Notre Dame Law Review

Volume 62 | Issue 4 Article 5

1-1-1987

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I. Introduction

The disaggregation or "wrongful conduct" theory in antitrust law requires plaintiffs seeking treble damages under section four of the Clayton Act[1] to prove the amount of damages sustained with greater accuracy than was previously required. Several courts have recently imposed the requirement in private monopolization actions, a trend that could significantly affect the degree to which private antitrust actions supplement public trade regulation law enforcement. Specifically, in *Berkey Photo, Inc. v. Eastman Kodak Co.*,[2] the Second Circuit applied the disaggregation theory in a treble damage action charging the defendant with illegal monopolization in violation of section two of the Sherman Act.[3] In federal courts in the ninth and the seventh circuits, the theory adopted by the *Berkey* court has generally been accepted, while the Third Circuit has implicitly rejected the theory.[4]

As a general matter, the disaggregation of damages concept in treble damage actions is both logical and necessary. The relevant language of section four of the Clayton Act authorizes recovery of damage suffered "as a result of a violation of the antitrust laws," and unless a plaintiff's economic loss produced by market activities of other firms is a result of illegal conduct there should be no recovery for it. Accordingly, numerous courts have held that plaintiffs must prove their damages flowed from unlawful anticompetitive acts, not lawful competition.[5] However, for the reasons discussed hereafter, this general requirement should have a substantially restricted application in monopolization cases.

The terminology used by courts addressing the disaggregation issue in monopolization cases or in suits involving allegations of violations of other antitrust law prohibitions has varied greatly. The *Berkey* court spoke of allowing damages only for injury flowing from the "wrongful

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1 15 U.S.C. § 15 (1982). The section, in pertinent part, reads:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

2 603 F.2d 263 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

3 15 U.S.C. § 2 (1982). The section reads:

> 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, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

4 Two decisions approving the theory are ILC Peripherals v. IBM Corp. ("Memorex"), 458 F. Supp. 423, 434 (N.D. Cal. 1978); and MCI Communications v. American Tel. & Tel. Co., 708 F.2d 1081, 1161-64 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983). The theory was rejected in Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 106 S. Ct. 3284 (1986).

5 *See, e.g.*, Allegheny Pepsi-Cola Bottling Co. v. Mid-Atlantic Coca-Cola Bottling Co., 690 F.2d 411, 415 (4th Cir. 1982) (evidence of damages was held to be inadequate because plaintiff failed to show what portion of its economic losses were caused by alleged illegal predatory pricing by defendant); Coleman Motor Co. v. Chrysler Corp., 525 F.2d 1338, 1352-53 (3d Cir. 1975) (Plaintiff's use of projections to prove damages found to be unacceptable because they did not lead to a reasonable estimate of damages caused by the alleged violations. The court stated "we cannot permit a jury to speculate concerning the amount of losses resulting from unlawful, as opposed to lawful, competition.")

conduct" of the defendant, and did not mention the term "disaggregation."[6] However, two courts that have addressed the issue in the monopolization context have used the term "disaggregation."[7] Also, in reported treble damage decisions involving alleged antitrust violations other than monopolization, "segregation" has been frequently referred to as the relevant concept.[8] As this Article specifically focuses upon the requirement in the context of private monopolization actions, the term disaggregation will be used to refer to the concept of requiring the plaintiff in a private antitrust action to prove the specific portion, if any, of the economic loss it suffered from participating in a market was produced by acts of the defendant that violated the antitrust laws.

Theoretical support for the *Berkey* court's disaggregation requirement may be found in certain statements in the well-known Areeda & Turner treatise.[9] The position of Professors Areeda and Turner is that since the trebling feature of section four of the Clayton Act is "punitive," a defendant should not be liable for economic losses suffered by an injured plaintiff unless the losses are proved by the plaintiff to have been the result of the "wrongful conduct" of the defendant.[10] Both the academic statement of the wrongful conduct rule as well as those decisions adopting it in private monopolization cases have been criticized.[11]

Whatever the theoretical and practical justifications for the disaggregation theory at the time of the *Berkey* decision in 1979, it is now appropriate to reconsider the issue it was designed to address. As discussed below, recent decisions of the United States Supreme Court interpreting section four of the Clayton Act and section two of the Sherman Act significantly affect the validity of the requirement.[12] Those decisions and the disaggregation requirement itself require extensive background discussion to avoid confusion.

II. Development of the Disaggregation Requirement Controversy

A. *Decisions*

In *Berkey*, the plaintiff, a camera manufacturer and provider of photofinishing services, alleged that Kodak's marketing of the company's new 110 Instamatic and Kodacolor X film were unlawful acts of monopolization. At trial, Berkey easily proved Kodak's monopoly positions in the consumer film and camera markets, and the jury also found that Ko-

6 *See Berkey*, 693 F.2d at 296-99.

7 *See MCI Communications*, 708 F.2d at 1187-92 (Wood, Jr., J., concurring in part and dissenting in part); Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 825 (2d Cir. 1983).

8 *See* C. Hills, Antitrust Advisor 700-01 (3d ed. 1985).

9 3 P. Areeda & D. Turner, Antitrust Law 98-99 (1978).

10 *Id.* Areeda and Turner refer to "wrongful conduct" as "exclusionary conduct" in their treatise. It is clear that the authors believe that only the specific effects of conduct that is considered wrongful, or exclusionary, should establish the liability of the defendant.

11 *E.g.*, H. Hovenkamp, Economics and Federal Antitrust Law 413-15, 452-53 (1985); and Note, *Segregation of Antitrust Damages: An Excessive Burden on Private Plaintiffs*, 72 Calif. L. Rev. 403, 423-27 (1984). The disaggregation requirement in private treble damage monopolization cases has also been approved in academic literature. *See* Easterbrook, *Detrebling Antitrust Damages*, 28 J. L. & Econ. 445, 462-67 (1985).

12 *See infra* text accompanying notes 84-140.

dak's marketing practices were unlawful acts of monopolization. On the issue of relief the jury found that Berkey was entitled to recover damages (before trebling) of $11,500,000 for overcharges it had paid to Kodak in buying film from the defendant during the four-year period immediately prior to suit.[13] The trial court's charge to the jury on this point was, in effect, that if the jury believed that Berkey had suffered *any* damage as a result of Kodak's monopoly in the film market, the plaintiff was entitled to recover the *entire* difference between what Kodak's price would have been if the film market had been competitive, and the price that Berkey actually paid to Kodak in the monopolized market that existed.[14]

The Second Circuit reversed the jury's award of $11,500,000 on the ground that Berkey had not specifically proved that the full amount of the monopoly overcharge was the result of Kodak's wrongful conduct in the latter's monopolization of the film market.[15] Acknowledging a "dearth of cases on point,"[16] the court relied upon its understanding of the Supreme Court's "basic rule for antitrust damages" set forth in the *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.* decision in 1977.[17] The court noted that it was possible that Kodak might have held a monopoly position in the film market solely as the result of its fair competitive practices. In that case Kodak's wrongful conduct would not have added to its monopoly control of the film market, and would not have increased Kodak's ability to extract a monopoly overcharge from film purchases. Therefore, the court stated it would be penalizing Kodak unnecessarily to make it respond in damages for the full amount of monopoly overcharge. Instead, the court held that Berkey should have been awarded a pretrebled sum equal to only that portion of the monopoly overcharge that was the result of Kodak's unlawful conduct.

Thus, the *Berkey* court required a plaintiff to estabish the disaggregation of a monopoly overcharge as a precondition of treble damage recovery in a private monopolization case. In effect, the court established an "antitrust standing" requirement for such plaintiffs.[18] Three circuit court opinions have considered the disaggregation requirement in major monopolization damage cases during the seven years since *Berkey*.[19] Although the subsequent decisions have generally not used the terms "wrongful conduct" or "disaggregation," the arguments that they have addressed are the same as those accepted by the *Berkey* court. These decisions, which do not cite *Berkey*, split on the disaggregation requirement issue.

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13 Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 293 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

14 *Id.* at 294.

15 *Id.* at 296-98.

16 *Id.* at 297.

17 *Id.* The citation for *Brunswick* is 429 U.S. 477, 489 (1977). *Brunswick* and the basic antitrust damages rule that it established are discussed at length at *infra* text accompanying notes 70-83.

18 *See* discussion of the recent development of the concept of antitrust standing at *infra* text accompanying notes 84-114.

19 *See infra* notes 20-27 and accompanying text. A district court decision one year prior to *Berkey* also contains a statement and acceptance of the disaggregation theory. ILC Peripherals Leasing Corp. v. IBM Corp., 458 F. Supp. 423, 434, 436 (N.D. Cal. 1978), *aff'd sub nom.*, Memorex Corp. v. IBM Corp., 636 F.2d 1188 (9th Cir. 1980) (per curiam), *cert. denied*, 452 U.S. 972 (1981).

The most complete discussion of the disaggregation issue appears in the *MCI Communications v. American Telephone & Telegraph Co.* decision of the Seventh Circuit.[20] In reversing a massive damage award, the court apparently held that the plaintiff in a private monopolization action must offer proof on the amount of damage it has suffered as the result of the illegal acts of the defendant monopolist, and general evidence of the plaintiff's loss of profits due to the fact that defendant held a monopoly position in the market is inadequate.[21] Although the majority opinion neither cited *Berkey* nor used the term "disaggregation," the dissent specifically argued that the disaggregation concept was inappropriate in the case.[22]

The disaggregation requirement was again raised in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*.[23] The court rejected an argument by defendant AT&T that the plaintiff's damage study was inadequate because it did not segregate the plaintiff's allegedly lost profits on the basis of those losses resulting from wrongful conduct and those losses resulting from "lawful activity." The court held that the record did not support the defendant's argument, and it is unclear whether the court considered the merits of the argument in rejecting it.[24]

The clearest rejection of the disaggregation requirement appears in *Bonjorno v. Kaiser Aluminum & Chemical Corp.*, decided by the Third Circuit in 1984.[25] In that case, plaintiff Bonjorno had competed with Kaiser Aluminum Company in the manufacture and sale of aluminum drainage pipe in Maryland and surrounding states. Bonjorno claimed that its bankruptcy was caused by Kaiser, which obtained a monopoly position in the aluminum pipe market as a result of the Bonjorno bankruptcy. The trial court held that a number of Kaiser practices violated section two of the Sherman Act and awarded Bonjorno a judgment, after trebling, of $4,651,560.[26]

The Third Circuit was unconcerned with the fact that at least some of Bonjorno's losses leading up to its bankruptcy were attributable to the fact that Kaiser was a powerful competitor and would have taken substantial sales from the plaintiff without resorting to any unlawful acts. The court simply held that it was not error for the trial court judge to allow the jury sitting in the damages part of a bifurcated trial to award damages based upon the general reduction in value of the plaintiff's business without receiving guidance from the liability jury on which of the allegedly unlawful acts of the defendant had been determined to be wrongful, and which had not.[27] By so holding, the court implicitly rejected the idea that only damages for economic loss specifically caused by the illegal conduct of the defendant can be awarded to a plaintiff in a damage action

20 708 F.2d 1081, 1161-64 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).
21 *Id.* at 1161-64.
22 *Id.* at 1187-92 (Wood, Jr., J., concurring in part and dissenting in part).
23 700 F.2d 785, 825-26 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).
24 *Id.* at 825.
25 752 F.2d 802 (3d Cir. 1984), *cert. denied*, 106 S. Ct. 3284 (1986).
26 *Id.* at 806.
27 *Id.* at 812-13.

under section four of the Clayton Act. The *Bonjorno* court did not consider the legal concepts relevant to an evaluation of the disaggregation requirement.

