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DAMAGE DETERMINATION IN PRIVATE ANTITRUST SUITS

John D. Guilfoil*

Damage determination in private antitrust suits presents a complex and multifaceted problem. Unfortunately, efforts to find a just and practical solution have often emphasized one aspect of the problem at the expense of other, equally relevant considerations. Prior analyses of damage determination, for example, have considered awards as falling into three possible categories: lost profit; decreased revenue; and increased cost. A little reflection reveals the inadequacy of such treatment, for economically, decreased revenue and increased cost cause damage only if in not being shifted forward to consumers or backward to resource suppliers they result in lost profit. It is primarily for philosophical rather than economic reasons that such distinctions have been made.

I. The Period 1890-1939

A. Judicial Philosophy Concerning Standards

The inflexibility in damage determination was founded upon a judicial conservatism,¹ which was nowhere more evident during the period 1890-1939 than in the early approach to damage calculation, where the showing of damage in precise amounts was demanded of all plaintiffs. This attitude stemmed from English common law, which viewed any estimate of lost profit as too uncertain and speculative to form the basis of an award.

The classic treble damage suit illustrating early judicial attitudes toward damage awards for lost profit is *Central Coal & Coke Co. v. Hartman*.² In overruling the trial court's award of damages the Eighth Circuit held:

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1 Of 157 recorded treble damage suits during the period 1890-1939, damage awards were made in 33 instances. In only 14 of these cases, however, was an award sustained on appeal. Seven of these cases involved refusals to deal: *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904); *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79 (2d Cir. 1939); *William H. Rankin Co. v. Associated Billboards*, 42 F.2d 152 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930) (consolidated on appeal with *Charles A. Ramsey Co. v. Associated Billboards*); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924); *Victor Talking Mach. Co. v. Kemeny*, 271 Fed. 810 (3d Cir. 1921). Three involved price fixing: *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555 (1931); *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390 (1906). Two involved price-discrimination: *George Van Camp & Sons Co. v. American Can Co.*, 278 U.S. 235 (1929); *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931). One involved monopolization: *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932). One involved a labor union: *Lawlor v. Loewe*, 235 U.S. 522 (1915).

2 111 Fed. 96 (8th Cir. 1901). The plaintiff in this refusal-to-deal suit was a small coal dealer who bought at wholesale and resold at retail. After withdrawing from a proven price-fixing conspiracy with a number of coal companies, he found himself blackballed by his former coconspirators. The latter refused to sell him coal at any but retail prices. Bringing suit under the Sherman Act, 26 Stat. 209 (1890), as amended, 15 U.S.C. §§ 1-7 (1964), *Hartman* received initial compensation for lost profits stemming from this refusal to sell.

Actual damages only may be secured. Those that are speculative, remote, or uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is logically and legally inferable. . . . [T]he anticipated profits of a business are generally so dependent upon numerous and uncertain contingencies that their amount is not susceptible of proof with any reasonable degree of certainty; hence the general rule that the expected profits of a commercial business are too remote, speculative, and uncertain to warrant a judgment for their loss.³ (Emphasis added.)

As the period progressed, courts grew more liberal in their approach to damage calculation. Eager to take advantage of this changed philosophical outlook, but hesitant to collide with the doctrine of the *Hartman* case, plaintiffs resorted to devious means of promoting their cause. Thus, in *Straus v. Victor Talking Mach. Co.*,⁴ also involving a refusal to deal, the plaintiff pursued the circuitously phrased argument that:

they were entitled to buy goods in a free [wholesale] market; . . . they were prevented from doing this by defendants' illegal combination; . . . they were forced, therefore, to buy in the [retail] market which defendants had created, and were thus compelled to pay more for their goods than the price which in that [wholesale] market was the fair and reasonable price established by the defendants themselves.⁵

Far from objecting to the technical niceties of this approach, the Second Circuit embraced it.⁶ "Difficulty of ascertainment," proclaimed the court, "is no longer confused with right of recovery."⁷

Triggering this change in attitude was the Supreme Court, which during this period proved itself a bold trail blazer in estimating damages from whatever cause, once an injury has been shown. Affirming an award of damages for price-fixing, the Court made clear that once guilt on the part of a defendant had been established, compensation, however difficult of computation, should be rendered:

It is true that there was uncertainty as to the extent of the damage, but there was none as to the fact of damage; and there is a clear distinction between the measure of proof necessary to establish the fact that petitioner had sustained some damages, and the measure of proof necessary to enable the jury to fix the amount. The rule which precludes the recovery of uncertain damages applies to such as are not the certain result of the wrong, not to those damages which are definitely attributable to the wrong and only uncertain in respect of their amount. . . .

