendant's violation of the Clayton Act.²³

1. *Proving the Fact of Damage*

The fact that a defendant violates the antitrust laws, or that defendant's conduct injures plaintiffs in their business or property, alone does not create a private cause of action under the Clayton Act. The plaintiff must prove that the alleged violation caused the claimed injury.²⁴ Failure to establish a causal relationship between the defendant's act and the plaintiff's injury is a failure to prove the fact of damage.²⁵

18. *Id.* at 225.

19. *See, e.g.*, cases cited at note 14 *supra*; E. TIMBERLAKE, *supra* note 13, at § 3.02; Weinberg, *Recent Trends in Antitrust Civil Action Damage Determinations*, 1976 DUKE L.J. 485.

20. *See* *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

21. In *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979), the Supreme Court held that an injury to "business or property" includes injury suffered by consumers forced to pay conspiratorially higher prices for goods. *Id.* at 337-45. Prior to this decision, some lower courts denied standing to consumer plaintiffs, holding that injury to business or property must be a commercial or competitive injury. *See* Note, *Antitrust: Consumer Standing After Reiter v. Sonotone Corp. and Illinois Brick Co. v. Illinois*, 11 LOY. U.L.J. 327 (1980); 58 WASH. U.L.Q. 717 (1980).

22. Clayton Act § 4, 15 U.S.C. § 15 (1976) ("injured in his business or property by reason of anything forbidden in the antitrust laws . . ."). *See, e.g.*, E. TIMBERLAKE, *supra* note 13, at § 20.02 (fact of damage or legal injury must be proved with certainty); J. VON KALINOWSKI, 16N BUSINESS ORGANIZATIONS, ANTITRUST LAWS AND TRADE REGULATION § 115.02[1] (1978) (fact of damage or causation requires greater burden of proof than that required in showing amount of damages).

23. *See, e.g.*, E. TIMBERLAKE, *supra* note 13, at § 21.01; J. VON KALINOWSKI, *supra* note 22, at § 115.03[1].

24. *See* notes 38-50 *infra* and accompanying text.

25. *See* E. TIMBERLAKE, *supra* note 13, at § 21.02.

To prove the fact of damage, the plaintiff must establish first, that the defendant violated the antitrust laws;²⁶ second, that the plaintiff's injury was the type of injury that the antitrust laws were designed to prevent;²⁷ and finally, that the defendant's violation directly or proximately caused the plaintiff's injury.²⁸ The customer of a monopolist must show that the defendant violated section 2 of the Sherman Act²⁹ by unlawfully monopolizing the relevant product market³⁰ to prove a violation of the antitrust laws. The elements of unlawful monopolization are the possession of monopoly power³¹ in the relevant market and "the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident."³²

No precise, well-settled rules exist to determine the type of conduct that constitutes monopolization.³³ Willful acquisition or maintenance

26. Clayton Act § 4, 15 U.S.C. § 15 (1976). *See, e.g.*, Glenn Coal Co. v. Dickenson Fuel Co., 72 F.2d 885, 887 (4th Cir. 1934) (plaintiff must establish violation of the Antitrust Act and must allege facts from which the court can determine that there has been a violation of the Act); J. VON KALINOWSKI, *supra* note 22, at § 115.02[1][b].

27. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977). *See* notes 37-47 *infra* and accompanying text.

28. *See* notes 45-50 *infra* and accompanying text.

29. Sherman Act § 2, 15 U.S.C. § 2 (1976) provides in part: "Every person who shall monopolize, or attempt to monopolize . . . any part of trade or commerce . . . shall be deemed guilty of a felony . . ."

30. The relevant market includes both a product and a geographic market. The relevant market is the "area of effective competition within which defendants operate." Standard Oil Co. of Cal. v. United States, 337 U.S. 293, 300 n.5 (1949). The relevant product market is determined by identifying those products in which cross elasticity of demand exists. United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 380 (1956).

31. Monopoly power is "the power to control prices or exclude competition." United States v. Grinnell Corp., 384 U.S. 563, 571 (1966); United States v. E.I. Du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946). *See also* Standard Oil Co. of N.J. v. United States, 221 U.S. 1, 58-59 (1911).

32. United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966).

33. United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954). Judge Wyzanski reviewed the leading case on monopolization and formulated three tests of monopolizing behavior: (1) The defendant has engaged in monopolizing behavior if engaged in predatory practices. *Id.* at 341 (citing United States v. American Tobacco Co., 221 U.S. 106 (1911) and Standard Oil Co. of N.J. v. United States, 221 U.S. 1 (1911)). (2) The defendant must intend to monopolize; this may be actual intent or the intent may result from a firm's free choice of business policies. If the firm chooses the more anticompetitive of several possible methods of doing business, the requisite intent exists. *Id.* at 341-42 (citing United States v. Aluminum Co. of Am., 148 F.2d 416 (2d Cir. 1945)). (3) The defendant has monopolized if it enjoys the power to exclude competition and plans to or has engaged in any exclusionary practice even though that practice does not restrain competition. Judge Wyzanski suggests that a domi-

of monopoly power may include conduct that would be lawful if engaged in by a company without monopoly power.³⁴ There are, however, few cases that define monopolizing conduct.³⁵ The dearth of well-settled rules has advanced the argument that treble damages are not appropriate unless defendant has engaged in clearly anticompetitive

nant firm may be monopolizing by simply doing business and flexing its economic muscles. A dominant firm may use superior skill as a defense. The approach suggests that possession of monopoly power shifts the burden of proof to the defendant to show that its power resulted from superior skill. *Id.* at 342 (citing *United States v. Griffith*, 334 U.S. 100 (1948)). See generally 3 P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 613 (1978); L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 33-48 (1977).

34. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954) (leasing rather than selling machines is monopolizing). See also *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (defendant's plans to meet increased demand is monopolizing conduct).

35. Malina, *Recent Developments in Monopolization Litigation*, 47 ABA ANTITRUST L.J. 1135 (1978). Malina refers to section 2 as the "most ephemeral of the antitrust laws" and says you can count the important precedent on two hands. *Id.* at 1135-36 n.4. *United States v. Grinnell Corp.*, 384 U.S. 563 (1966) (offense of monopoly has two elements—possession of monopoly power in the relevant market and willful acquisition and maintenance of that power); *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377 (1956) (relevant market for determining the power to control price and exclude competition contains those commodities reasonably interchangeable by consumers for same purpose); *United States v. Griffith*, 334 U.S. 100 (1948) (use of monopoly power, however lawfully acquired, to foreclose competition, gain competitive advantage, or destroy a competitor violates section 2); *Telex Corp. v. IBM Corp.*, 510 F.2d 894 (10th Cir.), *cert. dismissed*, 423 U.S. 802 (1975) (plug compatible peripheral products too narrow product market while use of ordinary market methods and pricing practices prevalent throughout industry is not "predatory"); *United States v. Aluminum Co. of Am.*, 148 F.2d 416 (2d Cir. 1945) (to violate section 2 must have intent, but no monopolist monopolizes unconscious of what he is doing and corporation which embraces each new opportunity cannot argue that they never excluded competition); *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953) (economic effect of lease only policy exclusionary and defendant intends to engage in leasing practices which maintain its market power). See also *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377 (1973) (defendant's use of its dominance in transmission of power in its service area to foreclose potential entrants is attempt to monopolize); *American Tobacco Co. v. United States*, 328 U.S. 781, 809-10 (1946) (combination to control commerce in a commodity violates section 2 if coupled with power and intent to exclude competitors even if the means lawful, competition not excluded, and prices not raised); *United States v. International Harvester Co.*, 274 U.S. 693, 708 (1927) (mere size of a corporation or existence of unexercised power is not an offense if not unlawful conduct in the exercise of power); *United States v. United States Steel Corp.*, 251 U.S. 417, 450-51 (1920) (mere size is not an offense); *United States v. American Tobacco Co.*, 221 U.S. 106, 175-84 (1911) (violation alone not a result of the existence of dominion and control over tobacco trade but because wrongful purpose and illegal combination established); *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 60-62, 75-77 (1911) (section 2 embraces all attempts to restrain trade by attempts to monopolize or by monopolization).