A number of factual differences between the *Berkey* and *Bonjorno* cases are evident at a glance. First, *Berkey* was a "customer" case in which all or part of an alleged overcharge is the damage suffered.[28] In *Bonjorno*, as in *MCI* and *Litton*, the party claiming damage was a competitor of the monopolist, and the plaintiffs sought recovery, in one form or another, for lost profits. A second point is that the *Berkey* court held that almost all of the acts of monopolization allegedly committed by the defendant were actually *not* unlawful conduct, while the *Bonjorno* court sustained a trial court determination that at least some of the acts defendant complained of were unlawful.[29]

However, the factual differences between the two decisions do not obscure the fact that in *Berkey* the court required the plaintiff to prove the dollar amount of damage it suffered as the result of specified conduct ("wrongful acts") of the defendant, while in *Bonjorno* the court did not require any such showing. More specifically, the *Berkey* court required the plaintiff in a monopolization case to prove what specific part of the total economic loss or "damage" it suffered was attributable to the specific wrongful acts of the defendant. On the other hand, the *Bonjorno* court held that plaintiff's failure to establish that the losses it suffered were exclusively due to the defendant's wrongful conduct was of no legal significance.

B. *Underlying Problems*

The controversy over disaggregation stems in large part from the fact that it is extremely difficult to determine the exact damages produced by a specific act that violates the antitrust laws. A risk will always exist that such uncertain damages will either be too small to adequately reflect the harm suffered by the plaintiff, or will be too large and unjustly burden the defendant. The disaggregation requirement clearly places the "risk of uncertainty" on this issue on the plaintiff. Unless the plaintiff can prove the precise amount of damage suffered as the result of a specific illegal act of the defendant, the plaintiff will recover nothing under the *Berkey* formulation for damage recovery in an action brought under section four of the Clayton Act on the basis of the defendant's alleged violation of section two of the Sherman Act.[30] Of course, many types of litigation present the issue of which party should bear the burden on a

28 Berkey had prevailed on its claim that it was damaged as a competitor in the camera market in the trial court, but the circuit court reversed this portion of the judgment without discussion of damage theory. 603 F.2d at 290. Therefore, the discussion of damages in *Berkey* is entirely concerned with Berkey's allegations of injury as a customer. *Id.* at 294-98.

29 *See supra* text accompanying notes 13-16.

30 Of course, if the jury finds that all of the complained of acts of the defendant were "unlawful" in that each and all of the acts were illegal acts of the monopolist defendant, the issue of disaggregation will not arise. However, the common issue in monopolization actions is which of the acts of the defendant can be considered wrongful, and which are blameless under the law that has developed under section two of the Sherman Act. *See infra* text accompanying notes 115-40, for a discussion of the substantive law of monopolization and the importance of distinguishing wrongful from blame-

particular issue that cannot be resolved with a comforting degree of certainty. The issue, however, is particularly pressing in treble damage antitrust litigation due to the uncertain nature of economic evidence and the large judgment amounts mandated by the trebling requirement of section four of the Clayton Act.[31]

One thesis of this Article is that courts may have adopted the disaggregation rule in monopolization cases because of a distaste for the uncertainty of substantive monopolization law. This hypothesis is explored below, with a brief discussion of the law of monopolization and the recent United States Supreme Court decision removing some of the uncertainty attending it.[32] If judges have been uncomfortable with the substantive law of monopolization, the automatic trebling of damage awards under section four of the Clayton Act is a further inducement to restrict monopolization damage recovery through the use of the disaggregation requirement.[33] This Article takes the position that the understandable concern of courts over the historically uncertain nature of monopolization law in the context of the private treble damage action is inadequate support for the disaggretation requirement.[34]

This Article also contends that *Berkey*'s reliance upon the *Brunswick* opinion's well-known "antitrust injury" requirement for an award of damages is misplaced.[35] In part, this is because *Berkey* was decided before the Supreme Court clarified the antitrust injury concept in such recent decisions as *Blue Shield of Virginia v. McCready*[36] and *Associated General Contractors of California v. California State Council of Carpenters*.[37] Also, the substantive law of the monopolization prohibition in section two of the Sherman Act and the policies behind both that section and section four of the Clayton Act conflict with the view that the antitrust injury requirement inflexibly requires the plaintiff to disaggregate damages in a monopolization action.[38]

On the other hand, it is clear that the antitrust injury requirement announced in *Brunswick* has a significant role to play in assuring that valid, efficiency-producing competition is not penalized by treble damage awards. For this reason, this Article offers a proposal for allocating the crucial risk of uncertainty in actions such as *Berkey* and *Bonjorno*. The author proposes a structure for damage awards that meets the concerns of those courts that have required disaggregation without eliminating the significant benefits society realizes from private treble damage enforce-

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less conduct in determining whether the monopolization prohibition in section two has been violated.

31 The jury verdict amounts in private treble damage monopolization actions can be noteworthy even without trebling, *e.g.*, in *Berkey* the jury awarded the plaintiff $37,620,130, and in *MCI* the jury awarded $1,800,000,000. *See* 603 F.2d at 268 (*Berkey*) and 708 F.2d at 1092 (*MCI*).

32 *See infra* text accompanying notes 115-40.

33 Possible judicial concern over the trebling feature of § 4 of the Clayton Act is discussed at *infra* text accompanying note 59.

34 *See infra* text accomapnying notes 156-57.

35 *See infra* text accompanying notes 142-49.

36 457 U.S. 465 (1982); *see infra* notes 84-90 and accompanying text.

37 459 U.S. 519 (1983); *see infra* notes 91-114 and accompanying text.

38 *See infra* text accompanying notes 142-49.

ment of the monopolization prohibition of section two of the Sherman Act.

To furnish the reader with a review of the legal and theoretical context of the disaggregation theory, the first topic for discussion in this Article is the basic principles of treble damage recovery.[39] The decisions of the United States Supreme Court during the seven year period since the *Brunswick* decision dominate this topic.[40] The second necessary background topic is narrower in focus—the law of private monopolization actions. Such suits are brought under section four of the Clayton Act, and involve allegations that the defendant has harmed the plaintiff by violating the monopolization prohibition in section two of the Sherman Act.[41] The two most prominent subjects in considering the topic are the substantive law of the monopolization prohibition and recent private monopolization action decisions rendered by federal Circuit and District Courts.[42]

III. The Law of Treble Damages Under Section Four of the Clayton Act

A. *Basic Considerations*

The essential language of section four of the Clayton Act has remained unchanged since the original enactment of the statute in 1914.[43] The section has a broad sweep: "Any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, and . . . a reasonable attorney's fee."[44]

In suits involving claims of overcharges from price fixing in violation of section one of the Sherman Act, courts have held that the phrase "any person" includes business firms,[45] state and local governments,[46] foreign nations,[47] and consumers.[48] The Supreme Court has reviewed only a few treble damage actions in which the plantiff's primary allegation was that the defendant violated the monopolization prohibition in section two of

39 *See* Part III, *infra* text accompanying notes 43-59.

40 The Supreme Court decisions of the last seven years on the topic of treble damages are reviewed at *infra* text accompanying notes 60-69.

41 *See* Part IV., *infra* text accompanying notes 115-40.

42 The law of monopolization is discussed at *infra* text accompanying notes 115-40. The private monopolization action decisions are discussed at *supra* text accompanying notes 13-29.

43 When § 4 was passed in 1914, it recodified and superseded § 7 of the original Sherman Act of 1890. In 1980 and 1982, § 4 was amended to include awards of interest, and subsections (b) and (c), dealing with recoveries by foreign nations, were added.

44 15 U.S.C. § 15 (1982).

45 Coast v. Hunt Oil Co., 195 F.2d 870 (5th Cir.), *cert. denied*, 344 U.S. 836 (1952), holding that partnerships are "persons" under § 4. *Cf.* United States v. Cooper Corp., 312 U.S. 600, 606 (1941) (holding that corporations are also "persons"); *and* United States v. Brookman Co., 229 F. Supp. 862, 864 (N.D. Cal. 1964).

46 Georgia v. Pennsylvania R.R. Co., 324 U.S. 439, 447 (1945) and Georgia v. Evans, 316 U.S. 159, 162 (1942) held that states are persons under the section. Chattanooga Foundry v. City of Atlanta, 203 U.S. 390, 396 (1906) held that the term includes cities.

47 Pfizer, Inc. v. India, 434 U.S. 308, 318 (1978). After this decision, Congress passed legislation to limit recovery by foreign governments to single damages, subject to certain exceptions. 15 U.S.C. § 15(b) (1982).

48 Reiter v. Sonotone Corp., 442 U.S. 330, 341 (1979).

the Sherman Act. It is clear, however, that the word "person" in section four of the Clayton Act will be interpreted in the same broad fashion in all actions brought under the section regardless of the provision of the antitrust law allegedly violated by the defendant.[49]

Federal courts have long viewed private treble damage actions with favor. This view is based on the perception that private actions are necessary to supplement the efforts of federal government enforcement of the antitrust laws.[50] On the other hand, Congress has passed a number of laws in the last ten years carving out limited exemptions from the automatic treble damages feature of section four in actions involving certain forms of economic activity.[51] This legislative activity indicates, at least in part, a concern over the uncertainty of economic determinations by courts and juries.

A risk of uncertainty attends any courtroom determination of fact, and rules concerning burdens of persuasion and standards of proof have historically been used to control and allocate the risk of uncertainty in lawsuits. The burden of persuasion requires a party to convince the finder of fact of the existence of a particular fact by the introduction of relevant, admissible evidence of the particular fact. For example, a plaintiff brings an action under section four of the Clayton Act, alleging that defendants A and B fixed prices and the plaintiff was thereby forced to pay an overcharge in purchasing the product sold by A or B. The plaintiff introduces evidence showing that defendant competitors A and B agreed to fix prices, and defendants A and B introduce evidence tending to prove that they did not fix prices. The plaintiff would have the burden of persuasion and the finder of fact must rule that the fact (that defendants A and B agreed to fix prices) does *not* exist *unless* the plaintiff's evidence is more persuasive to the finder of fact than is the evidence produced by defendants A and B.

A second legal consideration in this area is the standard of proof, which establishes the degree of certainty of the existence of a fact that a party with the burden of persuasion must meet in order to prevail on the

49 *See, e.g.* Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481, 488-89 (1968).

50 *E.g.*, in reference to the passing-on defense, the *Hanover Shoe* court stated that if it were allowed, buyers

> would have only a tiny stake in a lawsuit and little interest in attempting a class action. In consequence, those who violate the antitrust laws by price fixing or monopolizing would retain the fruits of their illegality because no one was available who would bring suit against them. Treble-damage actions, the importance of which the Court has many times emphasized, would be substantially reduced in effectiveness.

Id. at 494.

