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ARTICLES

THE CONFLUENCE OF MUDDIED WATERS: ANTITRUST CONSEQUENTIAL DAMAGES AND THE INTERPLAY OF PROXIMATE CAUSE, ANTITRUST INJURY, STANDING AND DISAGGREGATION

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INTRODUCTION

The concept of consequential damages is commonplace in both contract and tort law.¹ In the perennial of first year contract cases, *Hadley v. Baxendale*,² students learn that the party breaching a contract is liable not only for the immediate loss caused by the breach, but for all losses which the party had reasonable notice of at the time of contract formation.³ In another first year perennial, *Palsgraf v. Long Island Railroad Co.*,⁴ students learn that a tortfeasor is liable for all losses that are a reasonably foreseeable result of his conduct. The tortfeasor, however, is not liable for those losses which are not reasonably foreseeable, even though they are actually caused by him.

Each of these fundamental cases played a part in establishing an important rule to deal with the reality that misconduct can cause a number of harms, each of which in turn can cause other harms, and so on ad infinitum down the chain of causation. Each rule occupies a middle ground, which does not unfairly limit damages to the most immediate result of the misconduct. Likewise, each does not run to the other extreme and allow recovery for every conceivable consequence of the misconduct. Unfortunately, unlike contract and tort law, antitrust law does not have such a defined rule concerning damages. For the past hundred years, the Sherman Act has governed antitrust law.⁵ Since this jurisprudence spans many decades, one would think that there would be an established rule governing the availability of consequential damages in antitrust cases. Traditionally, there has been such a rule, albeit one rarely discussed. Recently, however, the issue of consequential damages has become clouded due to a number of new innovations in antitrust doctrine that have

1 The term "consequential damages" is frequently used in contracts cases. See *Developments in the Law - Damages*, 61 HARV. L. REV. 113, 116-18 (1947). Sometimes courts use the phrase "general damages" to refer to those damages that automatically follow from a finding of liability and "special damages" to refer to those that do not. *Id.* The general versus special nomenclature is most prevalent in tort cases. *Id.*

2 9 Ex. 341, 156 Eng.Rep. 145 (1854).

3 For purposes of this article, immediate damages in antitrust cases will be called "direct damages" while those analogous to other losses will be called "consequential damages."

4 248 N.Y. 339 (1928); see also *Van Leet v. Kilmer*, 252 N.Y. 454, 455 (1930) (requiring foresight when determining liability for losses).

5 See Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1998)).

caused unexpected and sometimes contradictory results.

In order to make these issues more concrete, we will illustrate the problem with a recurring hypothetical. Suppose Jane runs a fruit stand at an offramp on the interstate highway. There she sells three items: Oranges, fresh-squeezed orange juice, and apples. A cartel of orange producers, called Moonkissed, engages in anticompetitive conduct that restrains the market for oranges.⁶ This behavior may consist, for example, of a refusal to deal with Jane or predatory pricing. Lastly, such anticompetitive behavior concerns only fresh oranges themselves and does not immediately involve fresh-squeezed orange juice. As a result, Jane can no longer sell oranges or fresh-squeezed orange juice. Without the revenue from those sales, Jane goes out of business altogether.⁷

Clearly, Jane can recover her lost profits from the sale of oranges because those are direct damages. The issue arises, however, whether she can recover the profits lost on the sale of the fresh-squeezed orange juice. One consideration in answering that question is whether it matters if fresh-squeezed orange juice occupies a separate market from that for fresh oranges.⁸ In addition, another issue unresolved is whether Jane can recover her lost profits from the sale of apples.⁹ Finally, should it matter if

6 See *id.* In relevant part, the Sherman Act reads:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Section 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony. . .

Id.

7 The analysis would be the same if Jane remained in business, but the sales of orange juice and apples were reduced because of her loss of orange sales. Such an effect might occur if Jane lost some customers who would have come to the fruit stand for oranges and also bought orange juice or apples while they were there. Nevertheless, the hypothetical focuses on the more factually pristine situation where a plaintiff is driven out of business altogether. Thus the factual link between the misconduct affecting one category of products and the loss of sale of other products is readily apparent.

8 Generally, to prove an antitrust violation, except in per se cases brought under Section 1 of the Sherman Act, a plaintiff must establish, first, what the relevant market is, and second, that the defendant(s) had monopoly or market power in that relevant market. See, e.g., *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*, 472 U.S. 284, 297 n.9 (1985) (finding necessary showing of some kind of restraint on competition was lacking); *Sullivan v. National Football League*, 34 F.3d 1091, 1112 (1st Cir. 1994) (requiring harm to competitors in order to be violative of antitrust laws).

9 The issue of consequential damages might conceivably arise in cases brought by consumers, but this article focuses on the issue where it usually arises. In cases brought

Moonkissed also sells orange juice or apples?

This article considers the issue of whether, and under what circumstances, consequential damages are available in antitrust cases. Part I of this article addresses the question of consequential damages under the doctrine of proximate cause. Part I also demonstrates that consequential damages are available when proximate cause is established. Part II analyzes the issue under the recent doctrine of antitrust injury and considers the arguments for and against the availability of consequential damages under this doctrine. Moreover, Part II further concludes that consequential damages are available so long as the plaintiff establishes antitrust injury in connection with her direct damages. Part III discusses limitations on who may recover consequential damages under the doctrine of antitrust standing. Part IV analyzes the difficulties in proving the proper amount of antitrust consequential damages in light of the disaggregation doctrine. The article concludes with a recommendation of the proper standard to be used in evaluating antitrust consequential damages.

I. PROXIMATE CAUSE

Antitrust law was originally considered a codification of the common law.¹⁰ Conduct restraining trade could thus be analogized to other torts. For example, conduct that restrains trade may harm others in much the same way that trespass or battery does.¹¹ Consequently, it is not surprising that courts have adopted the tort concept of proximate cause to determine the appropriate scope of antitrust damages.¹² Under this analysis,

by a defendant's competitors or others in the chain of distribution of the products of the defendant or a competitor of defendant.

¹⁰ See *Standard Oil Co. of N. J. v. United States*, 221 U.S. 1, 60 (1911) (concluding that standard of reason applied at common law was intended to be measure used for purpose of determining whether certain conduct violates Sherman Act). See generally Donald Dewey, *The Common-Law Background of Antitrust-Policy*, 41 VA. L. REV. 759, 759 (1955) (discussing creation of Sherman Act as codifying common law antitrust principals); Franklin D. Jones, *Historical Development of the Law of Business Competition*, 36 YALE L.J. 42, 42 (1926) (discussing early common law antitrust policies in colonial America).

¹¹ See Dewey, *supra* note 12, at 760-61 (discussing use of reasonable test used in common law tort cases to determine harm caused by restraint on trade).

¹² See William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1450-51 (1985). The article analogizes the appropriate scope of liability in antitrust to the proximate cause doctrine in tort law. *Id.* See, e.g., *Associated Gen. Contractors of Cal., Inc., v. California State Council of Carpenters*, 459 U.S. 519, 532 (1983). Although particular common-law limitations were not debated in Congress, the frequent references to common-law principles imply that Congress simply assumed that antitrust

plaintiffs are entitled to recover all damages proximately caused by the antitrust violation once it is proven.¹³

*Perkins v. Standard Oil Co.*¹⁴ demonstrated the proximate cause standard as it relates to consequential damages. This standard allows for consequential damages as a matter of course when the nexus between the misconduct and the loss is sufficiently close. In *Perkins*, the plaintiff recovered lost profits on gasoline sales that could not be made due to the defendant's predatory pricing scheme. Since the defendant's pricing scheme concerned the price for gasoline itself, the lost profits component of the plaintiff's damages constituted direct, rather than consequential damages. Moreover, the Court held that the plaintiff could recover for items such as loss of brokerage fees, rental on service station leases, and other indebtedness proximately caused by the defendant's predatory pricing. These damages were clearly consequential rather than direct. The Court reasoned that they were nevertheless recoverable because the plaintiff "was entitled to present evidence of all of his losses to the jury."¹⁵

The *Perkins* Court did not address the concept of consequential damages as explicitly as it might have if it had thought it was dealing with a controversial concept. Indeed, few courts have approached antitrust consequential damages with the recognition that the subject is hotly disputed as a conceptual matter. Given the familiarity of consequential damage doctrine in tort law, there generally has not been a perceived need to examine how these damages work in the antitrust context.¹⁶

damages litigation would be subject to constraints comparable to well-accepted common-law rules applied in comparable litigation. *Id.*

¹³ See *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 697 (1962) (stating jury can infer causal relation exists where plaintiff proves a loss that antitrust violation would be likely to cause); see also *Pierce v. Ramsey Winch Co.*, 753 F.2d 416, 436 (5th Cir. 1985) (stating plaintiff may recover "damages proximately caused by an antitrust violation.") See, e.g., *First Nationwide Bank v. Gelt Fund Corp.*, 27 F.3d 763, 799 (2nd Cir. 1984) (describing proximate cause as "reasonably foreseeable" or "anticipate as a natural consequence").