For comment on recent monopolization cases, see Comment, *Draining the Alcoa "Wishing Well": The Section 2 Conduct Requirement After Kodak and Calcomp*, 48 *FORDHAM L. REV.* 291 (1980).

behavior.³⁶

Private plaintiffs may not recover merely because a defendant violated the antitrust laws.³⁷ The private plaintiff also must prove an injury of the type that the antitrust laws are designed to prevent.³⁸ The Supreme Court, in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,³⁹ refused to impose section 4 liability on the defendant Brunswick when defendant's violation of section 7 of the Clayton Act⁴⁰ injured plaintiff in its business. Brunswick had violated section 7 by its acquisition of a bowling alley that competed with plaintiff, Pueblo Bowl-O-Mat. The plaintiff alleged that "but for" defendant's illegal acquisition, the competing business acquired by the defendant would have ceased doing business.⁴¹ Plaintiff sought damages based on the amount of business lost to the defendant. Although defendant's violation caused plaintiff's loss, the Court held that the plaintiff did not suffer an "injury of the type antitrust laws were designed to prevent."⁴² Injury resulting merely from the presence of competition is not the type of injury protected by the antitrust laws.⁴³

36. 3 P. AREEDA & D. TURNER, *supra* note 3, at § 630c. "[S]uch damages are punitive, and punishment is inappropriate when . . . the law is unclear, or even where the liability determination rests on . . . uncertain economic factual determinations." *Id.*

37. *See, e.g., Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 486 (1976) (to recover damages plaintiff must prove more than that defendant violated an antitrust law); *Wolfe v. National Lead Co.*, 15 F.R.D. 61, 63 (N.D. Cal. 1953), *aff'd*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955) (forbidden acts not relevant if they did not result in private damage). *See also United States v. Borden Co.*, 347 U.S. 514, 519 (1954) (government did not expect private plaintiff to function as attorney general).

38. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977):

Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."

Id. (emphasis in original). *See also Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969) (Court could infer causal relationship between injury and antitrust violation); *Continental Ore Co. v. Union Carbide Corp.*, 370 U.S. 690, 697 (1962) (may infer cause if loss and violation likely to cause that type of loss).

39. 429 U.S. 477 (1977).

40. 15 U.S.C. § 18 (1976) provides in part: "No corporation engaged in commerce shall acquire . . . another corporation engaged also in commerce, where in any line of commerce . . . the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly."

41. 429 U.S. at 481.

42. *Id.* at 487-88.

43. *Id.* An elementary principle in the law of damages is that defendants are liable only when their tortious conduct invades a legally protected interest—an interest protected against a

The final element of proof of fact of damage⁴⁴ requires a showing that the violation complained of was the direct⁴⁵ and proximate cause⁴⁶ of the plaintiff's injury.⁴⁷ Although the violative act must be a substantial factor in causing the harm,⁴⁸ the act need not be the only factor.⁴⁹

hazard by some rule of law. See L. GREEN, RATIONALE OF PROXIMATE CAUSE § 1 (1929); RESTATEMENT (SECOND) OF TORTS § 9, comment a (1967). In contrast to the *Brunswick* fact pattern, the predatory practices of a deep pockets entry into the market is the hazard against which plaintiff's profits are protected. 429 U.S. at 487.

44. Fact of damage relates to the plaintiff's standing to sue. The risk of multiplicity of suits requires the courts to place some proximity limitations on antitrust plaintiffs. Hoffman, *Antitrust Standing: Congress Responds to Illinois Brick*, 1978 WASH. U.L.Q. 529, 531. Discussion of the Supreme Court's denial of the offensive use of the "passing on" doctrine limiting standing to direct purchasers as announced in *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), is beyond the scope of this Note. For an understanding of the standing doctrine and controversy, see *Fair and Effective Enforcement of the Antitrust Law: Hearings on S. 1874 Before the Subcomm. on Antitrust and Monopoly of the Senate Comm. on the Judiciary*, 95th Cong., 2d Sess. Pt. 2 (1978); Hoffman, *supra*, at 529; Note, *Antitrust: Consumer Standing After Reiter v. Sonotone Corp. and Illinois Brick Co. v. Illinois*, 11 LOYOLA U.L.J. 327 (1980); Comment, *A Legal and Economic Analysis of the Cost Plus Contract Exception in Hanover Shoe and Illinois Brick*, 47 U. CHI. L. REV. 743 (1980). See generally Pollack, *Standing to Sue, Remoteness of Injury, and the Passing-On Doctrine*, 32 ABA ANTITRUST L.J. 5 (1966).

45. *Loeb v. Eastman Kodak Co.*, 183 F. 704, 709 (3d Cir. 1910) ("Moreover, it is manifest that the plaintiff did not receive any direct injury from the alleged illegal acts of the defendant. . . . [A]ny injury which he . . . received was indirect, remote"); L. SULLIVAN, *supra* note 33, at § 247 (injury derivative in nature may not be sustained); E. TIMBERLAKE, *supra* note 13, at § 4.02. See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 760 (1977) (directness is more restrictive test to determine when wrongdoer should not be liable).

46. Proximate cause, used interchangeably with the term legal cause, signifies a causal relationship between defendant's conduct and plaintiff's injury which is substantial enough that the law considers it just to hold defendant responsible. See RESTATEMENT (SECOND) OF TORTS §§ 5, 9, 431, comment a (1967); C. MCCORMICK, HANDBOOK OF THE LAW OF DAMAGES 266, 267 (1935).

47. J. VON KALINOWSKI, *supra* note 22, at § 115.02[1][b]. "The basic thrust of the proof in any private treble damage action is that plaintiff's injuries were proximately caused by the defendant's proscribed conduct. Generally this means that but for the antitrust violation the plaintiff would have been in a more favorable economic position." *Id.*

48. RESTATEMENT (SECOND) OF TORTS § 431, comment a (1967). See C. MCCORMICK, *supra* note 46, at 266, 267.

49. *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 361 F.2d 874, 885 (1st Cir. 1966) (even if market factors contributed to plaintiff's injury, plaintiff in an antitrust action not barred merely because factors other than defendant's unlawful conduct contributes to injury); *Haverhill Gazette Co. v. Union Leader Corp.*, 333 F.2d 798, 806 n.16 (1st Cir. 1964) (question is not primarily extent of damage when there are multiple causes because there is no burden of excluding all other causes of loss); *Momand v. Universal Film Exchs.*, 172 F.2d 37, 43 (1st Cir. 1948), *cert. denied*, 336 U.S. 967 (1949) (there are a number of factors which contributed to plaintiff's injury, but usual tort rule is that plaintiff may recover loss to which defendant's wrongful conduct substantially contributed). See also *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 699, 700 (1962) (plaintiffs need not show that they had exhausted other sources before they could claim damage from defendant's acts).

