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*Donald G. Rez**

I. Introduction

In a 1969 decision, the United States Court of Appeals for the Ninth Circuit held in *Fowler Manufacturing Company v. Gorlick*[1] that a private party seeking damages for secondary-line injuries suffered from price discrimination violations of the Robinson-Patman Act[2] need not establish a causal relationship between the price discrimination alleged and the amount of damages demanded. Specifically, the Ninth Circuit stated:

> [T]he right of a court to grant a general damage award under the Robinson-Patman Act for the amount of an illegal difference in prices and allowances does not depend upon its having been evidentially established, and the court's being able to find on the basis thereof, that a lessening of competition has in fact occurred, and that the extent of the injury occasioned thereby in the particular situation corresponds to the amount of the discrimination. The Act permits recovery of the amount of a discrimination in prices and allowances without the necessity of any such specific proof or finding as a basis therefor.[3]

The decision substantially relieves the plaintiff of the burden of proving two separate elements of a price discrimination claim. This holding contravenes every known principle of the antitrust laws. Under *Fowler,* the plaintiff need not prove a causal relationship between the price discrimination and the asserted injury. Thus, the plaintiff is freed from proving any injury to competition. Secondly, the plaintiff is presumptively entitled to automatic damages—a

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1 415 F.2d 1248 (9th Cir. 1969), *cert. denied,* 396 U.S. 1012 (1970) (hereinafter cited as *Fowler*).

2 Section 2(a) of the Clayton Act, as amended by the Robinson-Patman Act, 15 U.S.C. § 13(a) (1976) reads, in pertinent part, as follows:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. . . .

Originally, section 2 of the Clayton Act was concerned with price discrimination's effect upon the seller's competitors (primary-line injury). However, the advent of mass-purchasing chain stores and various forms of discount houses, following World War I, seemingly threatened the survival of independent merchants. These merchants prevailed upon the Congress to amend the statute to more effectively control discriminatory concessions the chains received from suppliers. Thus, the main thrust of the Robinson-Patman amendments is control of secondary-line injury. *See* P. Areeda, Antitrust Analysis 866-67 (1974).

3 415 F.2d at 1253. This language immediately makes *Fowler* assailable. "By the express wording of the statute, the effect on competition must be substantial. Trivial, remote, or inconsequential effect is not enough. 'There must be something more than an essentially temporary minimal impact on competition.' " Continental Baking Co. v. Utah Pie Co., 349 F.2d 122, 150 (10th Cir. 1965). Thus, as to some alleged injuries the statutory language itself rebuts *Fowler.*

damage award of the full amount of the difference in price paid by it and that paid by its competitor. Thus, the plaintiff would not be required to demonstrate the actual amount of damages that it has suffered. Conceivably, an uninjured plaintiff could recover substantial damages under the *Fowler* standard.

Fowler has recently become the focus of contention in several Robinson-Patman Act cases in the Ninth Circuit. In *Ricky Hasbrouck, d/b/a Rick's Texaco v. Texaco,*[4] a Spokane, Washington, jury returned a substantial treble damage verdict in favor of the plaintiffs.[5] The suit was filed by twelve Texaco dealers alleging that Texaco sold gasoline at a lower price to certain favored distributors. Two *Fowler* jury instructions, on the crucial causation and damages elements in the case, were proposed by the plaintiff and given by the court.[6]

Judge Marion Callister, on March 31, 1980, entered an order granting a judgment notwithstanding the verdict in favor of Texaco. The court also issued a memorandum decision which held that its jury instructions predicated on *Fowler* were erroneous and should not have been given. The court further declared that *Fowler* is not the law in the Ninth Circuit. Given that a large jury verdict is at stake, the Ninth Circuit will soon be offered an opportunity to review its *Fowler* decision.

On the basis of the *Hasbrouck* jury verdict, seven Shell dealers in Arizona have filed a $2.3 million suit against Shell alleging that Shell sold gasoline to certain "wholesale mass marketers" at five cents per gallon less than it charged the dealers. Similarly, eight Union 76 dealers in Arizona have filed a suit claiming $1.25 million. They also claim that certain distributors were receiving unwarranted preferential prices.[7]

Two other recent decisions have flatly rejected the *Fowler* analysis. The Fifth Circuit, in *Chrysler Credit Corp. v. J. Truett Payne, Inc.,*[8] acknowleged *Fowler*

4 No. C-76-27 (E.D. Wash).

5 The jury returned a verdict of approximately $2.75 million after trebling on August 31, 1979.

6 The two injury instructions relied heavily on *Fowler.* The first instruction, on causation, cited only *Fowler.* It read as follows:

> With respect to this requirement of proving that the violation was a proximate cause of injury to the plaintiff, I instruct you that under the Robinson-Patman Act this requirement is satisfied if you find that Texaco did unlawfully discriminate in price against the plaintiff. The discrimination in price or services is regarded under the law as constituting a direct business injury. Therefore, if you find that Texaco did unlawfully discriminate in price or services against a plaintiff, without legal justification, then you should also find that the plaintiff suffered injury which was proximately caused by the violation.

The second instruction also prominently featured *Fowler* and read as follows:

> In this case, the plaintiffs have measured the damages which they allege they suffered as being equal to the amount of the price discrimination. I instruct you that this is one appropriate way in which damages may be measured in a case like this. As I just mentioned, the amount of a discrimination in price is regarded as constituting a direct business injury. Under the law, the actual amount of discrimination can thus be the measure of a general damage award for a plaintiff. That is, you may measure the damages by taking the per gallon discrimination and multiplying it by the number of gallons the plaintiff purchased. This does not preclude you from measuring such damages, if any, in any other reasonable manner or from assessing any additional or other damages you may find to have been proximately caused by defendant's actions. You may make a reasonable estimate based upon actual facts which are in evidence. As I have said before, the decision on whether there have been violations of the law, and if so, what the damages are, are entirely within the province of the jury.

7 *Oil Express,* November 26, 1979, at 1; *Oil Express,* March 3, 1980, at 1.

8 607 F.2d 1133 (5th Cir. 1979).

but stated that "we decline to follow it."[9] A federal district court decision. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.* was even more emphatic.[10] The court in that case directed a verdict for the defendant. It did so despite the plaintiff's reliance upon *Fowler*. "After reviewing *Fowler* and cases decided before and after it, I find that it does not represent the law of this circuit and probably would not represent the law of the Ninth Circuit today."[11]

It is clear that the issue of the continuing validity and effect of the *Fowler* decision has been joined. It is the conclusion of this article that Judge Cahn's *Sweeney* opinion is correct. The *Fowler* decision is incorrect and it should not be followed today.[12]

II. Causation

Fowler establishes that a court may award damages solely upon the proof of price discrimination, without proof of a connection between the discrimination and the injury allegedly suffered by the plaintiff. By dispensing with the requirement of proof of causation of injury, *Fowler* departs from the established elements for private recovery under the antitrust laws.

The Supreme Court has expressly disaffirmed the *Fowler* causation concept espoused in *Fowler*. In *Perkins v. Standard Oil Co.*,[13] a case brought by a distributor against his supplier, the Court explicitly held that the plaintiff must establish that its injury was the result of the illegal price discrimination in order to recover damages.[14] Indeed, the Supreme Court in *Perkins* noted that it was the plaintiff's burden to establish such causation.[15] The *Fowler* holding that an award of damages under the Robinson-Patman Act "does not depend upon its having been evidentially established . . . that a lessening of competition has in fact occurred, and that the extent of the injury occasioned thereby in the particular situation corresponds to the amount of the discrimination"[16] does not comport with the Supreme Court's mandate.

Furthermore, the *Fowler* court neglected to consider that section 2(a) of the Robinson-Patman Act does not, by its own terms, establish a private right of action but merely establishes the standard of illegality. It is section 4 of the

9 *Id.* at 1136.
10 478 F.Supp. 243 (E.D. Pa. 1979).
11 *Id.* at 273.
12 The opinion in *Fowler* was written by Judge Johnsen, an Eighth Circuit judge sitting by designation on this case. It is interesting to note that Judge Johnsen had authored an earlier Robinson-Patman Act opinion on causation and damages for the Eighth Circuit in Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945). Subsequently, in American Can Co. v. Russellville Canning Co., 191 F.2d 38 (8th Cir. 1951), that court limited much of the applicability of its *Elizabeth Arden* holding. Judge Johnsen dissented. He did so on the basis of his decision in *Elizabeth Arden* and some dicta in Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947). These are the precise bases upon which he rested his opinion in *Fowler*. Thus, the Eighth Circuit had already cast suspicion upon Judge Johnsen's Robinson-Patman analysis prior to his authoring *Fowler*. *See* Enterprises Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957) (Judge Learned Hand, after analyzing *Elizabeth Arden* and *Bruce's Juices* rejected them as providing improper standards of Robinson-Patman damages).
13 395 U.S. 642 (1969).
14 *Id.* at 648. ("Before an injured party can recover damages under the Act, he must, of course, be able to *show a causal connection* between the price discrimination in violation of the Act and the injury suffered.") (Emphasis added).
15 *Id.* at 648-49. (Plaintiff "had the burden of showing that any damage to his business was proximately caused by [defendant's] price discriminations. . . .").
16 *Fowler,* 415 F.2d at 1253.