¹⁴ 395 U.S. 642, 649-50 (1969) (concluding that injured party must show causal connection between price discrimination and injury suffered in order to recover damages).

¹⁵ See *id.* at 650. In antitrust circles, any cases predating the late 1970's are sometimes derided as an "old case," presumably bereft of Chicago School enlightenment. But the Supreme Court demonstrated that its 1969 decision in *Perkins* is still good law when it cited the case as authority for affirming an antitrust damages award in 1990 in *Texaco Inc. v. Hasbrouck*, 496 U.S. 543, 566-67 (1990), where the Court upheld the principle of *Perkins* notwithstanding "additional link to the distribution chain."

¹⁶ For example, many courts have awarded a plaintiff the going concern value of her

Several circuit court cases, however, have discussed the issue in more depth than *Perkins*. For example, in *Greene v. General Foods Corp.*,¹⁷ a distributorship, terminated as a result of the manufacturer's anticompetitive conduct, was awarded not only lost profits resulting from the loss of that manufacturer's product lines (direct damages), but also lost profits from the loss of the manufacturer's *other* product lines.¹⁸ Applying this holding to our hypothetical, Jane would be allowed to recover for the lost orange juice and apple sales that occurred as a result of the cartel's anticompetitive behavior. Furthermore, in *Graphic Prods. Distrib. v. Itek Corp.*,¹⁹ the court acknowledged that under *Greene*, a distributorship that is improperly terminated due to anticompetitive behavior by the manufacturer may be able to recover losses suffered in other product lines (consequential damages) if the jury concludes that these losses were proximately caused by the termination.²⁰

Both the *Greene* and *Graphic* holdings have been embodied in the jury instructions typically issued in antitrust cases:²¹

business when she was driven out of business as a result of defendant's anticompetitive conduct. See, e.g., *Copy-Data Sys., Inc. v. Toshiba Am., Inc.*, 663 F.2d 405 (2d Cir. 1981), *rev'd* 755 F.2d 293 (2d Cir. 1985); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26, 46-47 (5th Cir. 1972). The "courts are to take a charitable view of the difficulties of proving damages . . . when . . . a plaintiff must try to prove what would have accrued to him in the absence of the defendant's anti-competitive practice." *Id.*; *Farmington Dowel Prods. Co. v. Foster Mfg. Co.*, 421 F.2d 61, 80 (1st Cir. 1969). A damage award is confined to profits lost to date plus going concern value at that date when plaintiff went out of business. *Id.* It is unclear from the factual discussions in the above cases whether plaintiff's business contained any sources of revenue other than those in the market directly affected by the anticompetitive conduct. To the extent such other sources of revenue were incorporated into the going concern value, these courts awarded consequential damages, albeit without discussion.

17 517 F.2d 635, 660-66 (5th Cir. 1975) (finding evidence to support injury both with respect to lost profits and overall diminution of plaintiff's business).

18 See *id.* at 660-66; see also *Skor-Line Rambler, Inc. v. American Motors Sales Corp.*, 543 F.2d 601, 604 (7th Cir. 1984) (stating that "to be meaningful, such damages must include the amount of money that the dealer could have obtained in the future from the profits form his franchise").

19 717 F.2d 1560, 1583 (11th Cir. 1983) (noting that court could not assume lost profits are never recoverable).

20 See *id.* at 1583; see also *Malcolm v. Marathon Oil Co.*, 642 F.2d 845, 864 (5th Cir. 1981) (allowing proof of lost profits to be jury question); *Godix Equipment Export Corp. v. Caterpillar Inc.*, 948 F.Supp. 1570, 1582 (S.D. Fla. 1996), *aff'd*, 144 F.3d 55 (11th Cir. 1998) (holding that "a plaintiff's damages in a lost profits antitrust case are simply the profits that a plaintiff would have made in a competitive market absent the effect of the antitrust activity").

21 See *Sample Jury Instructions in Civil Antitrust Cases*, Prepared by a Task Force of the Section of Antitrust Law of the American Bar Association (William A. Montgomery et. al. 1990).

If you find that plaintiff has been injured by an antitrust violation committed by defendant, the law provides that plaintiff should be fairly compensated for *all* damages to its business and property which were a direct result or likely consequence of the conduct which you have found to be unlawful.²²

Similarly, the instruction on "Lost Profits" states that a "[p]laintiff is entitled to recover *any profits it lost* as a result of an antitrust violation caused by defendant."²³ Consequently, antitrust law and tort law share the characteristic that juries, not courts, determine as a factual matter whether the causal link between the defendant's misconduct and a given item of damage is sufficiently close for the plaintiff to recover.²⁴

Although no court has explicitly held that consequential damages are unavailable as a matter of law in antitrust cases, this does not ensure that the courts will always award consequential damages when sought. In fact, some courts have found consequential damages unavailable on the facts of a particular case before them.²⁵ These rulings, however, do not undermine the legal proposition that such damages are available upon a proper factual showing.

II. ANTITRUST INJURY

The issue of consequential damages would be unworthy of discussion if the proximate cause doctrine was the only element of consideration in antitrust cases. Other antitrust doctrines of more recent vintage, however, appear to have muddied the otherwise clear application of the proximate cause standard to the issue of consequential damages. Foremost among these recent

²² See *id.* at F-9 (emphasis added).

²³ See *id.* at F-14 (emphasis added).

²⁴ Of course, once the facts are established beyond dispute, a court will review whether, as a matter of law, the connection is sufficiently close to warrant recovery, but the applicable legal standard of proximate cause is so deferential to the factual finding that the fact-finder's determination will rarely be assailable for legal infirmity.

²⁵ See *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 661 F. Supp. 1448, 1479-80 (D. Wyo. 1987), *aff'd. in part and rev'd. in part*, 885 F.2d 683 (10th Cir. 1989) (noting that plaintiff made no showing as to how the defendant's attempt to monopolize natural gas produced in Wyoming, for transmission out of state, caused plaintiff to lose sales on natural gas not produced in Wyoming and not shipped out of state); see also *H.J., Inc. v. ITT Corp.*, 867 F.2d 1531, 1549-50 (8th Cir. 1989) (concluding that plaintiff made no showing that defendant's predatory pricing caused plaintiff's losses).

doctrines is "antitrust injury," first articulated by the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*²⁶

A. *The Content of the Antitrust Injury Doctrine*

The Court in *Brunswick* held that a prerequisite for recovering damages under the antitrust laws²⁷ is that a:

[P]laintiff must prove [the existence] of *antitrust injury*, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anti-competitive effect either of the violation or of the anticompetitive acts made possible by the violation.²⁸

Furthermore, in order to constitute antitrust injury, the plaintiff's injury must be "attributable to an anti-competitive aspect of the practice under scrutiny."²⁹ Since the Sherman Act's focus is on consumer welfare, it has been stated that "antitrust injury occurs only when the claimed injury flows from acts harmful to consumers."³⁰ In other words, "[t]he restriction or distortion of consumer choice by reason of the antitrust defendant's conduct in the market is the essence of antitrust injury."³¹

26 429 U.S. 477, 489 (1977) (setting forth "antitrust injury" as type of injury that antitrust laws were intended to prevent); see also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 108-10 (1986) (indicating that to recover, plaintiffs must prove type of injury antitrust laws were designed to prevent, namely an "antitrust injury").