51 *See, e.g.*, the Export Trading Company Act of 1982, 15 U.S.C. §§ 4001-4003 (1982). The Act established a procedure which permits persons engaged in export trade to receive a certificate that sets the limits of their antitrust liability. The Soft Drink Interbrand Competition Act, 15 U.S.C. §§ 3501-3503 created a new legal standard for judging the reasonableness of territorial restraints imposed on bottlers. The National Cooperative Research Act of 1984, 15 U.S.C. §§ 4301-4305 provided that in cases involving joint research and development ventures, courts shall apply the rule of reason, impose single damages and permit recoveries of attorneys' fees by defendant in certain circumstances. The Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 provides that treble damages are not recoverable from any local government, nor any official or employee acting in official capacity.

factual issue.[52] For example, under the standard of proof applicable in criminal prosecutions, the state must prove the facts necessary to establish the guilt of the accused "beyond a reasonable doubt." The usual standard in civil litigation is proof by a "preponderance of the evidence," meaning that the trier of fact must be convinced that it is "more probable than not" that a certain fact exists. In certain civil actions, the party with the burden of persuasion of a fact must meet a higher standard of proof requiring a showing that a fact exists by "clear and convincing proof," meaning that the finder of fact must be convinced that it is "highly probable" that a particular fact exists. The plaintiff generally has the burden of persuasion on all facts necessary to establish the cause of action, and the defendant has the burden of persuasion on all facts necessary to establish the elements of an affirmative defense. The standard of proof applicable to the finding of a particular fact in a civil action will usually be either "preponderance of the evidence" or "clear and convincing proof."

The burden of persuasion and the standard of proof are important concepts to keep in mind when considering the disaggregation requirement. Generally, under section four of the Clayton Act, the plaintiff has the burden of persuasion on the factual issues of whether the defendant violated any of the antitrust laws, whether the defendant's antitrust violation injured the plaintiff in its business or property and the amount of damage to its business or property that the plaintiff suffered. The risk of uncertainty is thus placed upon the plaintiff in that if the fact finder is uncertain that any of the three facts has been proven, plaintiff cannot recover damages.

In order to ease the plaintiff's burden of persuasion in damage actions under section four of the Clayton Act, the Supreme Court adjusted the applicable standard of proof to reflect the fact that determining the effect of a specific action in an economic market is a highly uncertain enterprise. In *Story Parchment Co. v. Paterson Parchment Paper Co.*,[53] the Court announced that the burden of proof on the issue of the amount of damage suffered by the plaintiff would be less rigorous than the standard of proof required on the issue of whether the plaintiff sustained *some* injury from the defendant's antitrust violation.[54] In subsequent decisions, the Court has held that the plaintiff must meet the preponderance of the evidence standard and prove that the occurrence of the *fact* of injury to the plaintiff was "more probable than not." However, the Court has held that the *amount* of the injury sustained may be proved by a "just and reasonable inference" from the evidence presented by the plaintiff.[55]

In allowing a greater degree of uncertainty in the proof of the

52 *See* G. LILLY, AN INTRODUCTION TO THE LAW OF EVIDENCE §§ 15, 15 n.2 (1978); MCCORMICK ON EVIDENCE §§ 336, 337 (Cleary rev. 3d ed. 1984).

53 282 U.S. 555 (1931).

54 *Id.* at 562, 566.

55 J. Truett Payne Co. v. Chrysler Motors Corp., 451 U.S. 557, 565-67 (1981). *See also* Zenith Radio Corp v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 114 (1969); Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927).

amount of damage, the Court has discussed its justifications several times. Most recently, the Court has declared:

> Our willingness to accept a degree of uncertainty in these cases rests in part on the difficulty of ascertaining business damages as compared, for example, to damages resulting from a personal injury or from condemnation of a parcel of land. The vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation.[56]

A second reason for the "lower" measure of proof for the amount of damages is that it would be "a perversion of fundamental principles of justice" to deny recovery of damages to the plaintiff because the defendant's violation of law "is of such a nature as to preclude the ascertainment of the amount of damages with certainty."[57]

The standard of proof on the issue of whether the defendant violated an antitrust law has always been the traditional preponderance of the evidence test. The lack of debate on this issue is perhaps misleading, however, because the issue of what type of conduct on the part of the defendant the plaintiff must prove to establish a violation of section two of the Sherman Act has traditionally been extremely controversial.[58] This uncertainty in the substantive law of section two of the Sherman Act has clouded the violation issue in monopolization treble damage actions. The *Berkey* disaggregation requirement reflects, to some extent, judicial reluctance to impose large damages for a violation of a skeletal statutory prohibition which federal courts have not clearly interpreted.[59]

To summarize, the Supreme Court has long held that a plaintiff in a private antitrust damage action must prove the fact of the defendant's antitrust violation by a preponderance of the evidence and the fact of antitrust injury by the same measure of proof; but the amount of the damages plaintiff suffered may be proved by a just and reasonable inference. Such an inference does not necessarily prove it was more likely than not that plaintiff sustained a certain amount of damages. The inference merely establishes that the amount of damages awarded was not arrived at by mere speculation. The plaintiff still bears the burden of the uncertainty of predicting economic marketplace results in establishing an award of damages, but the lower standard of proof eases that burden significantly.

B. *Modern Interpretation of Section Four of the Clayton Act and the Concern Over Uncertainty*

The Supreme Court noted the need to maintain treble damage recovery to supplement government antitrust enforcement in *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*[60] This treble damage action was

56 *Truett Payne*, 451 U.S. at 566.
57 *See id.* at 567 (quoting *Eastman Kodak*, 273 U.S. at 379).
58 *See infra* text accompanying notes 125-40.
59 *See* discussion at *infra* text accompanying notes notes 155-58.
60 392 U.S. 481, 491-94 (1967).

brought by a lessee of shoe machines produced by the defendant, an alleged illegal monopolist. The plaintiff claimed it would have purchased defendant's machines had it been offered the option, but defendant maintained a lease-only policy. The defendant was a monopolist, and because its lease-only policy had an anticompetitive effect, the policy had earlier been held to be exclusionary conduct which violated section two of the Sherman Act.[61] The plaintiff claimed the rental price for defendant's machines was inflated and sought to recover the rental overcharge under section four of the Clayton Act. In response, the defendant asserted that any rental overcharge paid by the plaintiff was imposed equally on all of the monopolist's rental customers, and that all of the defendant's customers, including the plaintiff, used the rented machines to produce shoes that were in turn sold to retailers. The defendant argued that the plaintiff "passed on" any rental overcharge by increasing the price charged for plaintiff's shoes. Thus, according to defendant's argument, the plaintiff suffered no injury or damages for purposes of section four of the Clayton Act.

The Court rejected the monopolist-defendant's argument on two grounds, both of which have significance for the disaggregation requirement controversy. First, to accept the economic propositions inherent in defendant's argument would "require additional long and complicated proceedings involving massive evidence and complicated theories."[62] This would deter plaintiffs who might otherwise bring actions. Second, the defense, if accepted, could be asserted against each customer of a product allegedly impacted by the original monopolist's overcharge, down to the ultimate consumer of the final end product. In the case at bar, the end product was shoes, and the Court rightly declared that consumers of such items would have only a "tiny stake in a lawsuit and little interest in attempting a class action."[63] This also would reduce the number of treble damage actions brought and allow antitrust violators to "retain the fruits of their illegality."[64]

The Supreme Court's decision in *Hawaii v. Standard Oil Co.*[65] initiated a series of important decisions developing the concept of standing to seek damages under section four of the Clayton Act. The concept was in part a response to the uncertainty inherent in economic evidence, but the *Hawaii* decision did not focus on this concern. The decision involved the claim of the state of Hawaii that a price fixing conspiracy had artificially inflated the price of gasoline within the state. The state further alleged that the high price of gasoline impeded development of the state's economy. Hawaii sought treble damage recovery for the reduction in the amount of growth of the state's economy caused by the defendants' alleged gasoline overcharging. It is reasonably certain that artificial inflation of the price of a commodity as basic to industrial

61 United States v. United Shoe Mach. Corp., 110 F. Supp. 295, 343-44 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

62 392 U.S. at 493.

63 *Id.* at 494.

64 *Id.*

65 405 U.S. 251 (1972).

growth as gasoline will retard the growth of a state's economy. The issue presented, however, was strictly one of statutory construction—whether Hawaii's claim was for damage to its "business or property" as required under section four of the clayton Act. The Court held that Hawaii's claim was not within the phrase and denied treble damage recovery under the statute. In passing, the court implied concern over the uncertainty of economic evidence by noting that determining the injury to the economy of a state would require "an examination of the impact . . . upon every variable that affects the State's economic health—a task extremely difficult, 'in the real economic world . . . .' "[66]

Two years after *Hawaii*, the Court voiced more direct concern over the uncertainty of economic evidence in *Illinois Brick Co. v. Illinois*.[67] Like *Hawaii*, this case addressed the issue of what sort of injury is compensable under section four of the Clayton Act. Although no standing issue was involved, the Court held that purchasers of brick buildings from general contractors could not collect damages from the brick manufacturers that allegedly fixed the price of the bricks used by the contractors in constructing the building. Basing its holding on the ground of uncertainty, the Court specifically stated that "we do not address the standing issue."[68] The bricks in question were manufactured by defendants, who sold them to masonry contractors. The masonry contractors in turn contracted with general building contractors to construct brick walls and other brick structures in buildings to be built by the general contractors. The plaintiffs, approximately seven hundred governmental entities, purchased the buildings through bid procedures from the general contractors. The Court held that indirect purchasers of the bricks, including the plaintiffs, did not suffer injury for which they could recover damages under section four of the Clayton Act because of an illegal overcharge imposed upon the direct purchasers, the masonry contractors. This holding was considered necessary because of the complexity and uncertainty of determining how much of the overcharge was "passed on" to the indirect purchasers and because the defendants otherwise might be faced with multiple and overlapping liabilities.[69]

C. *The* Brunswick *Decision and Antitrust Standing*

In 1977, the Court significantly changed the focus of Clayton section four by specifically addressing the "antitrust standing" issue in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*.[70] The plaintiffs, operators of several bowling centers, alleged that Brunswick had violated section seven of the

66 *Id.* at 263 n.14.

67 431 U.S. 720 (1977).

68 *Id.* at 728 n.7.

69 The Court also specifically relied upon its prior decision in *Hanover Shoe*, in which it held that a seller who imposes an illegal overcharge on a direct purchaser cannot escape liability to that purchaser by arguing that the purchaser merely "passed on" the illegal overcharge by increasing the prices it charged for the products or services it sold to the general public or to other firms. *See supra* text accompanying notes 60-64. In *Hanover*, the Court had rejected the defensive use of the pass-on theory and in *Illinois Brick* a majority of the Court held that it would be inconsistent with *Hanover* to allow the offensive use of the pass-on theory.

70 429 U.S. 477 (1977).

Clayton Act by acquiring and resurrecting certain bowling centers that would otherwise have gone bankrupt and ceased doing business. As competitors of the centers that would have gone out of existence, plaintiffs claimed injury in the amount of the profits denied them because of the competition they faced from the resurrected bowling centers. The court of appeals affirmed a district court judgment for $6,575,040, but the Supreme Court reversed.