Clayton Act which permits a private right of action.[17] The *Fowler* court wholly ignored section 4 of the Clayton Act. Rather, the court predicated it analysis on section 2 (a) of the Robinson-Patman Act. In terms of the elements of causation and damages, this was clearly erroneous.

Initially, the statutory history of the Robinson-Patman Act is quite explicit in rejecting the very causal inference adopted in *Fowler*. The Senate had adopted a special private right of action section applicable to the Robinson-Patman Act which incorporated a *Fowler*-like provision. However, that provision was deleted in conference.[18] This strongly suggests that the standards of section 4 of the Clayton Act were contemplated by Congress to be applicable to the Robinson-Patman Act.

There is little doubt that section 4 of the Clayton Act requires that a plaintiff prove a causal relation between the antitrust violation asserted and the injury alleged. The Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*[19] resolved the issue when it required the plaintiffs in a private treble damage action to "prove antitrust injury."[20] The Ninth Circuit in particular has been most emphatic in applying this analysis to its antitrust cases. In *Solinger v. A & M Records,*[21] the Ninth Circuit held that a plaintiff must establish that the loss sustained by its business or property "was caused by the alleged antitrust violation" in order properly to maintain a private antitrust action for damages.[22] In *Kapp v. National Football League,*[23] the Ninth Circuit agreed that the trial "court properly instructed the jury that there must be a causal relationship between the illegality, if any, and the injury if proved."[24] The mere fact that an antitrust violation had been demonstrated was insufficient. The plaintiff was required to prove that there was a causal connection between the asserted antitrust injury and the violation of the antitrust laws.

This is precisely the holding in *California Computer Products, Inc. v. International Business Machines Corp.*[25] In that case the court stated that only those persons causally injured by antitrust violations could maintain a private action. "Moreover, in order to prevail the plaintiff must prove not only injury causally

17 Section 4 of the Clayton Act, 15 U.S.C. § 15 (1976), provides as follows:

> 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.

18 The conference report states that "The Senate bill set up a new measure of damages for violations of the law, whereas the House bill left the damages to be determined in accordance with the provision of the existing Clayton Act. The Senate receded." Conference Report, HR No. 2951, 74th Cong., 2d Sess. 8, quoted in *Measure and Elements of Damages for Violation of Robinson-Patman Act,* 9 ALR FED. 279, 282.

19 429 U.S. 477 (1977).

20 *Id.* at 489 ("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"). (Emphasis in original).

21 586 F.2d 1204 (9th Cir. 1978), *cert. denied,* 441 U.S. 908 (1979).

22 *Id.* at 1310 ("The third element that [plaintiff] must show in order to sustain a claim under section 4 is that the loss to his business or property was caused by the alleged antitrust violation. The injury caused by the violation must be one the antitrust laws were designed to protect against").

23 586 F.2d 644 (9th Cir. 1978), *cert. denied,* 441 U.S. 907 (1979).

24 *Id.* at 648.

25 1979-1 Trade Cas. (CCH) ¶ 62,713 (9th Cir. 1979).

linked to the asserted violation, but also that the injury is of the type the antitrust laws were intended to prevent."[26]

The Supreme Court's decision in *Perkins*[27] leaves little doubt that the requirement of a causal connection is specifically applicable to Robinson-Patman cases. Legally and conceptually, the Robinson-Patman Act is an antitrust statute. It must be construed in accordance with general principles of antitrust law.[28] Moreover, in light of the *Brunswick* line of cases, it seems clear that private suits for violation of the Robinson-Patman Act must, like other private antitrust actions, be construed to require a showing of causation.

Indeed, *Brunswick* and its progeny have been explicitly applied to cases involving claims under section 2(a) of the Robinson-Patman Act. The Fifth Circuit was explicit in the use of this methodology. In *Chrysler Credit Corp. v. J. Truett Payne, Inc.*,[29] the court first cited *Brunswick* and restated its holding. The court then noted different prices charged different purchasers did not necessarily cause antitrust injury. The plaintiff, the court held, must still establish that the price differential actually caused him to lose sales or profits to the favored purchaser.[30] Similarly, the court in the *Sweeney* case quoted *Brunswick* and refused to apply *Fowler* on the basis of the analysis mandated by *Brunswick*.[31] The Seventh Circuit, in *Lupia v. Stella D'Oro Biscuit Co., Inc.*,[32] affirmed the granting of a summary judgment to defendant on a section 2(a) claim. In so doing, that court also relied heavily on the *Brunswick* analysis.

The essential error in the *Fowler* analysis is that it relies exclusively on a showing of a price differential. Yet such reliance fails to recognize that "price discrimination is . . . only one element of the statutory prohibition and [is] not

26 *Id.* at 77,972. *See* Knutson v. Daily Review, Inc., 468 F.Supp. 226, 229 (N.D. Cal. 1979) (for plaintiffs to prove the fact of damage they "must establish with reasonable probability the existence of a causal connection between defendant's violation of the antitrust law and plaintiff's revenue-impairing injury"); Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 688 (1980) ("plaintiff must show more than that it suffered injury causally linked to the antitrust violation; the injury must be shown to have 'flowed' from the wrong.")

27 Perkins v. Standard Oil Co., 395 U.S. 642 (1969).

28 *See* Great Atlantic and Pacific Tea Co., Inc. v. FTC, 99 S.Ct. 925, 933 n.13 (1979) ("More than once the Court has stated that the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws. United States v. United States Gypsum Co., __ U.S. __, 98 S.Ct. 2864, 57 L.Ed.2d 854; Automatic Canteen Co. v. FTC, 346 U.S. at 74. *See also* LaRue, *Recent Judicial Efforts to Reconcile the Robinson-Patman Act with the Sherman Act,* 36 WASH. & LEE L. REV. 325 (1979).

29 607 F.2d 1133 (5th Cir. 1979).

30 Specifically the court held as follows:

> As the Supreme Court ruled in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977), the antitrust laws do not provide a damages remedy for all losses traceable to conduct violating the antitrust laws, only for losses that are part of the anticompetitive effect of such conduct. When a seller charges different prices to different purchasers, as alleged here, injury to competition does not necessarily result. Both the statute and the courts recognize this. 15 U.S.C. § 13(a). *See, e.g., United States v. United States Gypsum Co.*, 438 U.S. 422, 450, 98 S.Ct. 2864, 57 L.Ed.2d 854 (1978). Competition is harmed only to the extent that the favored purchaser, by use of the discriminatory price difference, actually draws sales or profits from his unfavored competitor. *See, e.g., Enterprise Industries, Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965, 77 S.Ct. 1049, 1 L.Ed.2d 914 (1957); *Uniroyal, Inc. v. Jetco Auto Service, Inc.*, 461 F.Supp. 350, 357-59 (S.D.N.Y. 1978); *McCaskill v. Texaco, Inc.*, 351 F.Supp. 1332, 1341 (S.D. Ala. 1972), *aff'd sub nom. Harrelson v. Texaco, Inc.*, 486 F.2d 1400 (5th Cir. 1973); *Handler, Changing Trends in Antitrust Doctrines,* 77 *Colum.L.Rev.* 979, 992-93 (1977). *See also Perkins v. Standard Oil Co.*, 395 U.S. 642, 648-49, 89 S.Ct. 1871, 23 L.Ed.2d 599 (1969) (implying that disfavored purchaser must show more than mere price difference to recover damages). As discussed above, there is no evidence, much less substantial evidence, that such was the case here.

Id. at 1136.

31 Edward J. Sweeney & Sons v. Texaco, 478 F.Supp. 243, 273-75 (E.D. Pa. 1979).

32 586 F.2d 1163, 1168-69 (7th Cir. 1978), *cert. denied,* 440 U.S. 982 (1979).

per se illegal or unfair."[33] *Fowler* ignores the remaining elements of a cause of action brought under section 4 of the Clayton Act.[34] Indeed, as stated by the court in *Chrysler Credit Corp. v. J. Truett Payne, Inc.:*

> [T]he showing necessary to establish a section 2(a) violation is not the same as the showing necessary to support a private action for damages. . . . Price discrimination which threatens competition but which has not caused any actual competitive injury may be held to violate the statute even though it will not support an action for damages.[35]

Thus, the assertion in *Fowler* that the "case law as to the Sherman Act does not fit the Robinson-Patman Act"[36] is irrelevant. At issue is the construction of section 4 of the Clayton Act which has been interpreted to require plaintiffs to prove causation of injury before damages will be awarded for a violation of the Robinson-Patman Act.[37]

The overwhelming response of courts which have faced a treble damage price discrimination claim has been to require a particularized showing of causal connection between the price discrimination and the injury asserted. *Fowler* not withstanding, courts have simply never recognized a presumption which spans this causal requirement.

