

Washington Law Review

Volume 70 | Number 2

4-1-1995

"Speculative" Antitrust Damages

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“SPECULATIVE” ANTITRUST DAMAGES

Roger D. Blair* and William H. Page**

Abstract: The most important antitrust penalties are treble damage awards based on the individual harms that violations cause. For these penalties to function as an economically rational deterrent, there must be a practical mechanism for proving individual harm, and for distinguishing such harm from “speculation.” In this article, the authors present an account of that mechanism. First, they argue that the law’s measure of antitrust damages is based on a standard of net *individual* harm that is qualified in certain cases by a principle of net *social* harm. Net harm is measured by the difference between the plaintiff’s actual condition (given that the violation has occurred) and its but-for condition (assuming that the violation did not occur). Second, the authors show that law’s mechanism for proof of damages requires a projection of the but-for condition from a reasonably comparable base experience. The projection must use both the evidentiary foundation and a theoretical model to isolate the defendant’s illegal conduct as the difference between the actual and but-for conditions. Proof is speculative if the projection fails to account for actual or theoretical factors other than the violation that may have caused the asserted harm.

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We would like to thank Craig Callen, Robert Emerson, Amanda Esquibel, Herbert Hovenkamp, and John Lopatka for comments on earlier drafts, and Richard Monohan for research and editorial assistance.

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I. INTRODUCTION

Much of the scholarly discussion of antitrust damages in recent years has focused on the problem of reconciling the private damage action with the public purpose of the antitrust laws. The treble damage remedy is based on private harm to individual economic actors,¹ yet it is designed to enforce the public policy of promoting competition.² Because the private harm and hence the potential damages that a violation causes may far exceed any harm to competition, the treble damage remedy creates a danger of overdeterrence. Consequently, the courts have formulated the doctrines of antitrust injury and standing to limit the types of harms that are compensable and the classes of plaintiffs who may sue.³ We have suggested in our earlier work that these doctrines are best understood as judicial efforts to shape antitrust damages to approximate an optimal penalty—one that minimizes the costs of overdeterrence and underdeterrence.⁴

1. 15 U.S.C. § 15(a) (1988) (antitrust plaintiff may recover three times the damages "by it sustained").

2. *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 317 (1965) (reasoning that "[p]rivate antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws."), *quoted in Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 336 (1971); *Leh v. General Petroleum Corp.*, 382 U.S. 54, 59 (1965). On its effectiveness, see Amanda Kay Esquibel, Note, *Protecting Competition: The Role of Compensation and Deterrence for Improved Antitrust Enforcement*, 41 Fla. L. Rev. 153, n.76 (1989).

3. See generally, William H. Page, *The Scope of Liability for Antitrust Violations*, 37 Stan. L. Rev. 1445, 1483–85 (1985) (distinguishing concepts of antitrust injury and standing).

4. *Id.* at 1456–59. One measure of the optimal penalty is the "net harm to persons other than the offender." William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. Chi. L. Rev. 652,

Any practical adaptation of the private damage remedy to antitrust policy requires an effective mechanism for the proof of individual harm. Courts cannot shape damages to approximate an optimal penalty unless they can calculate individual harm with reasonable accuracy. If, on the other hand, courts can determine the individual harm from the offense, they can apply the doctrines of antitrust injury and standing so that the sum of the compensable harms approximates the optimal measure of damages. In our work on antitrust damages up to now, we have generally assumed that a mechanism for calculation and proof of individual harm exists. In this article, however, we examine a central feature of that mechanism, the court's standards of certainty for proof of damages. Although we refer to antitrust injury and standing in the next part, we will generally set to one side the complexities of approximating the optimal penalty in order to focus on the question of proving individual damages.

The standards of proof for antitrust damages are easily stated in the abstract. A plaintiff must prove that it was injured by the antitrust violation and by how much. To establish the fact of injury, or "impact," from an antitrust offense, a plaintiff must prove, "with reasonable certainty," a causal relation between the defendant's violation and the plaintiff's harm.⁵ The plaintiff's burden in establishing the amount of the injury is somewhat lighter: "[I]t will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference."⁶ In other words, once the plaintiff establishes the fact of damage or injury with reasonable certainty, the jury may "make a just and reasonable estimate of the damage based on relevant data."⁷ The Supreme Court has justified the more relaxed standard for proving the amount of damages

656 (1983). In practical terms, this amount is the sum of the deadweight welfare loss from the offense and any monopolistic wealth transfer to the offender minus net benefits during the period of below cost pricing.

5. See *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946); *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931) ("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."). See also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 & 123-24 (1969) ("proving the fact of damage under § 4 of the Clayton Act is satisfied by its proof of some damage flowing from the unlawful conspiracy"); *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 696-702 & n.7 (1962).

6. *Story Parchment Co.*, 282 U.S. at 563-66.

7. *Bigelow*, 327 U.S. at 264. *Accord Zenith*, 395 U.S. at 123-24; *Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811-12 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977); *Flinkkote Co. v. Lysfjord*, 246 F.2d 368, 391-92 (9th Cir.) (finding proof of amount of antitrust damages not governed by common law requirement of reasonable certainty), *cert. denied*, 355 U.S. 835 (1957).

by reasoning that the wrongdoer should bear the costs associated with uncertainty in proving damages.⁸

Courts typically label insufficient proof of antitrust damages as "speculative."⁹ Our goal in this Article is to identify the determinants of this common characterization.¹⁰ The familiar standards recited in the last paragraph tell us little about this question. We have instead tried to find the content of the idea of speculativeness by discovering underlying patterns in the courts' uses of the term. Our goal is not merely descriptive, however. We also emphasize the role of economic theory in guiding the damages inquiry. In particular, we suggest that economics plays a central role in the analysis of the consequences of illegal practices, the identification of causal factors, and the evaluation of the plaintiff's proof.

We first consider the law's measure of antitrust damages. The plaintiff must show that the defendant's illegal conduct prevented the plaintiff from doing better than it actually did. The plaintiff must therefore project a hypothetical or "but-for" condition that excludes only the effects of the defendant's illegal conduct. The difference between that projected condition and the plaintiff's actual condition (both stated in terms of some standard index, like profits or prices) is the claimed measure of damages. We show that this measure of damages is usually

8. *Bigelow*, 327 U.S. at 264-65:

Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

See also *Story Parchment*, 282 U.S. at 563:

Where the tort itself is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of fundamental principles of justice to deny all relief to the injured person, and thereby relieve the wrongdoer from making any amend for his acts.

9. *Zenith*, 395 U.S. at 124; *Bigelow*, 327 U.S. at 264. See also *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1205 (1st Cir. 1987) ("If the plaintiff's proffered evidence permits no more than 'pure speculation and guesswork,' then the damage evidence is insufficient as a matter of law."); *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 417-18 (5th Cir. 1985) ("In an antitrust case, once a plaintiff proves that it has been injured, it is entitled to utilize any just and reasonable method short of speculation to calculate the amount of its damages based on relevant data.").

10. As elsewhere in the law of evidence, determinations of speculativeness control the jury: if there is no evidence from which a rational jury could conclude that the plaintiff's account of events is more likely true than not, then the defendant must win on summary judgment or directed verdict; the jury cannot be asked to speculate.

applied to determine individual net harm from antitrust violations. The plaintiff must deduct any offsetting benefits it received or costs it avoided because of the violation. But the principle of individual net harm, if slavishly followed, would undermine the public goals of antitrust law in some cases by permitting recovery for procompetitive harms or by imposing insurmountable problems of proof. Consequently, the doctrines of antitrust injury and standing adjust the principle of individual net harm, denying recovery for some net harms, and permitting recovery for some gross harms. We suggest that the doctrines reflect a principle net social harm that, in effect, offsets an injury to one actor with benefits to others and adjusts the right to recover accordingly. An important determinant of net social harm, particularly in the doctrine of standing, is whether the damages asserted are speculative.¹¹

We then describe the mechanism of proof, emphasizing its dependency upon both economic theory and a sufficient evidentiary foundation. The plaintiff must project what its performance would have been in the damage period but for the violation from a base experience unaffected by the violation. Our central conclusion is that a projection is “speculative” if it fails to account rationally for factors other than the defendant’s illegal conduct that may have caused (or significantly contributed to) the asserted difference between the two conditions.¹² The relevant causal factors may be actual or theoretical. The relevant actual causal factors are determined by the evidentiary foundation the plaintiff offers for its projection. In Part IV below, we describe the most common

11. *Associated Gen. Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 542 (1983); *Hawaii v. Standard Oil Co.*, 405 U.S. 251, 262–263 n.14 (1972). The Court in *Associated* noted that

[t]he common law [of tort] required the plaintiff to prove, with certainty, both the existence of damages and the causal connection between the wrong and the injury. No damages could be recovered for uncertain, conjectural, or speculative losses. Even if the injury was easily provable, there would be no recovery if the plaintiff could not sufficiently establish the causal connection.

Associated, 459 U.S. at 533 n.26 (citations omitted).

12. *Southern Pac. Communications Co. v. AT & T*, 556 F. Supp. 825, 974 (D.D.C. 1982) (“[c]ourt must have a basis for assuring itself that other causes of plaintiffs’ injury have been ‘filtered out’ of the damage claim”), *aff’d*, 740 F.2d 980 (D.C. Cir. 1984), *cert. denied*, 470 U.S. 1005 (1985). See also *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483 (8th Cir. 1992), *cert. denied*, 113 S. Ct. 1048 (1993).

When a plaintiff improperly attributes all losses to a defendant’s illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. This is precisely the type of ‘speculation or guesswork’ not permitted for antitrust jury verdicts.

Id. at 1494 (citing *Bigelow*, 327 U.S. at 264).

evidentiary foundations: the plaintiff's own performance before (or after) the illegal conduct or the performance of some "yardstick" firm. General economic conditions and the specific behavior of market participants in the base period must be comparable to those in the damage period. Any differences that would predictably affect the plaintiff's performance must be accounted for and any compensating benefits from the defendant's conduct or the plaintiff's own mitigation efforts must be netted out. In Part V, we discuss the theoretical causal factors for which the plaintiff's projected but-for scenario must account the predictable, lawful profit-maximizing and cost-minimizing responses of all economic actors, including the defendant, to the plaintiff's projected conduct.

II. DEFINING THE MEASURE OF HARM

Speculativeness is primarily a deficiency in proof. In the next part, we will examine the evidentiary and theoretical foundations that courts require for proof of antitrust damages. But whether proof is speculative also depends on the law's definition of what is to be proved. Manifestly, some legally defined criteria of harm would be easier to meet, and therefore less likely to result in speculative proof, than others.¹³ Even under an apparently straightforward standard of individual harm, like the one prescribed in Section 4 of the Clayton Act, there are a host of choices in defining the measure of damages that may raise or reduce problems of proof. In making these choices, courts have sought to define a measure of harm that reflects the social cost of the offense yet is practical for courts to apply. Some rules are designed to assure that the measure of damages reflects the net individual harm to the plaintiff. Courts have also formulated the doctrines of antitrust injury and standing, which qualify the standard of individual net harm in favor of a standard of net social harm. Economic theory guides the determination of both sorts of harm.

A. *Net Individual Harm: Benefits and Avoided Costs*

Economic theory teaches that antitrust violations involve a multitude of consequences for actors in the market, some harmful and some

13. The law could eliminate the issue of speculativeness by providing for a specified civil penalty or liquidated damages that the plaintiff could recover simply by proving that a certain type of violation took place. Alternatively, the law could provide for calculation of the optimal fine by some mechanism, then assign private plaintiffs the right to sue for that amount. Landes, *supra* note 4, at 671-72; Frank H. Easterbrook, *Detrebling Antitrust Damages*, 28 J.L. & Econ. 445, 462-67 (1985).

beneficial. The same actor may suffer lost revenues but avoid certain associated costs; it may lose one valuable opportunity but gain another; or it may suffer increased costs that are partially compensated by increased revenues. Consequently, the courts have developed a number of rules aimed at assuring that the definition of the plaintiff's actual and but-for conditions actually reflect the net harm to the plaintiff from the antitrust violation.¹⁴ These rules, while necessary to an economically rational definition of harm, can significantly increase the plaintiff's problems of proof.

Whatever the plaintiff's suggested index of harm—profits, costs, going concern value, or prices—the measure of antitrust damages is the difference between its actual condition and its “but-for” condition. The actual condition is the plaintiff's situation given that the violation has occurred; the but-for condition is the plaintiff's situation in a hypothetical world in which the violation has not occurred, but conditions are otherwise the same.¹⁵ “Lost profits,” for example, means the difference between the firm's actual profits during the damage period and the profits it would have earned but for the illegal conduct. The “overcharge” means the difference between the price actually paid and the price that would have been paid but for the violation.