27 See Clayton Act, ch. 323, § 4, 38 Stat. 730, 731-32 (1914) (current version at 15 U.S.C. § 15). This section governs award of damages in antitrust cases. *Id.*

28 See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. at 489 n.14. In *Brunswick*, the Supreme Court, after defining "antitrust injury," observed that its definition: [D]oes not necessarily mean . . . that § 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior—predatory below-cost pricing, for example—may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished.

Id.; see also *Zenith Radio Corp. v. Hazeltine Research*, 395 U.S. 100, 125 (1969). The Court, when applying its definition to the facts of a particular case, found "antitrust injury" in conspiring to exclude prospective patent licensee's from the Canadian market. *Id.*

29 See *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990) (finding plaintiff's claimed injuries were direct result and intended objective of defendant's price-fixing scheme); see also *State Oil Co. v. Kahn*, 118 S.Ct. 275, 287 (1997) (indicating that vertical maximum price fixing should be evaluated under rule of reason to determine existence of anticompetitive conduct).

30 See *Rebel Oil Co. v. Atlantic Richfield Co.*, 51 F.3d 1421, 1445 (9th Cir. 1993) (finding plaintiff alleging "primary-line discrimination" must prove antitrust injury by showing injury flows from effects of conduct that are harmful to consumer welfare).

31 See *Sullivan v. Tagliabue*, 34 F.3d 1091, 1101 (1st Cir. 1994) (noting "overall con-

However, the importance of the antitrust injury requirement was underscored in 1990 when the Supreme Court decided *Atlantic Richfield Co. v. USA Petroleum Co.* ("ARCO").³² In *ARCO*, the plaintiff alleged that the defendant engaged in vertical price-fixing, a practice then considered per se illegal under any circumstances.³³ The Court held that the plaintiff, absent proof of price predation, did not suffer antitrust injury. The Court reasoned that any increase in the defendant's prices would benefit the plaintiff's ability to lure customers away from the defendant, and that any non-predatory decrease in the defendant's prices constituted price competition which is conduct to be praised rather than condemned under the antitrust laws.³⁴ *ARCO* is especially important since before its decision the antitrust injury requirement could be interpreted as merely a method to eliminate claims that were substantively weak.³⁵ The *ARCO* decision made clear that even claims that are substantively strong will not always result in a favorable outcome to a party whose injury is unrelated to the harmful effect on competition.

In this respect, *ARCO* and other Supreme Court cases over the last twenty years, such as *Brunswick and Associated General Contractors v. California State Council of Carpenters*,³⁶ display an interesting trend. Although it has become commonplace to note that the overall trend has favored defendants, the Supreme Court has actually changed the substantive aspect of antitrust

sumer preferences in setting output and prices is more important than higher prices and lower output, per se, in determining whether there has been an injury to competition" (citing *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 107 (1984)).

³² 495 U.S. at 331 (holding plaintiff did not satisfy requirement of proving antitrust injury).

³³ See *Albrecht v. Herald Co.*, 390 U.S. 145, 164 (1968). The Court held that vertically imposed maximum price-fixing is per se illegal. *Id.*; see also *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 374-75 (1911). Similarly, the Court ruled that vertically imposed scheme to fix minimum prices is per se illegal. *But see Kahn*, 118 S.Ct. at 281. The Court in *Kahn* overruled *Albrecht*, holding that vertical maximum price-fixing is not per se illegal, but would be analyzed under the Rule of Reason. *Id.* The Court found it "difficult to maintain that vertically-imposed maximum prices could harm consumers or competition to the extent necessary to justify their per se invalidation." *Id.* Currently, however, vertical minimum price-fixing is still per se unlawful. *Id.*

³⁴ See *Atlantic Richfield*, 495 U.S. at 337-38 (holding vertical, maximum price fixing agreement, while unlawful under Sherman Act, does not cause antitrust injury unless it results in predatory pricing).

³⁵ See Robert Taylor, *Antitrust Standing: It's Growing-or More Accurately it's Shrinking - Dimensions*, 55 ANTITRUST L.J. 515, 516 (1986) (stating that antitrust injury requirement may only be method of eliminating substantively weak claims).

³⁶ 459 U.S. 519, 536-37 (1983).

law less than practitioners realize. Rather than altering the substantive law, the Court has focused on procedural mechanisms, such as antitrust injury, to prevent private plaintiffs from using the substantive law to their advantage in a way that the Court believes would not enhance the competitive process.³⁷

The rise of the antitrust injury doctrine may have a potentially significant impact on antitrust consequential damage claims. Indeed, the authors have seen defendants argue that the antitrust injury requirement essentially overrules the proximate cause line of authority and renders consequential damages unavailable as a matter of law. As of yet, there is surprisingly little authority squarely addressing this point. This article will consider next the arguments that would be asserted by the defendant, and then the plaintiff, if the hypothetical case of *Jane v. Moonkissed* reached the courts.

B. Antitrust Injury and Consequential Damages: The Defendant's Argument Against Recovery

Defendants arguing against recovery of consequential damages seek to impose a number of antitrust injury requirements, each of which must be established independently for each component of damages. In our hypothetical, *Moonkissed* would argue that *Jane* must not only show antitrust injury to recover for her loss of orange sales, but must also make an independent showing of antitrust injury with respect to orange juice and apples in order to recover for these losses.

Moonkissed would cite to the antitrust injury cases discussed previously, focusing on the language that a plaintiff can recover only for "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."³⁸ *Moonkissed* could further seize upon this language from the *ARCO* case:

³⁷ See, e.g., Norman W. Hawker, *The New Antitrust Paradox - Antitrust Injury*, 44 RUTGERS L. REV. 101, 101 (1991) (arguing vociferously that not only should *Arco* be overruled, but also that antitrust injury requirement should be abandoned in its entirety).

³⁸ See *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977) (holding injury should reflect anticompetitive effect either of violation or anticompetitive acts made possible by violation); see also *Blue Shield of Va. v. McCreedy*, 457 U.S. 465, 483 n.19 (1982) (indicating that relationship between claimed injury and defendant's unlawful conduct is one factor considered in determining redressability of particular form of injury).

[A]n antitrust defendant's misconduct] may have three effects, often interwoven: In some respects the conduct may reduce competition, in other respects it may increase competition, and in still other respects effects may be neutral as to competition. The antitrust injury requirement ensures that a plaintiff can recover only if the loss stems from a [sic] competition-reducing aspect or effect of the defendant's behavior.³⁹

Moonkissed would attempt to link this language to cases stating that harm to competition can generally be evaluated only after a relevant market has been defined and the defendant's market (or monopoly) power assessed.⁴⁰

Relying upon these general principles, Moonkissed could then argue that Jane cannot show antitrust injury for her lost apple sales unless she demonstrates that apples occupy a distinct relevant market in which Moonkissed engaged in anticompetitive conduct. From the facts of the hypothetical, since Moonkissed does not participate in the market for apples, Moonkissed cannot have market or monopoly power with respect to apples because apples occupy a separate relevant market from oranges. Moonkissed would therefore argue that any award of damages for Jane's loss of apple sales would not relate to Moonkissed's behavior in the market for oranges.⁴¹ Moonkissed could bolster its position by citing to cases where direct damages were not allowed because of a failure to establish antitrust injury.⁴² The language of these cases could then be interpreted to imply that consequential damages are therefore not recoverable as well.

Moonkissed could further strengthen its argument by citing to the theoretical work of certain Chicago School academics. These academics have argued that the proper measure of damages is

³⁹ See *Atlantic Richfield*, 495 U.S. at 344 (holding antitrust injury requirement "ensures that a plaintiff can recover only if the loss stems from competition reducing aspect or effect of the defendant's behavior").