For example, in *Balian Ice Cream Co. v. Arden Farms Co.,*[38] a pre-*Fowler* case, the Ninth Circuit rejected any presumption connecting a price differential with an injury. "There is no presumption set up anywhere that, merely because there is a differential in various areas, necessarily a price discrimination

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33 Albert H. Cayne Equip. Corp. v. Union Asbestos & Rubber Co., 220 F.Supp. 784, 789 (S.D.N.Y. 1963) *citing* Federal Trade Commission v. Simplicity Pattern Co., 360 U.S. 55, 64, 79 S.Ct. 1005 (1959). The "Supreme Court [363 U.S. 536] at 553, 80 S.Ct. at 1277, disclaimed any flat prohibition of price differentials, recognizing that price differences constitute but one element of a § 2(a) violation." Anheuser-Busch, Inc. v. Federal Trade Commission, 289 F.2d 835, 836 (7th Cir. 1961), *on remand from,* 363 U.S. 536, 80 S.Ct. 1267 (1960), quoted in, Sun Oil Co. v. FTC, 294 F.2d 465, 471 (5th Cir. 1961). *See* Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir. 1975).

34 "Since commercial hardship may arise from an infinite range of factors, a fundamental prerequisite of any treble-damage recovery is that the plaintiff's injury is the causal consequence of the defendant's proven violation. For in the absence of such a causal nexus, the plaintiff's damages are not produced 'by reason of anything forbidden in the antitrust laws,' as required by the authorization of section 4 of the Clayton Act." F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT, 530 (1962).

35 607 F.2d 1133, 1136-37 (5th Cir. 1979). Indeed, it may be that some showing of causation is required even in government enforcement cases where section 4 is inapplicable. For example in Minneapolis-Honeywell Regulator Co. v. FTC, 191 F.2d 786, 791 (7th Cir. 1951), *cert. dismissed,* 344 U.S. 206 (1952), the court deemed "the absence of causal connection" decisive. *But see* Foremost Dairies v. FTC, 348 F.2d 674, 680 (5th Cir.), *cert. denied,* 382 U.S. 959 (1965) ("FTC's inference of probable competitive injury has been upheld even in the face of direct testimony by non-favored customers that the price discrimination had not resulted in an injury to their businesses.").

36 415 F.2d at 1251. *See* Bruce's Juices v. American Can Co., 330 U.S. 743, 756 (1947).

37 It is true that in Solinger v. A & M Records, Inc., 586 F.2d 1304 (9th Cir. 1978), *cert. denied,* 441 U.S. 908 (1979), the Ninth Circuit properly noted that the strength of the showing of causation which must be shown varies under the different antitrust statutes. However, this variable standard requires a more stringent showing of causation for those statutes involving an incipiency standard such as section 7 of the Clayton Act. 586 F.2d at 1312 n.9. *See* Brunswick Corp. v. Pueblo Bowl-O-Mat, 429 U.S. 477 (1977). This is because violations of these statutes imply absolutely nothing more than that competition *may* be harmed. In such cases, damages are more threatened than real. Similarly, the "Robinson-Patman Act is an incipiency statute." Chrysler Credit Corp. v. J. Truett Payne, Inc., 607 F.2d 1133, 1137 (5th Cir. 1979). Thus, the required showing of causation should be more stringent in a Robinson-Patman case than in a Sherman Act case. Thus, in a perverse way, *Fowler* was not incorrect, it was only backwards. *See* Areeda, *Antitrust Violations Without Damage Recoveries,* 89 HARV. L. REV. 1127 (1976).

38 231 F.2d 356 (9th Cir. 1955), *cert. denied,* 350 U.S. 991 (1956).

exists."[39] The mere proof of a differential, without causation and damages, does not constitute actionable price discrimination.[40]

In *Rutledge v. Electric Hose & Rubber Co.*,[41] the district court held that the fact that manufacturers of hydraulic hoses had sold their products to manufacturers of coupling assemblies at prices ranging from eighteen to twenty-five percent less than prices at which they sold to the plaintiffs was insufficient by itself to establish a violation of the Robinson-Patman Act.[42] Significantly, although the case was decided after *Fowler,* this ruling was explicitly upheld by the Ninth Circuit.[43] Particularly noteworthy is the fact that the Ninth Circuit cited and relied upon *Youngson v. Tidewater Oil Co.*[44] The court in that case had required explicit showings by the plaintiff of causation and damages. *Fowler* had questioned the validity of that ruling. The fact that the Ninth Circuit thereafter relied upon this case, while ignoring *Fowler,* tends to draw *Fowler* into serious question.

Numerous other cases suggest the limited vitality of *Fowler.* In *Dantzler v. Dictograph Products, Inc.*,[45] the court was explicit in requiring a showing of a "causal connection." Indeed the court noted that such a requirement was mandated by the case law on the subject.[46] Similarly, in *Kidd v. Esso Standard Oil Co.*,[47] defendant prevailed despite a jury finding of price discrimination and competition. As stated in *Alexander v. Texas Co.*,[48] even assuming an unlawful price discrimination, a plaintiff must nevertheless establish that the price difference resulted in the diversion of business to the preferred customers.[49] The court in *Sano Petroleum Corp. v. American Oil Co.*,[50] was even more emphatic. "There is no presumption that the proscribed discrimination in price has caused damage to the plaintiff. The burden of proving such damage is always on the plaintiff."[51]

Furthermore, it is clear that this burden is not satisfied by a mere recitation of the fact of price discrimination. All of the cited cases involved such recitations but nevertheless deemed the showing of causation to have been inadequate. The case of *McCaskill v. Texaco, Inc.*[52] is especially instructive. In that case, the court noted that the plaintiff had not established an evidentiary basis

39 *Id.* at 368.

40 *See* Texas Gulf Sulphur Company v. J. R. Simplot Co., 418 F.2d 793, 806 (9th Cir. 1969) (price discrimination only prohibited "where the 'effect' causes or may cause forbidden competitive injury."); *See also* Refrigeration Engineering Corp. v. Frick Company, 370 F.Supp. 702, 713 (W.D. Tex. 1974).

41 327 F.Supp. 1267 (C.D. Cal. 1971).

42 *Id.* at 1275.

43 Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir. 1975).

44 166 F.Supp. 146, 147 (D. Ore. 1958).

45 309 F.2d (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963).

46 *Id.* at 330 ("The need for one who claims damage in a suit of this kind to show the causal connection between the losses he suffers and the illegal acts of the defendant, is clearly shown in the cases cited and other decisions of the courts").

47 295 F.2d 497, 498 (6th Cir. 1961).

48 165 F.Supp. 53 (W.D. La. 1958).

49 *Id.* at 58. ("Assuming that defendant committed unlawful price discrimination, plaintiff must still show that Texaco's price differences were the *proximate cause* of a diversion of business from him to the 12 preferred Texaco dealers"). (Emphasis in original).

50 187 F.Supp. 345 (E.D.N.Y. 1960).

51 *Id.* at 353. *See* Continental Oil Co. v. Frontier Refining Co., 338 F.2d 780, 782 (10th Cir. 1964) ("The plaintiff must further prove a causal connection between the price discrimination and the alleged injuries as well as the damages suffered. . . .").

52 351 F.Supp. 1332 (S.D. Ala. 1972), *aff'd sub nom.* Harrelson v. Texaco, Inc., 486 F.2d 1400 (5th Cir. 1973).

to satisfy this proximate causation requirement. The court quoted the "causal connection" language of *Perkins* and then noted that "[a]s the courts have long explained, this is obviously not satisfied by merely showing a price difference, particularly in the gasoline marketing context where the favored and disfavored purchasers are not the only ones in the marketplace to whom the ultimate consumer may turn."[53] The court further reasoned that reliance by the plaintiff on price difference alone is insufficient. Such reliance would fail to "satisfy the fundamental evidentiary requirements that would allow a jury to infer the requisite causal connection between the lower price to someone else and injury to plaintiffs' business or property."[54]

Although a few decisions have supported the *Fowler* causation analysis,[55] recent case authority is strongly contrary to that position. As discussed above, the courts in both *Chrysler Credit Corp. v. J. Truett Payne, Inc.*[56] and *Edward J. Sweeney & Sons, Inc. v. Texaco*[57] explicitly rejected *Fowler*. A *Fowler*-type analysis was also dismissed in *Merit Motors, Inc. v. Chrysler Corp.*[58] That court affirmed summary judgment for the defendant solely on the grounds that the plaintiffs "had not shown sufficient injury to sustain a private action under the Clayton Act."[59] The plaintiff-dealers claimed violations of sections 2(a), (d), and (e) of the Robinson-Patman Act for programs which Chrysler had instituted to increase sales to "fleet purchasers." The plaintiff-dealers had not participated in these programs. Although the plaintiffs presented an expert witness, summary judgment was entered. The court rejected a theory of damages predicated upon "the 'inherent' economic effects" of the defendants' actions. The court held that "a plaintiff must prove that he has been or will be injured by some violation of the antitrust laws."[60] This refusal to apply an inherent effects test seems in direct contravention of *Fowler*. Similarly, the Fourth Circuit implicitly rejected a *Fowler* analysis in *Marty's Floor Covering Co. v. GAF Corp.*[61] The court noted that the trial court had emphasized that "there was no sufficient proof of causation affecting competition on plaintiff's part" despite a showing of price

53 *Id.* at 1341.