The principle of individual net harm guides the definition of the plaintiff's actual and but-for conditions. The principle requires, for example, that the plaintiff include in its actual condition any benefits that

14. *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 791 F.2d 1356, 1367 (9th Cir. 1986) (“An antitrust plaintiff may recover only to the ‘net’ extent of its injury; if benefits accrued to it because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct.”), *cert. denied*, 484 U.S. 826 (1987).

15. *DeLong Equip. Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1205 (11th Cir.) (reasoning that damage issue raises “hypothetical question” of “what would have occurred if the defendants had not violated the antitrust laws”), *cert. denied*, 114 S. Ct. 604 (1993); *National Farmers' Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1306 (8th Cir.) (“[A]n antitrust plaintiff's damages should reflect the difference between its performance in a hypothetical market free of all antitrust violations and its actual performance in the market infected by the anticompetitive conduct.”), *cert. denied*, 489 U.S. 1081 (1989); *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985) (“[T]he amount of damages is the difference between what the plaintiff could have made in a hypothetical free economic market and what the plaintiff actually made in spite of the anticompetitive activities.”); *Fishman v. Estate of Wirtz*, 807 F.2d 520, 550 (7th Cir. 1986) (“[A]n antitrust plaintiff is given an exceedingly difficult task: quantifying the difference between what actually happened and what would have happened in a hypothetical free market.”); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 47 (5th Cir.) (measure of damages is “what financial advantage would the plaintiff have gained but for the actions of the defendant”), *cert. denied*, 409 U.S. 1077 (1972). *Bigelow*, 327 U.S. at 264 (antitrust damages measured “by comparison of profits, prices and values as affected by the conspiracy, with what they would have been in its absence under freely competitive conditions”).

it received from participation in an illegal transaction. When an illegal practice harms the plaintiff in one way but benefits the plaintiff in another, the two effects must be offset.¹⁶ Theory predicts, for example, that the seller of two products used in fixed proportions will be able to charge only a single price for the package; even a monopolist of one of the products will only be able to increase the price of one of the products by reducing the price of the other.¹⁷ Thus, if a tying arrangement increases the price of the tied product to the plaintiff, but reduces the price of the tying product, the plaintiff is harmed only to the extent that the amount of the increase exceeds the amount of the reduction.¹⁸

The law also requires the plaintiff, in calculating its but-for condition, to deduct any costs that it avoided as a result of being illegally excluded from a profitable opportunity. The most obvious expression of this point is the rule that the plaintiff is entitled only to its lost net profits, not gross profits. The plaintiff is thus required to deduct from its projected lost profits the ordinary costs it would have incurred in making those profits.¹⁹ The plaintiff loses the anticipated revenues, but it avoids the costs it would have incurred in making those sales. Similarly, if participating in an illegal transaction with the defendant allows the plaintiff to avoid expenses it would have incurred in lawful transactions, those saved expenses should be deducted from the damage award.

16. *Perma-Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 140 (1968) ("The possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages . . ."); *Los Angeles Memorial Coliseum Comm'n*, 791 F.2d at 1366-68 ("if benefits accrued to [plaintiff] because of an antitrust violation, those benefits must be deducted from the gross damages caused by the illegal conduct"). See also Phillip Areeda, *Antitrust Violations Without Damage Recoveries*, 89 Harv. L. Rev. 1127, 1136 (1976) (requiring "offset [of] injuries which plaintiffs may have suffered at the hands of defendants with benefits which they may have derived from the very activities they attack.").

17. Aaron Director & Edward H. Levi, *Law and the Future: Trade Regulation*, 51 Nw. U. L. Rev. 281, 290 (1956); Ward S. Bowman, *Tying Arrangements and the Monopoly Problem*, 67 Yale L.J. 19, 21-23 (1957).

18. See *Olmstead v. Amoco Oil Co.*, 725 F.2d 627, 629-31 (11th Cir. 1984); *Kypta v. McDonald's Corp.*, 671 F.2d 1282, 1285 (11th Cir.), cert. denied, 459 U.S. 857 (1982). See also *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43, 52 (9th Cir. 1971) (overcharge on tied products must be reduced by value of tying product, the Chicken Delight trademark), cert. denied, 405 U.S. 955 (1972); Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice* 613-14 (1994).

19. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 379 (1927); *Graphic Prods. Distribs. v. ITEK Corp.*, 717 F.2d 1560, 1580 (11th Cir. 1983); *Wolfe v. National Lead Co.*, 225 F.2d 427, 431 (9th Cir.) ("[T]he only way of ascertaining whether the business was more profitable in one year than another is by comparing the net profits for one year with another. . . ."), cert. denied, 350 U.S. 915 (1955).

As an example of this last point, consider the case of a monopolist that illegally adopts a lease-only policy.²⁰ In *Hanover Shoe*, the Supreme Court held that in such a case, the lessee was entitled to the difference between the lease price and the hypothetical sale price of the product.²¹ This requirement imposes a significant burden on the plaintiff. Theory suggests that the lessee will only pay a lease price that reflects the present value of the costs of owning the machine over its useful life, including the costs of capital, the costs of maintenance, and the product's salvage value. Thus, the lease functions in essentially the same way as a purchase that is financed over a term equal to the length of the lease. A plaintiff would have to net out these compensating benefits in order to show harm and, as a first approximation, the amounts would be equal. There would be provable damages only if the lease is demonstrably an exclusionary practice, measured by the increased overcharge attributable to the enhanced monopoly power.²²

If a plaintiff who is illegally foreclosed from one profitable opportunity uses its resources to pursue the next-best alternative, its calculation of its actual condition must net out the compensating gains.²³ Indeed, because the plaintiff is required to take reasonable steps to mitigate damages, a court may make such a deduction even if the plaintiff does not actually pursue the alternative opportunity.²⁴ When a plaintiff is illegally excluded from one opportunity, its harm is the expected value of that opportunity.²⁵ Any valuation of that opportunity must take account of costs the plaintiff would have incurred in pursuing it, including the cost of giving up the next-best alternative open to the

20. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 503-04 (1968) (damages from lease-only policy must account for capital costs that plaintiff saved by not purchasing machines).

21. *Id.* at 487 (finding damages from monopolist's illegal lease-only policy equal to rental price less the hypothetical purchase price).

22. See Hovenkamp, *supra* note 18, at 614-15 (1994). See also *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 297 (2d Cir. 1979) (finding that "true measure of damages . . . is the price increment caused by the anticompetitive conduct that originated or augmented the monopolist's control over the market"), *cert. denied*, 444 U.S. 1093 (1980). Analogously, if a plaintiff alleges that the defendant has used a tying arrangement to price discriminate, it should recover the difference between the price actually paid and the single monopoly price.

23. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. 1985).

24. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 863 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981). See generally Neil W. Hamilton & Virginia B. Cone, *Mitigation of Antitrust Damages*, 66 Or. L. Rev. 339 (1987).

25. H.L.A. Hart & Tony Honoré, *Causation in the Law* 311 (2d ed. 1985) ("[L]ost opportunity is translated into money with the help of the notion of economic man, maximizing his gains and minimizing his losses. The norm taken in order to decide what loss defendant has 'caused' is a plaintiff making the best he can of his opportunities . . .").

plaintiff.²⁶ If an excluded plaintiff unreasonably fails to pursue the next-best opportunity, then the plaintiff's own actions, not the defendant's illegal conduct, are responsible for that loss.

B. Net Social Harm: Antitrust Injury and Standing

An exclusive focus on individual net harm would, in some instances, conflict with antitrust policy. The antitrust remedy should be tailored to its social purpose by assuring first that the remedy does not foster anticompetitive ends and second that the most efficient plaintiff brings suit.²⁷ Courts have therefore qualified the principle of individual net harm by applying the doctrines of antitrust injury and standing.²⁸ Both qualifications recognize that net individual harm must in certain cases be subordinated to net social harm in the calculation of a deterrent penalty.

The first difficulty the individual net harm standard poses is that, in some instances, practices that nominally violate antitrust rules may cause a net harm to a particular firm but nevertheless result in a net social benefit by enhancing efficiency.²⁹ Maximum price-fixing, for example, is per se illegal and may injure competitors of the conspirators by

26. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 556-57 & n.34 (7th Cir. 1986) (equating mitigation and opportunity cost); *Fontana Pipe & Fabrication v. Ameron, Inc.*, 993 F.2d 882 (9th Cir. 1993) (upholding as damages the difference between profits of a plant plaintiff would have purchased and profits of plant plaintiff was forced to build from scratch).

27. Page, *supra* note 3, at 1450-59.

28. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 110 n.5 (1986). The Court cited Page, *supra* note 3, at 1483-85 (distinguishing concepts of antitrust injury and standing). The lower courts have further developed the doctrines along these lines.

Over time, courts have developed a two-pronged analysis to determine whether a plaintiff has antitrust standing. As a necessary first step, courts must determine whether the plaintiff suffered an antitrust injury. If the answer to that question is yes, they must then determine whether any of the other factors, largely relating to the directness and identifiability of the plaintiff's injury, prevent the plaintiff from being an efficient enforcer of the antitrust laws.

Balaklaw v. Lovell, 14 F.3d 793, 798 n.9 (2d Cir. 1994). See also *Greater Rockford Energy & Technology Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993):

Antitrust injury involves a causation requirement in order to define the class of potential plaintiffs eligible to bring suit Standing, on the other hand, examines the connection between the asserted wrongdoing and the claimed injury to limit the class of potential plaintiffs to those who are in the best position to vindicate the antitrust infraction.

(citations omitted), *cert. denied*, 114 S. Ct. 1054 (1994); *Todorov v. DCH Healthcare Auth.*, 921 F.2d 1438, 1449 (11th Cir. 1991).

29. Page, *supra* note 3, at 1460-61.

lowering prices to consumers.³⁰ The antitrust injury doctrine addresses this concern, denying recovery to certain plaintiffs who have suffered a net individual harm if their harm is not the result of the anticompetitive aspect of the alleged violation.³¹ In the case of vertical maximum price-fixing, the Supreme Court has held that the competitors may not sue for their harm unless the prices illegally fixed are predatory.³²

We have argued elsewhere that the antitrust injury doctrine is based on a principle (however inchoate) of optimal damages—damages must be rationally related to the inefficiency that the alleged monopolistic practice creates.³³ Antitrust injury is thus a means of linking the damage remedy for individual harm to the public goals of antitrust law. It qualifies the standard of individual net harm in the interest of a larger principle of net social harm.³⁴ Competitors may suffer a net individual harm from the procompetitive aspect of an antitrust violation, but that harm is offset by the simultaneous benefits to consumers. In the case of maximum price-fixing, the harm to the competitors from lower prices is more than offset by the benefit to consumers from the same prices.³⁵

The individual net-harm standard raises a second concern for antitrust policy. In some cases the standard can raise so many problems of proof that the direct costs of proof and the risk of error become unacceptably large. In such instances, rigid adherence to the net-harm standard would require either denying recovery entirely or accepting an arbitrary damage award. Neither result would be consistent with antitrust policy. Thus, in certain cases, the courts have altered the definition of harm or who may sue. Overcharge damages, for example, were recognized by the Supreme

30. *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332 (1982) (finding horizontal maximum price fixing per se illegal). *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (finding vertical maximum price fixing per se illegal).

31. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (finding antitrust injury is “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.”).

32. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328 (1990). See Roger D. Blair & Gordon L. Lang, *Albrecht After ARCO: Maximum Resale Price Fixing Moves Toward the Rule of Reason*, 44 Vand. L. Rev. 1007 (1991).

33. See, e.g., Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 Vand. L. Rev. 1539 (1989); Page, *supra* note 3.

34. Landes, *supra* note 4, at 656 defines the optimal penalty as the “net harm to persons other than the offender.” Because Landes advocates a single penalty, not a series of suits by individuals, his notion of net harm necessarily contemplates netting of benefits and harms among classes of affected persons.

35. See Roger D. Blair & David L. Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. Fla. L. Rev. 461 (1981).

Court primarily because of the difficulty of proving lost profits in price-fixing cases. Rather than require the complex netting associated with lost profits, and thus practically deny recovery, the Court permitted plaintiffs to prove damages by showing a price enhancement.³⁶

Problems of proof also arise in cases claiming damages for remote consequences of antitrust violations. Antitrust standing doctrine therefore denies recovery to those whose harms are too remote for practical proof.³⁷ The goal of the doctrine is to assign the right to sue for antitrust injury to the most efficient plaintiff.³⁸ Those who suffer indirect or derivative harm may be denied standing, because others more directly affected are in a better position to sue.