Brunswick had allegedly violated section seven of the Clayton Act, which prohibits mergers or acquisitions that "may . . . substantially . . . lessen competition" in any market.[71] The "anticompetitive effect" theory of the plaintiffs' case was that Brunswick, as a giant corporation with a "deep pocket," would intimidate small bowling center operators who attempted to compete with it in local bowling center markets. These intimidated small operators would not challenge the Brunswick-owned centers through aggressive competition, fearing heavy retaliation. Thus, at the time Brunswick acquired the failing bowling centers, one could reasonably predict that the acquisitions would substantially lessen competition. Both the district court and the court of appeals accepted this theory of violation, and the Supreme Court accepted it for the purpose of addressing the standing issue.[72]

The plaintiffs' theory of damages was simplicity itself. Because the plaintiff bowling centers would have had larger market shares if the Brunswick-acquired bowling centers had gone out of business, the plaintiffs argued they were entitled to recover the lost profits that the reduction in their market shares necessarily entailed.[73] The plaintiffs' argument posed the question of whether a plaintiff able to prove an antitrust law violation could recover any loss of profit "casually linked" to the violation. The Supreme Court definitively rejected the plaintiffs' theory because that principle would divorce "antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so . . . ."[74]

The Court reasoned that the merger was, arguendo, illegal because it brought a " 'deep pocket' parent into a market of 'pygmies'," yet the loss of income suffered by plaintiffs because of the continued existence of the acquired bowling centers "bears no relationship to the size of either the acquiring company (Brunswick) or its competitors [the plaintiffs]."[75] To the trial and appellate courts, the fact that Brunswick's size gave it the

71 15 U.S.C. § 18 (1982).

72 This theory of anticompetitive effect, which establishes a violation of § 7 when a very large corporation merges into a market in which it will compete with much smaller and less well-financed rivals, has been referred to as the market entrenchment theory. *See* the 1968 Justice Department Merger Guidelines, 2 Trade Reg. Rep. (CCH) ¶ 4510 (1982). The United States Supreme Court first announced the theory in F.T.C. v. Proctor & Gamble Co. (Clorox), 386 U.S. 578 (1967). In *Brunswick*, the court mentions the theory several times. *See, e.g.*, 429 U.S. 477, 482, 487 & 490.

73 The Court of Appeals expressly accepted the plaintiffs' theory of damages in deciding that the *Brunswick* acquisitions were illegal, and, since the acquired bowling centers would have otherwise gone out of business, any loss "casually linked" to "the mere presence of the violator in the market" could be recovered by the plaintiffs. *See Brunswick*, 429 U.S. at 487 (quoting NBO Indus. Treadway Cos. v. Brunswick Corp., 523 F.2d 262, 272-73 (3d Cir. 1973)).

74 429 U.S. at 487.

75 *Id.*

capacity to substantially harm competition through intimidation was enough to support its liability even though there was no evidence that the company had actually used its size to intimidate smaller rivals.[76] The loss suffered by the plaintiffs, however, was not a product of the large size of Brunswick compared to its rivals, and this was the only aspect of the merger that had made it illegal under section seven. Therefore, the Supreme Court held that "respondents' injury was not of 'the type that the statute was intended to forestall.' "[77]

The foregoing would have been sufficient for the Court to deny plaintiffs recovery under section four of the Clayton Act. The Court, however, went further and noted that "the antitrust laws are not merely indifferent to the injury claimed here," because the antitrust laws were enacted to protect competition and not individual competitors.[78] Although the Court's opinion does not clarify the point, it is nonetheless clear that the Court was impressed with the fact that plaintiffs' theory required an exclusive focus on the economic health of the plaintiffs, without considering either the competitive health of the markets in which the plaintiffs competed, or the relationship between the anticompetitive acts of the defendant and the economic health of the plaintiffs.

The Court discussed antitrust standing, or the right to recover damages for "antitrust injury," in the following terms:

> [F]or plaintiffs to recover treble damages on account of § 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove *antitrust* injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause."[79]

The quoted passage establishes two alternative concepts of "antitrust injury," injury necessarily resulting from the antitrust violation, or injury from acts made possible by the violation. These concepts were announced in a review of a treble damage award allegedly caused by a violation of section seven of the Clayton Act, a prophylactic statute which requires a prediction of future anticompetitive effect, as opposed to a finding that actual injury to competition or to a competitor has occurred. Four years later, the Supreme Court noted the prophylactic nature of the statute addressed by the *Brunswick* court in *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*[80] The issue in *Truett Payne* was whether treble damages were automatically available to a plaintiff upon proof that the defendant violated section 2(a) of the Robinson-Patman Act.[81] The Court held that since the Robinson-Patman Act only requires proof that injury

76 *Id.* at 481-84.
77 *Id.* at 487-88 (quoting Wyandotte Co. v. United States, 389 U.S. 191, 202 (1967)).
78 *Id.* at 488.
79 *Id.* at 489 (quoting *Zenith*, 395 U.S. at 125) (emphasis in original).
80 451 U.S. 557, 562-63 (1981).
81 15 U.S.C. § 13(a) (1982).

to competition *may* result, the proof of a violation does not establish that a competitor has been injured for the purpose of an action under section four of the Clayton Act.[82]

Although the prophylactic nature of the statutory provision considered in *Brunswick* was extremely important to the antitrust injury discussion in that case, the *Berkey* court adopted the *Brunswick* language without discussing the difference between section seven of the Clayton Act and the monopolization prohibition in section two of the Sherman Act.[83] The monopolization prohibition is not violated unless the process of competition has been injured, while section seven requires only a showing that injury to competition may occur. The failure of the *Berkey* decision to appreciate the prophylactic nature of the statute involved in *Brunswick* calls the validity of the disaggregation requirement announced in *Berkey* into question.

D. *Merger of the Concern Over Speculation and the Antitrust Standing Concept*

The Court reaffirmed the principle that section four of the Clayton Act should receive an expansive reading to deter violators and compensate victims in *Blue Shield of Virginia v. McCready*.[84] Plaintiff McCready, a Blue Cross health plan subscriber, obtained psychotherapy services from a psychologist and sought reimbursement from Blue Shield. When Blue Shield denied payment, plaintiff filed a treble damage action alleging a boycott between Blue Shield and the state psychiatrist association to deny payment to Blue Cross subscribers who received therapy from psychologists, rather than psychiatrists. The trial court held that McCready had no standing to seek antitrust damages, and the Supreme Court reversed. The Court distinguished *Hawaii* and *Illinois Brick* on the ground that since McCready had paid her psychologist's bill and was seeking repayment of that exact sum her claim involved no danger of duplicative recovery and was not speculative in nature.[85]

To the argument that the plaintiff's injury was too "remote" from the alleged violation to give her standing, the Court had a two part reply. First, the economic and physical connection between the alleged boycott violation and the harm suffered by the plaintiff was very close, the plaintiff being " 'within that area of the economy . . . endangered by' " the defendant's illegal boycott agreement.[86] The second part of the reply addressed the *Brunswick* requirement that the injury involved must be of " 'the type the statute was intended to forestall.' "[87] Noting that defendants were alleged to have entered into an agreement to coercively boycott patients of psychologists into using psychiatrists, the Court found that the injury to those patients was "inextricably intertwined" with the

82 The Court also noted the persuasive legislative history of the Robinson-Patman Act as a separate ground for its holding on this point. 451 U.S. at 562-63.

83 *See infra* text accompanying notes 142-49.

84 457 U.S. 465 (1982).

85 *Id.* at 474-75.

86 *Id.* at 480-81 (quoting *In re* Multidistrict Vehicle Air Pollution M.D.L. No.31, 481 F.2d 122, 129 (9th Cir.), *cert. denied sub nom.*, Morgan v. Automobile Mfrs. Ass'n., 414 U.S. 1405 (1972)).

87 *Id.* at 481 (quoting Wyandotte Transp. Co. v. United States, 389 U.S. 191, 202 (1967)).

injury the boycotters intended to inflict and "[fell] squarely within the area of Congressional concern."[88]

In his dissent, Justice Rehnquist argued that an injury suffered by the plaintiff must be of an exact type that the antitrust laws were intended to prevent in order for the plaintiff to recover under section four of the Clayton Act.[89] The response of the majority was that this view is "unrealistically narrow" in that it focuses on only a certain type of market participant as being a possible plaintiff. To the majority, any market participant can suffer injury of the type that conveys standing to bring a treble damage action, as long as the participant was engaging in an activity that the proscribed conduct was likely to impact.[90]

In the next term, *Associated General Contractors of California, Inc. v. California State Council of Carpenters* thoroughly analyzed the treble damage standing question.[91] Reviewing a number of concerns addressed in *McCready*, the Court set forth an integrated Clayton section four standing analysis for the first time. Plaintiff California State Council of Carpenters ("Union") alleged that all members of Associated, an association of building contractors, had agreed to subcontract for carpenter services only with nonunion subcontractors. The Union also alleged that Associated had pressured property owners and other builders to engage in the same subcontracting practice. This conduct was further alleged to have weakened and restrained the trade of certain contractors.[92]

The Court assumed, arguendo, that the alleged conduct would constitute a coercive boycott in violation of the antitrust laws, and proceeded to determine whether the unions had standing to seek antitrust damages under section four of the Clayton Act.[93] To reach the legal issue of standing, the Court also assumed: (1) that the weakened and restrained contractors were those who did business with unionized carpentry subcontractors, and (2) that the plaintiff Union might thereby have suffered harm because it would be difficult to sign collective bargaining contracts with nonunion firms seeking to avoid the boycott.[94]

Noting that common law concepts have always been properly used in interpreting section four of the Clayton Act, the Court opened a new era of "antitrust standing" analysis. First, the Court established that the concept of antitrust standing differs significantly from the constitutional concept of standing to litigate.[95] Proof of the fact of injury is enough to satisfy the constitutional standing requirement, but antitrust standing requires a "further determination whether the plaintiff is a proper party to bring a private antitrust action [for treble damages under section four of

88 *Id.* at 481-84.

89 *Id.* at 486 (Rehnquist, J., dissenting).

90 *Id.* at 484 n.21.

91 459 U.S. 519 (1983).

92 *Id.* at 528.

93 *Id.* at 528. Neither the complaint nor the lower court opinions were models of clarity, and the Supreme Court devotes no little effort to making assumptions about the facts alleged in the complaint and the theories of the District Court and the Court of Appeals opinions.

94 *Id.* at 528 (unionized subcontractors assumed to be the target of the boycott); *id.* at 541 n.46 (Union might have suffered several possible economic injuries from defendant's coercion).

95 *Id.* at 535 n.31.

the Clayton Act]."[96] This determination requires an evaluation of three major topics: "[T]he plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them."[97]

The Court described the antitrust standing requirement as being very similar to the common law concept of "proximate cause," an elusive notion that has long bedeviled first year law students studying torts.[98] Neither antitrust standing nor proximate cause are concepts which allow a court to "announce a black-letter rule that will dictate the result in every case."[99] In this connection, the Court quoted from Judge Andrews' famous dissent in the *Palsgraf v. Long Island R.R. Co.* decision, in which the Judge noted that proximate cause was not a concept producing easy solutions to problems. The Judge stated: "What we do mean by the word 'proximate' is, that because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point."[100]

However uncertain in application the concept of antitrust standing may be, the Court clearly held that neither proof that the plaintiff suffered economic loss because of the defendant's antitrust violation, nor proof that the defendant intended to injure the plaintiff by the violation is sufficient to establish antitrust standing.[101] The first fact is obviously a precondition, and the second may be relevant. However, neither fact is sufficient by itself to support the conclusion that antitrust standing exists in a particular case.