54 *Id.*

55 For example, in Becker-Lehmann, Inc. v. Firestone Tire & Rubber Co., 202 F.Supp. 514, 517 (E.D. Mo. 1959), the court, relying on the same *Bruce's Juices dictum, see* 330 U.S. 743, (1947), as did the *Fowler* court, stated that:

> Firestone has chosen to support its motion for summary judgment on the grounds that even if they have discriminated against the plaintiff, it cannot recover because it cannot show that it has suffered any damages as a proximate result of the conduct of any one defendant. Proof that Firestone illegally discriminated in price in favor of The Suburban Tire Company would be sufficient in itself to show some damage to the plaintiff.

See Mississippi Petroleum, Inc. v. Vermont Gas Systems, Inc., 1972 Trade Cas. (CCH) ¶ 73,843 (S.D. Miss. 1972) (Court noted that *Fowler* allowed presumption of competitive injury but noted cases *contra.* Nevertheless, the court seemed to apply *Fowler.*) The court in Power Replacement Corp. v. Air Preheater Co., Inc., 356 F.Supp. 872 (E.D. Pa. 1973) did not go as far. However, that court did say that the showing of discriminatory prices shifted the burden to defendant to establish that damages were not proximately caused by the discrimination. 356 F.Supp. at 899. The Supreme Court decision in *Perkins* seems directly at odds with this district court opinion.

56 607 F.2d 1133 (1979).

57 478 F.Supp. 243 (E.D. Pa. 1979).

58 569 F.2d 666 (D.C. Cir. 1977).

59 *Id.* at 668.

60 *Id.* at 670.

61 604 F.2d 266 (4th Cir. 1979), *cert. denied,* 100 S.Ct. 670 (1980).

fluctuations between prices charged plaintiff and other purchasers.[62] The court of appeals agreed.[63]

The Eighth Circuit's opinion in *Zwicker v. J.I. Case Co.*[64] is perhaps most impressive of all because the *Fowler* opinion is predicated essentially on the 1945 Eighth Circuit opinion in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*[65] The approach outlined in *Elizabeth Arden* was not used in *Zwicker,* which clearly required a showing of actual causation.[66] In that case, the manufacturer had instituted a special program whereby certain dealers could qualify for discounts and other benefits. The plaintiff-dealer was initially not included in the program. Other nearby dealers were included. The plaintiff's sales dropped,[67] and plaintiff eventually sued. Despite the fact that plaintiff's sales had declined and that nearby dealers were receiving benefits for sales they were making, the trial court granted damages only for injuries resulting from one sale.[68] The court of appeals rejected even this award in language requiring a particularized showing of causation:

> We need not decide whether that [loss of a single sale] would satisfy the requirement of injury to competition, for our review of the record leads us to conclude that the court clearly erred in finding that Zwicker's lost tractor sale was the result of the price discrimination.[69]

The trend in recent case law overwhelmingly requires a particularized showing of causation.[70]

III. Causation and Damages

Fowler also impacts on a second element of a price discrimination case. Much of the *Fowler* opinion focuses upon the amount of damages to which a plaintiff is entitled and the method of computation by which this amount is ascertained. Initially, it should be noted that the issues of causation and amount of damages overlap significantly. In the first place, damages cannot be established as antitrust injury unless the proper causative nexus exists. Fur-

62 *Id.* at 270.
63 *Id.* ("We agree.").
64 596 F.2d 305 (8th Cir. 1979).
65 150 F.2d 988 (8th Cir.) *cert. denied,* 326 U.S. 773 (1945).
66 And damages as well.
67 "During the period of Zwicker's exclusion from Operation Penetration, two Case dealers with a thirty-mile radius of Turtle Lake received various benefits as a result of the program. In 1971, of thirty-three sales made by the Case dealer in McClusky, North Dakota, ten were accorded Operation Penetration discounts. Similarly, seven out of the sixteen sales made in 1971 by the Case dealer in Garrison, North Dakota, were Operation Penetration sales. Meanwhile, Zwicker's sales of large Case tractors dropped from eight in 1968-69, and ten in a fourteen-month period in 1969-70, to three sales during all of 1971." 596 F.2d at 307.
68 "The trial court found that the sole injury resulting from the price discrimination was the single tractor sale Zwicker lost to the McClusky dealer." *Id.* at 309.
69 *Id.*
70 *See* Palmer News, Inc. v. ARA Services, Inc., 476 F.Supp. 1176, 1190 (D. Kan. 1979) ("[A]ny Robinson-Patman plaintiff must undertake to prove a causal connection between the price differential complained of and the injury suffered." *See also* General Glass Co. v. Globe Glass & Trim Co., 1978-1 Trade Cas. (CCH) ¶ 61,998 at 74,271 (N.D. Ill. 1978) (requiring particularized showing of causation under section 2(f) of the Robinson-Patman Act); Berkey Photo, Inc. v. Eastman Kodak Co., 457 F.Supp. 404, 427-28 (S.D.N.Y. 1978), *aff'd in part and rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 48 U.S.L.W. 3517, No. 79-427, (February 19, 1980) (requiring particularized showing of causation under section 2(f) of the Robinson-Patman Act.).

thermore, the harm must arise from the antitrust violation. "To be one of several causes is not enough."[71] The damages awarded in an antitrust case must represent compensation for an injury to an interest protected by the antitrust laws. To the extent that other factors contribute to the plaintiff's injury, the causation element is lacking and damages should not be awarded.[72]

The plaintiff must show a causal connection between the violation and its reduced sales, because there may be other reasons for the reduction in sales. For example, one of the factors which may break this causative link is that of off-setting costs incurred by the favored purchaser which neutralize any nominal price advantage a price discrimination may afford.[73]

Fowler presumes the entire total of the price discrimination to be the actual damages suffered by plaintiff. However, in cases in which the favored purchaser performs functions in excess of those performed by the plaintiff, the *Fowler* standard is unrelated to the actual damages suffered. Wholesalers who also sell at retail still incur costs by performing wholesaling functions which most retailers do not perform. They also may save the manufacturer the expense of providing certain services. In such cases, *Fowler* is particularly inappropriate either as establishing a presumption for causation or for the measure of damages.

Similarly, there are cases in which a plaintiff has admitted that it was forced to lower prices because of the competition of third-party retailers, not that of the favored purchaser. This admission denies a causal relation between defendant's alleged discriminatory sales and the plaintiff's claimed injuries.

Such a situation was presented to the court in *Krieger v. Texaco, Inc.*[74] on Texaco's motion for summary judgment. The plaintiffs had testified that stations other than those of the favored purchaser were underselling them. As the court stated: "There is no claim that the lost gallonage went to the Glaser stations. In fact, he mentions three stations closer to him than any Glaser station which charged lower prices than himself."[75] As a result, summary judgment was appropriately entered. The plaintiff must not only show causation, but also establish a particularized correlation between the price discrimination and the resultant damages.[76]

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71 Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986, 997 (9th Cir. 1979), *cert. denied,* 100 S.Ct. 688 (1980).

72 *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946).

73 "For so long as the amount of the discount corresponds with the cost of the functions assumed by the recipient, it is absorbed by the buyer and cannot causally influence competition based on his resale activities, which are shaped by a multitude of commercial considerations." F. ROWE, PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT 192 (1962).

In this regard a difficulty with the *Fowler* causation presumption is that it suggests that a private plaintiff may thereafter take advantage of the "price by use" doctrine established in FTC cases. That doctrine holds that a wholesaler who sells a portion of his goods at retail may not receive a wholesaler's discount for the goods sold at retail regardless of whether wholesale functions were performed. *See, e.g.,* Standard Oil Co. v. F.T.C., 173 F.2d 210, 217 (7th Cir. 1949), *rev'd on other grounds,* 340 U.S. 231 (1951); Monroe Auto Equipment Co. v. F.T.C., 347 F.2d 401 (7th Cir. 1965). If *Fowler*'s causation presumption is applied to the "price by use" concept, it is clear that an integrated retailer will be subjected to treble damage suits merely because it has internalized certain necessary wholesaling functions rather than purchasing them from the outside. Applying *Fowler* in such a context would promote inefficiency, result in higher consumer prices, and discourage the evolution of new forms of merchandising.

74 373 F.Supp. 108 (W.D.N.Y. 1973).

75 *Id.* at 113.