The clearest example of such a comparative inquiry involves the allocation of overcharge damages, which are themselves a qualification of the principle of net harm. In *Illinois Brick*, the Court denied indirect purchasers from price-fixers the right to sue for their actual damages, even though the direct purchasers may have passed on much of the overcharge to others.³⁹ Instead, the Court assigned the full right to recover to the direct purchasers, who are not required to net out the amount of the overcharge that they passed on.⁴⁰ In effect, the netting process occurs between the two classes of potential plaintiffs who suffered actual harm. The standard of individual net harm yields to a standard of net social harm in order to accommodate the limitations of the legal system. The problems of proof in allocating the overcharge among direct and indirect purchasers would be so great that it would undermine the system of private enforcement.

The notion of speculativeness plays a crucial role in the law of standing because the most efficient plaintiff is likely to be the one whose damages are least speculative. As we will see, proof of damages is speculative if it fails to account for factors that may have caused the

36. *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U.S. 390, 396 (1908). For discussion, see Jeffrey L. Harrison, *The Lost Profits Measure of Damages in Price Enhancement Cases*, 64 Minn. L. Rev. 751, 760 (1980).

37. *Associated Gen. Contractors of Cal., Inc., v. California State Council of Carpenters*, 459 U.S. 519, 540-45 (1983) listed several factors to be considered in determining standing: (1) the directness of the asserted injury; (2) the existence a class of better-situated plaintiffs; (3) the speculativeness of the asserted injury; (4) the danger of duplicative recoveries because of the difficulty of identifying damages and apportioning them among direct and indirect victims of the asserted conduct; and (5) the causal connection between the antitrust violation and the plaintiff's harm.

38. See *supra* note 28.

39. *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977).

40. *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 392 U.S. 481, 494 (1968).

plaintiff's harm. Rules of standing involve categorical determinations that certain types of harms are speculative. Proof of damages becomes more speculative as the list of causal factors that may have contributed to the plaintiff's harm grows. Given the various netting requirements that the law imposes, those plaintiffs who are more remotely affected will necessarily face more difficult problems of proof. At some point, a court can say as a matter of law that the number of potential causal factors that the plaintiff would have to account for is so great that the damages claimed are inherently speculative. In such instances, the courts may deny standing to one class and adjust the definition of harm to ease the burden of proof on another class.

III. FORMULATING THE DAMAGE MODEL

Netting the various consequences of the violation is only one part of the task of proving damages. The plaintiff must also account for the effect of numerous other factors that may have affected its condition. Ideally, the only causal factor accounting for the difference between plaintiff's actual experience in the damage period and its but-for experience should be the defendant's illegal conduct. Proof of the plaintiff's actual condition may be complex, particularly where compensating benefits and mitigation efforts are at issue. But speculativeness becomes an issue primarily in the proof of the plaintiff's but-for condition. Because of the multitude of potential influences on business conditions, a plaintiff cannot prove what would have happened with the same degree of certainty that it can prove what did occur.⁴¹ The plaintiff will, of course, be inclined to make optimistic claims about what might have been. But the mere fact that the plaintiff has not done as well as it would have liked, even if its bad fortune coincides with an antitrust violation, is not evidence that the illegal action harmed it. There is no reason to believe, *ex ante*, that any firm will make a profit.⁴² The plaintiff must show something specific about its experience that would allow a court to infer that it would have done better had the defendant's illegal action not occurred.

41. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) ("The vagaries of the marketplace usually deny us sure knowledge of what the plaintiff's situation would have been in the absence of the defendant's antitrust violation.").

42. Todd Marcus Young, Comment, *Unestablished Businesses and Treble Damage Recovery Under Section Four of the Clayton Act*, 49 U. Chi. L. Rev. 1076, 1079 n.14 (1982) (95% of all new businesses fail).

The plaintiff must thus construct and support a scenario of events in the but-for world in which its condition there, measured by the appropriate standard of harm, is better than its actual condition. The plaintiff must rely on theoretical reasoning to construct its but-for scenario and on quantitative methods and an evidentiary foundation to support it. The plausibility of this scenario depends upon both the sufficiency of the evidentiary foundation and the persuasiveness of the reasoning and quantitative techniques that the plaintiff offers. Courts evaluate these characteristics of the plaintiff's scenario based on a theoretical understanding of the practices at issue and an assumption of rational behavior by all market participants.

A. *The Evidentiary Foundation*

Plaintiffs typically rely on expert testimony to prove damages, but even an expert may not base his or her opinion on a general knowledge of the industry.⁴³ To establish an evidentiary foundation, the plaintiff must show that something very like its but-for scenario has actually happened to it or to a similar firm under comparable circumstances and would probably have occurred again during the damage period if the defendant had not acted illegally:

[A]lthough the courts are not strict about the kind of foundations or theories which are employed so long as it is credible and substantial . . . some such foundation must be shown. It will not be rejected *where there is some prior experience with which to make a comparison*. With such evidentiary foundation there can be a projection; where, on the other hand, the profits are mere possibilities and are too far removed from reality, they must be held unacceptable.⁴⁴

The thinking here is that one can infer harm based on a comparison of the plaintiff's performance in the damage period with its (or a similar firm's) performance at another time and place unaffected by the illegal conduct. If circumstances in the two periods are otherwise comparable, then the court will infer that, had defendant's illegal conduct not occurred, the plaintiff would have matched the performance of the base period.

43. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (rejecting plaintiff's "expert" projection of costs based on "experience plus inflation").

44. *Webb v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 678 (10th Cir. 1977) (emphasis added).

This process of proof involves two related comparisons. First, the plaintiff establishes the evidentiary foundation by comparing its actual experience in the damage period with the experience in a foundation or base period in which the defendant's illegal conduct did not affect the market. This foundation provides the basis for projecting the plaintiff's but-for experience. Second, the measure of damages is determined by comparing the plaintiff's but-for experience with its actual experience in the damage period. The following diagram illustrates the process:

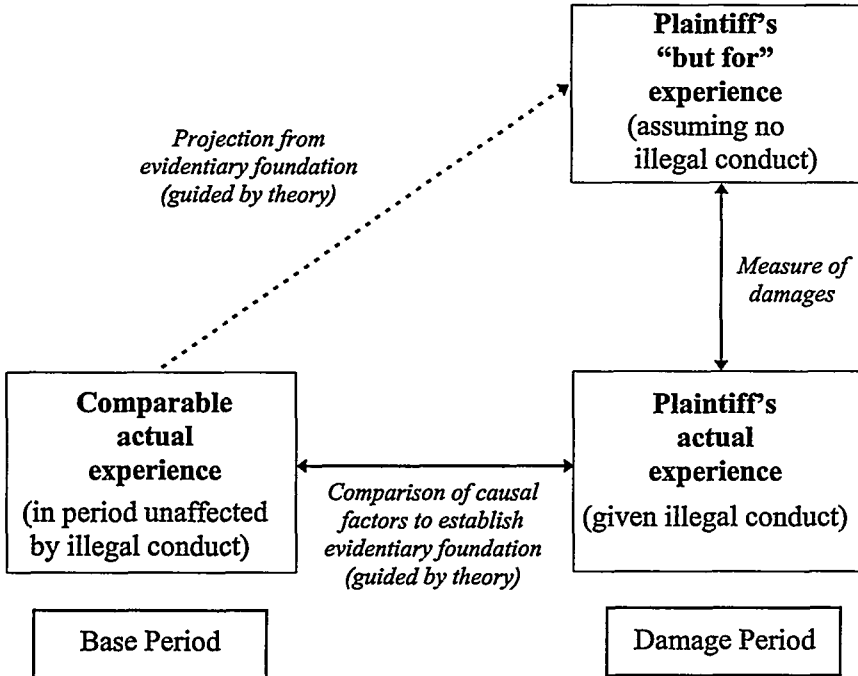


Figure 1

To construct a but-for scenario in which the consequences of the defendant's illegal conduct (and nothing else) are deleted, the plaintiff must establish an evidentiary foundation showing that the plaintiff could have been more successful in a world where the defendant had not violated the antitrust laws. The plaintiff typically must show that something like its but-for scenario has occurred in the base period. Causal factors in the base period other than the illegal conduct must be reasonably comparable to those in the damage period. If such a base period can be shown, then a projection to establish the but-for scenario is possible using various theoretical and quantitative methods. Inevitably,

there will be differences between the periods for which the plaintiff must account in its proof and in its narrative of events in the but-for world. Once the but-for condition is shown, the calculation of damages is simply a matter of subtracting the measure of the plaintiff's actual condition from the measure of its but-for condition.

B. *The Role of Economic Theory*

In constructing a but-for scenario, the plaintiff must offer a theoretical account, based on the evidentiary foundation, to support its argument that it would have done measurably better in the absence of the defendant's illegal conduct. Even when there is evidence that the plaintiff earned profits in an earlier period, which declined coincidentally with the defendant's illegal actions, the plaintiff must somehow avoid the competing inference that unrelated causal factors during the damage period caused its decline. In doing so, the plaintiff must rely on a theoretical model of the illegal practice. The model's assumptions and causal implications will provide the basis for both the measure of damages and the projection of the plaintiff's but-for experience.

Courts evaluate evidence in light of their preconceptions about the likelihood of the alleged conduct. They will be more favorably disposed toward a party's case if the party alleges that firms behaved, or will behave, in line with judicial preconceptions. The Supreme Court in *Zenith* acknowledged the significance of judicial preconceptions by stating that a plaintiff can rely on "just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiff's business and from the evidence of the decline in prices, profits and values, not shown to be attributable to other causes."⁴⁵ Proof of the violation and a decline in the plaintiff's fortunes may be enough to isolate the violation as the critical causal factor where the perceived "tendency" of the violation is to harm someone in the plaintiff's position. In antitrust cases, particularly in recent years, economic theory deeply influences the courts' perceptions of these tendencies. If the plaintiff is alleging the sort of harm that the applicable model leads the court to expect, the plaintiff is more likely to make a persuasive showing that its good fortunes would have continued absent the defendant's illegal conduct.⁴⁶

45. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)) (emphasis added).

46. For example, one court reasoned:

To construct a plausible scenario of how the defendant and others would have acted in the but-for world, the plaintiff must again rely on economic theory to predict behavior. The damage model will certainly be undermined if it assumes that actors will not act rationally to pursue their self-interest. As one court put it, “[i]n a hypothetical economic construction, . . . economic rationality must be assumed for all competitors, absent the strongest evidence of chronic irrationality.”⁴⁷ Thus, the model may not assume that firms would not maximize profits or minimize costs in response to the plaintiff’s competitive conduct in the but-for world.⁴⁸

Economic theory may show the plaintiff’s alleged scenario to be impossible. For example, theory teaches that when a cartel increases its prices, nonconspiring competitors benefit by selling larger quantities at the higher prices.⁴⁹ Consequently, these firms cannot sue for damages from minimum price fixing by their competitors because no economic theory can support proof of harm.⁵⁰ Theory can also raise the possibility

[G]iven the assumption of predatory pricing conduct, Malcolm’s business would be directly injured by depressed market prices. Regardless of a businessman’s reaction to predatory pricing some injury will almost certainly follow: if he retains his price he will lose volume and if he lowers his price he will have a smaller margin of profit on each unit sold. His total revenues, and hence profits, will usually decrease in a depressed market. Malcolm, in this case, provided the district court and jury with evidence of injury caused by the violation when he testified that a particular price generally prevailed, on his entry to the market he set a slightly lower price, and after his entry into the market his competitors dropped to a predatorily low price. This evidence easily translates into a finding of lost revenue and, hence, profits for Malcolm’s business.

Malcolm v. Marathon Oil Co., 642 F.2d 845, 855–56 (5th Cir.) (footnotes omitted), *cert. denied*, 454 U.S. 1125 (1981). In *Malcolm*, the court’s reasoning was also influenced by evidence of intent to harm competition. The court suggested that “[i]n cases where the defendants’ acts are motivated by intent to injure the plaintiff, the inferential leap to the finding of fact of damage, is not great.” *Id.* at 855.

47. *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1262 (9th Cir. 1981), *cert. denied*, 455 U.S. 1018 (1982).

48. *Knutson v. Daily Review, Inc.*, 548 F.2d 795 (9th Cir. 1976), *cert. denied*, 433 U.S. 910 (1977).

Rather than imposing the nearly impossible burden of proving what each dealer would have done if he had been free to make his own pricing decision, we assume that, absent evidence to the contrary, a dealer would have raised his prices had it been profitable to do so; that is, dealers are profit maximizers.

Id. at 812. See also *Northwest Publications Inc. v. Crumb*, 752 F.2d 473, 477 (9th Cir. 1985).

49. *Roger D. Blair & Virginia G. Maurer, Umbrella Pricing and Antitrust Standing: An Economic Analysis*, 1982 Utah L. Rev. 763, 779–85.

50. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 583 (1986) (finding plaintiff television manufacturers would not have been injured by alleged price fixing conspiracy of other manufacturers because they would have benefited from artificially higher prices); *Datagate, Inc. v. Hewlett-Packard Co.*, 941 F.2d 864, 868–69 (9th Cir. 1991) (reasoning that existing competitor in

that the plaintiff suffered no net harm. The example given in the last section of tying of products used in fixed proportions is pertinent here. If the defendant induced the plaintiff to pay the overcharge on the tied product by reducing the price of the tying product, the overcharge is not an accurate measure of the plaintiff's harm. Consequently, courts require that the plaintiff prove an overcharge on the sum of the prices of the tying and tied products. Finally, economic theory can identify instances in which the plaintiff may have received offsetting benefits by its efforts to mitigate damages. Thus, even if the defendant's conduct harmed the plaintiff initially, if the plaintiff found alternative uses for its resources or otherwise mitigated its damages, those compensating benefits must be netted out of any damage award.⁵¹

The model of the practice in issue may also affect the standard of proof that the plaintiff must meet to prove that the practice accounts for its decline. In general, scenarios based on more determinate models are less likely to be viewed as speculative. The Supreme Court has held that when a plaintiff alleges an offense that is not a plausible means of gaining monopoly profits, the plaintiff, to avoid summary judgment, must offer better-than-usual proof that the offense actually occurred.⁵² Similarly, if the plaintiff is alleging an offense that does not predictably cause the sort of harm the plaintiff alleges, then the plaintiff will have to do more to prove that it was actually harmed, and by how much. By the same token, if the plaintiff is alleging a practice that would very likely harm an actor in the plaintiff's position, proof of the violation almost by itself proves the fact of injury.⁵³ In situations in which the fact of

the market would have benefited, not been injured, by defendant's conduct that allegedly chilled entry into the market), *cert. denied*, 112 S. Ct. 1667 (1992); *Belcher Oil Co. v. Florida Fuels, Inc.*, 749 F. Supp. 1104, 1108 (S.D. Fla. 1990) (finding seller was not injured by competitors' alleged minimum price fixing scheme).

51. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 440 (5th Cir. 1985), illustrates what is at stake on the mitigation issue. The plaintiff's overall profits had actually increased after the defendant, a winch manufacturer, terminated the plaintiff's distributorship. Although the increased profits were attributable to sales of products other than winches, the defendant argued that the increased profits may have been attributable to the plaintiff's diversion of resources from selling winches. The court found, however, that the proof of lost profits on winches alone was (barely) sufficient to support the jury's award. It noted that the plaintiff's expert testified that the plaintiff's sales records showed that the increased profits were from trailer sales, and that the defendant had failed to cross examine the expert on the issue. Moreover, the plaintiff had testified that it could have continued its winch sales during the damage period.

52. *Matsushita*, 475 U.S. at 597-98.

53. Note, *Private Treble Damages Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business*, 80 Harv. L. Rev. 1566, 1573 (1967) ("In some cases, evidence establishing the violation will support the inference that plaintiff must have suffered some harm. . .").

damage is particularly obvious on theoretical grounds, courts often emphasize the leniency of the plaintiff's burden in proving the amount of damage.

Very often the persuasiveness of the plaintiff's scenario is related to the number of economic actors that the model must accommodate. Economic theory does not predict human conduct with the same certainty that physics can predict the movement of physical objects.⁵⁴ Changing prices and terms of exchange can only change incentives, not compel action. The more links in an alleged chain of human causation, the more likely the court is to conclude that the illegal conduct cannot be isolated as a cause. When the plaintiff is alleging that the defendant wrongfully terminated it as a dealer, a decline in sales immediately following the termination may be enough to show the fact of injury.⁵⁵ But if the plaintiff is alleging that the defendant induced third parties to stop dealing with it, the plaintiff will have more difficulty proving causation. An example is a case in which the plaintiff claimed that the defendant's change in its warranty policy to its customers cost the plaintiff sales. The court found that the plaintiff had not supported the inference that the defendant's action significantly influenced purchasers in their choice of product.⁵⁶ Reduced warranty terms will certainly tend, *ceteris paribus*, to make a product less attractive to a consumer; but *ceteris paribus* is less likely to be assumed as the number of potential causal factors increases.

This is not to say that indirect effects will never be provable. Suppose, for example, that a group of firms conspires to increase prices and a nonconspiring competitor of those firms increases its price to match theirs. Purchasers from the nonconspiring firm suffer the same overcharge as purchasers from the conspirators⁵⁷ and therefore should be

54. Hart and Honoré, *supra* note 25, at 51–52 (describing differences between human and physical causation).

55. *Graphic Prods. Distributions v. Itek Corp.*, 717 F.2d 1560, 1579 n.35 (11th Cir. 1983); *Greene v. General Foods Corp.*, 517 F.2d 635, 665 (5th Cir. 1975), *cert. denied*, 424 U.S. 942 (1976). *But see J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 792–94 (5th Cir. 1983) (allowing no damages where refusal to deal by one supplier did not limit plaintiff's ability to obtain product or increase plaintiff's costs; plaintiff's losses shown to be result of decline in orders by its sole customer).

56. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1496 (8th Cir. 1992). Of the 100 companies with which the plaintiff contended it had negotiated sales, it could only provide evidence of lost sales with two. The court found that the evidence involving these two companies demonstrated only that the defendant's conduct "was one factor among many, and not a controlling or major factor, which [the] two companies took into account in deciding whether to purchase a used machine from [the plaintiff]." *Id.* at 1497.

57. For a fuller presentation of the economics, see William H. Page, *Optimal Antitrust Penalties and Competitors' Injury*, 88 Mich. L. Rev. 2151 (1990); Blair & Maurer, *supra* note 49; Charles C.

permitted to sue the conspirators for the overcharge. Some courts have suggested, however, that the effect on those who purchase from nonconspirators is too speculative to justify granting them standing to sue the conspirators for the overcharge.⁵⁸ But what we have said about the inferential value of the theoretical tendency of an alleged practice contradicts this conclusion. Economic theory shows that a rational fringe competitor will match the price increase of a dominant firm (or cartel) in its market; if it did not do so, it would fail to maximize its profits. Consequently, if purchasers from the nonconspiring firm can prove that their supplier increased its price to match the illegally fixed price of the defendants, they should recover.

Recall, however, that the Supreme Court in *Zenith* qualified its acceptance of "tendencies" by a requirement that the harm is "not shown to be attributable to other causes."⁵⁹ No matter how strong the theoretical tendency of the defendant's illegal conduct to harm someone in the plaintiff's position, a damage model may be undermined by actual differences between events in the base period and the damage period that would predictably have affected its condition. As the Court's phrase "not shown to be attributable to other causes" implies, the obligation to identify the other causes will shift to the defendant if the plaintiff makes a plausible prima facie case. Theory also guides the determination of which causal factors could have affected the plaintiff's performance in the damage period. Possible causal factors include changes in general supply or demand conditions, changes in prices of substitute or complementary goods, the specific conduct of the plaintiff and defendant, entry of new rivals, product innovation, changes in government policies, and acts of God.

Van Cott, Note, *Standing at the Fringe: Antitrust Damages and the Fringe Producer*, 35 Stan. L. Rev. 763 (1983); Comment, *Standing of Purchasers From Nonconspirators to Challenge Price-Fixing Conspiracy: Mid-West Paper Products v. Continental Group, Inc.*, 93 Harv. L. Rev. 598 (1980).

58. See, e.g., *Mid-West Paper Prods. Co. v. Continental Group*, 596 F.2d 573, 583-87 (3d Cir. 1979) ("[I]t cannot readily be said with any degree of economic certitude to what extent, if indeed at all, purchasers from a competitor of the price-fixers have been injured by the illegal overcharge."). But see *Beef Indus. Antitrust Litig. v. A & P.*, 600 F.2d 1148, 1166 n.24 (5th Cir. 1979), cert. denied, 449 U.S. 905 (1980); *In re Arizona Dairy Prods. Litig.*, 627 F. Supp. 233, 236 (D. Ariz. 1985); *In re Uranium Antitrust Litig.*, 552 F. Supp. 518, 523-26 (N.D. Ill. 1982).

59. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 123-24 (1969) (quoting *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (1946)).

IV. PROVING A COMPARABLE PRIOR EXPERIENCE

Proof of what would have happened in the but-for world must rest on an evidentiary foundation showing some comparable experience at a time and place when the illegal activity did not influence the market. The courts have recognized two principal approaches to proving a comparable base period: the “before-and-after” and “yardstick” methods.⁶⁰

A. The “Before-and-After” Approach

The plaintiff will normally attempt to prove causation by showing that it was flourishing until the defendant acted illegally. This so-called before-and-after method of proof is the prototype for proof of damages.⁶¹ The plaintiff must normally show, with appropriate business records,⁶² how it actually performed when it was not burdened by the defendant’s illegal actions and when other relevant circumstances were comparable to those in the damage period. In *Eastman Kodak Co. v. Southern Photo*

60. *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985): Damages may be proven by (1) comparing the plaintiff’s profits before or after the alleged anticompetitive activity with the profits made while the plaintiff was subjected to the anticompetitive activity; (2) examining the profits of a business comparable to the plaintiff’s business which was not affected by the anticompetitive activity; or (3) projecting the market share which the plaintiff would have attained absent the anticompetitive activity, and then projecting plaintiff’s profits accordingly. For a brief survey of these approaches, see Richard C. Hoyt, Dale C. Dahl, and Stuart D. Gibson, *Comprehensive Models for Assessing Lost Profits to Antitrust Plaintiffs*, 60 Minn. L. Rev. 1233 (1976).

61. Indeed, in early cases, the courts spoke of this method as the exception to the otherwise inherent speculativeness of lost profits as a measure of damages:

While the law seldom looks favorably upon recovery of losses of expected profits there is notable exception to the general rule to the effect that lost profits from destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long-established business generally has it in his power to prove the amount of his expenses of operation and the income he has derived from it for a long time before, and for the time during the interruption of which he complains.

Roseland v. Pfister Mfg. Co., 125 F.2d 417, 420 (7th Cir. 1942). See also *Loder v. Jayne*, 142 F. 1010 (E.D. Pa.), *rev’d*, 149 F. 21 (3d Cir. 1906); *Central Coal & Coke Co. v. Hartman*, 111 F. 96 (8th Cir. 1901).

62. See, e.g., *Cecil Corley Motor Co. v. General Motors Corp.*, 380 F. Supp. 819, 857 (M.D. Tenn. 1974) (awarding defendant judgment notwithstanding the verdict where plaintiff failed “to allocate or proportionalize the expenses to each of its four product lines and related operations”). But see *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138, 1141–42 (8th Cir. 1969) (upholding estimate of profit in a particular product line).

Materials Co.,⁶³ the plaintiff proved its gross profits in the four years prior to the defendant's monopolistic refusal to deal, then claimed as damages the same amount for the four-year damage period less the estimated costs it would have incurred in buying and selling the defendant's products. The Supreme Court approved the damage award as a "just and reasonable inference,"⁶⁴ despite the defendant's contention that the two periods were not comparable and that the plaintiff would not have been able to sell as much in the damage period as it had sold previously.

When the plaintiff uses the before-and-after approach, the issue of speculativeness depends first and foremost upon whether potentially causal conditions in the base period are comparable to those in the damage period.⁶⁵ Where the circumstances are not comparable, the inference that the defendant's illegal conduct accounts for the difference in the plaintiff's fortunes does not hold. The difficulty, of course, is that in any market, circumstances are in constant flux; it will never be possible to prove that all circumstances are the same in any two periods. The courts, however, do not require identical conditions,⁶⁶ but conditions that are comparable in relevant respects. What is relevant depends, in turn, upon the court's theoretical understanding of market relationships and the "tendencies" of the practice at issue. This theoretical understanding provides the court with a picture of how things usually occur, given the existence of certain conditions; the evidentiary foundation then demonstrates the existence of those conditions for the particular case.

1. *Reliability of the Plaintiff's Performance in the Base Period as a Predictor*

There must be a basis in the record for an inference that the plaintiff's performance in the base period would have been replicated in the damage period but for the violation. One factor that affects the strength of such an inference is the length of the base period. The shorter the

63. 273 U.S. 359, 378-79 (1927).

64. *Id.* at 379. See also *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 264 (7th Cir. 1946).

65. *Pacific Coast Agric. Export Ass'n v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1207 (9th Cir.) (holding plaintiff must make "some showing that the market conditions in the two periods were similar but for the impact of the violation"), *cert. denied*, 425 U.S. 959 (1976).

66. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 (5th Cir. 1981) ("Each sale and the amount of loss on the transaction need not be shown; averages may be used to show that the plaintiff generally lost money over a period of time.").

plaintiff's track record of profitability, the less plausible is the inference that its good fortunes would have continued. Courts normally require a showing that, prior to the illegal activity, the plaintiff "had been selling the same product, quite often in the same geographical market, with substantial success for a significant period of time."⁶⁷ If the plaintiff proves it has performed at a certain level for a significant time shortly before the damage period, the court may infer that the various factors affecting the firm's performance, especially those internal to the firm, are relatively constant, and therefore essentially the same during both periods. A very brief period of profitability is more likely to be an aberration and thus less likely to support an inference that the plaintiff's decline is the result of the violation. In *Southern Photo*, the base period was four years, but courts regularly uphold the use of periods of several months.⁶⁸ One court even accepted a single month.⁶⁹

Even if the base period is long enough to permit the necessary inference, it must also be typical of the plaintiff's experience in the full range of times unaffected by illegal activity. If the plaintiff's performance in the asserted base period was not typical of its performance in other comparable periods, we cannot infer that the plaintiff would have done as well in the damage period but for the illegal conduct. If, for example, the plaintiff suffered losses in most years, but was successful in others, it may not select an unusually profitable year as

67. *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1498 (8th Cir. 1992).

68. *Eiberger v. Sony Corp. of Am.*, 622 F.2d 1068 (2d Cir. 1980) (upholding last year before business destroyed where business was consistently improving); *Malcolm*, 642 F.2d at 864 (upholding last eight months before business destroyed).

In *Key Enterprises*, for example, the plaintiff had been a successful supplier of durable medical equipment (wheelchairs, hospital beds, walkers, and the like) for 19 months. The plaintiff's monthly sales revenues grew steadily over the September 1983–March 1985 period. In April 1985, the plaintiff was foreclosed from the market, precipitating the antitrust suit. The plaintiff's experience in the six-month period preceding the suit provided the base for projecting its but-for condition in the damage period. *Key Enters. of Del. v. Venice Hosp., Sammett Corp.*, 919 F.2d 1550 (11th Cir. 1990). The damage model is offered here only for illustration. The case was settled after the 1990 panel opinion while the petition for rehearing was under consideration and the panel's mandate was stayed. The Eleventh Circuit granted the petition for rehearing without knowledge of the settlement. *Key Enters. of Del. v. Venice Hospital*, 979 F.2d 806 (11th Cir. 1992). The court subsequently determined that the grant of the rehearing was improvident, because the case had become moot, and that the proper procedure was to dismiss the appeal, vacate the district court's judgment, and remand to the district court with instructions to dismiss the case. *Key Enters. v. Venice Hosp.*, 9 F.3d 893 (11th Cir. 1993).

69. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 439–40 (5th Cir. 1985). The court upheld as a basis for comparison the plaintiff's average profit per unit on a sample of 88 of the 200 units it sold in the month prior to its termination, despite the defendant's evidence that the average profit per unit for that year was only one tenth of the plaintiff's figure. *Id.* at 440–41.

a base period⁷⁰ unless the losses in the unprofitable years were the result of abnormal events.⁷¹ Similarly, if the plaintiff's profits declined and actually became losses after the test period but before the illegal conduct, one could not infer that the termination caused the plaintiff's demise.⁷²

2. *Accounting for Other Causal Factors in the Damage Period*

Even if the plaintiff's performance in the base period was typical and substantial, the but-for scenario may not hold if causal factors other than the illegal conduct in the base period were significantly different from those in the damage period.⁷³ As one court wrote,

Although [the plaintiff] Isaksen may well have suffered losses during the period of Vermont Castings' unlawful activity, he made no effort to establish how much of the loss was due to that activity as distinct from unrelated business factors. The most important

70. *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969) (rejecting profit projection based on abnormally profitable six-month period), *cert. denied*, 396 U.S. 1062 (1970). *R. S. E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 966-68 (M.D. Pa. 1981) (rejecting plaintiff's use of most profitable portions of two different years as base periods). In *Amerinet*, 972 F.2d at 1495, the court found that the plaintiff was already facing a decline in its business prior to the defendant's conduct and that factors other than the defendant's conduct substantially contributed to the plaintiff's eventual failure. The plaintiff's own expert testified that the plaintiff "was in a period of decline prior to [the defendant's] alleged antitrust violations and needed substantial revenues from its new and unestablished entry into the field of used . . . printers in order to survive." *Id.* Moreover, the plaintiff had been involved in suits against several prior employees in which it had stated in its complaints that it had been materially harmed in 1986 and 1987 by elements other than the defendant's unlawful conduct. *Id.* at 1496.

71. *Tire Sales Corp. v. Cities Serv. Oil Co.*, 637 F.2d 467 (7th Cir. 1980), *cert. denied*, 451 U.S. 920 (1981). The district court had rejected the use of 1969 as a test year because "1970 was the last calendar year of plaintiff's contract with Citgo and because 1969 was one of only two profitable years in a 5-year period." *Id.* at 475. The court of appeals reversed, finding that 1970 was an abnormal year because plaintiff had already been replaced as distributor in part of that year. The court continued: "Moreover, since plaintiff's gross sales had been increasing progressively in 1967, 1968 and 1969, and since losses in the 5-year period are to some extent attributable to such exceptional events as destruction by a tornado, there were still other reasons to use 1969 to calculate plaintiff's future earnings absent antitrust violations by Citgo from January 1, 1971, when Berry Tire officially replaced plaintiff, and December 1, 1975, when plaintiff closed down." *Id.*

72. *Peltier v. Exxon Corp.*, 527 F.2d 757, 760 (9th Cir. 1975); *General Elec. Credit Corp. v. Grubbs*, 478 F.2d 53, 58-59 (5th Cir.) (denying recovery when plaintiff "had been operating at a loss prior [to the illegal acts and] it was only a matter of time until his business failed"), *cert. denied*, 414 U.S. 854 (1973).

73. In one case, the plaintiff offered an expert who admitted that "the cause of the decline in sales theoretically could have been anything," *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 806 (9th Cir. 1988), and "did not confirm that relevant market conditions were the same before and after the time the injury was alleged to have occurred." *Id.* at 807. See also *Pacific Coast Agric. Export Assn. v. Sunkist Growers, Inc.*, 526 F.2d 1196, 1206-07 (9th Cir. 1975).

such factor was the diminished demand for woodburning stoves. Not only had the market for such stoves become saturated, but oil prices had begun to fall, making wood a less attractive fuel for heating, relative to oil, than it had been before. All Isaksen did to prove damages was to compare his average profits for several years before and several years during the period of unlawful activity. *Post hoc ergo propter hoc* is not a valid methodology of damage calculation, especially where it is apparent that other causal factors are at work.⁷⁴

The list of potential causal factors is virtually unlimited, but they can be grouped into three categories: general market conditions, the conduct of the plaintiff, and the conduct of the defendant. General market conditions may differ if, for example, the base period was in wartime, if price controls were in effect,⁷⁵ or if the market was unusually noncompetitive.⁷⁶ They may also differ if the damage period coincided with a recession;⁷⁷ if input prices increased during that period;⁷⁸ if an unrelated cartel increased the price of a substitute for the defendant's product;⁷⁹ or if consumers' tastes changed, as in *Isaksen*. In such cases, one cannot infer that the plaintiff's performance in the base period would have been replicated in the damage period but for the defendant's conduct, unless the damage model accounts for the effects of the differences in market conditions.⁸⁰

74. *Isaksen v. Vermont Castings, Inc.*, 825 F.2d 1158, 1165 (7th Cir. 1987), *cert. denied*, 486 U.S. 1005 (1988).

75. In *In re Fertilizer Antitrust Litig.*, 1983-1 Trade Cas. (CCH) ¶ 65,418 (E.D. Wash. 1983), the court excluded the plaintiff's damage model in a price-fixing case because prices in the test period had been subject to federal price controls. The court reasonably concluded that removal of the controls may have played a role in the price increase during the damage period.

76. In *Allegheny Pepsi-Cola v. Mid-Atl. Coca-Cola Bottling Co.*, 690 F.2d 411, 414-15 (4th Cir. 1982), the plaintiff claimed it suffered losses as a result of a predatory pricing conspiracy, and sought to prove damages by the differences in prices before and after the defendant's entry. But the court found that the prior period had been an atypical, noncompetitive one in which prices were unusually high; the plaintiff's harm was simply the result of a return to competition. This conclusion is sensible, because price reductions typically accompany a new entry.

77. *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 435 (N.D. Cal. 1978) ("Memorex offered no evidence of the effect of the recession on its operations and hence its damage claim."), *aff'd mem.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 452 U.S. 972 (1981).

78. *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1332, 1341 (9th Cir. 1991).

79. See Hovenkamp, *supra* note 18, at 607 (1994). If the price of a substitute for the product increases, demand for the product, and hence its price, will increase.

80. See also *In re Corrugated Container Antitrust Litig.*, 756 F.2d 411, 418-19 (5th Cir. 1985) (affirming verdict for defendant when plaintiff's evidence of overcharge met by defendant's

The plaintiff's own conduct in the damage period may also undermine an inference that the defendant's conduct caused its harm. If the plaintiff made poor management decisions in the damage period that would have affected it adversely regardless of defendant's illegal conduct, the damage proof must account for the effects of those decisions.⁸¹

If a number of the defendant's acts allegedly harmed the plaintiff, and only some of them are found illegal, a damage theory must be capable of distinguishing the lawful competitive harm from the unlawful.⁸² Likewise, if some of the defendant's conduct was immune from antitrust attack, it cannot form the basis for damages.⁸³ Since the defendant's lawful conduct cannot properly be excluded from the but-for world, it must be accounted for in the damage model.⁸⁴

evidence that its "price increases were caused by increases in the cost of linerboard, fuel, and labor").

81. *United States Football League v. National Football League*, 842 F.2d 1335, 1377 (2d Cir. 1988) (holding defendant's evidence of "self-destructive USFL decisions" justified a jury award of \$1).

82. *MCI Communications Corp. v. AT & T*, 708 F.2d 1081, 1161 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983); *Coleman Motor Co. v. Chrysler Corp.*, 525 F.2d 1338, 1353 (3d Cir. 1975) ("Plaintiff's own experts conceded that the damage figures they tendered were attributable at least in part to the lawful competition of Chrysler's factory dealerships. On the evidence adduced, the jury rationally could not have reduced these figures to reflect only losses due to unlawful competition."); *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 911 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962); *ILC Peripherals Leasing Corp. v. IBM*, 458 F. Supp. 423, 435 (N.D. Cal. 1978) ("[D]uring the relevant time period, IBM introduced a number of products in the markets defined by Memorex as to which no challenge is made."), *aff'd mem.*, 636 F.2d 1188 (9th Cir. 1980), *cert. denied*, 459 U.S. 972 (1981). Distinguishing lawful and unlawful conduct is no mean feat. For a concise treatment, see Frank Easterbrook, *On Identifying Exclusionary Conduct*, 61 *Notre Dame L. Rev.* 972 (1986).

83. *Federal Prescription Serv., Inc. v. American Pharmaceutical Ass'n*, 663 F.2d 253, 271 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982).

84. In *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044-45 (4th Cir. 1987), *cert. denied*, 486 U.S. 1017 (1988), the defendant successfully showed that part of the plaintiff's harm was the result of lawful competitive actions by the defendant, contradicting a specific assumption of the plaintiff's expert. *See also Coleman Motor*, 525 F.2d at 1352 (test period not comparable to damage period because it predated defendant's entry into market; relevant comparison is between period of lawful competition and period of illegal activity.) *But see National Farmers' Org. v. Assoc. Milk Producers*, 850 F.2d 1286, 1307 (8th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989):

An antitrust plaintiff's damage claim is not . . . rendered speculative or unreasonable merely because it fails to provide for a specific reduction in the event that allegations of certain unlawful conduct are rejected. In other words, if an antitrust plaintiff alleges that the defendant engaged in unlawful acts A, B, C, and D, and acts C and D are later rejected as a basis of liability, it does not automatically follow that the damage award must be reduced. Rather, if acts A and B support the entire damage award, it must be sustained.

The court added that, on remand to determine if the proof supported the entire award, the district court should "avoid tightly compartmentalizing the plaintiff's proof," because "some of the

When a plaintiff improperly attributes all losses to a defendant's illegal acts, despite the presence of significant other factors, the evidence does not permit a jury to make a reasonable and principled estimate of the amount of damage. . . . To allow otherwise would force a defendant to pay treble damages for conduct that was determined to be entirely lawful.⁸⁵

In one case, the plaintiff claimed that the defendant railroad had offered a combination of rail and truck transportation, in the process conspiring with shipping agents to violate established Interstate Commerce Commission tariffs by offering illegally low prices.⁸⁶ The court in that case found that the plaintiff had proved an antitrust violation and injury in fact. The plaintiff failed, however, to prove the amount of injury because it did not show the amount of its sales that would have been diverted to the defendant by *lawful* competition under its combination shipping plan.⁸⁷ The court concluded that “[i]n the absence

appellees' conduct, if viewed in isolation, was lawful, yet formed part of the mosaic that constituted the unlawful conspiracy.” *Id.* (citations omitted). The court also noted that:

[t]he fact that the appellees' illegal conspiracy was composed of lawful and unlawful conduct so tightly intertwined as to make it difficult to determine which portion of the damages claimed were caused by the unlawful conduct should not diminish the recovery. Similarly, the Court should recognize that the harmful consequences of certain unlawful conduct may have been exacerbated by otherwise lawful conduct. In such a situation, the fact that lawful conduct contributed to additional injury should not prohibit recovery for that injury.