The Court listed four factors that must be considered in an action brought under section four of the Clayton Act to determine if the plaintiff possesses antitrust standing. The first is the nature of the harm the plaintiff allegedly suffered, and the inquiry is whether the harm is "of the type that the antitrust statute was intended to forestall."[102] Apparently, only a customer or a competitor of the antitrust violator suffers harm of the type Congress envisioned. Since in the case before the Court the Union was neither, it could not qualify for antitrust standing on the basis of this factor.[103]

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96 *Id.*

97 *Id.* at 535; *see infra* discussion in text accompanying notes 109-10.

98 Proximate cause is said to exist when a court holds that damages from a tort injury suffered by the plaintiff are recoverable from the defendant in a civil case. In such situations, courts frequently say that the defendant's tortious act was the proximate cause of the injury sustained by the plaintiff. Conversely, courts often declare that there is no proximate cause between defendant's tort and the injury suffered by the plaintiff if a judicial determination has been made that the defendant should not be liable to the injured plaintiff. *See* D. Dobbs, R. Keeton & D. Owen, PROSSER & KEETON ON TORTS (5th ed. 1984). "[Proximate cause requires] some reasonable connection between the act or omission of the defendant and the damage which plaintiff has suffered." *Id.* at 263. "The term 'proximate cause' is applied by the courts to those more or less undefined considerations which limit liability even where the fact of causation is clearly established." *Id.* at 273. "[Proximate cause is] the limitation which the courts have placed upon the actor's responsibility for the consequences of the actor's conduct." *Id.* at 264.

99 459 U.S. at 536.

100 *Id.* at 536-37 n.34 (quoting Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 351-52, 162 N.E. 99, 103 (1928) (Andrews, J., dissenting)).

101 *Id.* at 537.

102 *Id.* at 540. The language used by the Court is almost identical to that used in *Brunswick*, 429 U.S. at 487-488.

103 459 U.S. at 539-40. The Court starts its discussion on this point by stating that the antitrust

The second factor is the directness of the injury suffered.[104] Indirect injuries are suffered by firms that are neither customers nor competitors of the antitrust violator. A firm suffering an indirect injury suffers such injury because of actions taken in response to the antitrust violation by a firm that was either a customer or competitor of the antitrust violator. The most obvious situation in which an indirect injury occurs is the passed-on overcharge paid by an "indirect purchaser."[105] Indirect injuries are highly disfavored by the Court because of "conceptual difficulties" in measuring the amount of damage and the fact that firms suffering direct injury will normally provide adequate private treble damage enforcement to deter antitrust.[106]

The third antitrust standing factor is speculativeness. The Court's discussion, however, indicates that courts may consider this factor only in situations in which the plaintiff's economic injury is indirect and may have been produced by causes that are independent of the antitrust violation.[107] The fourth and final factor listed by the Court is manageability of the plaintiff's damage action, which is primarily a matter of determining if a number of plaintiffs on different levels in the product distribution chain will necessarily be involved in the litigation.[108]

Thus, in the antitrust standing analysis discussion in *Associated General Contractors*, the Court spoke of four factors to be considered: Type, directness, speculativeness, and manageability. However, the Court concentrated on only one factor, the type of harm suffered by the plaintiff, in order to determine whether the plaintiff's injury was of the type for which Congress intended to provide a remedy in passing the antitrust laws. Actually, the Court appeared far more concerned with the type of plaintiff than the type of injury alleged. Thus, the real concern about type is whether the plaintiff is reasonably within a class that Congress intended to protect by the passage of the antitrust laws. In the opinion, the Court listed only customers and competitors as entities suffering the type of harm Congress intended to prevent by passing the antitrust statutes.[109] Because both customers and competitors are classes of entities immediately affected by the acts of an antitrust violator, the second factor of directness is necessarily subsumed in the Court's analysis of the type of harm; and the third and fourth factors are also apparently inconse-

laws were intended "to assure customers the benefits of price competition." *Id.* at 538. Apparently competitors also suffer the type of injury Congress wanted to forestall by the passage of the antitrust statutes. *Id.* at 539. The Court was much impressed by the fact that the plaintiff in the case was a labor union and that labor unions do not generally approve of competition in those markets in which they are attempting to organize workers. *Id.* at 539. The Court also believed that it was significant that Congress adopted other distinct statutes addressing the problems of labor union, and that there is a broad exemption from antitrust laws for labor union activities. These enactments indicate that antitrust law is, in general, not designed to protect unions in the context of management relations. *Id.* at 539-40.

104 459 U.S. at 541.

105 *See supra* text accompanying notes 67-69.

106 459 U.S. at 541-42.

107 *Id.* at 542-43.

108 *Id.* at 543-45.

109 *Id.* at 538-40.

quential for the same reason.[110]

Labor unions were almost certainly outside the class or classes of entities Congress intended to protect with the passage of the antitrust laws. Therefore, the Court was not required to canvass the types of market participants that could reasonably have been objects of Congress' protective intentions when it passed the Sherman and Clayton Acts. Certainly, one cannot easily read the decision to imply that *only* customers and competitors were within the requisite intent of Congress, as there is every reason to believe that such firms as those forced to sell products at an artificially low price due to a price fixing conspiracy of purchasers were also within the protection intended by Congress.

In the *Brunswick* and *Associated General Contractors* decisions, the Court provided two concepts which may be used to attempt a synthesis of the Court's decisions in the area of antitrust standing. The "result of anticompetitive consequences" concept from *Brunswick*, while valuable, is actually inconsistent with two of the Court's five antitrust standing decisions, *Hawaii* and *Illinois Brick*.[111] On the other hand, the Court's factor analysis in *Associated General Contractors* rationalizes all of the Court's decisions in this area, and provides a theoretical synthesis for lower courts.

The Court's focus upon the type of economic relationship between the plaintiff and the defendant, and the directness of the injury suffered by the plaintiff in *Associated General Contractors* established that consideration of these two factors would control the issue of antitrust standing. Analyzing the facts presented in prior antitrust standing decisions of the Court relevant to the type of relationship and directness of injury factors explains the holdings of those decisions and provides a principle for future application. In *Illinois Brick* and *Associated General Contractors*, the plaintiffs were not customers or competitors of the defendant, and the plaintiffs did not bear the direct brunt of the antitrust violation. In both cases, antitrust standing was denied. In *Hanover Shoe*, the antitrust violator's customer was the plaintiff, and in *McCready* the plaintiff was in a customer relationship with Blue Shield, a member of the group of illegal

110 The fact that customers and competitors are directly affected by the violators' acts means that the damages sustained by such plaintiff firms will be as certain and non-speculative as damages are likely to be in private antitrust actions. Thus, there would be no concern over the speculativeness of damage claims by firms within those two classes. Also, *Illinois Brick* apparently teaches that firms that do not experience the effect of an antitrust violator's acts directly will rarely be allowed to obtain treble damage recovery under § 4 of the Clayton Act. Thus, questions of manageability of damage actions brought by firms that are not either customers or competitors of the antitrust violator will seldom be raised.

111 The allegation that the economy of the state of Hawaii would be damaged, through a lower growth rate, by prolonged artificially high gasoline prices is not open to question. Similarly, the assertion that the state would realize lower revenues from sales, franchise, income, and other taxes due to the lessened growth of the state's economy is incontravertable. Thus, it would appear that the damage alleged by the state was a result of the anticompetitive consequences of the defendants' alleged price fixing violation of the Sherman Act.

Similarly, the *Illinois Brick* indirect purchasers undoubtedly paid an overcharge in some amount as a consequence of the defendnats' alleged price fix on the sales of bricks to contractors. The immediate anticompetitive result of that antitrust violation logically would be an increase in the price of the bricks when purchased by the contractors. This price increase in turn must have resulted in an increase in the price the plaintiff governmental entities paid for the brick structures they bought from the contractors.

boycotters. The Court held that antitrust standing was established in both decisions. Finally, in *Brunswick* the court found that the acts of the defendant generated no anticompetitive consequences. Accordingly, the Court did not consider facts relating to either the type or directness factors.[112]

The disaggregation requirement in *Berkey* does not accord with the factor analysis of the antitrust standing issue in *Associated General Contractors*.[113] As will be discussed, this conflict additionally justifies the Third Circuit's rejection of the disaggregation requirement in the *Bonjorno* decision.[114]

IV. The Development of the Law of Monopolization

A full consideration of the disaggregation requirement in private monopolization actions requires an understanding of the substantive law of monopolization for two reasons. First, the plaintiff in such actions must establish that the defendant has violated the monopolization prohibition in section two of the Sherman Act in order to recover treble damages under section four of the Clayton Act. Second, one can argue that a number of courts have adopted the disaggregation requirement in private monopolization actions because of the ambiguous nature of the substantive monopolization offense.[115] Some of the ambiguities of the monopolization offense have been resolved by the Supreme Court's recent *Aspen Skiing*[116] decision, and this development is of great importance in evaluating the disaggregation requirement in private monopolization cases.[117]

The basic elements of the monopolization offense under section two of the Sherman Act are easily stated. First, the defendant must be shown to possess monopoly power in the market in which it operates. Second, the monopolist's market power must have been either obtained or maintained by "exclusionary conduct" that differs from socially desirable competitive practices. Although both elements obviously require resolutions of complex factual and legal questions, the second element has consistently been a source of greater controversy in decisions and academic literature.[118]

The first element, possession of monopoly power, initially requires us to define both the geographic market and the product market in which the defendant's power will be determined, a process that has often

112 If the *Brunswick* mergers, which were the alleged antitrust violations, had actually generated anticompetiive consequences in the form of "deep pocket" acts of the *Brunswick* firms, *and* if the plaintiffs had been injured as a result of those deep pocket activities, the Court would have found antitrust standing, under the *Associated General Contractors* analysis. The plaintiffs, as competitors of the merged entities, would have been entitled to recover damages because they would have suffered direct injury from the anticompetitive consequences made possible by the defendant's antitrust violations.

113 *See supra* text accompanying notes 91-108.

114 *See infra* text accompanying notes 150-54.

115 *See infra* text accompanying notes 121-40 and 155-58.

116 Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985). *See infra* text accompanying notes 134-40.

117 *See infra* text accompanying notes 155-58.

118 *See, e.g.*, H. HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 136-38 (1985).

proved difficult for courts to accomplish.[119] Decisions have defined "monopoly power" as the ability to control price within the market or exclude competitors from the market. However, courts have almost invariably accepted evidence of a defendant's very high percentage of the total sales made in the relevant market as a surrogate for empirically determining whether a defendant has actually exercised control of prices or excluded competitors from competing in the relevant market.[120]

On the second, or "exlusionary conduct" element, the law has been considerably less easy to summarize. It is clear that monopolization can produce adverse economic consequences, because a monopolist has no effective price competition to restrain it from raising its prices to make the largest possible profit. The loss to the economy is not the "excess" profits the monopolist may obtain, but is the inefficiency caused by the fact that at least some buyers will forego purchasing the monopolized product and settle for a less valuable, but lower priced, substitute product. This substitution would not be required if the monopolized product were sold at a lower price established through the process of competition.[121]

Monopoly pricing and the inefficiency it produces are detrimental to society. However, it is also quite obvious that society benefits from the competition of firms that are attempting to obtain a larger market share, and at some point an extremely successful firm may obtain a monopoly share of a particular market through product innovation or efficient operation. If the exclusionary conduct element of the monopolization offense could be satisfied by proof that the defendant merely competed in an extremely effective manner, firms would never compete vigorously when they approached a market share that is equated with monopoly power. The potential problem is great, since courts accept approximately eighty percent as a minimum monopoly market share percentage, with some authority for a smaller figure in certain circumstances.[122] Thus, unless the exclusionary conduct element of the substantive mo-

119 The type of issue that courts must resolve in defining product markets include, for example, whether championship boxing matches are in the same product market as other professional boxing matches and whether glass bottles and metal cans occupy the same market in which food and beverage producers make the purchases for the packaging and vending of their products. *See* International Boxing Club of N.Y., Inc. v. United States, 358 U.S. 242 (1959) (holding that championship professional boxing matches constitute a separate market); and United States v. Container Corp. of Am., 393 U.S. 333 (1969) (holding that bottles and metal cans are in the same general "container" market).