76 *See* Enterprise Industries, Inc. v. Texas Co., 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965, (1957); McCaskill v. Texaco, Inc., 351 F.Supp. 1332 (S.D. Ala. 1972). Compare the recent dicta in Paceco,

IV. Damages

Once the fact of antitrust injury and the requisite causation have been established, plaintiff's burden becomes much less severe. The Supreme Court has recognized that there is "a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damage, and the measure of proof necessary to enable the jury to fix that amount."[77] This is a distinction "between the existence of an injury in fact and the means by which the amount of damage can be measured. . . . [The] inability to estimate . . . damages does not mean that they were not suffered; nor does it bar an antitrust suit."[78] It should be noted that there is some debate concerning the amount of overlap between proof of causation and amount of damages.[79] In effect, these somewhat conflicting standards tend to give some leeway to the jury. "If there is sufficient evidence in the record to support an inference of causation, the ultimate conclusion as to what that evidence proves is for the jury."[80]

Merely because some leeway is granted to the plaintiff regarding the required amount of proof, it should not follow that a presumption as to the amount of damages to be awarded exists. Nevertheless, it is within the context of establishing the amount of money plaintiff may recover that *Fowler* reasserts itself. The Ninth Circuit stated as follows:

> [W]e hold that under the Robinson-Patman Act, unless the evidence establishes a greater consequential injury, discrimination in prices or allowances is entitled to be regarded as constituting a direct business injury and that the amount thereof thus properly can be made the basis and measure of a general damage award.[81]

By itself, this holding can be reasonable. Certainly there are times when the amount of the discrimination is also the amount of the actual injury suffered by a plaintiff. However, the *Fowler* court went even further: "The Act permits recovery of the amount of a discrimination in prices and allowances without the necessity of any specific proof or finding as a basis therefor."[82] Such a rule,

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Inc. v. Ishikawajima-Harima Heavy, Etc., 468 F.Supp. 256, 263 (N.D. Cal. 1979) in which the court noted in passing that "In dealing with a standardized product such as gasoline where a retailer acquires it for immediate resale, the price of that commodity plays the determinative role in competition." The court therein had no occasion to pass on these additional concepts and the statement seems to have been a mere throwaway line.

77 Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1930).

For example:

"At least two types of evidence have been used to show a causal connection between the price discrimination and the reduced sales: (1) customer testimony that they bought from the plaintiff before the discrimination period but thereafter bought from a favored buyer because the favored buyer's price was less than the plaintiff's; and (2) corresponding loss of sale volume during the discrimination period by other nonfavored buyers." *Measure and Elements of Damages for Violation of Robinson-Patman Act,* 9 A.L.R. FED. 279, 288.

78 Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097, 1102 (9th Cir. 1979).

79 For example, the *Handgards* language stating that "[t]o be one of several causes is not enough" 601 F.2d at 997 should be contrasted with the statement that "[p]laintiff need not show that the illegality was a more substantial cause than any other." Bargain Car Wash, Inc. v. Standard Oil Co. (Indiana), 466 F.2d 1163, 1174 (7th Cir. 1972), *quoting* Perma Life Mufflers, Inc. v. International Parts Corp., 302 U.S. 134, 143, 88 S.Ct. 1981, 1987 (1968) (White, J., concurring).

80 Perkins v. Standard Oil Co., 395 U.S. 642, 648 (1969).

81 415 F.2d at 1252.

82 *Id.* at 1253.

establishing a presumption of damages in the amount of the price discrimination, is contrary to the established law and has been widely criticized.

The *Fowler* rule has, however, received some support based primarily on its simplicity and ease of application. Such ease of administration should be weighed against the observation that the "inability to prove damages to the satisfaction of the judiciary . . . is the most important of the many reasons that can be specified to explain the failure of private enforcement as an instrument of antitrust policy."[83] The *Fowler* presumption, on the other hand, certainly facilitates private damage recovery. Perhaps for this reason, the *Fowler* analysis has attracted a following, however limited.[84]

In the main, the *Fowler* presumption of damage has been either criticized or ignored. Regarded as a deviation of the case law when decided, it has had little influence on subsequent developments. One reason for its lack of influence is that the *Fowler* language is only dictum. It bears no relation to the damages actually granted in the case. Fowler was a manufacturer of electric water heaters. Gorlick was a wholesaler of plumbing supplies and used its electric water heaters, along with his competitors, as a "leader" in obtaining and making plumbing supply contracts. The trial court found that:

> Thrifty [Gorlick's corporate name] did not pay the same prices as [his competitors] for products of like kind and quality as those purchased at the same time from Fowler Manufacturing Company. Because of the keenly competitive market [in the State of Washington], prices at which the products were purchased from the manufacturer significantly affected the re-sell price, the business which could be done, the profits which could be expected. The *evidence establishes* without a doubt, if not tacitly admitted by the defendants, *that Thrifty* did not meet competition with [his competitors] and *lost profits by meeting such prices at least to the extent of the difference in the cost of the water heaters sold by Thrifty and the cost of the water heaters sold by [his competitors].*[85]

Thus, the *Fowler* damage award is based on proof of actual lost profits and lost customers. The court of appeals opinion affirmed this award. Consequently, the presumption of damages in *Fowler* is mere dictum.

The *Fowler* concept of damages has a further inherent weakness. The Congress, in fashioning the Robinson-Patman Act, explicitly considered and rejected the *Fowler* measure of damages. The Senate, in its version of the bill, included a passage that read as follows:

> For purposes of suit under Section 4 of the [Clayton] Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the

83 Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience,* 30 GEO. WASH. L. REV. 181, 210 (1961).

84 *See* Grace v. E.J. Kozin Co., 538 F.2d 170, 174 (7th Cir. 1976); Century Hardware Corp. v. Acme United Corp., 467 F.Supp. 350, 357 (E.D. Wis. 1979) ("[I]t appears that if the buyer is unable to pass on the price to its own customer, the price differential is a proper measure of damages."); Mississippi Petroleum, Inc. v. Vermont Gas Systems, Inc., 1972 Trade Cas. (CCH) ¶ 73,843 at 91,537 (S.D. Miss. 1972) ("[P]laintiff's claim of the price differential as his measure of damages is tenable.").

85 Brief for Appellee [Gorlick] at 8, quoting from Memorandum Decision of June 30, 1967 (emphasis added). Quoted in Note, *Private Recovery Under the Robinson-Patman Act,* 21 SYRACUSE L. REV. 941, 949 (1970).

> pecuniary amount or equivalent of the prohibited discrimination, payment or grant involved in such violation. . . .[86]

This provision was never part of the House bill and was deleted in conference. The general rule of damages, which requires proof of loss, was considered appropriate. Thus, the legislative history of the Robinson-Patman Act directly refutes the *Fowler* analysis.

The presumption implicit in *Fowler,* that a disfavored purchaser should be automatically awarded damages for the full amount of the price discrimination, does not comport with established case law. Numerous cases reject this assertion. The leading case is *Enterprise Industries, Inc. v. Texas Co.*[87] The court, per Judge Learned Hand, held as follows:

> At all events the *statute should not be read as creating any presumption* that "where the fact of damage is shown * * * the pecuniary amount or equivalent of the prohibited discrimination" is the "proper measure of damages." Exactly that was a provision in the bill, when it came from the Senate to the House (S. 3154, 74th Cong., 2d Sess.), and it was eliminated in conference. This action becomes particularly persuasive in contrast with the retention of that part of § 13(b) that imposes a burden of proof on the seller as to the effect of a "discrimination." Congress obviously did not wish the seller to be under a double burden, as soon as the buyer proved that he had been charged a higher price than any of his competitors; especially the burden of proving the negative upon an issue as to which the seller could know nothing and the buyer everything. Indeed, that was a burden that Congress might well hesitate to impose in an action in which the seller must not only make good the buyer's loss, but also pay him a fine in double the amount of his loss. It is fair to suppose that, if Congress had thought the evil of price discrimination so great as to require so drastic a procedural support, it would have made its purpose more clear.[88]

A number of cases have explicitly stated that there is no presumption of damages. In *Uniroyal, Inc. v. Jetco Auto Service, Inc.*[89] it was stated that "[t]he court rejects any notion that damages may be presumed merely from the fact of discrimination." Similarly, in *Sano Petroleum Corp. v. American Oil Co.*[90] the court held "there is no presumption that the proscribed discrimination in price has caused damage to the plaintiff. The burden of proving such damage is always on the plaintiff."[91] In *Freedman v. Philadelphia Terminals Auction Co.*[92] the plaintiff asserted that upon a showing of an illegal discrimination by defendant, the plaintiff is immediately damaged as a matter of law to the extent of the discrimination. The court firmly rejected the plaintiff's contention: "Plaintiffs had no automatic right to recover the terminal charges without proof of loss,

86 S. 3154, 74th Cong., 2d Sess. (1936).
87 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957).
88 *Id.* at 460 (emphasis added).
89 461 F.Supp. 350, 359 (S.D.N.Y. 1978).
90 187 F.Supp. 345 (E.D. N.Y. 1960).
91 *Id.* at 353. *See* Berkey Photo, Inc. v. Eastman Kodak Co., 457 F.Supp. 404, 427 (S.D.N.Y. 1978) *aff'd in part and rev'd in part,* 603 F.2d 263 (2d Cir. 1979), *cert. denied,* 48 U.S.L.W. 3517 No. 79-427 (February 19, 1980) (The court refused to instruct the jury that the amount of the price difference should without more be taken as the measure of damages.)
92 197 F.Supp. 849 (E.D. Pa. 1961), *aff'd,* 301 F.2d 830 (3d Cir.), *cert. denied,* 371 U.S. 829 (1962).

even if a violation of the Robinson-Patman Act had been found to have existed."[93] In *Kelly v. General Motors Corp.*,[94] the court "reject[ed] the suggestion by plaintiff that his damages will be the amount of the price difference."[95]

Several other cases have simply rejected a *Fowler* presumption by forcing the plaintiff to prove its amount of losses. Even those cases which eventually accede to the "general damage" yardstick of *Fowler*—which award the plaintiff the amount of the price differential—require proof that this is the amount of loss that plaintiff has suffered.