Id. at 1307. The court pointed out that the defendants had contributed to the uncertainty of proof by destroying documents. *Id.*

85. *MCI*, 708 F.2d at 1162–63 (citations omitted).

86. *Farley Transp. Co. v. Santa Fe Transp. Co.*, 786 F.2d 1342, 1347–48 (9th Cir. 1985).

87. The plaintiff improperly assumed

[t]hat all of Santa Fe's Plan V shipping business, or at least all of the newly attracted business, was infected by the unlawful scheme to deviate from the required tariff rates. No evidence was produced showing the number of trailers that were diverted from the plaintiffs because of the illegal price-cutting activities, as opposed to legitimate competition. Accordingly, the jury was required to speculate.

Id. at 1351. The court explained more fully:

The missing link was evidence allowing at least a reasonable inference as to the amount of customer business diverted to Santa Fe Plan V because of, rather than without regard to, lower rates attributable to the illegal scheme to deviate from the tariff. . . . Any effort to prove that customers were motivated by unlawful lower shipping rates in directing their business to the Santa Fe Plan V would naturally require an initial showing that material savings were in fact provided those customers. The next step, then, would be presentation of evidence that those savings, attributable to the unlawful scheme, were the impetus for the diversion of customer business, instead of some other attractive element of the Santa Fe Plan V *approach to piggyback shipping*.

Id. at 1352.

of any guidance in the record, we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition."⁸⁸

In some instances, however, a court will require the defendant to offer evidence of its procompetitive actions that may account for the plaintiff's harm. If the plaintiff has made an initial showing of harm that properly excludes causes that are "internal to the plaintiff or general to the market,"⁸⁹ the defendant must offer evidence that the harm to the plaintiff was the result of lawful conduct.

[T]he fact that the . . . illegal conspiracy was composed of lawful and unlawful conduct so tightly intertwined as to make it difficult to determine which portion of the damages claimed were caused by the unlawful conduct should not diminish the recovery. Similarly, the Court should recognize that the harmful consequences of certain unlawful conduct may have been exacerbated by otherwise lawful conduct. In such a situation, the fact that lawful conduct contributed to additional injury should not prohibit recovery for that injury.⁹⁰

If the plaintiff's harm is the result of several actions of the defendant, all of which are illegal, then the plaintiff's burden is lighter:

[a] plaintiff claiming injury caused by more than one of the defendant's unlawful practices need not prove the amount of damage caused by each illegal practice if the plaintiff shows that disaggregation is impracticable. If the plaintiff shows that such proof is impracticable, the burden shifts to the defendant to demonstrate the contrary.⁹¹

88. *Id.* at 1351 (citation omitted) (quoting *Coleman Motor*, 525 F.2d at 1353).

89. *Omni Outdoor Advertising, Inc. v. Columbia Outdoor Advertising, Inc.*, 891 F.2d 1127, 1144 n.8 (4th Cir. 1989), *rev'd on other grounds*, 499 U.S. 365 (1991). *See also* *Eastern Auto Distrib. v. Peugeot Motors, Inc.*, 795 F.2d 329, 338 (4th Cir. 1986); *accord* *United States Football League v. National Football League*, 842 F.2d 1335, 1378-79 (2d Cir. 1988).

90. *National Farmers' Org. v. Assoc. Milk Producers*, 850 F.2d 1286, 1307 (8th Cir. 1988), *cert. denied*, 489 U.S. 1081 (1989).

91. *Spray-Rite Serv. Corp. v. Monsanto Co.*, 684 F.2d 1226, 1242-43 (7th Cir. 1982), *aff'd*, 465 U.S. 752 (1984) (citations omitted). *See also* *Bonjorno v. Kaiser Aluminum & Chem. Corp.*, 752 F.2d 802, 813 (3d Cir. 1984) (finding that where plaintiff's theory is "that all the [defendant's] acts taken together show the willful acquisition or maintenance of a monopoly which damaged and forced Columbia out of business," plaintiff need not segregate proof of amount of damages attributable to a particular act), *cert. denied*, 477 U.S. 908 (1986).

B. The "Yardstick" Approach

The before-and-after approach to proof of damages is the most common method and provides the prototype for proof of damages. There are alternatives, however, because the plaintiff may have no acceptable track record in a prior period. The plaintiff may have just begun business because different competitive conditions prevailed in all prior periods.⁹² The plaintiff may avoid these difficulties by the yardstick approach, "linking the plaintiff's experience in a hypothetical free market to the experience of a comparable firm in an actual free market."⁹³ But the plaintiff's construction of its but-for scenario in yardstick cases is more complicated; it must show that it would have done better in the damage period than it had ever done before.

1. The Unestablished Business

The problems of the yardstick approach are most apparent in cases in which the plaintiff alleges that the defendant prevented it from entering the market.⁹⁴ In such cases, the plaintiff must clear the initial hurdle of demonstrating that it was prepared to enter the market and would have done so but for the illegal conduct: "[i]ndicia of preparedness include adequate background and experience in the new field, sufficient financial capability to enter it, and the taking of actual and substantial affirmative steps toward entry, "such as the consummation of relevant contracts and procurement of necessary facilities and equipment."⁹⁵ In many cases this standard will be insurmountable.⁹⁶ One court rejected a damage

92. *Shannon v. Crowley*, 538 F. Supp. 476, 480 n.10 (N.D. Cal. 1981).

93. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 551 (7th Cir. 1986); *See also Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

94. *See H. Hovenkamp, supra note 18*, at 625-26.

95. *Hecht v. Pro-Football, Inc.*, 570 F.2d 982, 994 (D.C. Cir.) (footnotes omitted), *cert denied*, 436 U.S. 956 (1978). Other circuits state similar tests. *See, e.g., Solinger v. A & M Records, Inc.*, 580 F.2d 1304, 1309 (9th Cir.), *cert. denied*, 441 U.S. 908 (1979); *Martin v. Phillips Petroleum Co.*, 365 F.2d 629, 633-34 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966). A plaintiff who is already in the relevant line of business and alleges it was prevented from expanding into a new market may face a lighter burden: "[t]he Court does not believe that a going concern, which is the victim of an anti-competitive practice, must forego damages for sales it would have made as the result of the natural expansion of its business simply because it was victimized early in its existence before its attempts to expand could ripen into evidence of preparedness and intent to increase its output." *Heattransfer Corp. v. Volkswagenwerk, A.G.*, 553 F.2d 964, 986 n.20 (5th Cir. 1977).

96. *In re Dual-Deck Video Cassette Recorder Antitrust Litig.*, 11 F.3d 1460, 1464-66 (9th Cir. 1993) (applying *Solinger*) (plaintiff had "no experience, no affirmative action to enter the market, no demonstrated ability to raise the money to enter the market;" damage claim was "pie in the sky");

projection when the plaintiff had made only two test sales of the product, had demonstrated no experience in selling the product prior to the illegal action, and provided no evidence that it had experience in selling any similar products which it might rely upon in marketing the new product.⁹⁷

Once the unestablished firm has established its ability to enter a market, it must then show the amount of damages, usually lost profits, that it would have suffered. If the firm has an established record of entry in other comparable markets, then its performance in those markets could provide a reasonable yardstick. Otherwise, the plaintiff will be required to find a similar firm to serve as a yardstick. Herbert Hovenkamp contends that

[e]stimation of lost profits in such situations is so speculative that the court's decision can be no more than arbitrary. Ex ante, no one could predict the market share or sales volume that could be attained by a prospective business, and no estimate of future profits can be made without some estimate of volume of sales.⁹⁸

Consequently, he suggests that courts should "award precluded entrants their sunk costs [i.e., investment that will not be recovered], plus the fair market value of any contractual obligations which they have already received but will be unable to perform because of the antitrust violations."⁹⁹ There are substantial difficulties with this measure of harm. All of the lost investments that Hovenkamp mentions would have been made in the absence of the antitrust violation. Thus, they should be compensable only if, but for the violation, the precluded firm would have made enough sales to recover its investments. But, if it is impossible to estimate lost sales volume, as Hovenkamp states, there is no basis for making such an assumption.

Hayes v. Solomon, 597 F.2d 958, 973-74 (5th Cir. 1979) (inadequate plans, contracts, and finances to demonstrate intent and preparation) (applying *Martin*, 111 U.S. 1078 (1980)). *But cf.* Neumann v. Vidal, 710 F.2d 856, 858-60 (D.C. Cir. 1983) (applying *Hecht*) (sufficient evidence of experience, financial resources, and steps toward entry to create jury issue).

97. *Amerinet, Inc., v. Xerox Corp.*, 972 F.2d 1483, 1498 (8th Cir. 1992).

98. Hovenkamp, *supra* note 18, at 626.

99. *Id.*

2. *Accounting for Actual Differences Between Periods, Markets, and Firms*

Even if a plaintiff establishes that it was sufficiently prepared to enter the business, it still must provide a basis for a projection of profits in the market. Here, its lack of a track record in the market makes its task more difficult than that of an established firm. Because it is unable to use the prototype before-and-after method of proof, it must typically rely on a yardstick as the foundation for its but-for scenario. The yardstick method faces greater obstacles than the before-and-after method, because it requires the plaintiff to show the comparability of either a different firm from itself, or of a different market from its market, or both.¹⁰⁰ In one case, the plaintiff calculated lost going concern value by applying a 1.7% profit margin taken from a survey of baking companies in the *Almanac of Business & Industrial Financial Ratios*. The plaintiff's experts argued that the plaintiff's real performance (a 0.8% profit margin) in the test year was affected by depressed business conditions. Nevertheless, the court rejected the 1.7% figure because the expert had failed to show that the firms in the survey were comparable to the plaintiff. Consequently, it only permitted damages based upon the 0.8% actual profit margin in the test year.¹⁰¹

In another case, the plaintiff claimed that its rental referral business in Providence, Rhode Island, was injured by the defendant newspaper's refusal to carry its advertisements. The plaintiff was part of a national chain, and offered as a yardstick the Nashville, Tennessee, office of the same chain. The court found that the plaintiff's market was not comparable to the yardstick's market because of differences in the population, the vacancy rate, and the number of housing and rental units.¹⁰² The plaintiff had failed to account for "the impact of industry,

100. *Home Placement Serv., Inc. v. Providence Journal Co.*, 819 F.2d 1199, 1206 (1st Cir. 1987) (plaintiff must show "product, firm, and market comparability"). For a statistical approach, see Roger D. Blair & Amanda K. Esquibel, *Yardstick Damages in Lost Profit Cases: An Econometric Approach*, 72 *Denver U. L. Rev.* 113 (1994).

101. *William Inglis & Sons Baking Co. v. Continental Baking Co.*, 942 F.2d 1332, 1341 (9th Cir. 1991). In effect, the court rejected the use of an average across an array of firms. In other contexts, however, courts have relied upon averages for determining lost income and expected work life.

102. *Home Placement*, 819 F.2d at 1206 n.9. The differences were as follows:

	Vacancy Rate	Population	Housing Units	Rental Units	Available Rental Units
Nashville	7.2%	699,271	169,216	63,794	4,593
Providence	5.8%	854,400	285,026	116,860	6,544

rental patterns, unemployment, summer rentals, and colleges" or the "relative competition in the rental referral industry in each market."¹⁰³ In addition, the plaintiff failed to show that the yardstick firm was comparable to the plaintiff in "organization and resources"¹⁰⁴ and "that the two firms were administered and operated in the same way."¹⁰⁵ Proof that the fee charged by the two firms was the same was not enough.

It might seem that a damage calculation would be most acceptable if the yardstick is the plaintiff itself in a comparable market,¹⁰⁶ or a comparable firm in the same market as the plaintiff's.¹⁰⁷ But even in these kinds of cases, there is fertile ground for challenging the asserted similarity. For example, the plaintiff often may not use a firm in its own market because the financial success of the yardstick would be enhanced by the injury to the plaintiff. Furthermore, the plaintiff's own experience in a different market may not be sufficiently comparable if it involves a significantly different mix of products¹⁰⁸ or significantly different customers.¹⁰⁹

103. *Id.* at 1207.

104. *Id.* at 1208.