The injury suffered by the plaintiff must flow "from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by that violation."⁵⁰

2. *Proving the Amount of Damage*

Although damages cannot be entirely speculative,⁵¹ courts hold that less certainty is required to prove the amount of damage once plaintiff has proven the fact of damage.⁵² The method used to measure damages will differ with the type of violation and the relationship between plaintiff and defendant.⁵³ Competitors, for example, may recover lost profits by comparing plaintiff's profits before defendant's antitrust violation with plaintiff's profits after the violation.⁵⁴ Customers who pay a higher price because of a price-fixing conspiracy are entitled to recover the difference between the price paid and a competitive or reasonable price.⁵⁵ When defendants conspire to lower prices to drive a competitor out of business, the plaintiff may recover the difference between the price prevailing at the time plaintiff entered the market and the price at which defendant's conduct forced plaintiff to sell goods.⁵⁶

50. 429 U.S. 477, 489 (1976).

51. *See, e.g.*, *Story Parchment Co. v. Paterson Parchment Co.*, 282 U.S. 555 (1931) (damages may not be proved by mere speculation, but sufficient proof exists if evidence shows extent of damages as a matter of just and reasonable inference); *National Wrestling Alliance v. Meyers*, 325 F.2d 768 (8th Cir. 1963) (tendency of courts is to award damages when wrong is perpetrated, but not allow recovery for loss of prospective profits based on mere speculation); *Loew's, Inc. v. Cinema Amusements, Inc.*, 210 F.2d 86 (10th Cir.) (damages will not be speculative because they cannot be measured with mathematical exactness), *cert. denied*, 347 U.S. 976 (1954).

52. *See* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) (citing *Taylor v. Bradley*, 4 Abb. Pr. 363, 366-67 (N.Y. 1868)): "The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount."

53. *See generally* J. VON KALINOWSKI, *supra* note 22, at § 115.03[1].

54. *Id.* at § 115.03[3].

55. *See* *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) ("The plaintiffs alleged a charge over a reasonable rate and the amount of it. If the charge be true that more than a reasonable rate was secured by the combination, the excess over what was reasonable was an element of injury."); *City of Atlanta v. Chattanooga Foundry & Pipeworks*, 127 F. 23, 27 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906) ("If the effect of a combination [is] to enhance the price of a commodity . . . the difference between what he was thus compelled to pay and the reasonable price of the commodity under natural competitive conditions would be an injury to that business directly resulting from such unlawful combination.").

56. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931).

In *Hanover Shoe v. United Shoe Machinery Corp.*⁵⁷ the Supreme Court addressed the issue of the amount of damages a purchaser may recover from a monopolist. In *Hanover Shoe* the court found defendant's leasing practice a monopolizing activity.⁵⁸ In discussing proof of amount of damages the Court held that a customer proves a prima facie case of injury and damage under section 4 of the Clayton Act when defendant's conduct inflated the price paid by the customer for business materials.⁵⁹

3. *Burden of Proof on Fact and Amount of Damages*

The Supreme Court has emphasized the need to simplify proof of damage.⁶⁰ The Court has consistently held that in proving damage the defendant bears the risk of uncertainty caused by his improper conduct.⁶¹ In *Eastman Kodak Co. v. Southern Photo Materials Co.*⁶² the Supreme Court held that antitrust plaintiffs may recover damages although the damages cannot be calculated with absolute exactness. The Court explained that a defendant is not entitled to complain that damages cannot be measured with exactness or precision because defend-

57. 392 U.S. 481 (1968).

58. *Id.* at 485-86.

59. We think it sound to hold that when a buyer shows that the price paid by him for materials purchased for use in his business is illegally high and also shows the amount of the overcharge, he has made out a prima facie case of injury and damage within the meaning of § [4].

Id. at 489. See also note 52 *supra* and accompanying text.

60. See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977).

The concern in *Hanover Shoe* for the complexity that would be introduced into treble-damages suits if pass-on theories were permitted was closely related to the Court's concern for the reduction in the effectiveness of those suits. . . . The apportionment of the recovery . . . would increase the overall costs of recovery by injecting extremely complex issues into the case. . . . This additional uncertainty would further reduce the incentive to sue. The combination of increasing the costs and diffusing the benefits of bringing a treble-damages action would seriously impair this important weapon of antitrust enforcement.

We think the longstanding policy of encouraging vigorous private enforcement of the antitrust laws . . . supports our adherence to the *Hanover Shoe* rule

Id.

61. To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not, and cannot be the law

Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 564 (1931). *Accord*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264-65 (1946); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927).

62. 273 U.S. 359 (1927).

ant's wrongful conduct is responsible for the difficulty in ascertaining the precise damages suffered by the plaintiff.⁶³

The Supreme Court reaffirmed this principle in *Story Parchment Co. v. Paterson Parchment Paper Co.*⁶⁴ In *Story Parchment* the court of appeals reversed a jury award reasoning that "pure conjecture" was necessary to determine if the conspiracy to lower prices actually forced prices below a normal competitive response to plaintiff's entry into the market.⁶⁵ On appeal the Supreme Court reversed and ruled that although the extent of the damage was uncertain, the fact of damage was indisputable.⁶⁶

Greater certainty generally is required to establish the fact of damage than is necessary to prove the amount of damage.⁶⁷ The Supreme Court, however, in several cases lightened the burden of proving the fact of damage.⁶⁸ In *Bigelow v. RKO Pictures, Inc.*⁶⁹ the Supreme Court reinstated a lower court damage award and found that plaintiff's evidence "tended to show damage."⁷⁰ The Court explained that the jury could reasonably conclude from proof of the defendant's wrongful acts and the acts' tendency to injure plaintiff's business that defendant's

63. *Id.* at 379. Kodak and other suppliers sold Southern photographic materials, necessary to Southern's business, at dealer discounts. Kodak acquired all the plaintiff's competition and attempted unsuccessfully to purchase Southern. Kodak refused to sell to Southern except at retail prices after the unsuccessful acquisition. Kodak argued that the sale of its goods represented only a small part of the plaintiff's sales and that the damages were purely speculative and "not of an amount susceptible of expression in figures." *Id.* at 378.

64. 282 U.S. 555 (1931).

65. *Paterson Parchment Paper Co. v. Story Parchment Co.*, 37 F.2d 537, 539 (1st Cir. 1930), *rev'd*, 282 U.S. 555 (1931).

66. *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931).

67. It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix the amount.

Id. at 562; *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). *See also Wolfe v. National Lead Co.*, 225 F.2d 427, 433 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955).

68. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969); *Hanover Shoe v. United Shoe Mach. Corp.*, 392 U.S. 481 (1968); *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690 (1962); *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 257 (1946); *Weinberg*, *supra* note 19, at 490. This commentator suggests that defendant should bear the risk of uncertainty caused by his improper conduct in proving the fact of damage and the amount of damage. His analysis of Supreme Court cases indicates the Court imposes that two-fold burden on defendants. *Id.* *See* notes 69-79 *infra* and accompanying text.

69. 327 U.S. 251 (1946).