The generally accepted measure of damages caused by price discrimination is the actual business losses which have been suffered by plaintiff.[96] As stated by Professor Rowe, "*actual* injury is a prerequisite to any recovery by a 'disfavored' customer—and that the amount of the discrimination may be the *ceiling* on his recovery."[97]

Virtually all of the cases which have agreed that the general damages rule of *Fowler* should be applied have recognized the principle enunciated by Rowe. Actual damages which the plaintiff has proven have been the standard for recovery of damages. *Elizabeth Arden Sales Corp. v. Gus Blass Co.*[98] is often cited along with *Fowler* for the proposition that the award of general damages is proper. Indeed, the opinion was written by Judge Johnsen, who also authored *Fowler*. The case involved a violation of sections 2(d) and 2(e) in that the defendant, a manufacturer of cosmetics, had paid the salary of a cosmetic clerk for one store but only half the salary of the clerk in another store. The plaintiff claimed injury to the extent of the half salary. The court held damages to be established as follows:

> What the seller is thus both permitted and commanded to do, we can see no sound reason under the language or policy of the statute for not compelling him to do by an action for general damages, *where such damages have been directly suffered and are plainly measurable.* Thus, in the present case, it is obvious, as the trial court found, that appellee has sustained a direct loss in "the increased cost of the operation of its cosmetic department," to the extent of the difference in the allowances, which were arbitrarily made and without any proportionalized basis or standard.[99]

The court further noted cases in which general damages were not appropriate.

The *Elizabeth Arden* case is the most renowned general damage case. However, it permits the recovery of general damages only in those instances where they are the actual damages that plaintiff has suffered. As the court stated in *State Wholesale Grocers v. Great Atlantic & Pacific Tea Co.*:[100]

> [I]t matters little what label is placed on the type of damage that is being sought in each particular case, the important consideration being that the

93 *Id.* at 852.
94 425 F.Supp. 13 (E.D. Pa. 1976).
95 *Id.* at 20.
96 *See,* F. ROWE, *supra* note 73, at 530 ("When the defendant's causal responsibility appears, the plaintiff's recovery is measured by his *actual* business losses.") (emphasis in original).
97 *Id.* at 531 (emphasis in original).
98 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 773 (1945).
99 *Id.* at 996 (emphasis added).
100 202 F.Supp. 768 (N.D. Ill. 1961).

> damages, whatever form they may take, are actual business losses resulting from or attributable to a violation of any section of the anti-trust laws.[101]

The *State Wholesale* court, therefore, awarded damages equal to the amount of the discrimination when such damages had been proven to have been suffered. Furthermore, the court noted that it was deciding a section 2(d) case. "[A]s counsel for the plaintiffs so convincingly argue, to hold that it is necessary for the plaintiffs to show a loss of business in order to establish the fact of damage would be to require them to meet the 'adverse effect upon competition' requirement of Section 2(a). This would result in that requirement being read into Section 2(d)."[102] The court recognized that section 2(a) of the statute explicitly requires an actual loss of business to be shown and acknowledged the impropriety of applying the generalized methodology of *Elizabeth Arden* or *State Wholesale Grocers* to the *Fowler* situation.

The cases which do permit general damages to be recovered are generally explicit in finding that actual injury to the extent of the price discrimination has been suffered. In *American Can Co. v. Ladoga Canning Co.*,[103] the court explained that the standard of damages was not necessarily the difference in the price of cans charged the plaintiff and that charged other customers. The court noted that "the actual damages which the plaintiff suffered might possibly have been a sum that equalled such difference."[104] It then analyzed the proof submitted in light of the rule granting the plaintiff some leeway in proving the amount of damages once the fact of damages is established.

Similarly, in *Century Hardware Corp. v. Acme United Corp.*,[105] the court approved the price differential standard as "a proper measure of damages."[106] It did so on the basis that in a bid situation, in which bidders are supplied by the same manufacturer, a price differential will naturally result in an injury in the amount of the differential. This holding was predicated, however, on the peculiar nature of competitive bidding by those with the same supplier.[107] In a section 2(c) case, *Grace v. E. J. Kozin Co.*,[108] the court awarded damages in the amount of the illegal commission (bribe) that the defendant had granted to the plaintiff's agent.[109] The court held that the amount of the bribe represented the

101 *Id.* at 773.
102 *Id.* at 776.
103 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931).
104 *Id.* at 769.
105 467 F.Supp. 350 (E.D. Wis. 1979).
106 *Id.* at 357.
107 *Id.* ("I believe that in a case in which competing purchasers seek to resell the commodity in question through a bid-award procedure, the winner being the lowest bidder, it is probable that there is little or no opportunity for the winning bidder to pass on the higher price. An attempt to pass on the higher price necessarily raises the bid and increases the chance that a competitor's bid will be lower. Accordingly, I believe that the price differential is an appropriate measure of damages in this case. In the years 1974-1976, the plaintiff purchased $6,732.54 worth of school scissors for which it should have received the 5% discount. The price differential on these purchases, therefore, is $336.63.")
108 538 F.2d 170 (7th Cir. 1976).
109 *Id.* at 174. ("The district court decided to award minimum damages to plaintiff under Count I. The court quite sensibly assumed that if Kane had given his total undivided loyalty to Greene, Kane would have negotiated for Kozin's lowest price, which would not have included any commission from Kozin to Kane. In other words, had Greene and Kozin been the joint venturers, Kozin would have agreed to a price equal to his proven price less the commission paid Kane, still allowing Kozin to realize his normal profit yet eliminating in part the price discrimination. On this basis it was appropriate for the district court to conclude that plaintiff's damages under Count I were at least equal to the $19,780.64 commissions paid to Kane on Kozin's sales to Greene.").

minimum amount that plaintiff was injured. Such a rule is proper given that there would be no payment made unless a return on the investment of at least that amount was contemplated. Yet this has no relation to the dynamics in a price discrimination case. In such a case, the manufacturer is supplying both the favored and unfavored purchaser. From the manufacturer's perspective, the fact of injury to plaintiff is entirely fortuitous. The manufacturer is concerned solely with maximizing its sales. Indeed, presumably, it would prefer plaintiff, the non-favored purchaser, to increase its sales since it pays the manufacturer the greater price.

This survey indicates that some courts, upon analysis of the damages sustained by plaintiff, have held that the amount of the discrimination has been an appropriate standard of damages. However, these holdings have depended upon a showing of injury in fact in the situation presented.

Numerous other cases have suggested how rarely the *Fowler* measure of damages can properly be invoked. The seminal point of analysis for this rejection of the *Fowler* methodology is supplied by Mr. Justice Cardozo in *Interstate Commerce Commission v. United States.*[110] The case is not a Robinson-Patman case, but the analysis is applicable:

> If by reason of the discrimination, the preferred producers have been able to divert business that would otherwise have gone to the disfavored shipper, damage has resulted to the extent of the diverted profits. If the effect of the discrimination has been to force the shipper to sell at a lowered . . . price . . . damage has resulted to the extent of the reduction. But none of these consequences is a necessary inference from discrimination without more.[111]

The reasoning of Justice Cardozo was applied by Judge Learned Hand in *Enterprise Industries v. Texas Co.*[112] In that case, plaintiff was denied damages. The court's equation for measuring plaintiff's loss is instructive:

> The gross loss was the profit on any sales that it would have made to the nine competitors' customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors. From this must, however, be deducted what added profit it may have got by being free to charge what it chose, particularly in the through traffic where there was little competition. Moreover, we have no reliable figures from which to appraise either the gross loss or the gain, for the plaintiff had not shown how much of the business of the nine Texaco competitors it would have retained or obtained at the same price as they; and equally we do not know what would have been

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It should also be noted that a proper damages rule was seemingly framed in Martin B. Glauser Dodge Co. v. Chrysler Corp., 418 F.Supp. 1009 (D.N.J. 1976), *reversed,* 570 F.2d 72, 85 (3rd Cir. 1977), *cert. denied,* 438 U.S. 908 (1978), as follows: [I]f a direct correlation can be shown between an antitrust defendant's discriminatory conduct and the profits lost by the plaintiff, the amount of discrimination is an acceptable measure of damages. 418 F.Supp. at 1021. *But see* Bruce's Juices, Inc. v. American Can Co., 87 F.Supp. 985 (D. Fla. 1949), *affirmed,* 187 F.2d 919, *modified on other grounds,* 190 F.2d 73 (5th Cir.), *cert. dismissed,* 342 U.S. 875 (1951) ("The price differential was clearly available to the larger competitor for innumerable competitive, and therefore harmful, purposes and of necessity the small canner, who has paid more, has thereby sustained direct injury. Argument to the contrary is but to say that a lower price has not been beneficial.") 87 F.Supp. at 990.

110 289 U.S. 385 (1933).

111 *Id.* at 390-91.

112 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965 (1957).