⁴⁰ See *Broyles v. Wilson*, 812 F. Supp. 651, 654 (M.D. La. 1993), *aff'd*, 3 F.3d 439 (5th Cir. 1993) (holding market definition is essential to make out antitrust claim); see also *Gough v. Rossmoor*, 585 F.2d 381, 385 (9th Cir. 1978) (finding merit in appellant's contentions that appellee has failed to define relevant market).

⁴¹ Although Moonkissed's conduct eliminates Jane as a seller of apples, her share of that market is too small to affect general competitive conditions in that market.

⁴² See, e.g., *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1531 (3d Cir. 1990) (stating that plaintiff must show extent of actual injury attributable to harm to competition).

determined by the "optimal deterrence" model.⁴³ Under this model, the ideal measure of damages to deter anticompetitive conduct should be equal to the consumer welfare that is lost as a result of the output reduction and/or price increase caused by the conduct. Although theorists admit that the ideal measure of damages can never be attained in the real world, they assert that rules of recovery can be fashioned so that damage awards approximate their ideal.⁴⁴ This "optimal deterrence" model would almost certainly preclude awards of consequential damages because such damages, by definition, do not approximate the higher prices or foregone purchases suffered by consumers in the relevant market affected by defendant's misconduct. In other words, Jane's lost profits on apple sales do not approximate the higher prices consumers will have to pay for oranges as a result of Moonkissed's conduct.⁴⁵

The importance of a relevant market definition to the defendant's argument against consequential damages should not be underestimated. In our hypothetical, this importance can be understood by considering Jane's attempt to recover damages for the profits lost from the loss of fresh-squeezed orange juice sales. If orange juice is included in the market for oranges, then Jane's lost orange juice sales would not constitute consequential damages. Instead, they would be direct damages suffered as a result of the defendant's misconduct. On the other hand, if orange juice is not included in the relevant market, those losses are consequential, and therefore subject to Moonkissed's attack.

This reliance on market definition has an ironic ramification.

⁴³ See, e.g., William M. Landes, *Optimal Sanctions for Antitrust Violations*, 50 U. CHI. L. REV. 652, 676 (1983) (arguing optimal deterrence requires damage award to competitor to depend on net harm, rather than on competitor's lost profits); William H. Page, *The Scope of Liability for Antitrust Violations*, 37 STAN. L. REV. 1445, 1452 (1985) (discussing standard of optimal deterrence, and noting optimal penalty would deter only when welfare loss from reduction in competition outweighed gains in productive efficiency).

⁴⁴ See Page, *supra* note 43, at 1463. As is stated:

The practice that is prohibited must be predictably associated with the kind of harm that the plaintiff alleges. The focus of antitrust injury thus shifts from proving actual causation in the particular case to an economic evaluation of the connection between the harm alleged and the inefficiency of the defendant's conduct.

Id.

⁴⁵ See Roger D. Blair & William H. Page, *"Speculative" Antitrust Damages*, 70 WASH. L. REV. 423, 427 (1995). The optimal deterrence theorists see antitrust injury and the rule against speculative damages as the best doctrinal opportunities for courts to use in imposing their agenda on litigants. *Id.*

Typically, plaintiffs define the market as narrowly as possible in order to increase the defendant's share in the defined market, and thus strengthen the inference that the defendant possesses market or monopoly power.⁴⁶ Conversely, defendants define the market as broadly as possible to obtain the opposite result.⁴⁷ But defendants' arguments against the availability of consequential damages would turn those tendencies upside-down. If the defendants' arguments prevail, plaintiffs would have an incentive to define the relevant market broadly enough to encompass as much of their damages as possible, whereas defendants would have the incentive to do the opposite.

C. *Antitrust Injury and Consequential Damages: The Plaintiff's Argument for Recovery*

A plaintiff in Jane's position, arguing for consequential damages, would be best advised to cite the line of proximate cause cases awarding such damages. Although some of the cases were decided before the antitrust injury requirement was formulated, they directly address the question of consequential damages, whereas the antitrust injury cases cited by Moonkissed do not. In this regard, Jane will argue that Moonkissed cannot cite any case which explicitly held that the antitrust injury requirement renders consequential damages categorically unavailable.

Furthermore, Jane can cite to cases that have held that consequential damages are available even in light of the antitrust injury requirement. Pre-eminent among this authority is Judge Kennedy's (now Justice) dissenting opinion, in *Ostrofe v. H.S. Crocker Co.*⁴⁸ In *Ostrofe*, the plaintiff alleged that he had been fired from his job and then boycotted in the industry for refusing to participate in a price fixing scheme. In a divided opinion, the Ninth Circuit held that the plaintiff had stated two cognizable antitrust claims.⁴⁹ First, the court indicated that the plaintiff

⁴⁶ See IRVING SCHER, ANTITRUST ADVISOR § 1.22 (4th ed. 1998).

⁴⁷ See *id.*

⁴⁸ See 740 F.2d 739, 751 (9th Cir. 1984) (Kennedy, J., dissenting) (arguing that plaintiff's claim should be dismissed because he should be pursuing remedies for wrongful discharge, not treble damages for antitrust violations); see also *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F. Supp. 256, 257 (E.D. La. 1981) (noting that since there were no antitrust injuries, consequential damages were not properly recoverable).

⁴⁹ See *Ostrofe v. H.S. Crocker Co.*, 740 F.2d 739, 740-41. The court found *Ostrofe* had "standing both as a direct boycott victim who sustained antitrust injury from the . . .

had the requisite antitrust standing to assert a claim for the alleged group boycott. Second, the court found that he could "seek treble damages based on his yearly salary as compensation for injuries resulting from Crocker's [the defendant- employer] participation in a price-fixing conspiracy in the labels market."⁵⁰

Justice Kennedy agreed with the plaintiff's first claim, but disagreed with the court as to the second. Justice Kennedy concluded that this injury did *not* constitute antitrust injury, and therefore, Ostrofe lacked antitrust standing to sue.⁵¹ In the context of this discussion, however, Justice Kennedy articulated the key legal point supporting the position that consequential antitrust damages are available under the antitrust injury regime: "We have on occasion *included consequential damages* in an antitrust award, but only when the plaintiff also has *other damages that are related to the decrease in competition.*"⁵² In other words, Justice Kennedy concluded that Ostrofe's problem was not that he was seeking consequential damages, but that he was doing so without proving any direct damages at all.

In our hypothetical, Jane will assert Justice Kennedy's theory concerning consequential damages. Justice Kennedy's analysis begins with the proposition that consequential antitrust damages are those which do *not* independently satisfy the antitrust injury test. Nevertheless, Justice Kennedy stated that the rule is that once the plaintiff establishes direct damages that satisfy the consumer antitrust injury requirement, the plaintiff is entitled to *all* damages proximately caused by that *conduct*, whether direct or consequential. In other words, the plaintiff satisfies the antitrust injury requirement when demonstrating the effects of defendant's conduct in the relevant market. Once that conduct is condemned, the proximate cause cases cited above hold that

market conspiracy," and "as a direct victim of a boycott undertaken as a means to accomplish the purpose of the price fixing conspiracy . . ." *Id.*

⁵⁰ See *id.* (arguing plaintiff's claim for treble damages "does not reflect or respond to the breakdown in competition caused by the antitrust violation").

⁵¹ See *id.* at 750 (noting that "a treble damage measure 'unrelated to the size of the injury increases the total social cost of antitrust enforcement'" (citing William H. Page, *Antitrust Damages and Economic Efficiency: An Approach to Antitrust Injury*, 47 U. CHI. L. REV. 467, 497 (1980))); see also *Greater Rockford Energy & Tech. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (finding that plaintiff lacked standing because it failed to show antitrust injury).