120 *See* L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST 74 (1977) and decisions cited *infra* note 122.

121 H. HOVENKAMP, *supra* note 118, at 19-21; T. CALVANI & J. SIEGFIRED, ECONOMIC ANALYSIS AND ANTITRUST LAW 47-51 (1979).

122 *See* ABA, ANTITRUST DEVELOPMENTS 118-19 (1984), L. SULLIVAN, *supra* note 120, at 74-76. *See also* the following modern decisions: United States v. Grinnell Corp., 384 U.S. 563, 571 (1966) (87% sufficient); *International Boxing Club*, 358 U.S. at 249 (93% considered sufficient); United States v. E I. DuPont, 351 U.S. 377, 391 (1956) (75% deemed sufficient); United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 424 (2d Cir. 1945) (90% sufficient and 60-64% deemed insufficient); and United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954) (per curiam) (considerable weight in finding monopoly power given to a market share finding of 75%, with the implication that a market share of over 50% with other factors could support a finding of monopoly power). Older precedents include: United States v. International Harvester Co., 274 U.S. 693 (1927) (64% insufficient); United States v. United States Steel Corp., 251 U.S. 417

nopolization offense is difficult to establish, the extremely successful firm in a market would strictly curtail its activities for fear of violating the statute and suffering the risk, if not the reality, of massive treble damage liability.[123]

Leading firms in an industry may well be the most likely competitors to produce product breakthroughs and new and more efficient methods of production and distribution.[124] If this argument has force, which even advocates of vigorous antitrust enforcement will concede, the exclusionary conduct element of the monopolization offense should either be hard to prove or certain in meaning so that leading firms will feel free to compete aggressively. On the other hand, heavily dominant firms often have the economic muscle to engage in practices that drive competitors from a market and produce a monopoly.

The general response of courts to this conflict has been to temporize and thereby avoid definitive policy decisions on these issues. Modern monopolization law begins with the 1940 *United States v. Aluminum Co. of America* decision of the Second Circuit.[125] Justice Learned Hand established that monopoly power would be determined by market percentage shares in most instances and that *any* conduct on the part of a monopolist that could not be described as the exercise of skill, foresight or industry would be considered monopolization conduct.[126] This ambiguous general conception of exclusionary conduct was obviously of little use to managers or legal counsel of a leading firm for appraising the antitrust litigation risks inherent in a new business move.

Unfortunately, the facts establishing the exlusionary conduct of Alcoa did not provide further certainty. Alcoa was shown to have opened new plants during its period of growth, often on the basis of projections of anticipated demand for Alcoa aluminum. Alcoa stimulated this demand through discovery of new industrial uses for aluminum and proselytizing such uses to potential aluminum buyers. While these would not appear to be business practices harmful to the public good, Justice Hand thought otherwise, stating:

> True, [Alcoa] stimulated demand and opened new uses for the metal, but not without making sure that it could supply what it had evoked.

(1920) (50% considered insufficient); and United States v. Eastman Kodak Co., 226 F. 62 (W.D.N.Y. 1915), *appeal dismissed*, 255 U.S. 578 (1921) (75-80% constitutes monopoly power).

123 A firm possessing a very high market share actually is mindful of the possibility of the massive expense of defending a private antitrust action successfully. This litigation expense, plus the potential for a treble damage judgment, will be taken into account, at least impressionisticly by the leading firms in determining market strategy and business moves. Such a calculation can, as noted in the text, lead to timidity by the leading firm.

124 R. Bork, The Antitrust Paradox 90-106 (1978); H. Hovenkamp, *supra* note 118, at 19-20; and R. Posner, Antitrust Law 15-22 (1976).

125 148 F.2d 416 (2d Cir. 1945) The Supreme Court was unable to consider the case because four justices voluntarily disqualified themselves, thus depriving the Court of the minimum statutory quorum of six justices. Congress then provided that such cases should be heard by the three most senior judges of the relevant court of appeals. Accordingly, the Supreme Court certified the case to the three distinguished judges of the Second Circuit (L. Hand, Swan, and A. Hand) who proceeded to issue the celebrated opinon. P. Areeda, Antitrust Analaysis 154 (1981).

126 *See* 148 F.2d at 424 (discussion of market share) and *id.* at 430-31 (discussion of defendant's conduct as something other than skill, foresight or industry).

> There is no dispute as to this; "Alcoa" avows it as evidence of the skill, energy and initiative with which it has always conducted its business; as a reason why, having won its way by fair means, it should be commended, and not dismembered. . . . Nothing compelled [Alcoa] to keep doubling and redoubling its capacity before others entered the field. It insists that it never excluded competitors; but we can think of no more effective exclusion than progressively to embrace each new opportunity as it opened, and to face every newcomer with new capacity already geared into a great organization, having the advantage of experience, trade connections and the elite of personnel. Only in case we interpret "exclusion" as limited to manoeuvers not honestly industrial, but actuated solely by a desire to prevent competition, can such a course, indefatigably pursued, be deemed not "exclusionary." So to limit it would in our judgment emasculate the Act; would permit just such consolidations as it was designed to prevent.[127]

While Alcoa taught an uncertain concept of monopolization conduct, the United States Supreme Court seemed to approve it in the *American Tobacco Co. v. United States*[128] decision in 1946.[129] *In United States v. Grinnell Corp.*[130] Judge Charles Wyzanski elaborated on his reading of the Alcoa decision. The Judge held that the government established the offense of monopolization when it proved that the defendant held a monopoly of the relevant market, unless the *defendant* could prove that its monopoly position was attributable to praiseworthy competitive acts and practices.[131] This proposition seems unsupportable because the language of the statute appears to require the government or a private plaintiff to prove both elements of a charge of illegal monopolization under section two of the Sherman Act. However, the Supreme Court did not accept or refute the concept in affirming the lower court judgment, and the uncertainty in the exclusionary conduct element continued.[132]

Unfortunately, for two decades following the *Grinnell* decision the Supreme Court did not consider any cases squarely raising the question of the meaning of the exclusionary conduct element of the monopolization offense, and the issue was addressed only by commentators and lower courts in such decisions as *Berkey* and *Bonjorno*.[133] During this period, an understandable concern over automatically trebled damages, awarded upon transgression of such a nebulous standard of conduct, may have caused a number of courts to adopt the disaggregation requirement.

In the summer of 1985 the Supreme Court delivered an unanimous opinion in *Aspen Skiing Co. v. Aspen Highland Skiing Corp.*, which clarified

127 *Id.* at 430-31.

128 328 U.S. 781 (1946).

129 *See id.* at 813.

130 236 F. Supp. 244 (D.R.I. 1964), *aff'd except as to decree*, 384 U.S. 563 (1966).

131 *Id.* at 248.

132 *See* United States v. Grinnell Corp., 384 U.S. 563, 570-71, 576-80 (1966). (This is the citation that Areeda apparently uses for the quotations from the Supreme Court's *Grinnell* decision. P. AREEDA, *supra* note 125, at 188).

133 *See, e.g.* Bonjorno v. Kaiser Aluminum & Chem. Corp., 752 F.2d 802, 808-10 (3d Cir. 1984), *cert. denied*, 106 S. Ct. 3284 (1986); Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 273-75, 281-85, & 291-94 (2d Cir. 1979); P. AREEDA & D. TURNER, ANTITRUST LAW 66-67 (1978); H. HOVENKAMP, *supra* note 118, at 10-158; L. SULLIVAN, *supra* note 120, at 94-105.

the concept of monopolization conduct to a considerable degree.[134] The Court rendered the decision in a private monopolization action brought by the owner of one of four ski areas in Aspen, Colorado, against the owner of the other three ski areas. The trial resulted in a treble damage judgment of $7,500,000 for the plaintiff. At issue on the appeal was whether the defendant had engaged in monopolization conduct by withdrawing from a joint marketing arrangement with the plaintiff. Under the joint marketing plan, skiers at Aspen had been offered a six day ticket with which they could ski at any of the four Aspen areas (three owned by the defendant and one owned by the plaintiff).

The Supreme Court approved the following trial court instruction:

> In considering whether the means or purposes were anti-competitive or exclusionary, you must draw a distinction here between practices which tend to exclude or restrict competition on the one hand and the success of a business which reflects only a superior product, a well-run business, or luck, on the other.[135]

The Supreme Court reviewed the evidence to determine if it supported the jury finding that the defendant's withdrawal from the joint marketing plan was "exclusionary." The Court's discussion established that the plaintiff, without the help of a presumption, has the burden of proving that the defendant engaged in exclusionary conduct in obtaining or maintaining its monopoly position.[136] The opinion also significantly rationalized the law of monopolization by providing a general analysis for determining exclusionary conduct.

To determine whether the termination of the marketing plan was exclusionary conduct, the Court considered three factual questions: The termination's effect upon the plaintiff, the termination's effect upon consumers, and whether the defendant had any "normal" or efficiency-producing business purpose for the termination.[137] It appears from this analysis that the Court considers conduct to be exclusionary under section two of the Sherman Act if the conduct impairs a rival's ability to compete and cannot be justified on the basis that it either produces consumer benefit through a better product or constitutes an attempt by the defendant to increase the efficiency of his business operations. Reviewing the facts of the case, the Court found that the termination of the multi-area ticket plan harmed the plaintiff through loss of market share, deprived consumers of a valuable product and was not justified by "any normal business purpose" offered by the defendant. In the words of the Court: "Thus the evidence supports an inference that [Aspen] Ski Co. was not motivated by efficiency concerns and that it was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival."[138]

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134 472 U.S. 585 (1985). Although the opinion was unanimous, Justice White did not participate in the decision of the case.

135 *Id.* at 596.

136 This point is established *sub silentio* by the opinion, which assumes that the plaintiff must produce evidence proving exclusionary conduct. *Id.* at 605-11.

137 *Id.*

138 *Id.* at 610-11.

It thus appears that the Court has determined that exclusionary conduct is activity that harms a competitor economically and is motivated only by a desire to obtain a long-run benefit when the competitor has been destroyed or substantially impaired. The Court specifically noted that "specific intent" is not a required element of a plaintiff's case in an action based on alleged monopolization as opposed to an attempt to monopolize case.[139] However, it would appear that *Aspen Skiing* goes a long way toward requiring specific intent to obtain a monopoly as a "culpability standard" in monopolization law. It is hard to see how specific intent to obtain a monopoly in a market differs from proof that the defendant intended to forego present economic benefit in order to obtain an advantage predicated upon an ability in the long run to control prices.