> its profit on the south bound through traffic if it has sold at the prevailing prices.[113]

It should be noted, however, that the court admitted that "the amount of the discrimination might well be a proper measure of the buyer's damages" if the buyer were forced to absorb the additional discriminatory price. In doing so, however, it was clear that the plaintiff must show how the addition in price affected the gallonage it sold.[114]

The Second Circuit, in *Sun Cosmetics Shoppe, Inc. v. Elizabeth Arden Sales Corp.*,[115] held that "[t]he only proper proof of damages is the loss to the plaintiff's business. . . ."[116] As a result, plaintiff was denied damages in precisely the same context in which Judge Johnsen, for the Eighth Circuit, had awarded them.[117] It was in this setting that the Eighth Circuit decided *American Can Co. v. Russellville Canning Co.*[118] In that case, the court explicitly required a showing of causal connection between injury and damages.[119] But the court went much further. In denying plaintiff damages in that case, the court ruled:

> We are of the opinion that there was an inadequate evidentiary basis for awarding the plaintiff damages for the alleged impairment of its competitive position. The district court apparently concluded that the failure of the plaintiff to maintain earnings during the postwar economic conditions upon the same level as previously, could fairly be attributed to discriminatory practices of the defendant. This upon the theory that all other causes had been eliminated and that it was reasonable to infer that the plaintiff had suffered a sort of financial attrition due solely to the practices of which complaint is made. This conclusion we regard as too speculative and conjectural to sustain any award of damages. There is no showing that the plaintiff ever ran out of funds. Its earnings prior to 1946 were large and in that year its profits yielded a high percentage of return upon its invested capital.[120]

The *Fowler* general damage rule was also rejected in *Kidd v. Esso Standard Oil Co.*,[121] a service station operator's suit against an oil company for allegedly selling gasoline to him at a higher price than it charged two of his competitors. No evidence that the competitors lowered their prices or that the plaintiff lost customers or profits was adduced at trial. The trial court charged the jury that the service station operator could recover only actual damages, and the jury found that no direct and proximate damages had been suffered as a result of the violation. The plaintiff contended that damages should have been awarded for at least the price differential. In affirming the jury decision, the court of appeals

113 *Id.* at 458-59.
114 *Id.* at 459.
115 178 F.2d 150 (2d Cir. 1949).
116 *Id.* at 153.
117 *See* Elizabeth Arden Sales Corp. v. Gus Blass Co., 150 F.2d 988 (8th Cir.), *cert. denied,* 326 U.S. 776 (1945).
118 191 F.2d 38 (8th Cir. 1951).
119 *Id.* at 54.
120 *Id.* at 60. Recall, again that Judge Johnsen, the author of both *Fowler* and *Elizabeth Arden,* dissented in part in the *Russellville* case. He did so on the basis of his decision in *Elizabeth Arden* and the dictum in *Bruce's Juices* which he was to rely upon in *Fowler.* The rest of the court, however, did not go along with him. Thus, the Eighth Circuit had already cast suspicion upon Judge Johnsen's Robinson-Patman analysis prior to his authoring *Fowler.*
121 295 F.2d 497 (6th Cir. 1961).

held that the trial court's charge was a clear and correct statement of pertinent legal principles. There was no recovery of damages.

There are numerous other cases which require that this stringent measure of damages be employed. In *Youngson v. Tidewater Oil Co.*,[122] the court concluded that in order to recover damages "one must show lost profits resulting from the necessity of meeting the prices of favored competitors or lost sales to such favored competitors due to one's inability to meet their prices, or both."[123]

Similarly, in *Kelly v. General Motors Corp.*,[124] the court required that the plaintiffs actually demonstrate the amount of lost profits they were claiming.[125] In *Alexander v. Texas Co.*,[126] the court refused to allow the amount of the discrimination to be used as the measure of damages and would allow recovery only for actual lost profits on sales lost by the plaintiff to the favored customers.[127]

In *Uniroyal Inc. v. Jetco Auto Service, Inc.*,[128] Uniroyal had granted a wholesale distributor's allowance to its favored purchaser without insuring that a certain percentage of these tires were sold wholesale. Furthermore, it granted the allowance on all such tires rather than solely on the portions sold wholesale. Jetco did not receive this allowance. In denying damages to the plaintiff, the court held that "Jetco cannot complain if [the favored purchaser] generated greater profit by reason of its lower costs so long as Jetco did not lose profits it otherwise would have made."[129] *Guyott Co. v. Texaco, Inc.* [130] is similarly emphatic in requiring "actual injury."[131] In determining actual injury "[t]he critical question is what sales did Guyott lose as a result of the price it paid to Texaco, not what accounts Guyott retained or obtained during the relevant period." [132] In *Dantzler v. Dictograph Products, Inc.*,[133] the court stated that "plaintiff's recovery in the instant case is measured by the losses he suffered from the discriminatory acts and not by the gains of the favored competitor."[134] In *American Cooperative Serum Ass'n v. Anchor Serum Co.*,[135] the court again demonstrated how the damage award must be tailored to the facts demonstrating plaintiff's loss. In that case "[t]he District Court based its judgment upon the evidence of a certified public accountant, who tabulated each of

122 166 F.Supp. 146 (D. Ore. 1958).
123 *Id.* at 147. Recall that this is the case which *Fowler* explicitly questioned but which was seemingly reinstated by the subsequent Ninth Circuit case of Rutledge v. Electric Hose & Rubber Co., 511 F.2d 668, 677 (9th Cir. 1975).
124 425 F.Supp. 13 (E.D. Pa. 1976).
125 *Id.* at 20 ("[T]he liability of the defendants for price discrimination would not be established unless Kelly and his fellow class members could individually demonstrate that the higher prices they paid for original equipment replacement parts caused them to lose profits to competing new car dealers.").
126 149 F.Supp. 37 (W.D. La. 1957).
127 *Id.* at 41 ("Rather, the true yardstick of [plaintiff's] damages, if any, in this respect would be the gross loss of profit on sales he otherwise would have made to those customers who bought from the favored dealers, instead of from plaintiff, because of the price differential.").
128 461 F.Supp. 350 (S.D.N.Y. 1978).
129 *Id.* at 359. Other cases which involve similar fact patterns which deny plaintiff any damage are Krieger v. Texaco, 373 F.Supp. 108, 112-13 (W.D.N.Y. 1973) and McCaskill v. Texaco, Inc., 351 F.Supp. 1332, 1341 (S.D. Ala. 1972).
130 261 F.Supp. 942 (D. Conn. 1966).
131 *Id.* at 952.
132 *Id.* at 953.
133 309 F.2d 326 (4th Cir. 1962), *cert. denied,* 372 U.S. 970 (1963).
134 *Id.* at 330.
135 153 F.2d 907 (7th Cir.), *cert. denied,* 329 U.S. 721 (1946).

plaintiff's sales made in Illinois at 65¢. . . . He also calculated the amount of each item if it had been sold at 75¢. . . . The difference between these totals is the amount upon which the judgment is based."[136] The court meticulously awarded such damages only in those areas where it was absolutely certain that plaintiff lost profits due to defendant's activities. The Fifth Circuit has recently re-emphasized this in *Chrysler Credit Corp. v. J. Truett Payne, Inc.*:[137] "Payne relied on its calculation of the alleged price discrimination to establish the amount of its alleged lost sales and profits. There is no necessary correlation, however, and Payne failed to establish one."[138] Simply put, establishing the amount of lost sales or profits is a requirement to recovery in these cases.[139]

The commentators, too, have virtually universally disagreed with the *Fowler* analysis. Professor Rowe, of course, had always argued that plaintiff's recovery must be "measured by his *actual* business losses."[140] This contention embodies the general thrust of the commentary subsequent to *Fowler* and constitutes the basis upon which *Fowler* is most sharply criticized.

As stated in one particularly critical article:

> The general damage rule [the *Fowler* rule] has been explicitly refused endorsement by Congress, spurned in practice by the courts, and appears inconsistent with the effective preservation of free and open competition. In the context of treble damage actions under the Robinson-Patman Act, the time, but not the opportunity, has long since passed for full adoption of the specific damage rule and the subsequent termination of the prevailing confusion in the courts.[141]

Other commentators have agreed. For example, one author noted that the holding of *Fowler v. Gorlick* is "unnecessary and will only treat plaintiffs to unequalizing windfalls that are inconsistent with the purpose of the Act."[142] The

136 *Id.* at 914.

137 607 F.2d 1133 (5th Cir. 1979).

138 *Id.* at 1137. The court also noted that "[a] price difference without more does not indicate the amount of lost sales or profits." *Id. See* Edward J. Sweeney & Sons, Inc. v. Texaco, 478 F.Supp. 243 (E.D. Pa. 1979), which offers an excellent summary of the law and analysis in the area and concludes that plaintiff failed to present enough damages evidence to submit the issue of liability to the jury. 478 F.Supp. at 276. The fact that the court mistakenly claims "that *Fowler* was decided more than ten years before *Enterprise*" 478 F.Supp. at 275 n.69, thus, implying *Fowler* to be outdated by the plethora of adverse case law does not seriously detract from the strength of the opinion. The conclusion that *Fowler* is an anachronism remains valid.