70. *Id.* at 260.

acts caused the damages.⁷¹

The Supreme Court in *Zenith Radio Corp. v. Hazeltine Research Inc.*⁷² permitted a trier of fact to infer the necessary causal connection between defendant's violation and plaintiff's injury after plaintiff proved a type of loss normally caused by that antitrust violation.⁷³ The Court in *Zenith* held plaintiff's evidence, although not conclusive, to be "sufficient" to sustain the inference that plaintiff had been injured by defendant's restraints.⁷⁴ The Court noted that the burden of proving fact of damage "is satisfied by . . . proof of *some* damage flowing from the unlawful conspiracy; inquiry beyond this minimum point goes only to the amount and not the fact of damage."⁷⁵

71. *Id.* at 264. In *Bigelow* the owner of a motion picture theatre brought an action alleging a conspiracy in the distribution of films. The court of appeals held that plaintiffs' evidence did not demonstrate what their earnings would have been in the absence of the illegal distribution because the conspiracy existed throughout the earnings period used to determine plaintiff's lost profits. Justice Frankfurter in dissent argued that plaintiff had not proven injury or fact of damage. Justice Frankfurter stated that the issue was whether the respondents' violation of the Sherman Act illegally injured the petitioner. *Id.* at 267-68 (Frankfurter, J., dissenting). See Donovan & Irvine, *Proof of Damages: Under the Anti-Trust Law*, 88 U. PA. L. REV., 511 (1940).

See also *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931). The Supreme Court held that there was not uncertainty of fact of damage. The court of appeals, however, was not certain that the combination was the "but for" cause of plaintiff's injury. "The error in the plaintiff's contention is the assumption that, but for the alleged unlawful conspiracy of the defendants . . . the prices current in November, 1927, would have continued to prevail, assuming them to be fair and reasonable." *Paterson Parchment Paper Co. v. Story Parchment Co.*, 37 F.2d 537, 539, 540 (1st Cir. 1930), *rev'd*, 282 U.S. 555 (1931).

The court of appeals noted that individuals may lawfully reduce prices to meet competition. *Id.* at 540. "[I]t is, we think, a moral certainty that, according to nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade, would at least have met every reduction in price made by the plaintiff to gain trade . . ." *Id.* at 541. The court concluded: "The plaintiff has not, therefore, sustained the burden of proving that it has suffered any measurable damage . . . by reason of the alleged unlawful conspiracy." *Id.*

If plaintiff had shown that defendant's conduct forced prices below a normal competitive response, the court of appeals would have been satisfied because both the fact and amount of damage would have been shown. The Supreme Court did not require that degree of certainty. 282 U.S. at 565 (the defendant should bear the risk of uncertainty caused by his improper conduct). See Note, *Damages—Loss of Profits Caused by Breach of Contract—Proof of Certainty*, 17 MINN. L. REV. 194, 196 (1933) (fact of loss and proof of loss are in effect "the same thing").

72. 395 U.S. 100 (1969).

73. *Id.* at 125 (because *Zenith* alleged precisely the type of injury the claimed violation was likely to cause—inability to secure comparable market because of license denial—causal relation may be inferred). See *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 700 (1962) (cannot deem injury flowing from the elimination of independent supplier too remote, nor must plaintiff be required to exhaust all sources of supply because the evidence is sufficient to infer the necessary causal connection between injury and violation).

74. 395 U.S. at 114.

75. *Id.* at 114 n.9 (emphasis in original). "It is enough that the illegality is shown to be a

The Supreme Court in *Hanover Shoe*⁷⁶ rejected the defense that if plaintiff passes on overcharges to the consumer, the plaintiff has not been injured and should not recover.⁷⁷ The Court noted that many factors influence pricing policies and thus rejected the "passing on" defense because it requires proof of an unascertainable figure.⁷⁸ The allowance of a pass-on defense with its attendant complexities would reduce the effectiveness of treble damage actions and allow monopolists to retain the fruits of their illegality.⁷⁹

The Supreme Court decision in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,⁸⁰ may, however, indicate an intent on the part of the Court to increase the burden of proof of the fact of damage. In addition to holding that plaintiff must prove injury of the type the antitrust laws were designed to prevent, the Court in *Brunswick* required the injury to flow "from that which makes defendants' acts unlawful."⁸¹ The *Brunswick* decision may have far reaching consequences if the language in the opinion is interpreted to allow plaintiffs to recover only for injuries that flow from the anticompetitive aspects of a defendant's behavior.⁸² This interpretation would force courts to articulate precisely the portion of defendant's conduct that is anticompetitive.⁸³

Brunswick does not, however, necessarily alter the amount of proof necessary to show the fact of damage. The defendant in *Brunswick* unlawfully acquired bowling alleys in violation of the antimerger provision of the Clayton Act.⁸⁴ The purpose of the antimerger provision is to prevent mergers that tend to lessen competition and increase concen-

material cause of the injury; a plaintiff need not exhaust all possible alternative sources of injury in fulfilling his burden of proving compensable injury under § 4." *Id.*

76. 392 U.S. 481 (1968).

77. *Id.* at 491-92.

78. *Id.* at 493.

79. *Id.* at 493-94. For further examination of *Hanover*, see Pollock, *Automatic Treble Damages and the Passing-On Defense: The Hanover Shoe Decision*, 13 ANTITRUST BULL. 1183 (1968); Note, *The Hanover Shoe Misunderstanding*, 9 NEW ENG. L. REV. 473 (1974); Note, *The Effect of Hanover Shoe on the Offensive Use of the Passing-On Doctrine*, 46 S. CAL. L. REV. 98 (1972).

80. 429 U.S. 477 (1972). See also notes 39-42 *supra* and accompanying text.

81. 429 U.S. at 489.

82. Baxter, *A Review of the Supreme Court's Antitrust Philosophy: Placing the Burger Court in Historical Perspective*, 47 ABA ANTITRUST L.J. 803 (1978).

83. "If this process is undertaken conscientiously, the courts inevitably will become aware that large portions of present antitrust doctrine prohibit conduct which is not anticompetitive at all." *Id.* at 816.

84. 15 U.S.C. § 18 (1976). See note 40 *supra*.

tration in an industry.⁸⁵ The plaintiff's interest in a reduction of competition was clearly not an interest protected by the antitrust laws. The antimerger provision was designed to protect the plaintiff against the predatory practices of a deep pockets entry into the market, which would lessen a plaintiff's ability to compete.⁸⁶ Thus, *Brunswick's* requirement that the injury be of the type which antitrust laws are designed to prevent, is not a departure from previous damage decisions. The requirement that the "injuries flow from that which makes the defendant's acts unlawful"⁸⁷ affirms the need to show proximate causation.⁸⁸

The Court in *Brunswick* followed a well-established method of proximate cause analysis in requiring proof of antitrust injury.⁸⁹ To establish liability, defendant must violate some rule of law, which protects an interest against a particular hazard. In *Brunswick* the interest protected was the plaintiff's interest in unimpeded competition from hazards that result from the predatory practices of a deep pockets entry into the market. The antimerger provision of the Clayton Act was the rule of law violated by the defendant.⁹⁰ *Brunswick* rejects the argument that a plaintiff need only demonstrate that defendant violated an antitrust law which places plaintiff in an economically worse position than if defendant had not committed the anticompetitive acts.⁹¹ The

85. Section 7 of the Clayton act prohibits corporate acquisitions when the effect is to substantially lessen competition or the acquisition tends to create a monopoly. 15 U.S.C. § 18 (1976). Section 7 was intended to be a monopoly preventive measure. Note, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., Injury and Causation Under Sections 4 and 7 of the Clayton Act*, 10 Sw. U.L. REV. 667, 668 (1978). See Note, *Section 7 of the Clayton Act: A Legislative History*, 52 COLUM. L. REV. 766, 766 (1952).