Assuredly the exclusionary conduct concept announced in *Aspen Skiing* will not remove all uncertainty for antitrust litigators and counselors. However, it possesses enough clarity to be highly useful to courts and competitors. Furthermore, the *Aspen Skiing* exclusionary conduct test gives clear direction on the issue of disaggregation.[140]

V. Evaluation of the Disaggregation Requirement

The disaggregation requirement suffers from two conceptual defects, each a separate ground for rejecting the rule. First, the *Berkey* court's reliance upon the *Brunswick* antitrust injury concept was erroneous due to the difference between the substantive antitrust prohibitions involved in the two cases. Second, the development of the "antitrust standing" concept in the *McCready* and *Associated General Contractor* decisions of the Supreme Court implicitly repudiates the disaggregation rule, because the rule would virtually eliminate almost all potential plaintiffs in monopolization actions.

A third reason exists for rejecting the disaggregation rule that has nothing to do with the jurisprudence that has developed regarding section four of the Clayton Act. The establishment of a balanced and analytical law of exclusionary conduct in the 1985 *Aspen Skiing* decision obviates the pressing need to curtail the exposure of monopolists to treble damage awards. The three reasons for rejecting the disaggregation requirement in monopolization cases are discussed in detail below.[141]

A. *The Misplaced Reliance Upon the* Brunswick *Concept of "Antitrust Injury"*

While both *Brunswick* and *Berkey* were treble damage actions under section four of the Clayton Act, the substantive provisions of the antitrust law involved in the two decisions are markedly different. That difference in the substantive prohibitions is so large that the *Berkey* court's reliance upon the "antitrust injury" language from the *Brunswick* decision was

139 *Id.* at 602-03.

140 *See infra* text accompanying notes 155-58.

141 The "misreading of *Brunswick*" reason is discussed at *infra* text accompanying notes 142-49. The "antitrust standing" reason is discussed at *infra* text accompanying notes 150-54. Finally, the "*Aspen Skiing*" reason is discussed at *infra* text accompanying notes 155-58.

erroneous.[142]

Section seven of the Clayton Act, which was involved in *Brunswick*, is prophylactic. The section was designed as an instrument to be used to void mergers that would *probably* cause an anticompetitive market in the future. Thus, the anticompetitive harm, or "antitrust injury," of a particular merger that section seven was designed to prevent might *never* occur, even though the statute would be violated by the merger when the probability of such harm is found.[143] This was, of course, the exact situation that occurred in the *Brunswick* case.[144]

In contrast, section two of the Sherman Act is a curative provision, which focuses on existing anticompetitive market situations. Thus, the anticompetitive harm that section two of the Sherman Act was designed to address, a monopolized market, must be found to exist *before* the section is violated. Society has a clear interest in vigorous competition, and the judicial inclusion of the exclusionary conduct requirement in the law of section two of the Sherman Act serves that interest.[145] However, the harm to competition, and the concommitant harm to society, always occurs when one firm holds such power in a market that it can control price or exclude competition.[146] If a position of monopoly power is held by a firm that has engaged in "exclusionary" practices to obtain or maintain that position, and is therefore presumably willing to engage in further exclusionary acts to keep the monopoly position, the threat to society is even more pronounced.

Because anticompetitive effect is always present in a market that has been monopolized in violation of section two of the Sherman Act, any participant in that market has experienced "injury of the type . . . that flows from that which makes defendants' acts unlawful [meaning the monopolization of the market by the use of exclusionary practices]." The injury will take the form of either increased prices paid by the monopolist's customers, or profits lost by excluded competitors of the monopolist.[147]

Another way of appreciating the crucial difference between the two

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142 *See* Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 297 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980), where the court states:

> we must determine the proper measure of damages in a § 2 case by juxtaposing the basic rule for antitrust damages with the fundamental principles of law under § 2 . . . . The basic rule was set forth in *Brunswick* . . . where the Supreme Court declared that plaintiffs in an antitrust action must prove "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful."

See also the discussion of the *Brunswick* opinion *supra* text accompanying notes 70-82.

143 Congress authorized judicial intervention into the marketplace under § 7 of the Clayton Act as a prophylactic measure only in merger situations. Hostility to mergers as a business practice was common during the early part of this century and, at least in part, the Clayton Act reflects this hostility. Section 7 of that Act was amended in 1950, but its essential features, which are the concern at issue, remain unchanged from 1914.

144 *See* discussion of the *Brunswick* decision *supra* notes 76-77 and accompanying text.

145 *See* discussion of the two elements of Sherman Act § 2 offense *supra* text accompanying notes 118-21.

146 Recall that ability to control price or exclude competition is the *legal* definition of monopoly power. *See supra* text accompanying notes 119-20.

147 There may also be injury to firms that sell goods and services to the monopolist and its marginal competitors. Those sellers will be faced with a monopsony situation and will make the sales at a lower price than would prevail in a competitive market. It should also be recalled that the lost profits

provisions is to note that section seven of the Clayton Act principally focuses upon a specific type of *business conduct*, mergers; while section two of the Sherman Act focuses upon a specific type of *market condition*, monopoly. Thus, if section two is violated, it is axiomatic that anticompetitive effect will be felt in the defendants' market. Quantifying the injury a particular market participant has suffered, while perhaps difficult, is a separate consideration from whether anticompetitive effect is likely to be present in a situation in which section two has been violated. There is no doubt that such anticompetitive effect is likely if not invariable.

Protection of competition and not competitors is a basic theme of judicial interpretation of the antitrust laws, and this concern was the explicit justification for the Supreme Court's antitrust injury pronouncement in *Brunswick*.[148] Because of the nature of the prohibition in section two of the Sherman Act, competition has been harmed whenever a violation of the section has been proved. Thus, treble damages should be awarded on the basis of the usual standard of proof in order to protect the process of competition by deterring future illegal monopolists. It therefore follows that since competition is always injured when section two of the Sherman Act is violated, the *Berkey* court erred in requiring the plaintiff to prove the amount of damages by anything more than a "reasonable inference," the proof standard under section four of the Clayton Act. The proof standard mandated by the disaggregation requirement is the more burdensome "more probable than not" standard, which has been rejected in antitrust treble damage actions under the decisions of the Supreme Court.[149]

B. *The Disaggregation Requirement and the Law of Antitrust Standing*

For the reasons stated in the preceding section, the validity of the disaggregation requirement under the *Brunswick* antitrust injury concept is at least questionable. It is more clear that the requirement is inconsistent with the law of "antitrust standing," developed by the Supreme Court in the years following the *Berkey* decision.[150] The practical effect of the *Berkey* court's announcement of the disaggregation requirement in the monopolization claim context is to require a plaintiff in a private monopolization case to prove the *amount* of its damages by a more probable than not standard. Without such proof, a plaintiff has no right to have the jury consider the questions of whether the plaintiff is entitled to *any* damages and what the amount of those damages should be. This "amount of damage" requirement adds, as a practical matter, another antitrust standing requirement for the plaintiff in a monopolization case to meet.

The additional antitrust standing requirement is inconsistent with

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of the excluded competitors of the monopolist may take the form of lost investment in the event competitors of the monopolist are driven into bankruptcy.

148 *Cf.* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 767-68 n.14 (1984) (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).

149 *See supra* text accompanying notes 53-57.

150 *See supra* text accompanying notes 70-84, for a discussion of the development of the law of antitrust standing.

the four factor antitrust standing test announced in the *Associated General Contractors* decision.[151] In that decision, the Supreme Court determined that plaintiffs are entitled to seek treble damages when the injury is of the type the antitrust law provision was enacted to forestall, the plaintiff suffered the injury in a direct fashion, the fact of damage is not speculative, and the litigation is manageable. Once those factors have been established, the plaintiff is entitled to seek treble damages under section four of the Clayton Act, meeting the usual burdens of proof that have been developed in the case law interpreting section four of the Clayton Act: "more probable than not" proof of the fact of violation and the fact of damage and "reasonable inference" proof of the amount of damage.[152]

The disagreggation requirement in the *Berkey* opinion requires a plaintiff in a private monopolization case to prove the amount of its damages before the plaintiff is entitled to seek relief under section four of the Clayton Act. This is an additional factor, unauthorized by *Associated General Countractors* and inconsistent with the third factor established by that decision: Whether the damage claim of the plaintiff is speculative in nature. For a damage claim to be "certain" as opposed to speculative, authorities require two things: Proof meeting the preponderance of the evidence standard that the plaintiff suffered *some* damage and evidence introduced into the record supporting a "reasonable inference" that the plaintiff's damage was in a particular amount. In contrast to this, the *Berkey* court requires a showing that the *amount* of damage can be proved on a more probable than not standard. This standard is onerous and in conflict with *Associated General Contractors*.

Regarding the specific market position of the plaintiff in *Berkey*, it would seem that the antitrust standing of a purchaser from an illegal monopolist is clear beyond argument. Such purchasers deal directly with the monopolist and suffer damages as certain and susceptible of convincing proof as any possible damage claim under section four. If Congress intended to confer the right of treble damage recovery on any class of market participants, it would appear to be direct purchasers from an illegal monopolist.

What appears to be the most important of the factors mentioned in *Associated General Contactors*, the directness of the injury suffered, is easily established by competitors and purchasers in the illegally monopolized market. This directness eliminates a principle concern in antitrust standing analysis, the danger of duplicate recovery.[153] Overcharged purchasers in a monopolized market are entitled to recover the amount by which the prices they paid exceeded the prices they would have paid in a competitive market. The competitive market price includes the profit that a hypothetical seller would have realized in making the sale to the plaintiff. On the other hand, an injured competitor sues to collect the profit it would have made on hypothetical sales if the market had been competi-

151 Associated Gen. Contractors of Cal., Inc. v. California State Council of Carpenters, 459 U.S. 519 (1983). *See supra* text accompanying notes 91-110.

152 *See* discussion of the burdens of proof under § 4 of the Clayton Act *supra* text accompanying notes 52-59.

153 *See Associated Gen. Contractors*, 459 U.S. at 544.

tive. This profit figure is obviously not available as an item of damage to the injured purchaser, and there is no danger of duplicate recovery. The Court in the *Aspen Skiing* decision clearly approved the proof of lost profits by an injured competitor.[154]

C. Aspen Skiing *Minimizes Possible Concern About Overdeterrence*

Given the uncertain state of the law of "exclusionary conduct" prior to the *Aspen Skiing* decision, a concern over possible overdeterrence chilling valuable competitive activity by dominant firms was a reasonable, if not a compelling, reason to adopt the disaggregation requirement. Society would hardly benefit if an ambiguous standard of conduct deterred dominant firms from introducing new products and business procedures. Two solutions of the pre-*Aspen Skiing* overdeterrence problem were apparently available. One, taken in the *Berkey* decision, was to virtually eliminate the possibility of large damage awards through imposing a difficult standard of proof for the amount of damage. The *Aspen Skiing* Court adopted the second solution, reformulating the standard of conduct under the monopolization prohibition in section two of the Sherman Act. The reformulation made the conduct standard certain enough for intelligent compliance by law abiding firms.[155]

Since *Aspen Skiing*, the plaintiff in a private monopolization action must virtually prove the defendant acted with a "specific intent" to monopolize in order to meet the terms of the reformulated exclusionary conduct element of the monopolization offense. If the evidence of exclusionary conduct must be sufficient to support a finding that the defendant was willing to forego short-term profit *and* long-run efficiency for the purpose of reaping monopoly profits, the plaintiff must prove that the defendant calculatedly planned the illegal monopolization. No firm that is genuinely intent on prevailing over rivals by competition on the merits will cross over this new standard inadvertently. Thus, "overdeterrence" is no longer a problem, and the *Berkey* court's solution can be discarded without loss.