139 The holdings in primary-line injury cases have been similar and buttress the line of cases which have been cited. For example, in Atlas Building Products Co. v. Diamond Block and Gravel Co., 269 F.2d 950 (10th Cir. 1959), *cert. denied,* 363 U.S. 843 (1960), the court emphatically required a showing of actual injuries and held as follows:

> The statute speaks of injury to "business or property" . . . And, those words in their ordinary sense have been construed in terms of (1) the difference, if any, between the amounts actually realized by the injured party and what it would have reasonably expected to realize from sales but for the unlawful acts complained of; and (2) the extent to which the value of the petitioner's property had been diminished as a result of such acts. . . .

269 F.2d at 958-59.

In John B. Hull, Inc. v. Waterbury Petroleum, 588 F.2d 24 (2d Cir. 1978), *cert. denied,* 440 U.S. 960 (1979), the court stated that "[e]very Robinson-Patman plaintiff must prove that the defendant's price discrimination has caused damage to him, Perkins v. Standard Oil Co., 395 U.S. 642, 648, 89 S.Ct. 1871, 23 L.Ed. 2d 599 (1969), and the most common form of *damage to a plaintiff competing seller would likely be lost profits because of a loss of customers.*" 588 F.2d at 29 (emphasis added). There can be no doubt that the case law is heavily weighted against the *Fowler* damage analysis.

140 F. ROWE, *supra* note 73, at 530 (emphasis in original).

141 Note, *Private Recovery Under the Robinson-Patman Act: Confusion in the Courts on the Proper Measure of Damages,* 21 SYRACUSE L.REV. 941, 953 (1970).

142 Casenote, *Antitrust Laws—Damages,* 48 TEX. L. REV. 690, 695 (1970).

same analysis is evidenced by an author who states that the *Fowler* analysis "seems to violate the congressional intent and the language of the private enforcement section of the Clayton Act."[143]

The most telling criticism of *Fowler* is provided by Professor Handler who expressed disagreement with the *Fowler* automatic damage rule for reasons of logic and policy.[144] The logical deficiencies of *Fowler* involve the issue of proving harm to the plaintiff:

> [I]n Robinson-Patman terms, the *sina qua non* of any recovery in a secondary line price discrimination case is a decision by the favored purchaser to take advantage of his lower cost by reducing his resale price. Then, and only then, can the seller's grant of an unlawful lower price to the favored buyer possibly result in injury to the plaintiff. That injury can be established in one of two ways. Once the favored buyer has lowered *his* price, the plaintiff has two options: (1) he may drop his price to avoid lost sales, in which event his damage would be the loss of profit margin due to the lower resale price; or (2) he may choose to maintain his higher resale price and suffer injury measured by the loss of profit on sales diverted to the favored competitor.[145]

As to the policy deficiencies in the *Fowler* reasoning, Handler points to the inherent anticompetitive nature of the Robinson-Patman Act. "So long as enforcement of the Robinson-Patman Act has been limited to cease and desist orders and to occasional damage recoveries by those able to show actual pecuniary injury, the statute's anticompetitive bias has been ameliorated."[146] Yet a rule of automatic damages may well raise a spectre of massive treble-damage exposure every time a seller lowers his price. This threat may impede natural market forces and thwart competition. Thus, as a matter of policy, *Fowler* is incorrect.

The Supreme Court has ruled that a plaintiff, in a private treble-damage action is permitted to recover only for its antitrust injury. This is defined as the harm flowing "from that which made the defendant's acts unlawful."[147] Professor Handler has analyzed the application of this doctrine to a section 2(a) claim as follows:

> In a secondary-line price discrimination case, it is not the price differential itself which makes defendant's conduct unlawful, just as it is not the merger itself which violates section 7; rather, the illegality results (if at all) from the statute's proscribed "anticompetitive effects"—the likelihood that the alleged discrimination may substantially lessen competition. The crux of the illegality is the injury which stems from that likely lessening of competition—in other words, that the price discrimination may enable the favored purchaser to lower his resale price to the competitive disadvantage of the disfavored plaintiff.

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143 Casenote, *Antitrust—Robinson-Patman Act,* 23 VAND. L. REV. 400, 403, (1970). *See* Recent Decisions, *Restraint of Trade,* 36 BROOKLYN L. REV. 295 (1970).

144 Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review,* 71 COLUM. L. REV. 1, 34 (1971) ("Even if we were to ignore the plain logical deficiencies in an automative damage rule, and turn solely to policy considerations, I have grave doubts with respect to the *Fowler* result.")

145 *Id.* at 33-34.

146 *Id.* at 35.

147 Brunswick v. Pueblo Bowl-O-Mat, 429 U.S. 477, 489 (1977).

> *Brunswick* thus serves to reaffirm *Enterprise*'s basic teaching: that cognizable injury in a section 2(a) case is to be traced *not* to the higher price paid by the plaintiff (the overcharge)—since the infraction is a price *difference* and all the law requires of the seller is a parity in pricing—but rather to the *undercharge* to plaintiff's competitor. Justice Cardozo, with characteristic felicity, put it this way in a different, but related, context: "The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less." Put in *Brunswick*'s terms, the fact that the disfavored purchaser pays more for the same product than the favored purchaser, while constituting a form of economic injury or harm to plaintiff's pocketbook, does not amount to "antitrust injury" or provide a proper measure of antitrust damages. On the other hand, "antitrust injury" is sustained where it can be shown that the favored competitor, by virtue of his lower cost, lowered his resale price so that the plaintiff either lost sales volume (if he did not meet his competition) or lost profits (if he did match the lower resale price). It is the harm from discrimination, that is the undercharge and not from the overcharge, which constitutes antitrust injury in the *Brunswick* sense.[148]

Professor Handler's analysis seems to have succinctly summarized the law as it has developed since *Enterprise.* Indeed, it was found dispositive in the recent case of *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*[149]

V. Conclusion

The Ninth Circuit decision in *Fowler v. Gorlick* potentially affects two elements of a plaintiff's case. The first element is that of causation. *Fowler* appears to hold that the plaintiff needs only to prove a price differential and that no proof of connection between the prohibited price discrimination and the injury alleged needs to be proven.

There does not appear to be any justification for such a presumption of causation. The Supreme Court has expressly disaffirmed such a presumption in *Perkins v. Standard Oil Co.*[150] Furthermore, both the Ninth Circuit and the Supreme Court have been adamant in their requirement that proof of causation be established in all antitrust suits. In failing to consider section 4 of the Clayton Act, the Fowler court disregarded the statutory history of the Robinson-Patman Act which requires a showing of a causal connection between the antitrust violation alleged and the injuries asserted. Without such a showing, plaintiff cannot prevail.

The second element of a private action for a price discrimination case which *Fowler* influences is the amount of damages to which the plaintiff may be entitled and the method of computation by which this amount is ascertained. In fact, *Fowler* may affect the computation of damages in two ways. First, it appears to establish a presumption of damages to be awarded in the amount of the price discrimination. Secondly, it establishes that the measure of damages

148 Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term*—1977, 77 COLUM. L. REV. 979, 992-93 (1977).
149 478 F.Supp. 243, 274 (E.D. Pa. 1979).
150 395 U.S. 642, (1969).

to be awarded the plaintiff in most price discrimination cases is to be the amount of the discrimination.

There are several reasons why those damages assertions in *Fowler* seem an incorrect statement of the recognized and applied rules of law. In the first place, in *Fowler* itself the plaintiff received damages for its actual proven injuries. Thus, the *Fowler* damages language is mere dictum. Furthermore, the *Fowler* damages analysis was considered and rejected by the United States Congress in fashioning the Robinson-Patman Act. Instead, the specific measurement of damages prescribed by section 4 of the Clayton Act was deemed appropriate. Under that standard, an actual showing of damages is required for recovery and no presumption operates thereunder.

The claim of a presumption regarding damages has been rejected by numerous cases. The leading case is *Enterprise Industries, Inc. v. Texas Co.*[151] The number of cases rejecting such a presumption is overwhelming. Indeed, even the Ninth Circuit, in a case subsequent to *Fowler,* has held that the plaintiff must prove that "the discrimination caused injury to the plaintiff."[152] This obviously rebuts any holding establishing a presumption of damages.

The *Fowler* analysis regarding the measure of damages which may be appropriate in certain cases is slightly more persuasive. Nevertheless, the plaintiff's recovery must be measured by its actual business losses. It may be true that the *Fowler* measure is appropriate in some cases, but this is only when the actual damages suffered by the plaintiff are the same as the amount of the price discrimination. Thus, it is only to the extent that a plaintiff has actually lost sales or lost profits that damages may be recovered. Obviously, it is the rare case in which the price differential marks these criteria.

While *Fowler* may have some limited impact in the analysis of the appropriate measure of damages, its presumptions regarding causation and amount of damages have been thoroughly discredited. These presumptions probably never were the rule of law and should not be followed today.

The statement by the court in *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*[153] seems absolutely correct. "After reviewing *Fowler* and cases decided before and after it, I find that it does not represent the law of this circuit and probably would not represent the law of the Ninth Circuit today."[154]

151 240 F.2d 457 (2d Cir.), *cert. denied,* 353 U.S. 965, (1957) (per Judge Learned Hand).
152 511 F.2d 668, 677 (9th Cir. 1975).
153 478 F.Supp. 243 (E.D. Pa. 1979).
154 *Id.* at 273.