Initially, many federal district courts prohibited damage recoveries for a section 7 violation because the statute is directed toward potential restraints of trade. A potential restraint cannot injure. J. VON KALINOWSKI, *supra* note 22, at § 115.03[4]. See Note, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., Injury and Causation Under Sections 4 and 7 of the Clayton Act*, 10 Sw. U. L. REV. 667, 689 (1978) ("[T]he statutory intentment test of injury and causation is premised upon the unique feature of both section 7 and section 4."). See also 2 P. AREEDA & D. TURNER, *supra* note 3, at § 346a; Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127 (1976).

86. See 429 U.S. 477, 487, 489 n.14 (1977).

87. *Id.* at 489.

88. "Proximate damages . . . are such as flow proximately from the cause of action, that are so connected with it as results of it, that the law regards the person responsible for the cause of action as responsible also for them." A. SEDGWICK, *ELEMENTS OF THE LAW OF DAMAGES* 45, 46 (2d ed. 1909).

89. L. GREEN, *RATIONALE OF PROXIMATE CAUSE* § 1 (1927).

90. See 429 U.S. 477, 480-81 (1977).

91. *Id.* at 486-87.

Brunswick rule insists that the interest invaded by the defendant be an identifiable, legally protected interest.⁹² The *Brunswick* analysis does not represent a departure from antitrust decisions that require the defendant to bear the burden of proving damages which result from its illegal behavior when defendant's violation creates the type of injury suffered by plaintiff.⁹³ Moreover, antitrust decisions after *Brunswick* have reaffirmed the importance of the treble damage action as a deterrent to violations of the antitrust laws and have reiterated the necessity of maintaining its effectiveness as a private enforcement mechanism.⁹⁴ Judicial support of the private treble damage action as a private enforcement mechanism further precludes an interpretation of *Brunswick* that would increase the plaintiff's burden of proof as to fact and amount of damage in a private treble damage action.⁹⁵

II. PROBLEMS AND CONTROVERSIES SURROUNDING PRIVATE TREBLE DAMAGE ACTIONS

The desirability and effectiveness of the treble damage action is the subject of controversy.⁹⁶ The overwhelming number of private antitrust actions indicates that treble damages provide an incentive to bring suit.⁹⁷ Treble damage actions, however, may not provide the desired compliance with the antitrust laws or deter violations of the antitrust laws.⁹⁸ A violation, rather than compliance with the antitrust laws,

92. See also J. VON KALINOWSKI, *supra* note 22, at § 115.02[3][b][ii].

93. See notes 69-79 *supra* and accompanying text.

94. In *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979), standing to sue was extended to consumer plaintiffs because the treble damage action was designed to encourage private challenges and to supplement the limited resources of the Department of Justice. *Id.* In *Pfizer, Inc. v. India*, 434 U.S. 308, 314 (1978), the Court permitted a foreign nation to bring an action under section 4 of the Clayton Act because the Sherman Act advocates the private action to deter violators and deprive them of the fruits of their illegality. See also *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 745 (1977). The Court refused to permit indirect purchasers to maintain an action for overcharges resulting from a violation of the Sherman Act because, "[t]he combination of increasing the costs and diffusing the benefits of bringing a treble-damages action could seriously impair this important weapon of antitrust enforcement." *Id.*

95. See notes 13, 14, 69-79 *supra* and accompanying text.

96. See note 3 *supra*.

97. Collen, *Procedural Directions in Antitrust Treble Damage Litigation: An Overview of Changing Judicial Attitudes*, 17 ANTITRUST BULL. 997, 998-99 (1972) (statistics show trend of increasing private actions after *Bigelow's* simplification of proof of damages and the *Electrical Equipment* cases). For a thorough discussion of the *Electric Equipment* cases, see Neal & Goldberg, *The Electrical Equipment Antitrust Cases: Novel Judicial Administration*, 50 A.B.A.J. 621 (1964).

98. Erickson, *The Profitability of Violating the Antitrust Laws: Dissolution and Treble Dam-*

may be profitable to the offender despite the imposition of a substantial treble damage award.⁹⁹ The private antitrust action may lead to settlements that restrain trade.¹⁰⁰ Additionally, the large number of suits that erroneously allege anticompetitive effects may create a "misinformation effect."¹⁰¹ Finally, the nondiscretionary nature of the imposition of treble damages may be the most objectionable feature of the treble damage action.¹⁰²

Commentators who favor judicial discretion in treble damage awards argue that treble damages are penal in nature and should be used only when violations are worthy of criminal prosecution.¹⁰³ Supporters of judicial discretion regard certain exclusionary acts as not justifying treble damages and believe damages should be limited to the amount reasonably attributable to the exclusionary conduct.¹⁰⁴ The Second Circuit position in *Berkey* that "an injured plaintiff is not entitled to have damages based on the excess of the monopoly price over the competitive price, but only to the price increment reasonably attributable to actionable behavior"¹⁰⁵ reflects dissatisfaction with both the

ages in Private Antitrust, 5 ANTITRUST L. & ECON. REV. 101 (1972) (damage awards are generally smaller than profits involved because cost-benefit ratio favors violations); Wheeler, *Antitrust Treble Damage Actions: Do they Work?*, 61 CALIF. L. REV. 1319 (1973) (inadequate empirical evidence to justify faith in treble damage actions as a deterrent or compensatory mechanism).

99. Erickson, *supra* note 98, at 102-03.

100. Austin, *Negative Effect of Treble Damage Actions: Reflection on the New Antitrust Strategy*, 1978 DUKE L.J. 1353, 1353-54 (risk conscious defendant might give plaintiff business advantages because of ambiguities in the antitrust law).

101. Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 340-44 (1974) (labelling nuisance claims as treble damages creates a "misinformation effect").

102. See 3 P. AREEDA & D. TURNER, *supra* note 3, at ¶ 331b3 (difficulties could be ameliorated if trebling were discretionary rather than mandatory).

103. *Id.* at ¶ 630c (treble damages are punitive and inappropriate when the law is unclear and liability rests on uncertain economic factual determinations).

104. *Id.* A more appropriate remedy might be the use of injunctive relief to break up a persistent monopoly even if there is no exclusionary conduct. See *id.* at § 600b (conduct component might be varied with degree of power, eliminating conduct element entirely in the face of durable and great power); Brookshire & Carroll, *Patents and Vertical Integration as a Source of Monopoly Power: The Photographic Industry*, 7 ANTITRUST L. & ECON. REV. no. 1, 49, 50 (1974) (no scale economies or legitimate patent justification for monopoly conditions in this industry—vertical dissolution of Kodak is appropriate remedy); Dougherty, Kirkwood, & Hurwitz, *Elimination of the Conduct Requirement in Government Monopolization Cases*, 37 WASH. & LEE L. REV. 83 (1980) (proposing elimination of conduct requirement and structural relief as the primary form of relief).

105. 603 F.2d 263, 298 n.57 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980) (quoting 3 P. AREEDA & D. TURNER, *supra* note 3, at 73).

lack of judicial discretion in treble damage awards and the dearth of well-settled rules defining monopolizing conduct.