⁵² See *Ostrofe*, 740 F.2d at 751 (awarding lost profits and costs of defending sham patent infringement suit (citing *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1300 (9th Cir. 1984)) (emphasis added)).

the plaintiff should be able to recover for all the harm suffered, even if incurred outside the relevant market, as long as that harm was proximately caused by defendant's misconduct.

Other cases support Justice Kennedy's analysis by applying a similar two-step approach to consequential damage issues. The first step is to determine whether the plaintiff has suffered any antitrust injury from the defendant's conduct. The second step is to treat the amount and type of damages as an issue of proximate cause. For example, in the case *In re Lower Lake Erie Iron Ore Antitrust Litigation*,⁵³ the court affirmed an award of damages by addressing antitrust injury at the outset and then discussing the damages issue in terms of reviewing evidence of causation. In *Rebel Oil v. Atlantic Richfield Co.*,⁵⁴ the court did not require that the antitrust injury flow *only* from the *effects* of defendant's conduct, but instead allowed antitrust injury to follow from the *conduct* itself.⁵⁵ This analysis is in accord with the awarding of consequential damages because these damages flow from anticompetitive conduct, even though such damages do not independently satisfy the antitrust injury requirement resulting from an anticompetitive effect in the relevant market.⁵⁶

Finally, in *Image Technical Services, Inc. v. Eastman Kodak Co.*,⁵⁷ the Ninth Circuit allowed lost profits not only for service revenues resulting from the monopolist's refusal to sell parts to

53 998 F.2d 1144, 1168-76 (3d Cir. 1993) (noting that "the direct nature of the injury absorbs the question of causal connection"); see also *City of Pittsburgh v. West Penn Power Comp.*, 147 F.3d 256, 256 (3d Cir. 1998) (noting determination of antitrust injury requires examining whether causal connection exists between alleged violation and injury).

54 51 F.3d 1421, 1433 (9th Cir. 1995) (stating that "private plaintiffs can be compensated only for injuries that the antitrust laws were intended to prevent").

55 See *id.* at 1433. "To show antitrust injury, a plaintiff must prove that his loss flows from an anticompetitive aspect or effect of the defendant's behavior . . ." *Id.*; see also *Volmar Distribs. v. New York Post Co.*, 825 F. Supp. 1153, 1161 (S.D.N.Y. 1993). The *Volmar* court indicated that plaintiff failed to "allege any 'competition-reducing aspect or effect' of defendants' conduct." *Id.*

56 See Roger D. Blair & Jeffrey L. Harrison, *Rethinking Antitrust Injury*, 42 VAND. L. REV. 1539, 1569-72 (1989). Antitrust injury exists when: (1) there is a logical connection between defendant's misconduct and a decrease in competition; and (2) damage to plaintiff is a necessary consequence of misconduct. *Id.* Consequential damages that satisfy the proximate cause standard will satisfy this proposed two-pronged test for establishing antitrust injury. *Id.*; see also *Bogan v. Northwestern Mut. Life Ins. Co.*, 953 F. Supp. 532, 550 (S.D.N.Y. 1997). The court stated that "[a]lthough the per se rule relieves plaintiff of the burden of demonstrating an anticompetitive effect, . . . , it does not excuse a plaintiff from showing that his injury was caused by the anticompetitive acts." *Id.*

57 125 F.3d 1195 (9th Cir. 1997), *cert. denied*, 118 S.Ct. 1560 (1998); see also *Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1296 (1984) (holding that Handgards' lost profits constituted type of injury antitrust laws were intended to prevent).

independent service providers (direct damages), but also for lost profits on used equipment the independent service providers could not sell. The court reasoned that the refusal to sell ensured that there were no alternative means to having the equipment serviced other than by the monopolist (consequential damages).⁵⁸ Although the court did not refer to antitrust injury specifically while discussing consequential damages, its attention to that requirement elsewhere in the opinion⁵⁹ renders the case positive authority supporting the theory that the antitrust injury requirement does not forbid awards of consequential damages as long as plaintiff's direct damages satisfy that requirement.⁶⁰

Jane could also support her position through the use of academic literature. There is authority arguing against the Chicago School theorists model of "optimal deterrence," a model which almost certainly would preclude awards of consequential damages. One critic of the model is Professor Hovenkamp,⁶¹ who has argued that the optimal deterrence model erroneously ignores the degree of harm suffered by the victims of anticompetitive conduct and the manner in which those harms amplify the anticompetitive effect of that conduct.⁶²

⁵⁸ See *Image Technical Servs., Inc.*, 125 F.3d at 1224 n.16 (indicating disaggregation doctrine applied and vacating amount of consequential damages awarded); see also *In re Lower Lake Erie Iron Ore Antitrust Litig.*, 998 F.2d at 1165 n.16 (noting that there is disaggregation of damages requirement).

⁵⁹ See *Image Technical Servs., Inc.*, 125 F.3d at 1202 (stating plaintiff must establish causal antitrust injury).

⁶⁰ See *Waterman S.S. Corp. v. Avondale Shipyards, Inc.*, 527 F.Supp. 256, 258 (E.D. La. 1981). Two steamship lines alleged that shipbuilders and their subcontractors conspired to restrain trade in the sale of certain vessels. *Id.* The court held that the plaintiffs could clearly recover for any overcharges they paid for vessels resulting from the conspiracy since such overcharges would be the direct result of the conspiracy. *Id.* In rejecting the defendants' arguments that any further damages would fail to constitute antitrust injury, the court also ruled that the plaintiff's could recover any "property damages and consequential damages" which were proximately caused by the conspiracy. *Id.* at 257-58.

⁶¹ See Herbert Hovenkamp, *Antitrust's Protected Classes*, 88 MICH. L. REV. 1, 11 (1989) (noting Optimal Deterrence Model is concerned with deterrence of violators and not compensation for its victims); see also *Young v. Lehigh Corp.*, available in 1989 U.S. Dist. LEXIS 11575, at *38 (N.D. Ill. 1989) (noting doctrine of antitrust injury and standing have been misused, taken together they represent an "indirect approach to the standard of optimal deterrence").

⁶² See Hovenkamp, *supra* note 61, at 4-5 (arguing for anticipated profits as result of antitrust violation); see also Hawker, *supra* note 37, at 128-30 (stating Supreme Court believes Chicago School has as empirical matter, underestimated anticompetitive effects of certain practices). See, e.g., C. Douglas Floyd, *Antitrust Victims Without Antitrust Remedies: The Narrowing of Standing in Private Antitrust Actions*, 82 MINN. L. REV. 1, 5-7 (1997) (discussing difficulties in squaring this approach with intent of Congress).

At a more fundamental level, Jane could support her position by stressing to the court that the fundamental purpose of awarding damages is two-fold: 1) deter anticompetitive conduct by defendants; and 2) compensate victims of such conduct for the harm they have suffered.⁶³ Although these two purposes may sometimes conflict in application, Jane can argue that the award of consequential damages fulfills both purposes.

Consequential damages fulfill the goal of deterrence by penalizing anticompetitive conduct that results in the loss of revenues in other lines of business, an effect of the loss of business in the relevant market.⁶⁴ Absent such awards, anticompetitive conduct would be undeterred and thus a defendant might find it profitable to engage in anticompetitive conduct to benefit in consequential aspects for which a defendant would not have to pay damages. In appropriate cases, consequential damages also fulfill the second purpose of antitrust damage awards by ensuring that the victim is fully compensated for all losses proximately caused by the defendant's anticompetitive conduct.⁶⁵ Such a rule also finds support from damage awards in other areas of civil law that generally contemplate awards of consequential damages in appropriate cases.

⁶³ See *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 746 (1977) (noting that purposes of § 4 are to deter violators, deprive them of fruits of their illegality, and also to compensate victims of antitrust violations for their injuries). *But see* Hawker, *supra* note 37, at 101 (stating that goal of damage awards is also to develop antitrust jurisprudence).