If a lingering concern remains over the uncertainty faced by a dominant firm under section two of the Sherman Act, it would appear to be misplaced. Although automatic trebling of damages can produce very large judgments, Congress chose the automatic trebling of damages lan-

154 *See* Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 598 (1985) where the Court mentions the fact that the plaintiff received a verdict of $2.5 million, trebled to $7.5 million, and the facts alleged in the case are only consistent with the proposition that this sum represents the plaintiff's lost profits. It should be noted that in the *Aspen Skiing* decision, the Court did not indicate approval of a disaggregation requirement, even though the facts apparently would have allowed the defendant to make an argument that disaggregation was appropriate. Because the Court did not address the issue, the reader of the decision cannot tell if the argument was tendered to this Court. Consequently, there is no precedential value in the fact that the Court did not address the disaggregation requirement issue. However, *Aspen Skiing* is the first extensive discussion of the exclusionary conduct concept by the Court since the Second Circuit's *Alcoa* decision, and it is the traditionally ambiguous exclusionary conduct concept that previously provided arguable practical justification for the disaggregation requirement. *See supra* text accompanying notes 115-33. Thus, the Court's silence on the point may be more significant than would ordinarily be the case.

155 For a discussion of the reformulated *Aspen Skiing* text for exclusionary conduct, see *supra* text accompanying notes 135-39.

guage used in section four of the Clayton Act in the last century and has never decided to change it.[156] The fact that section four of the Clayton Act authorizes an award of damages that may seem unreasonable is not a valid reason for the judiciary to eliminate the remedy through imposing a disaggregation requirement.[157]

The disaggregation requirement virtually eliminates the potential for any damage recovery in situations in which the monopolist has engaged in the wrongful conduct several years prior to the plaintiff's participation in the market. Market affecting events occurring subsequent to the wrongful conduct may make it impossible to determine what portion of the defendant's monopoly position is attributable to the wrongful conduct. However, the defendant's wrongful conduct, if it is to meet the "exclusionary conduct" test of *Aspen Skiing*, must be a deliberate and successful attempt to gain or hold monopoly market strength without earning it through fair competition. Treble damages recovery for injury produced by such conduct is appropriate if it is admitted that actions under section four of the Clayton Act are a valued deterrent to conduct that violates the antitrust laws. This assumption is well based in the language of Supreme Court opinions.[158]

However, it is valid to consider the plight of a monopoly power holder that has engaged in exclusionary conduct and is faced with massive potential liability in a treble damage action. If the wrongful conduct was not essential to attaining or maintaining the defendant's monopoly, it serves no interest of society to hold the firm liable for a competitor's losses or a customer's overpayments that do not flow from the firm's wrongful conduct. This concern should be reconciled with the general proposition that an antitrust violator should bear the risk of uncertainty about the amount of the economic injury inflicted by the violator's wrongdoing. Such a reconciliation can lead to a solution that avoids the

156 When signed into law by President Harrison on July 2, 1890, the Sherman Act contained eight sections. Section 7 of the Act read as follows:

> Any person who shall be injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful by this act may sue therefor in any Circuit Court of the United States in the district in which the defendant resides or is found, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee.

reprinted in A. WALKER, HISTORY OF THE SHERMAN LAW 30-31 (1910). With the passage of the Clayton Act in 1914, § 7 of the Sherman Act was repealed.

157 Areeda and Turner refer to the possible unwarranted nature of the market intervention by courts in situations in which exclusionary conduct was not the primary reason for the defendant's monopoly position, and recommend a disaggregation requirement in their treatise. 3 P. AREEDA & D. TURNER, ANTITRUST LAW 86-87 (1978). The *Berkey* court cited Areeda and Turner as support for the imposition of the disaggregation requirement in private monopolization treble damage cases. 603 F.2d at 297.

However, as mentioned in the text, Congress decided to make the damage awards under § 4 of the Clayton Act very large through automatic trebling. If this was unreasonable, it is still properly the exclusive perogative of Congress to change the law of these damage awards. For a discussion of legislation limiting the application of the treble damage language in § 4 of the Clayton Act in specific situations, see text accompanying note 51.

158 *See, e.g.*, Texas Indus., Inc. v. Radcliff Materials, Inc., 451 U.S. 630, 639 (1981) ("The very idea of treble damages reveals an intent to punish past, and to deter future, unlawful conduct, not to ameliorate the liability of wrongdoers."); Hanover Shoe, Inc. v. United Shoe Mach. Corp., 392 U.S. 481 (1968); *see supra* text accompanying notes 60-64.

problems of the *Berkey* disaggregation requirement, but satisfactorily addresses reasonable concerns caused by automatic trebling of damages awarded on inherently uncertain market predictions or reconstructions.

VI. A Proposed Solution to the Disaggregation Requirement Problem

The basic points to recall in considering a solution to the problem bear repeating. First, hypothetical market results are very difficult to prove with the degree of certainty that lawyers and judges find comfortable. Second, for unassailable reasons of policy, it is settled law that the risk of uncertainty attending such proofs must be borne by a defendant firm that has violated the antitrust laws, even though the damages to be awarded as a result of such proofs will be trebled. Third, the illegally monopolizing defendant should be held liable only for economic losses caused wholly, or in part, by the defendant's actions that violate section two of the Sherman Act.

The first step in formulating a solution is to adapt serviceable elements of the traditional law of treble damage actions for more effective use in private monopolization actions. Thus, the well-accepted requirement that the plaintiff has suffered some damage must be shown to be more reasonable than not should be strengthened in monopolization cases. This could be accomplished by including a jury instruction statement on the subject of damages requiring a high level of threshhold proof before the jury can consider the amount of damages that the plaintiff suffered. Thus, the jury should be instructed that in cases in which illegal monopolization is alleged, the plaintiff must present clear and convincing evidence to the jury proving that the defendant's exclusionary conduct had some effect upon the market and that this market effect had an impact upon the plaintiff's business, either through increased prices (if the plaintiff is a customer) or through lost sales opportunities (if the plaintiff is a competitor).[159] In practical terms, the judge should ask the jury to find that the plaintiff has convincingly shown that but for the exclusionary conduct of the defendant, the plaintiff would have either paid less for the product it bought, or the plaintiff would have made a greater profit on its operations.

Strengthening the requirement that a Clayton Act treble damage plaintiff prove the fact of damage will insure that trivial exclusionary conduct will not subject a monopolist to the risk of substantial damages in a treble damage suit. If the plaintiff satisfies the clear and convincing standard of proof on the fact of damage, it should recover the *entire* overcharge or loss of business it can show resulted from the fact that the defendant held a monopoly, unless the defendant can prove, again by clear and convincing evidence, that the amount of the overcharge or business loss can be disaggregated into a portion attributable to exclusionary acts and a portion attributable to legitimate competitive acts.

159 The jury should also be instructed that expert opinion may properly constitute much of the evidence on effect on markets, and that expert evidence can be considered clear and convincing by the jury, in the same way as eyewitness testimony or objective evidence may be considered to be clear and convincing proof of a fact.

Again, such proof will invariably take the form of expert testimony, and it will be up to the jury to determine if the defendant's proof on the point is clear and convincing.

It is informative to note that the shifting of the burden of proof of the feasibility of the disaggregation requirement accords with the approach adopted by courts to the issue. For instance, the court in *Memorex* endorsed the disaggregation requirement after noting that defendant IBM had shown that disaggregation of damages was possible.[160] In *Litton*, on the other hand, the appellate court apparently rejected the disaggregation requirement at least in part because the plaintiff's expert testimony established that disaggregation would not be "fruitful" and the defendant offered no evidence on the point.[161] While the recommended instructions may increase the amount of instruction given to the jury, in a trial that is bifurcated into liability and damage phases, lengthening the damage instructions to include the recommended points should not prove onerous to the jury in the damage phase. Federal Rule of Civil Procedure 42(b) authorizes the bifurcation of civil antitrust damage trials into liability and damage phases.[162]

As a practical matter, if enough time has elapsed after the completion of the exclusionary conduct, the defendant will probably not be able to offer clear and convincing proof that the damages suffered by the plaintiff can be disaggregated. This is because the effect on the market of defendant's exclusionary conduct will have been in turn affected by subsequent legitimate actions of the defendant. Disentangling the effect of the wrongful conduct from the effect of subsequent legitimate competitive acts on a particular participant in the market would normally be a matter of mere speculation. This consequence is fully consistent with the Supreme Court's antitrust injury statement in *Brunswick* that "[t]he injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."[163] The phrase, "anticompetitive acts," when referring to an illegal monopolist, should include legitimate acts made possible by illegal activity if the final result is a distortion of the market of monopoly proportions. This is consistent with the unique monopoly market power element of the monopolization prohibition in section two of the Sherman Act. The competitive evil of monopolization is so great that any activity capitalizing on such a market condition, when attributable to exclusionary conduct, should be equated with "anticompetitive acts" as that phrase is used in *Brunswick*.

A jury instruction on the crucial consideration of the time the exclusionary conduct occurs would also be helpful. Therefore, the jury should be informed that after a significant passage of time following the occur-

160 *See* ILC Peripherals Leasing Corp. v. IBM Corp, 458 F. Supp. 423, 434-35 (N.D. Cal. 1978), *cert. denied*, 452 U.S. 972 (1981).

161 Litton Sys., Inc. v. American Tel. & Tel. Co., 700 F.2d 785, 825 (2d Cir. 1983), *cert. denied*, 464 U.S. 1073 (1984).

162 *See, e.g.*, MCI Communications Corp. v. American Tel. & Tel. Co., 708 F.2d 1081, 1166-69 (7th Cir.), *cert. denied*, 464 U.S. 891 (1983).

163 Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977) (quoting Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 125 (1969)).

rence of the exclusionary conduct, disaggregation is legally impossible. What constitutes a significant period for purposes of the instruction will vary according to the size, structure and dynamic quality of the specific market involved in the litigation.

Finally, the judge should include an instruction clarifying the point addressed by the majority in the *MCI* decision. The court in that case was concerned that the jury might have established a large damage award without taking into account that certain of the plaintiff's losses were attributable to plaintiff's internal operations, such as bad management, and had no relationship to the act of the defendant.[164] To meet this concern, the jury should be instructed that it is particularly important in establishing damages in monopolization cases to consider the acts of the plaintiff to determine if the plaintiff's losses would have been suffered by it in a competitive market.

VII. Conclusion

Under well-accepted antitrust doctrine, the disaggregation requirement is inappropriate in private monopolization actions in the form set forth by the *Berkey* court. The solution tendered above recognizes that the requirement may, in some instances, be a useful device to avoid an inequitably large damage award. However, the proposed solution places the burden of proving the feasibility of the requirement on the defendant, the party for whose benefit the requirement was fashioned.

164 708 F.2d at 1160-64.