III. *BERKEY PHOTO, INC. v. EASTMAN KODAK CO.*—FILM AND COLOR PAPER CLAIMS

Kodak's system of marketing their pocket instamatic camera was the subject of the antitrust suit brought by Berkey against Kodak. In 1973 Kodak's sale of 5.1 million pocket instamatics captured a significant share of the amateur camera market.¹⁰⁶ Berkey Photo, a competitor and customer of Kodak,¹⁰⁷ alleged that Kodak introduced a line of defective film which was unnecessary to the operation of the pocket camera.¹⁰⁸ Kodak intended to employ a "systems" method of product introduction and to monopolize the camera and film market in violation of section 2 of the Sherman Act.¹⁰⁹

106. Kodak sold 2,984,000 pocket instamatic cameras in 1972. This was 50% of Kodak's total sales of amateur conventional still cameras and 30% of the total industry sales in that market. *Id.* at 278.

107. *Id.* at 267. Kodak is the leader in the photographic market with monopoly power in the relevant camera, film, and color paper markets. *Id.* at 269-71. In 1977 Berkey's sales were \$203 million while Kodak's were \$6 billion. Kiechel, *The Strange Case of Kodak's Lawyers*, FORTUNE, May 8, 1978, at 189.

Berkey Photo has been in the photofinishing business since 1933. A 1954 consent decree that prohibited Kodak from tying film processing to film purchase enabled Berkey and other film processors to process color film. Since 1954 Berkey has become a larger film processor of 126 and 110 film than Kodak.

Berkey also competed through its Keystone division between 1968-1978 with Kodak in the amateur still camera market. Berkey buys Kodak film, color paper, and other photofinishing equipment and also retails Kodak film and cameras. 603 F.2d at 267-71.

108. The new film contained several defects, which according to Berkey, Kodak concealed from the public. The defects included "graininess and keeping" qualities. Employees suggested use of the 126 film, already on the market for the new camera, because Kodacolor II was not ready for introduction. The film defects were significant enough that Kodak considered recalling all film spooled as of January 1972. Brief of Appellee at 27, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). Scientists further expressed concern that there was no need for the new film because small improvements in existing film (Kodacolor) would suffice and the new process "would raise hell in the photofinishing business . . . and the ultimate consumer would not benefit." 603 F.2d at 277 n.16.

109. 603 F.2d at 277 n.16. Berkey alleged that Kodak's simultaneous introduction of the 110 camera and Kodacolor II film was anticompetitive because Kodak's film monopoly prevented any other camera manufacturer from marketing such a system. Kodak generally made film to fit only its cameras, which prevented other camera makers from developing cameras in new formats. *Id.* at 270.

Berkey alleged that because the new film was unnecessary and defective, Kodak did not intend to compete on the merits, but rather intended to use its film monopoly to crush competitors. 457

A federal district court jury awarded Berkey over \$20 million¹¹⁰ because of excessive prices paid by Berkey for film and color print paper. The court of appeals reversed and remanded the three separate holdings of the district court.¹¹¹ First, the court of appeals reversed a judgment in favor of Kodak on the color paper claim¹¹² and held that a plaintiff may introduce proof of anticompetitive acts occurring before the four year statute of limitations¹¹³ to support a recovery of damages incurred within the four year period.¹¹⁴ Second, the court of appeals reversed and remanded the findings of monopolization.¹¹⁵ The court

F. Supp. 404, 415-16 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

110. 603 F.2d at 293. Berkey was awarded single damages of 15% of its purchases. Berkey contended that even if Kodak's prices had been lower by 30%, Kodak's profits would still have been at extraordinarily high levels. A pro forma statement of Kodak's sales and profits from 1969 to 1976 indicated that with a price reduction of 30%, Kodak's return on investment would have been between 28.4% and 32.8%; earnings as a percentage of sales would have been between 36.4% and 42.3%. Post-Argument Brief for Appellee at 24-25 & n.55, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979). *See also* Brookshire & Carroll, *supra* note 104, at 49 (Kodak, the nation's top monopoly overcharger, had earnings averaging slightly more than General Motors from 1962-1971); Scanlon, *FTC and Phase II: The "McGovern Papers"*, 5 ANTITRUST L. & ECON. REV. no. 3, 19, 33-36 (1972) (FTC estimates of monopoly margin credit the photography industry with maintaining the highest monopoly margin—11.1%).

111. 603 F.2d at 293-99.

112. To demonstrate that Kodak's monopoly was a result of its earlier unlawful acquisitions, Berkey sought to introduce evidence of a 1915 court decision which had found that Kodak monopolized the film and color print paper markets. *United States v. Eastman Kodak Co.*, 226 F. 62, 79-80 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1920). The allegations resulting in a verdict against Kodak included the acquisition of twenty competing companies, the sale of supplies under restrictions that prohibited dealers from handling or selling competitive products, which resulted in a forfeiture of dealer's ability to handle Kodak products if the dealer did not comply with the restriction. *Id.* at 63-64.

113. Clayton Act § 4(b), 15 U.S.C. § 15b (1976) provides: "Any action to enforce any cause of action shall be forever barred unless commenced within four years after the cause of action accrued."

114. 603 F.2d at 295.

So long as a monopolist continues to use the power it has gained illicitly to overcharge its customers, it has no claim on the repose that a statute of limitations is intended to provide. . . .

. . . .
Plainly, at the time a monopolist commits anticompetitive conduct it is entirely speculative how much damage that action will cause its purchasers in the future. Indeed, some of the buyers who will later feel the brunt of the violation may not even be in existence at the time. . . . Not until the monopolist actually sets an inflated price and its customers determine the amount of their purchases can a reasonable estimate be made. The purchaser's cause of action, therefore, accrues only on the date damages are "suffered."

Id. (citations omitted). For an analysis of this holding, see 48 GEO. WASH. L. REV. 643 (1980).

115. Berkey alleged seven different types of anticompetitive or exclusionary conduct that affected the film market:

stated that because the jury verdict was a general one, the court could not determine the specific actions that the jury found anticompetitive.¹¹⁶

Finally, Kodak argued at trial that even if evidence supported a finding of anticompetitive action affecting the film market, Berkey must show that the monopolizing acts directly and proximately resulted in the overcharge paid by Berkey.¹¹⁷ The district court rejected Kodak's argument in favor of a competitive price theory. The district court held that if the defendant acquired or maintained monopoly power by anticompetitive conduct, a customer of the defendant is entitled to recover the entire difference between monopoly price charged and the price that would have existed in a freely competitive market.¹¹⁸ The

1. "The evidence would not support a finding that the film monopoly was 'thrust upon' Kodak." Brief for Appellee at 31-33, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (2d Cir. 1979).

2. "Kodak manipulated the photofinishing market to exclude other film makers." *Id.* at 33-34.

3. "CP&P's exclusionary refusal to process films of others." *Id.* at 34-35.

4. "The imposition of a new processing system and the use of Kodak's camera monopoly to advantage Kodak as a film manufacturer." *Id.* at 36-37.

5. "The exclusionary use of systems advertising and pricing." *Id.* at 37-38.

6. "Kodak's paper monopoly leveraged film sales." *Id.* at 38.

7. "Anticompetitive practices as to foreign Kodak film." *Id.* at 39.

The district court found sufficient evidence of anticompetitive actions that maintained Kodak's huge share of the film market. *See* 457 F. Supp. at 421.

The district court noted that the introduction of the 110 system and Kodak's refusal to allow their photofinisher, CP&P, to handle non-Kodak film were flagrant anticompetitive acts. The record, according to the court, demonstrated that the refusal to handle other films purposefully and effectively impeded film competition. *Id.* at 422.