⁶⁴ Of course, defendants would reply that, under the optimal deterrence model, deterrence of such consequences constitutes "overdeterrence." *But see* *Image Technical Servs., Inc. v. Eastman Kodak Co.*, 125 F.3d 1195, 1357-58 (noting payment of lawyer's fees as part of penalty for antitrust violation provides both specific and general deterrence).

⁶⁵ See, e.g., Page, *supra* note 43, at 1457. The optimal deterrence commentators take issue with this second purpose of damage awards and seek to limit compensation to only the amount that will deter the specific loss to consumer welfare from the anticompetitive conduct. *Id.* This discusses the possibility of developing a set of rules limiting scope of liability that approximate standard of optimal deterrence without directly measuring efficiency effects. *Id.* The courts have never constrained the compensatory purpose of damage awards to such a narrow role as to make that purpose merely redundant with the purpose of deterrence. Doing so is difficult to reconcile with a legislative history showing a Congressional desire to see victims compensated for their losses. *Id.*; see also Frank H. Easterbrook, *A Reassessment of Antitrust Remedies: Treble What?*, 55 ANTITRUST L.J. 95, 95 (1986). "Section 4 of the Clayton Act says treble the damages by him sustained." *Id.* "This makes the remedy depend not on the extent to which the defendant has injured the competitive process but on the identity of the plaintiff." *Id.*; Floyd, *supra* note 62, at 6. Noting that the remedy under the statute should be confined to the class of persons Congress intended to protect. *Id.*

D. Consequential Damages and Antitrust Injury - The Appropriate Standard

While the reader is free to draw his or her own conclusions, the authors believe that Jane clearly has the more persuasive of the two arguments presented. The cases cited by Moonkissed are not directly on point, and furthermore, the optimal deterrence model has never been adopted by the Supreme Court or the circuit courts. Lastly, Moonkissed's position is difficult to defend when it contends that some of the harms resulting from a violation of the antitrust laws should not be compensated. Accordingly, we expect the courts to adopt Justice Kennedy's position. This position, once again, is that once a plaintiff establishes direct damages in satisfaction of the antitrust injury requirement, all consequential damages proximately caused by a defendant's misconduct may be recovered. Ultimately, the rules of proximate cause preclude recovery for harms that are too remote from the misconduct.

III. ANTITRUST STANDING

Antitrust standing "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."⁶⁶ The "crux of the standing analysis is whether the plaintiff is the proper party to vindicate the antitrust interest."⁶⁷ Confusion between the concepts of antitrust standing and antitrust injury arose in *Associated General Contractors, Inc. v. California State Council of Carpenters*,⁶⁸

⁶⁶ See *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (finding that plaintiffs failed to show antitrust injury); see also M. Sean Royall, *Disaggregation of Antitrust Damages*, 65 ANTITRUST L.J. 311, 311 (1997) (noting plaintiff must show "some damage" that was caused by defendant's violation).

⁶⁷ See *Greater Rockford Energy & Tech. Corp.*, 998 F.2d at 401 n.13 (noting antitrust injury and antitrust standing involve two separate inquiries); see also *Associated Gen. Contractors, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 539 (1983) (requiring evaluation of "plaintiff's harm, alleged wrongdoing by defendants, and relationship between them"); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 759-61 (1977) (discussing various tests for antitrust standing employed by courts).

⁶⁸ 459 U.S. 519 (1983) (finding plaintiff's complaint did not sufficiently allege that union was injured in its business or property by anything forbidden by antitrust laws).

when the Supreme Court included antitrust injury as part of its multi-factor antitrust standing test.⁶⁹ It has now become clear that whether antitrust injury is analyzed as a separate requirement or a decisive component of a more general standing test, is largely a semantic difference.⁷⁰ In either event, the plaintiff must demonstrate both an antitrust injury and a connection to the anticompetitive conduct that is direct enough to satisfy a balancing of the other standing factors identified in *Associated General*.⁷¹

One component of the standing doctrine is especially pertinent to the issue of antitrust consequential damages. Some cases have stated that a plaintiff must be a consumer or a competitor of the defendant to have standing.⁷² These statements have a sense of dicta about them because none of the courts were squarely presented with the issue of whether any non-consumer or non-competitor can have standing. Rather, these cases decided whether the particular non-competitor or non-consumer plaintiff had standing under the facts. More fundamentally, the

⁶⁹ See *id.* at 539-41 (noting that if either firm had been injured by antitrust violation, their injuries would be direct and they would have right to maintain their own treble damage actions against defendants); see also *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 595-96 (7th Cir. 1995) (setting forth factors such as causal connection between antitrust violation and plaintiff's injury, and speculative nature of claim and potential for duplicative recovery when determining whether plaintiff is proper party to bring private action); *Balaklaw v. Lovell*, 14 F.3d 797, 798 (2d Cir. 1994) (discussing need for plaintiff to establish antitrust injury).

⁷⁰ See *Blair & Harrison, supra* note 56, at 1551. "Whether these two tests are viewed as components of a general test for antitrust standing or as separate tests with the first addressing antitrust injury and the second addressing antitrust standing is functionally inconsequential." *Id.*; see also *Bell v. Dow Chem. Co.*, 847 F.2d 1179, 1182 (5th Cir. 1988). The court stated that antitrust injury is a component of standing inquiry, not separate qualification. *Id.*

⁷¹ 459 U.S. at 540-41 (stating factors include whether plaintiff is consumer or competitor in market in which trade is restrained, directness of asserted injury, potential for duplicative recovery, and existence of more direct victims of challenged conduct); see also *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110 (1986) (discussing need for injured party to be aggrieved by anticompetitive conduct); *Balaklaw v. Lovell*, 14 F.3d 793, 798 n.9 (2d Cir. 1994) (discussing factors that contribute to analysis of whether plaintiff has antitrust standing); *Greater Rockford Energy & Tech. Corp. v. Shell Oil Co.*, 998 F.2d 391, 395 (7th Cir. 1993) (discussing distinctions between antitrust standing and antitrust injury, even though concepts are often invoked interchangeably).

⁷² See, e.g., *Serfecz v. Jewel Food Stores*, 67 F.3d 591, 596 (7th Cir. 1995) (noting that Sherman Act was enacted to assure customers benefits of price competition and to protect economic freedom in market); *T.O. Bell v. Dow Chem. Corp.*, 847 F.2d 1179, 1183 (5th Cir. 1988) (denying plaintiff recovery for lack of standing, because he was neither consumer nor competitor in relevant market); *Eagle v. Star-Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987) (holding that party alleging injury must be either consumer or competitor in restrained market); *General Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 809 (8th Cir. 1987) (holding that standing to sue under Sherman Act is limited to consumer or competitor that proximately suffers injury).

idea that only consumers and competitors have standing is contradicted by other cases that grant standing to a particular non-consumer or non-competitor under the facts presented.⁷³ One court has gone so far as to say: "The circuits are split, however, over the question of whether a plaintiff must be either a consumer or competitor in the market harmed by the antitrust violation at issue in order to establish antitrust injury."⁷⁴

This aspect of the standing doctrine may potentially affect recovery of consequential damages in an antitrust case. As articulated above, the proper rule of antitrust consequential damages should result in the award of such damages whenever the plaintiff can prove antitrust injury from the defendant's conduct, and that the conduct proximately caused her consequential damages. Following the cases that state that only consumers or competitors have standing, however, could result in an additional requirement: Allowing consequential damages only when the plaintiff is a consumer or competitor of the defendant.