105. *Id.*

106. *National Farmers' Org. v. Assoc. Milk Producers*, 850 F.2d 1286, 1297 (8th Cir.) (plaintiff's performance in a different federal milk marketing order was an adequate yardstick), *cert. denied*, 489 U.S. 1081 (1989); *Rose Confections, Inc. v. Ambrosia Chocolate Co.*, 816 F.2d 381, 394 n.7 (8th Cir. 1987) (finding sales in West Coast and Midwest markets sufficiently comparable); *Syufy Enters. v. American Multicinema, Inc.*, 793 F.2d 990, 1002-03 (9th Cir. 1986), *cert. denied*, 479 U.S. 1031 (1987); *King & King Enters. v. Champlin Petroleum Co.*, 657 F.2d 1147, 1161-62 (10th Cir.) (finding profits of plaintiff's gas station in other markets sufficient as yardsticks to create jury question), *cert. denied*, 454 U.S. 1164 (1982); *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 858 & 860 n.24 (5th Cir.), *cert. denied*, 454 U.S. 1125 (1981).

107. *Phillips v. Crown Cent. Petroleum Corp.*, 602 F.2d 616, 631-32 (4th Cir. 1979) (finding prices paid to gasoline station in same area as plaintiff were a sufficient yardstick), *cert. denied*, 444 U.S. 1074 (1980). *See also* *Metrix Warehouse, Inc. v. Daimler-Benz Aktiengesellschaft*, 828 F.2d 1033, 1044 n.21 (4th Cir. 1987) (finding independent parts distributor could use independent garage market for replacement parts as yardstick), *cert. denied*, 486 U.S. 1017 (1983).

108. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 911-13 (2d Cir.) (upholding directed verdict where plaintiff failed to establish damages in the market for a full line of shoe machinery when its calculation was based upon its success in only some of the lines), *cert. denied*, 369 U.S. 865 (1962). *See also* *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1261-62 (9th Cir. 1981) (rejecting plaintiff's market share in small vessel market as a basis for projecting market share in large vessel market, from which it was allegedly foreclosed), *cert. denied*, 455 U.S. 1018 (1982).

109. *In Tic-X-Press, Inc. v. Omni Promotions Co.*, 815 F.2d 1407, 1421 (11th Cir. 1987), the plaintiff ticketing agency sued a stadium, alleging damages from its practice of conditioning stadium leases on the use of a ticketing agency linked to the Coliseum. The court limited the plaintiff's damages to the profits it would have made from the single promoter that plaintiff was able to prove would have used its service but for the tie. The plaintiff suggested as a yardstick its business at other venues in Atlanta, but the court rejected this experience as insufficiently comparable.

V. ACCOUNTING FOR PREDICTABLE MARKET RESPONSES

Even if the plaintiff is able to establish a comparable base period, its projection must still include a plausible scenario of how firms would have responded to its presence in the but-for world. Theory predicts that suppliers, competitors, and purchasers will respond to changes in incentives by maximizing their profits and minimizing costs. The plaintiff's prediction of likely events in the absence of the defendant's illegal conduct must take account of rational, lawful responses of other actors, including the defendant, to the plaintiff's projected market behavior. At the same time, the plaintiff's proof of its actual condition must take account of its opportunities to mitigate the harm from the defendant's conduct.

A. *Lawful Competitive Responses of Defendant and Others*

The plaintiff must assume that other market participants will act rationally. As one court put it, the plaintiff

[m]ust presume the existence of rational economic behavior in the hypothetical free market. This includes a rational price differential between [the plaintiff's] prices and defendants' prices based on all competitors attempts to maximize their own profits . . . and the potential entry of other competitors into the market.¹¹⁰

The assumption of rational economic behavior thus applies to all actors in the market whose conduct would affect the plaintiff's projected condition. The plaintiff may not, for example, assume that it could raise prices and maintain the same sales volume, because the law of demand strongly suggests that consumers will buy less of anything if the price increases.¹¹¹ Similarly, the plaintiff may not assume that it would have

110. *Dolphin Tours, Inc. v. Pacifico Creative Serv., Inc.*, 773 F.2d 1506, 1511 (9th Cir. 1985) (internal citations omitted). *R.S.E., Inc. v. Pennsy Supply, Inc.*, 523 F. Supp. 954, 966 (M.D. Pa. 1981):

Perhaps the most blatant defect in plaintiff's damage model for lost profits is its failure to account for any lawful competition. Surely plaintiff cannot have expected the defendants to sit idly by while it proceeded to grasp 25% of the road construction market and maintain its roughly 12% of the blacktop production market, when each market began to dry up. As defendants point out, they were well integrated, established firms in the area. To postulate damages on the assumption that they would not individually react by reducing their prices and therefore require plaintiff to further reduce its price, thus reducing its net profit, is absurd.

111. See *Gray v. Shell Oil Co.*, 469 F.2d 742, 749 (9th Cir. 1972) (excluding accountant's exhibit that assumed plaintiff "could have raised . . . retail gasoline prices six cents a gallon 'without losing any volume'"), *cert. denied*, 412 U.S. 943 (1973). On the law of demand, see George J. Stigler, *The*

been able to maintain high prices in the market without provoking price cuts by the defendant and other competitors.¹¹² As one court noted, “[a] reasonable jury could not . . . indulge in the assumption that a competitor would follow a course of behavior other than that which it believed would maximize its profits.”¹¹³ Consequently, the defendant need not introduce evidence that it would have reduced prices; it is enough that it would have been rational to do so.¹¹⁴ On the other hand, the requirement that the plaintiff take account of anticipated competitive responses does not require a detailed evidentiary basis. It appears to be enough that the plaintiff make a reasonable assumption about the effects of competition on the plaintiff’s profitability.¹¹⁵

Related to these points is the possibility of mitigation efforts by the plaintiff. If the plaintiff could have reduced its harm by alternative uses of its resources, the damage model must take those opportunities into account.¹¹⁶ In effect, the plaintiff’s actual condition must be adjusted for

Theory of Price 20–28 (4th ed. 1987); Richard A. Posner, *Economic Analysis of Law* 4–5 (4th ed. 1992).

112. See *Knutson v. Daily Review, Inc.*, 458 F. Supp. 226, 240 (N.D. Cal. 1979), *aff’d*, 664 F.2d 1120 (9th Cir. 1981).

113. *Murphy Tugboat Co. v. Crowley*, 658 F.2d 1256, 1262 (9th Cir. 1981), *cert denied*, 455 U.S. 1018 (1982). The plaintiff’s expert stated that it could not have made the projected profits unless it achieved a fourteen percent market share. But, in assuming that market share, the expert failed to account for the defendant’s predictable price cuts in response to its entry.

114. In *Dolphin Tours*, the plaintiff alleged it had been excluded from the market for Japanese tours of the United States. The court of appeals reversed the trial court’s grant of summary judgment for defendant on the damage issue, finding that on remand the plaintiff could remedy the difficulties with its scenario of the but-for world. The court found that, for purposes of summary judgment, a report prepared by the plaintiff’s witnesses provided a reasonable estimate of the plaintiff’s lost profits by projecting market shares and profits at the existing price differential and at one less favorable to plaintiff. The report did not sufficiently address the possibility of comparable American tour groups entering the market, or of lower-priced Japanese tours being offered, thus limiting the plaintiff’s market share. But the court held that the plaintiff’s expert could provide this information at trial. 773 F.2d at 1512.

115. In *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1204 (11th Cir.), *cert. denied*, 114 S.Ct. 604 (1993), in which a distributor had been denied access to a product, the court allowed as damages for past profits an estimate of the distributor’s lost profits on sales to a single end user. The model assumed that the distributor would have accounted for the end user’s *entire* purchases of the product. The only adjustment for possible competition by other distributors (as to past profits) was a ten percent reduction in price, which the expert claimed to be “the functional and mathematical equivalent of assuming that a significant portion of [the purchaser’s] media business would go to other distributors or manufacturers.” *Id.* The court upheld an award of damages despite the apparently arbitrary choice of the ten percent figure.

116. *J.T. Gibbons, Inc. v. Crawford Fitting Co.*, 704 F.2d 787, 792–94 (5th Cir. 1983) (allowing no damages where termination by one supplier did not limit plaintiff’s ability to obtain product or increase plaintiff’s costs).

rational mitigation efforts before it is compared with the but-for condition.

B. Growth During the Damage Period

The problem of accounting for competitive responses is related to the problem of assuming a growth rate for the future. Courts regularly reject such predictions as unjustified where the growth rate seems arbitrarily chosen.¹¹⁷ Consider a particularly clear instance of such arbitrariness:

To forecast sales through 1987, William McGlinchy [the plaintiff, who was treated as an expert] said that he “took the 838,000 pounds for 1982 actual sales and applied the 41 percent [compound annual] growth figure.” He asserted that he based the 41 percent growth rate on local economic data, country by country in Southeast Asia, dating from the 1970's. Yet William McGlinchy later acknowledged that in fact he first divined a total sales figure for 1987, then plugged in a compound growth rate—41 percent—that would work backward to the 1982 actual sales figure. Although the study stated that companies he had been associated with had enjoyed growth rates of 41 percent and 83 percent, the study gave no indication of how he estimated a total sales figure for 1987. Lacking any sound foundation, the study would mislead a jury into believing that damages had grown exponentially over the relevant period.¹¹⁸

Plaintiffs often contend that, because their sales were increasing at some rate before the defendant's illegal action, the same rate would continue indefinitely. But projection of an unbounded continuation of a prior growth rate ignores the responses of other firms as well as limitations on efficient scale of operations.¹¹⁹ Thus, if the plaintiff is to

117. *Keener v. Sizzler Family Steak Houses*, 597 F.2d 453, 457 (5th Cir. 1979) (rejecting plaintiff's bare assertion that “if he had been free to raise prices, he could have increased his volume ‘anywhere from one to three percent’”).

118. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988). See also *Wells Real Estate, Inc. v. Greater Lowell Bd. of Realtors*, 850 F.2d 803, 816 (1st Cir.) (finding unfounded prediction of growth by plaintiff but for defendant's action insufficient), *cert. denied*, 488 U.S. 955 (1988).

119. *Park v. El Paso Bd. of Realtors*, 764 F.2d 1053, 1067 (5th Cir.) (rejecting estimate that plaintiff would have been able to achieve a twenty percent market share and a profit margin of thirty percent without provoking responsive price cuts by competitors), *cert. denied*, 474 U.S. 1102 (1986); *American Bearing Co. v. Litton Indus., Inc.*, 540 F. Supp. 1163, 1173 (E.D. Pa.) (rejecting expert's projection of market shares of 12.5%, 37%, and 50% in successive years, when the estimates failed to account for defendant's probable responsive price cuts), *aff'd*, 729 F.2d 943 (3d Cir.), *cert.*

support an inference of continued growth, it must take account of maximizing responses and scale economies.¹²⁰ In addition, one must consider the limits of the size of the market.¹²¹

C. *The Duration of the Damage Period*

The need to account for likely competitive responses (and mitigation efforts) also affects the duration of the damage period. When plaintiffs have been excluded from the market or denied a source of supply, they sometimes claim damage periods that extend many years into the future. Because a business has no natural life, the effects of permanent economic impairment may persist for many years. On the other hand, new products, new technology, new entry, changed business conditions,

denied, 469 U.S. 854 (1984); *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 391 (6th Cir.) (rejecting 247% annual growth rate in competitive market), *cert. denied*, 372 U.S. 907 (1963).

120. In *Park*, 764 F.2d at 1058, the plaintiff alleged that it had been excluded from the El Paso market for real estate services. It started its real estate brokerage in 1975, charging flat fees to homeowners instead of the standard practice of commissions based on the price of the home. Its business increased until 1979, then declined sharply until 1982, when it finally left the market. The plaintiff's expert estimated that, but for the boycott by the defendant board of realtors, the plaintiff's lower flat rate would have allowed it to gain twenty percent of the market by 1983, and that only at that point would the defendants have begun competing on price. *Id.* at 1067. The court rejected this projection as speculative. *Id.* The expert offered no evidence that homeowners chose brokers based on price or that the other brokers would not have protected their market shares by competing at an earlier date. He offered no analysis of other real estate markets and could not point to another real estate business in the country that possessed twenty percent of the market. The largest El Paso firm at the time had less than seven percent. *Id.*

In *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 439 (5th Cir. 1985), the plaintiff's expert testified that the plaintiff's sales of winches would have steadily risen from 250 in October of 1978 (the month it was unlawfully terminated) to 520 per month by December of 1979, at which point it would have leveled off. The expert based this prediction on the expert's impression that this was "the way sales were running." *Id.* at 441. The court found this statement inadequate to support the verdict, but nevertheless found adequate support elsewhere in the record: (1) the fact that the defendant's winches were the "Cadillac" of winches; (2) the defendant's statement to the plaintiff that distributors of the defendant's winch often made \$300,000 per year; (3) the plaintiff's opinion that, given sufficient supplies, it could sell 600 to 700 of the defendant's winches per month; and (4) a different distributor's projected sales for the same period. *Id.* at 440-41. The court stated that it would have been "more comfortable with [the] projection if it had been tied to the history of a similar distributor—a 'yardstick' for comparison purposes." *Id.* at 440. Admitting that the issue was close, the court found sufficient evidence to create an issue for the jury. *Id.* at 441..