116. 603 F.2d at 299. If, on remand, the court again found that Kodak monopolized the film and color paper markets, the jury awards could not be reinstated because the court of appeals fashioned a new measure of damages for a monopolist's purchaser. *See* notes 122-30 *infra* and accompanying text.

117. 457 F. Supp. at 422. Kodak, on appeal, argued that Berkey did not show that the 110 systems introduction related to or affected Kodak's film prices. Thus, the claim should be dismissed for failure to prove cause-in-fact. Brief for Appellant at 114, *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263 (1979).

118. 457 F. Supp. at 422.

Stated more fully, the rule on which the verdict rests in this respect is that where a defendant

- (i) has monopoly power in a relevant market,
- (ii) has acquired or maintained this power by anticompetitive conduct, and
- (iii) has employed its monopoly power to charge a price higher than what a competitive price was or would have been,

a purchaser required to pay the monopoly price may recover the excess.

Id.

Judge Frankel compares this position with a price-fixing conspiracy. An illegal monopolist's power to set price is the "same species of evil, and for at least as compelling reasons, as the

court instructed the jury to determine whether the price paid by Berkey for film was higher than the price would have been in the absence of Kodak's monopolization of the film market.¹¹⁹ The court also informed the jury that Berkey could not recover if higher quality, better marketing methods, superior service, and customer preference caused the higher prices.¹²⁰ The district court limited recovery to the excess price attributable to Kodak's possession of monopoly power in the relevant market.

The court of appeals reversed the lower court award, and held that a purchaser is not entitled to damages based on a competitive price formula.¹²¹ A purchaser may recover from the monopolist only the "price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market."¹²² The court of appeals labeled this measure the wrongful conduct rule¹²³ because the rule premises damages on the monopolist's actual record of misconduct.¹²⁴ The court by using the *Brunswick* rule¹²⁵ found that excessive prices are the type of injury the antitrust laws were designed to prevent.¹²⁶ Because a legal monopolist may use monopoly pricing,¹²⁷ however, a "purchaser may recover only for the price increment that 'flows from' the distortion of the market caused by the monopolist's

unlawful power of conspirators to set *their* price." *Id.* at 423 (emphasis in original). Additionally, because the intended proximate consequence of a monopolist's conduct is to obtain a monopolist price, the monopolist should be liable. *Id.*

119. *Id.*

120. *Id.* at 442.

121. 603 F.2d at 297.

122. *Id.*

123. *Id.*

124. The court dismissed cases involving monopoly overcharges that stem from a price-fixing conspiracy.

There is a dearth of cases on point. . . . The reason for this lack of authority is that in most successful monopolization suits brought by purchasers the § 2 violation was merely a consequence of a § 1 offense that provided the rule of damages. Often, for example, the § 2 violation consists of a price-fixing conspiracy among firms controlling a large share of the market. The measure of the damages to one of the conspirators' customers is the difference between the price actually paid and the one at which the product would have sold absent the conspiracy. . . . In such a case, the monopoly price is entirely attributable to the anticompetitive conduct.

Id. (citations omitted).

125. 429 U.S. 477 (1977).

126. 603 F.2d at 297.

127. Monopoly pricing is permitted because it attracts competition. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 46, at 117 (1977).

anticompetitive conduct."¹²⁸

Because the wrongful conduct rule might be difficult to apply, the court suggested that plaintiff estimate the monopolist's market share, "but for" the monopolizing conduct.¹²⁹ Based on this estimate, the court would assess the price that the defendant could charge with this degree of market power. The difference between the actual price charged and plaintiff's "but for" price estimate would represent the amount attributable to the wrongful conduct.¹³⁰

Although plaintiff would have difficulty in proving that monopolizing conduct, which occurred outside the limitations period, contributed to the overcharge, plaintiff should not be denied the opportunity to establish a causal relation between the conduct and the overcharge.¹³¹

The court of appeals, however, stated that it would be unfair to require the monopolist to forfeit its legitimately acquired advantage and be penalized by treble damages for engaging in conduct beyond a *de minimis* level.¹³² The court explained that the Sherman Act's tolerance of lawfully acquired and maintained monopolies would be undercut if Kodak were required to forfeit its success "because its power has merely been supplemented by improper conduct."¹³³

IV. A COMPLICATED AND UNSOUND MEASURE OF DAMAGES

The lack of a clear definition of monopolizing conduct, coupled with the fact that charging a monopoly price is not in itself unlawful, makes courts reticent to impose treble damages.¹³⁴ The court of appeals in

128. 603 F.2d at 297.

129. "We recognize that if the monopolist, but for its illegitimate actions, would have had little or no market power, the wrongful conduct and competitive price rules may yield very similar results. The proper standard, though, is one that bases damages on the monopolist's actual record of misconduct." *Id.* at 298.

130. *Id.*

131. *Id.*

132. *Id.* at 297-98.

133. *Id.* at 298.

134. See notes 36, 105, 132, 133 *supra* and accompanying text; 3 P. AREEDA & D. TURNER, *supra* note 3, at ¶ 630.

[W]here injury and causality are shown, damages (before trebling) should be limited to that part of the injury reasonably attributable to the exclusionary conduct. The degree of causation is, of course, difficult to determine. . . . The punitive nature of treble damages makes it wholly inappropriate to allow "full" recovery where exclusionary conduct only partially contributed to monopoly power. Thus, purchasers from a monopolist should not be entitled to treble the difference between the prices charged and a "competitive" price, but only to treble the difference, if any, that exclusionary conduct can reasonably be said to have caused.

Berkey, in attempting to resolve these problems, departed from long standing precedent that encourages vigorous private enforcement of the antitrust laws. The court inappropriately applied *Brunswick*¹³⁵ to fashion a measure of damages that is substantively unsound and unnecessarily complicated. Moreover, the victim in applying the measure bears the risk of uncertainty created by the monopolist's unlawful acts.¹³⁶

The plaintiffs in *Brunswick* sought damages that resulted from a freely competitive market.¹³⁷ The Supreme Court in *Brunswick* applied standard tort causation principles¹³⁸ and held that lost profits would be compensable only if they flowed from the predatory practices of a deep pockets entry into the market.¹³⁹ The court of appeals in *Berkey* correctly recognized that excessive prices are the type of injury the antitrust laws are designed to prevent.¹⁴⁰ The court interpreted the phrase injury "that flows from that which makes defendant's act unlawful" to allow recovery of only the price increment that "flows from" the distortion of the market.¹⁴¹

The ability to charge a monopoly price depends on the possession of monopoly power, which includes the power to control prices.¹⁴² Price

Id. at ¶ 630, at 98-99.

135. 429 U.S. 477 (1977); see notes 39-43, 81-88 *supra* and accompanying text.

136. 603 F.2d at 298. "It may, of course, be difficult for a purchaser to demonstrate that conduct . . . contributed to an overcharge. . . . That, however, is no reason for denying it the opportunity to do so." *Id.* But see 603 F.2d at 298 n.58 ("We express no view on how the trial judge should allocate the burden of proving this causal relation, or lack of it, when plaintiff makes a preliminary showing of persistent monopoly power and a substantial history of anticompetitive conduct.").

137. 429 U.S. at 488.

[R]espondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of *competition*"

Id. (emphasis in original).

138. See notes 88-92 *supra* and accompanying text.

139. 429 U.S. at 487.