Perhaps returning to our hypothetical will clarify the matter. Jane is not a competitor or consumer of Moonkissed in the market for selling apples. This fact could present a standing problem if one forgets that Jane has already established her standing as the defendant's competitor in the market for selling oranges. Once a plaintiff has established standing to sue, no antitrust case has held that she need establish standing independently for each and every component of her damages. In this area, as in the analysis of antitrust injury, once the plaintiff has satisfied

⁷³ See, e.g., *Reazin v. Blue Cross & Blue Shield, Inc.*, 899 F.2d 951, 962-63 (10th Cir. 1990) (citing Supreme Court as noting that statute "does not confine its protection to consumers, or to purchasers, or to competitors"); *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F. 2d 1356, 1365 (9th Cir. 1986) (holding that injury such as that suffered by plaintiff could not be characterized as "an indirect ripple effect"); *National Bancard Corp. (NaBanco) v. Visa U.S.A., Inc.*, 596 F. Supp. 1231, 1241-47 (S.D. Fla. 1984), *aff'd.*, 779 F. 2d 592, 596 n.4 (11th Cir. 1985) (noting Supreme Court's suggestion that courts "analyze each situation in light of the factors set forth' in its analysis of plaintiff's standing position in the case before it"); *Fine v. Barry & Enright Prods.*, 731 F.2d 1394, 1397 (9th Cir. 1984) (discussing Court's endorsement of four factor "intention and preparedness" test to grant standing to plaintiff who is prospective entrant to business or industry); *Crimpers Promotions, Inc. v. Home Box Office, Inc.*, 724 F.2d 290, 291-92 (2d Cir. 1983) (holding that plaintiff need not be direct competitor in market in which defendant operates); *Chelson v. Oregonian Publ'g Co.*, 715 F.2d 1368, 1370-72 (9th Cir. 1983) (finding that nature of relationship between alleged antitrust violation and alleged injury "depends on facts in dispute, thus those facts are material to the outcome of this case").

⁷⁴ See *Sullivan v. Tagliabue*, 25 F.3d 43, 49 (1st Cir. 1994) (refusing to resolve this conflict because plaintiff could not support its claim of antitrust injury); see also *Floyd*, *supra* note 62, at 6 (rejecting consumer or competitor limitation on antitrust standing).

the basic standing requirement, the damages she may receive should be controlled by the doctrine of proximate causation.

This approach in itself raises a possible anomaly. Suppose for a moment that a consumer named Frank buys oranges from supermarkets at a reduced rate shortly before they spoil. Frank squeezes these oranges and sells the juice. Moonkissed, although a cartel of orange sellers itself, has no market or monopoly power in the market for fresh-squeezed orange juice. If Frank brings suit for profits lost in orange juice sales, Moonkissed will claim Frank lacks standing. Since Frank buys the oranges from supermarkets, he is not a consumer of Moonkissed. Because Moonkissed lacks market power in the market for fresh-squeezed orange juice, Frank is not a competitor of Moonkissed in the market in which the anticompetitive activity allegedly took place (the market for oranges). These facts do not bode well for Frank's chances of establishing standing under the line of cases limiting standing to competitors and consumers.

If that line of cases is followed, the anomaly is that Jane can recover for her damages from lost sales of fresh-squeezed orange juice, whereas Frank cannot simply because of the fortuity that Jane also competes with Moonkissed in another market, which happens to be the relevant market for liability purposes. In all other respects, the loss of orange juice sales by Jane are indistinguishable from those sales lost by Frank. A defendant might argue that Frank is simply more remote from the alleged misconduct, much like the labor union in *Associated General*. A plaintiff in Frank's position may respond that the anomaly illustrates why the line of cases limiting standing to consumers or competitors is mistaken. Given the conceptual weakness of those cases, plaintiffs appear to have the better of the two arguments, but the definitive resolution of the question has yet to be determined by any court.

IV. DISAGGREGATION

It is a long-standing maxim of antitrust law that plaintiffs must prove the facts of their injury with some rigor, but that there is a more lenient standard for proving the amount of dam-

ages.⁷⁵ The rationale for this rule is that "[t]he vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of defendant's antitrust violation," but a defendant should not be allowed to profit by the uncertainty created by his misconduct.⁷⁶

Despite this commonly accepted principle, circuit courts have adopted a number of rules imposing fairly strict limitations on how a plaintiff may prove the amount of her damage.⁷⁷ One such limitation is known as the disaggregation doctrine. Under this doctrine, a plaintiff who alleges that the defendant engaged in more than one anticompetitive practice must tailor her damage claim so that she "can prove the amount of damages flowing from each separate area of anticompetitive conduct."⁷⁸ Otherwise, the fact-finder will have "no rational basis on which to correlate the damages to the particular conduct found to be predatory or anticompetitive"⁷⁹ in the event that the fact-finder determines that some of the defendant's practices were anticompetitive and others were not.⁸⁰

The disaggregation doctrine has been both praised⁸¹ and criticized,⁸² but has been generally accepted without difficulty. Al-

⁷⁵ See *Story Parchment Co. v. Patterson Parchment Paper Co.*, 282 U.S. 555, 566 (1931) (stating that "if the damage is certain, the fact that its extent is uncertain does not prevent a recovery"); see also *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 124 (1969) (stating that fact that damages are uncertain does not preclude recovery because any other rule would enable wrongdoer to profit at expense of his victim); *George R. Whitten Jr. Inc. v. Paddock Pool Builders, Inc.*, 376 F. Supp. 125, 137 (D. Mass. 1974), *aff'd* 508 F.2d 547 (1st Cir. 1974) (stating that "damages need not be demonstrated with absolute certainty and this is especially true in antitrust cases").

⁷⁶ See *J. Truett Payne Co. v. Chrysler Motors Corp.*, 451 U.S. 557, 566 (1981) (expressing Court's willingness to accept degree of uncertainty because of difficulty in ascertaining damages).

⁷⁷ See *Blair & Page*, *supra* note 45, at 435-36 (noting that plaintiff must account for effect of numerous other factors).

⁷⁸ See *Northeastern Tel. Co. v. AT&T*, 497 F. Supp. 230, 247 (D. Conn. 1980), *rev'd. in part and vacated in part*, 651 F.2d 76 (2d Cir. 1981) (discussing that defendant's evidence on damages consisted of studies and calculations).

⁷⁹ See *Northeastern Tel. Co.*, 497 F. Supp. at 248 (noting lack of this rational basis if damages had not been tied to specific claims of anticompetitive conduct).

⁸⁰ See *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 825 (2d Cir. 1983) (noting that courts have held that damage studies are inadequate when only some of conduct complained of is found to be wrongful and damage study cannot be disaggregated).

⁸¹ See *Royall*, *supra* note 66, at 312 (arguing that disaggregation rule furthers purposes of treble-damage remedy by avoiding speculation in calculation of antitrust damages and preventing recovery of treble damages for injuries that flow causes other than defendant's unlawful conduct).

⁸² See, e.g., Charles N. Charnas, *Segregation of Antitrust Damages: An Excessive Burden on Private Plaintiffs*, 72 CAL. L. REV. 403, 421 (1984) (criticizing courts' fears of speculative damage awards as "exaggerated"); James R. McCall, *The Disaggregation of*

though the requirement may seem simple enough, it can impose daunting obstacles to recovery in practical application. These difficulties can be appreciated by reference to one of the leading disaggregation cases, *MCI Communications Corp. v. AT&T*.⁸³ The plaintiff alleged that the defendant had engaged in twenty-two separate monopolistic practices.⁸⁴ The jury ultimately found ten unlawful.⁸⁵ The plaintiff would have had to provide a damage study that valued each of the twenty-two practices⁸⁶ in order to present a damage claim that would withstand a disaggregation challenge. This task may not seem too burdensome in a multi-million dollar suit, until one recalls that a plaintiff may recover damages if an act is a material cause of her injury even though it is not the sole cause of her injury.⁸⁷

Accordingly, if the plaintiff in *MCI Communications* had produced a damage study assigning a value to each of the twenty-two practices it challenged, it would also have to produce a grid showing what awards would be proper depending on the combinations of practices found unlawful because the award study might otherwise engage in double counting. For example, if two-thirds of the damages caused by challenged practice number three would also have been suffered by challenged practice number seven alone, the damage study would have to make that fact clear to avoid both double counting if both practices were found illegal and disaggregation challenges if only one practice was found illegal. The permutations of damage combinations among

Damages Requirement in Private Monopolization Actions, 62 NOTRE DAME L. REV. 643, 662 (1987) (discussing that disaggregation requirement does not accord with factor analysis in antitrust standing).