121. For example, in *Key Enterprise*, see *supra* note 68, the plaintiff's actual monthly sales increased steadily until shortly before the foreclosure. A simple linear regression line drawn through these points would have projected a 250% increase in monthly sales over five years. This amount would have substantially exceeded the total market's sales. Consequently, the plaintiff chose to offer a damage theory that projected constant sales over the five years at an amount equal to the average monthly sales for the six months prior to foreclosure.

population changes, and so on may overwhelm the lingering effects of an antitrust violation. Of course, if the claimed damage period is arbitrarily long, courts will find the claim speculative.¹²² Likewise, entirely unsupported assertions about conditions far in the future will doom a damage theory.¹²³

The question is how to remove the arbitrariness. Courts have sometimes taken a plaintiff's managers' life expectancy as relevant to the duration of future damages.¹²⁴ But this approach ignores a host of factors, including competitive responses, and possible mitigation by the plaintiff that could attenuate the consequences of any antitrust violation. As one court observed, antitrust harm is not like a personal injury that results in a permanent disability.¹²⁵ Courts will also sometimes find appropriate points at which to cut off the damage period based upon when the illegal conduct ends (for example by injunction),¹²⁶ or its effects are clearly superseded by other events (for example, when the defendant could lawfully have terminated its relationship with the plaintiff at a certain time).¹²⁷ Perhaps the most important constraint on

122. *Mid-Texas Communications Sys., Inc. v. AT&T*, 615 F.2d 1372, 1391-92 (5th Cir.) (rejecting arbitrary 27-year damage period), *cert. denied sub nom. Woodlands Telecommunications Corp. v. Southwestern Bell Tel. Co.*, 449 U.S. 912 (1980).

123. *McGlinchy v. Shell Chem. Co.*, 845 F.2d 802, 807 (9th Cir. 1988) (rejecting plaintiff's testimony that expenses would remain constant at \$60,000 for nine years).

124. *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 864 (5th Cir.) (permitting inference of duration of business based upon "plaintiff's age, health, and desire to remain in the business"), *cert. denied*, 454 U.S. 1125 (1981); *Arnott v. American Oil Co.*, 609 F.2d 873, 888 (8th Cir. 1979), *cert. denied*, 446 U.S. 918 (1980). *Cf. Simpson v. Union Oil Co.*, 396 U.S. 13, 15-16 (1969) (Black, J., dissenting):

At the time the cause of action arose petitioner's life expectancy was about 25 years. The jury had a right to believe that his business would have grown through those 25 years, and no one can say with any absolute assurance that the jury verdict was in excess of the immediate and long-term returns he might have realized from his business during that period.

125. *Simpson v. Union Oil Co.*, 411 F.2d 897, 909 (9th Cir.), *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 864 (5th Cir.) (permitting inference of duration of business based upon "plaintiff's age, health, and desire to remain in the business"), *cert. denied*, 454 U.S. 1125 (1981), *rev'd per curiam on other grounds*, 396 U.S. 13 (1969).

126. *White & White, Inc. v. American Hosp. Supply Corp.*, 540 F. Supp. 951, 1039 (W.D. Mich. 1982) (stating "[a]ssuming defendant's full compliance [with injunction], the court is unable to find with any degree of certainty that plaintiffs will continue to sustain further damage."), *rev'd on other grounds*, 723 F.2d 495 (1983). The possibility (not certainty) of injunctive relief poses a vexing problem for damage calculations. It is not simply a matter of cutting off the flow of future damages when the injunction takes effect. In most instances, separate damage calculations, with and without injunctive relief, are necessary.

127. *Burton Supply Co. v. Wheel Horse Prods., Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,224, at 97,518 (N.D. Ohio 1974). *But see Arnott*, 609 F.2d at 887 (permitting damages beyond term of contract based on renewal expectancy).

the duration of the damage period is the required assumption of rational economic behavior. If the plaintiff's damage theory assumes rates of return that far exceed normal rates and fails to account for probable entry by new firms, the theory will likely be rejected.¹²⁸

An alternative to proof of a lost stream of future profits is to prove a reduction in the value of the plaintiff's business.¹²⁹ This approach accepts the market's assessment of the consequences of the illegal conduct, reflected in the price at which the plaintiff's stock is traded. If the plaintiff corporation's stock is not publicly traded, expert testimony can establish the value of the business. In many ways, this approach simplifies the various factors affecting speculativeness, such as mitigation and the effect of future competition, by its assumption that the value of the business accounts for those factors.¹³⁰ The plaintiff is not, however, limited to the going-concern value of the business at the time of the injury if subsequent experience shows the actual gains to be greater.¹³¹

128. In *Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987), a recently-formed seller of telex terminals sued Western Electric for refusing to provide it with lists of independent telex vendors. For its first few months in business, the plaintiff was able to sell 1800 terminals, or twenty percent of the market. *Id.* at 372-73. After the refusal, the plaintiff was quickly driven out of business. *Id.* The plaintiff's expert testified that the plaintiff would have sold an additional 10,000 terminals over the next three years (in addition to the 1800 already sold), earning \$54 million. The district court awarded \$54 million (\$24 million for antitrust damages and \$30 million for breach of contract) then, without explanation, remitted the award to \$12 million. *Id.* at 382-83. The circuit court reversed, holding that the damages were speculative. The court found that the plaintiff corporation had originally been organized as a tax shelter and had expected profits only to be \$1.4 million over the next 10 years. The profits estimated by the plaintiff in its damage study (\$54 million) represented a 191% return on its investment. The court of appeals reasoned that "a rate of return so far in excess of market rates of return would be a magnet drawing productive resources into the market—and confronting Olympia with competition from far more experienced firms." *Id.* at 382. The court also rejected the \$12 million awarded by the district court, which represented a 41% return, because the record contained "no basis for a rational estimation of Olympia's damages." *Id.* at 383.

129. *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 429 n.15 (5th Cir. 1985); *Graphic Prods. Dist., Inc. v. Itak Corp.*, 717 F.2d 1560, 1580 n.37 (11th Cir. 1983); *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 663-64 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975).

130. This is consistent with the efficient markets hypothesis of modern finance. Whatever information is available will be incorporated in the value of assets. As a result, one cannot beat the market without information that is unknown to anyone else. For a brief examination, see J. Fred Weston and Eugene F. Brigham, *Managerial Finance* 741-45 (7th ed. 1981).

131. *Fishman v. Estate of Wirtz*, 807 F.2d 520, 552 (7th Cir. 1986): "[W]e know of no case that suggests that a value based on expectation of gain is more relevant and reliable than one derived from actual gain. [Moreover,] [w]e know of no requirement that damages must always be computed as of the time of the injury or, if not, reduced by some appropriate discount rate to produce a value as of that date." *Id.*

The plaintiff may recover its lost past profits plus the going concern value of the company if the evidence on which it can base an assessment of the value is still available.¹³² Of course, the plaintiff may not recover both the going-concern value of the business and lost profits after the point of valuation; nor may it recover damages for lost profits after it sold its income-producing assets without deducting from the award the amount received from the sale.¹³³

D. *Alternative Scenarios*

In most instances, the plaintiff cannot predict competitive responses with certainty. Courts nevertheless often accept damage theories that take account of competitive responses of others explicitly, even if the estimated magnitude of the responses is virtually arbitrary. In such cases, the plaintiff typically will offer several scenarios on differing assumptions, and leave the choice of the appropriate scenario to the jury.¹³⁴ Such an approach makes the jury's choice of a "conservative" scenario apparently reasonable, despite the inherent arbitrariness of the values chosen.¹³⁵

132. *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931) (holding damages include both lost past profits and reduced value of its business); *Farmington Dowel Prods. Co. v. Forster Mfg. Co.*, 421 F.2d 61, 82 n.47 (1st Cir. 1969); *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958-59 (10th Cir. 1959) (same), *cert. denied*, 363 U.S. 843 (1960). In *Farmington*, because the business had not been in existence for ten years, the court determined that the going-concern value could not be determined. *Id.* at 80-81.

133. *William Inglis & Sons Baking Co. v. Continental Baking Co., Inc.*, 981 F.2d 1023, 1024 (9th Cir. 1992):

The amount paid for the bakery fixtures and equipment has an impact on damages. This amount was paid for assets of Inglis. It would be double-dipping for Inglis to have received an amount for the bakery fixtures and now to receive damages representing its lost future profits, because, once the bakery fixtures were sold, they could no longer be used to generate profit. Put another way, as things stand Inglis received the proceeds from the sale of the fixtures and equipment but not a profit stream from the use of these assets. If the violation had not occurred, Inglis would have received the profit stream but not had the proceeds of their sale. Inglis' net damage is the difference between the lost profit stream and the proceeds it did receive. Consequently, before the damages are trebled the amount allocable to the bakery fixtures should be deducted from the profit stream to determine damages.

134. *In re Wyoming Tight Sands Antitrust Cases*, No. 85-2349, 1990 WL 155542, at 13 (D. Kan., Sept. 6, 1990) (rejecting defendant's motion to exclude alternative damage theories, because "as long as each theory is a reasonable approximation of competitive terms which Pipeline could have been expected to demand at the time, it is for the jury to decide which theory to apply").

135. *See Fontana Pipe & Fabrication v. Ameron, Inc.*, 1993 WL 159908, at 2-3 (9th Cir., May 14, 1993).

In one case, the plaintiff's economist projected the plaintiff's lost profits to the year 2019, providing five possible scenarios showing differing degrees of market success.¹³⁶ Case one calculated lost profits of \$5,659,618 on the assumption that the plaintiff would have been the sole distributor to the principal buyer. Case two calculated lost profits of \$3,371,865 using a ten percent sale price discount to account for competition by other suppliers. Case three calculated lost profits of \$3,177,181, making a different competition adjustment by assuming that the plaintiff would continue to charge the full retail price with a fifty percent reduction in sales. Case four calculated lost profits of \$2,033,295, making both of the competition adjustments in cases two and three. Case five calculated lost profits of \$1,468,355 by assuming both competition adjustments, but making a greater than ten percent price reduction.¹³⁷

The plaintiff also introduced evidence showing the plaintiff's prior success as a distributor; its long-term association with the principal buyer and other customers; its ability to compete in price and special delivery requirements; and its reputation for customer service, product testing and delivery, and technical know-how. In addition plaintiff showed the principal buyer's need for the product.¹³⁸ The jury accepted case four and awarded \$2,033,295 in damages. The trial court set aside the verdict on the ground that the ten percent price discount was arbitrary, but the court of appeals reversed and reinstated the award.¹³⁹ The existence of alternative scenarios, even ones based on purely hypothetical variations, manifestly played a role in the court's conclusion that the award was not speculative. The alternatives presented appeared to depict the full range of possible outcomes. The jury was permitted to choose an apparently conservative scenario based on its members' general experience.

VI. CONCLUSION

Courts' insistence on an evidentiary and theoretical basis for damages—which they express by rejecting “speculative” damages—is consistent with the idea of optimal damages. If damages lack an evidentiary basis, the substantive law would be thwarted by permitting

136. *DeLong Equipment Co. v. Washington Mills Electro Minerals Corp.*, 990 F.2d 1186, 1205 (11th Cir.), *cert. denied*, 114 S.Ct. 604 (1993).

137. Each of the cases included the accountant's projection of lost profits prior to 1994. *Id.* at 1205.

138. *Id.* at 1203.

139. *Id.* at 1204–06.

recovery where no demonstrable anticompetitive consequences occurred. By the same token, an unreasonably strict standard of proof would weaken the damage action as a deterrent.

The cases suggest there are two principal defects in the proof of antitrust damages that provoke judicial references to speculativeness. First, the base-period experience and the damage-period experience must be comparable. Courts will accept a projection only if the plaintiff or a firm quite like it performed as well, or nearly so, as the projected scenario when the defendant's illegal conduct was not a factor. The degree of comparability that is required depends upon the court's perception of the tendencies of the alleged practice. Second, the but-for scenario must account for rational maximizing responses by all actors in the market during the damage period. One may not assume a free path to profitability in assuming that the defendant had not acted illegally.

Plaintiffs often try to avoid problems of speculativeness by presenting their models as "conservative." Typically, this approach requires the plaintiff to account for all adverse factors and assume one of the less rosy scenarios. The apparent appeal of this approach to courts, despite its arbitrary elements, says much about the nature of speculativeness as a legal construct. Proof of antitrust damages must be practical given the proof normally available. If the causal factor is explicitly acknowledged, not tacitly assumed, and an admittedly arbitrary range of alternative values is presented, courts are apparently willing to permit juries to rely on general experience in making a choice of one of the values.