140. 603 F.2d at 297.

141. *Id.*

142. Monopoly power is the power to control price and exclude competition. See note 31 *supra*.

The distinctive feature of an administered [monopoly] price situation is that prices, instead of being registered automatically by the interaction of supply and demand forces in an open market, are formulated in executive offices as matters of operating policy or economic planning by officials of corporations . . . who, through their control over blocks of capital resources . . . have considerable power to implement the price schedules they adopt.

is causally related to the defendant's unlawful conduct if a company exercises unlawfully acquired monopoly power to set a monopoly price.¹⁴³ The court in *Berkey*, however, expanded the notion of causation to require plaintiff to prove a nexus between specific price increments and defendant's wrongful conduct. In effect the *Berkey* court developed a theory of recovery based on defendant's culpability, rather than plaintiff's injury.¹⁴⁴

The *Berkey* court's measure of damages is extremely complicated and substantively unsound. The court of appeals recognized that market power enables the monopolist to overcharge and that monopolizing conduct directly enhances market power.¹⁴⁵ The court suggested that the relationship between wrongful acts and price increments could be determined by calculating the market share absent any illegitimate conduct and the price that could be charged with that share of the market.¹⁴⁶ The court's damage theory assumes the existence of two factors that may not exist in every case of monopolizing behavior. First, the court's analysis assumes a direct relationship between the monopolist's degree of market power and the price charged by the monopolist.¹⁴⁷ The relationship, however, exists only if the monopolist is maximizing profit.¹⁴⁸ The court's assumption of a direct relationship between the monopolist's degree of market power and the monopoly price charged is invalid because price increments are not directly related to actionable

Administered Prices, Hearings Pursuant to S. Res. 57 Before the Subcommittee on Antitrust and Monopoly of the Committee on the Judiciary, 85th Cong., 1st Sess. part 1, at 9 (1957) (statement of Edwin G. Nourse) (hereinafter cited as administered prices).

143. Judge Frankel correctly recognized that an illegal monopolist's power to set price is the "same species of evil . . . as the unlawful power of conspirators to set their price." *Berkey Photo, Inc. v. Eastman Kodak Co.*, 457 F. Supp. 404, 426 (S.D.N.Y. 1978), *aff'd in part and rev'd in part*, 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980). The court of appeals stated that price, in the case of a conspiracy, is entirely attributable to the anticompetitive conduct, 603 F.2d at 297. The illegal conspiracy gives the monopolist power and the power permits them to overcharge or undercharge.

144. "The proper standard, though, is one that bases damages on the monopolist's actual record of misconduct." 603 F.2d at 298.

145. *Id.*

146. *Id.*

147. A company may set prices at a level below that which would encourage others to enter the market or advance their competitive position by adopting a predatory price that forces others out of the market rather than improve their own profits. See L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* § 43 (1977).

148. See notes 149-51 *infra* and accompanying text.

behavior. Management, not illegal activity, establishes prices.¹⁴⁹ If a company's market power is sufficient to enable management to formulate price without regard to competition, then price reflects the rate of return the company wants to receive.¹⁵⁰ The firm, however, may not wish to maximize profits, although the optimum monopoly price may be much higher than the competitive price.¹⁵¹

If a company chooses to set a monopoly price that is not a profit maximizing price, the allocation of the overcharge between good behavior and bad behavior is a serious problem for the court. For example, if the monopolist charges \$45 for a product whose competitive price is \$40 and whose maximizing price is \$49, and the price the defendant could have charged had it not monopolized the market is \$45, the second circuit's test indicates that the victim of a section 2 violation will not receive any damages.

Second, the court's damage analysis assumes that the various aspects of defendant's actionable conduct can be identified and attributed to the creation of specific shares of the market. It is unlikely that a jury could reasonably calculate the market share that would exist absent the monopolizing conduct.¹⁵² A monopoly acquired through production of a superior product may be maintained by one small anticompetitive practice.¹⁵³ If only minimal anticompetitive conduct is necessary to maintain or achieve power to control prices, the conduct is entirely responsible for the overcharge. The only relevant determination is whether the incremental share of market power achieved by defend-

149. See *Administered Prices*, *supra* note 142. See also 457 F. Supp. at 423 n.24 (testimony of Kodak witness).

Q. In connection with Kodak product pricing during this period of time . . . was consideration given to the pricing of competitive products?

A. No. I don't really know what you're getting at. We didn't price, you know, with consideration of other products that were on the market. We priced from what we thought we could do the best and give us the greatest customer acceptance.

Q. As far as you know, has that continued to be the general pricing policy of Kodak?

A. Yes, I believe so.

Id.

150. See note 149 *supra*.

151. Posner, *The Economic Theory of Monopoly and the Case for Antitrust*, reprinted in T. CALVANI & J. SIEGFRIED, *ECONOMIC ANALYSIS AND ANTITRUST LAW* 47 (1979).

152. See 48 GEO. WASH. L. REV. 643, 662-64 (1980) (market share analysis is inappropriate because it may place too great a burden on plaintiffs).

153. Any one exclusionary act may seem trivial. Indeed, we shall often be unable to find that several such acts, taken together, probably "caused" or contributed significantly to defendant's power. Yet, such acts can determine the often marginal choice of an actual or potential rival deciding whether to enter or expand.

3 P. AREEDA & D. TURNER, *supra* note 3, at ¶ 626(c), at 78-79.

ant's illegal acts resulted in the maintenance or acquisition of the power to control prices.

If the power to control prices previously existed, the inquiry should be whether "but for" the monopolizing activity, competitive inroads would have resulted in the loss of the defendant's power to control prices. If the anticompetitive practice had no effect on the market power, plaintiff has not proven causation or fact of damage and a court should not permit a customer to recover the monopoly price.¹⁵⁴ When monopolizing conduct and superior products co-exist, the wrongdoer, not the victim, must bear the risk of uncertainty necessary to establish the causal relationship.¹⁵⁵ If monopolizing conduct is responsible for either the acquisition or maintenance of monopoly power, causation is established.¹⁵⁶ The amount of damages in this situation should be the entire amount of the overcharge because the monopolizing conduct damaged the customer in this amount. Monopolists should not be permitted to retain the fruits of their illegalities.

The trial court in *Berkey* applied the only practical and correct measure of damages.¹⁵⁷ The court of appeals in fashioning a new measure of damages failed to consider the practical difficulties involved in relating price movements to monopolizing conduct. More importantly, the Second Circuit did not account for the purposes of the antitrust laws—compensation of the victim, deterrence, and simplification of actions to encourage suits—in fashioning a damages measure.

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154. Areeda and Turner suggest that an exclusionary act should significantly contribute to creating or maintaining monopoly power in order to be causally related. *Id.*

155. See notes 60-73 *supra* and accompanying text.

156. 603 F.2d at 298 n.58. The court of appeals in *Berkey* expressed no opinion as to the allocation of the burden of proof once monopoly power and anticompetitive acts are shown. *Id.*

157. The district court applied the appropriate measure of damages:

The power to fix prices is after all the gist of monopoly power. When that power is unlawfully obtained or employed, the monopolist pursues the same proximate goal for himself as the price-fixing conspirators aim to share together. It accords with settled tort principles to hold the wrongdoer for the intended and proximate consequences of his conduct.

457 F. Supp. at 423. This measure does not add additional complexities, which would deter suits by private individuals, and would not allow wrongdoers to retain the fruits of their illegalities.