⁸³ 708 F.2d 1081 (7th Cir. 1983).

⁸⁴ 708 F.2d at 1092.

⁸⁵ See *id.* at 1092-93. Seven had been eliminated by defendant's summary judgment motion and the jury rejected five. *Id.*

⁸⁶ Compare *Continental Ore Co. v. Union Carbide & Carbon Co.*, 370 U.S. 690, 699 (1963) (stating that plaintiffs are entitled to have their allegations of conspiracy considered in aggregate and not have each piece of evidence concerning the conspiracy "compartmentalized" and then forgotten when next piece is considered), with *Southern Pac. Comm. Co. v. AT&T*, 556 F. Supp. 825, 1091 n.337 (D.D.C. 1983), *aff'd.*, 740 F.2d 980 (D.C. Cir. 1984) (holding that *Continental Ore* supports applying disaggregation doctrine).

⁸⁷ See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969) (noting that plaintiff's "need not exhaust all possible alternative sources of injury" to prove compensable injury under Section 4); *Affiliated Capital Corp. v. City of Houston*, 735 F.3d 1555, 1564 (5th Cir. 1984) (en banc) (noting that plaintiff "need only prove with a fair degree of certainty that the defendant's illegal conduct materially contributed to his injury").

the twenty-two challenged practices in *MCI Communications* could become virtually infinite once one accounts for this possibility of mutual overlap.

This task becomes even more difficult because the plaintiff must also distinguish the losses suffered due to anticompetitive conduct from exogenous factors such as economic fluctuations or her own mismanagement.⁸⁸ Some of the courts adopting the disaggregation doctrine require that the plaintiff's damage study segregate the amount of losses caused by each anticompetitive practice from such exogenous factors. However, since a plaintiff's damage study must typically be produced in advance of trial, she may not be aware of all the exogenous factors to be asserted by the defendant or introduced by third party witnesses on the stand, much less anticipate which of these factors will be adopted or rejected by the fact-finder. Asking the plaintiff to anticipate all these possibilities in advance of trial amounts to sheer speculation.

When the complications introduced by multiple causation and exogenous factors are considered, plaintiffs in cases challenging multiple practices appear highly unlikely to have a damage study that will exactly correspond to the ultimate findings of the trial court. In such cases, costly second trials on damages are a virtual certainty. Many plaintiffs might consider themselves lucky to only face the prospect of a retrial on damages, in light of disaggregation cases that hold that failure to disaggregate mandates a new trial on liability as well as damages,⁸⁹ or outright judgment in defendant's favor.⁹⁰ Raising such high hurdles to the likelihood of recovery hardly seems designed to encourage

⁸⁸ See, e.g., *National Assoc. of Review Appraisers & Mortgage Underwriters v. Appraisal Found.*, 64 F.3d 1130, 1135-36 (8th Cir. 1995) (holding that there was no recovery for losses due to factors other than defendant's anticompetitive violations); *Alexander v. National Farmers Org.*, 687 F.2d 1173, 1210 (8th Cir. 1982) (holding that plaintiffs must show that defendants "exclusionary behavior was a material cause of the harm suffered," in order to prove sufficient causal nexus).

⁸⁹ See, e.g., *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931) (holding partial new trial "may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice"); *Brooks v. Brattleboro Mem'l Hosp.*, 958 F.2d 525, 531 (2d Cir. 1992) (holding that because "issues of liability and damages are inextricably intertwined . . . there must be a retrial on all issues").

⁹⁰ See, e.g., *Southern Pac. Comm. Co. v. AT&T*, 556 F. Supp. 825, 1098 (D.D.C. 1983), *aff'd.*, 740 F.2d 980 (D.C. Cir. 1984) (dismissing case after finding that no injury was established and furthermore, that damage claim did not provide any basis for court to make "just and reasonable" approximation of amount of damages).

prosecution of the antitrust laws by "private attorneys general,"⁹¹ prosecutions which have long been thought crucial to enforcement of the antitrust laws.⁹²

Disaggregation simply facilitates the application of the antitrust injury doctrine as a substantive limitation on the recovery of antitrust damages.⁹³ If consequential damages are to be awarded, they simply must be disaggregated along with all other damages. However, consequential damage claims tend to involve more tangled lines of causation than do direct damage claims, since consequential damages do not occur in the relevant market that is the subject of inquiry during the liability portion of the trial. Therefore, in certain cases, disaggregating consequential damage claims to the extent they result from some of defendant's challenged practices, accounts for potential causal overlaps. These overlaps may arise from the difficulty in determining the amount of damages resulting from exogenous factors (other than defendant's misconduct), and could make the burden imposed by the disaggregation doctrine even more daunting.

There are certain safety valves in the disaggregation doctrine. For example, courts have stated that disaggregation will not be required where it is impracticable.⁹⁴ Further, courts have held that disaggregation is not required where the challenged conduct, although not found illegal, would cease when the illegal conduct ceased.⁹⁵ Finally, if the challenged practices found illegal would have caused all of plaintiff's damages, even though some challenged practices were found lawful, it will not be necessary to disaggregate.⁹⁶ Sensitive application of these aspects

⁹¹ See, e.g., *American Safety Equip. Corp. v. J.P. Maguire & Co.*, 391 F.2d 821, 826-27 (2d Cir. 1968) (holding that claims under antitrust laws are not private matter and that Congress "did not intend such claims to be resolved elsewhere than in the courts").

⁹² See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 635 (1985) (discussing that Sherman Act is designed to promote national interest of competitive markets).

⁹³ See Royall, *supra* note 66, at 323.

⁹⁴ See, e.g., *Spray-Rite Serv. Corp. v. Monsanto Co.*, 584 F.2d 1226, 1242-43 (7th Cir. 1982) *affd. on other grounds*, 465 U.S. 752 (1984). The burden then shifts to the defendant to show disaggregation is possible. *Id.*

⁹⁵ See *Litton Sys., Inc. v. AT&T*, 700 F.2d 785, 825 (2d Cir. 1983) (holding that even though some courts have held that damage studies are inadequate when only some conduct complained of is found to be wrongful and damage study cannot be disaggregated, in this case, there existed evidentiary basis for jury to award lost profits).

⁹⁶ See *National Farmers Org., Inc. v. Associated Milk Producers, Inc.*, 850 F.2d 1286, 1306-07 (8th Cir. 1988) (holding that plaintiff need only present evidence as to amount of its damages sufficient to allow finder of fact to make just and reasonable estimate not based on speculation).

of the disaggregation doctrine may prevent the doctrine from rendering the legal operation of consequential damages too procedurally onerous to be realized other than in theory.

CONCLUSION

Consequential damages in antitrust cases, although rarely discussed, have traditionally come under the doctrine of proximate causation. The antitrust injury requirement that has evolved over the last twenty years has provided defendants with an argument against awarding consequential damages, but it is an argument that should not, and has not, prevailed. In addition, antitrust injury and the standing doctrine generally should continue to act as screening devices against claims in their entirety. Once a plaintiff has satisfied these requirements, her entitlement to consequential damages should continue to be determined by the proximate cause doctrine. The difficulty of proving the link between defendant's misconduct and the amount of consequential damages to be awarded may sometimes be increased by the disaggregation doctrine, but such claims are nevertheless subject to proof in appropriate cases.

An intriguing aspect of the study of antitrust consequential damages is how the issue provides an example of the debates that exist in the law of antitrust. In this small corner of the law, one witnesses the jousting between Chicagoan theorists and their opponents, and the tension between deterring consumer welfare losses and compensating companies who make consumer welfare possible. Finally, one witnesses how the seemingly straight lines of antitrust economic analysis, such as the mandate to disaggregate, become hopelessly tangled when confronted by reality, where evidence is often conflicting and incomplete, and causation is often difficult and multi-faceted. None of these conflicts looks to be resolved soon. Rather, they seem certain to continue in both the narrow issue of consequential damages and the more general field of antitrust jurisprudence as the Sherman Act experiences its second century of development.