Where the tort is of such a nature as to preclude the ascertainment of the amount of damages with certainty, it would be a perversion of justice to deny all relief to the injured person In such case, while the

3 111 Fed. at 98.

4 297 Fed. 791 (2d Cir. 1924).

5 *Id.* at 802-03.

6 The court noted that the desire to award damages where a wrong had been done was evident by 1920. *Id.* at 802.

7 *Ibid.*

damages may not be determined by mere speculation or guess, it will be enough if the evidence show the extent of the damages as a matter of just and reasonable inference, although the result be only approximate.⁸

B. Standards Used in the Measurement of Damages

1. Past Profits as a Measure of Loss

The early decisions hesitated to utilize past profits as a measure of loss for fear of its speculative nature. In the *Hartman* case discussed *supra*, the court acknowledged one "notable exception" to the general rule denying plaintiffs damages for lost profits:

It is that the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was. The reason for this exception is that the owner of a long established business generally has it in his power to prove the amount of capital he has invested, the market rate of interest thereon, the amount of the monthly and yearly expenses of operating his business, and the monthly and yearly income he derives from it for a long time before, and for the time during the interruption of which he complains In the absence of such proof, the profits he claims remain speculative, remote, uncertain, and incapable of recovery.⁹

In this circumstance, then, a plaintiff was permitted to show lost profits by using past profits as a standard of comparison. However, recent or prospective entrants to an industry, because they lacked a profit history, were disqualified from collecting damages for lost profit. Such de facto discrimination against new firms in the interest of scientific damage calculation prevented plaintiffs during this period from recovering damages from proven monopolists.¹⁰

Even if a plaintiff possessed a history of past profits, however, recovery might have been denied him in the interest of exactitude. The plaintiff in *Victor Talking Mach. Co. v. Kemeny*¹¹ had agreed to charge prices fixed by the defendants, but subsequently was denied further goods because of price cutting. This, in the court's opinion, rendered its profit history inadequate as a measure of what it would have earned under lawful competition.

Profits which the plaintiff could anticipate . . . were only such as he could earn lawfully in a competitive market. Such profits cannot, we think, be ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition, and create monopoly.¹²

This doctrine was specifically repudiated in a later case involving a refusal to deal, *Eastman Kodak Co. v. Southern Photo Material Co.*¹³ The plaintiff

8 *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562-63 (1931). See also *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 769 (7th Cir. 1930).

9 *Central Coal & Coke Co. v. Hartman*, 111 Fed. 96, 98-99 (8th Cir. 1901). See note 2 *supra* and accompanying text.

10 See *Haskell v. Perkins*, 31 F.2d 53 (3d Cir.), *cert. denied*, 279 U.S. 872 (1929); *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, 223 Fed. 881 (3d Cir. 1915), *aff'd*, 248 U.S. 55 (1918).

11 271 Fed. 810 (3d Cir. 1921).

12 *Id.* at 819. See also *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694 (2d Cir. 1921).

13 295 Fed. 98 (5th Cir. 1923), *aff'd*, 273 U.S. 359 (1927).

had calculated damages by showing the gross profits it had made for a number of years prior to being denied the defendant's goods. From this figure it subtracted an estimated cost of overhead for the quantity of those goods it estimated it could have sold over the damage period. The resulting difference was termed lost profit. The defendant claimed it was impossible to compute lost profits in this way, since Southern Photo's profits before the damage period were the result of having participated in the defendant's illegal resale price-fixing conspiracy. After observing that "the plaintiff complied with the defendant's restricted terms of resale, for the reason that otherwise the plaintiff could not purchase or secure the goods necessary in the conduct of its business,"¹⁴ the court reasoned:

The plaintiff had an established business and the future profits could be shown from past experience. It was permissible to arrive at net profits by deducting from the gross profits of an earlier period an estimated expense of doing business. Damages are not rendered uncertain because they cannot be calculated with absolute exactness. *It is sufficient if a reasonable basis of computation is afforded, although the result be only approximate.*¹⁵ (Emphasis added.)

2. Profit Extrapolation as a Measure of Loss

Once past profits had been established as an accepted measure of present and future loss, it was logical to expect plaintiffs next to extrapolate past profits into an estimate of profit *increases* that would have occurred but for a defendant's predatory acts. This step was taken in two companion refusal-to-deal suits in the 1920's, consolidated as *William H. Rankin Co. v. Associated Bill Posters of United States & Canada*.¹⁶ Ramsey Company, one of the plaintiffs, made no attempt to extrapolate lost profits, being content merely to show its earnings before the unlawful conspiracy and leave the rest for the jury. Rankin Company, however, actually estimated *increases* in business and profits that it felt would have occurred over the damage period. The defendant attacked the estimate of future earnings by Rankin as "too speculative" to warrant recovery and then attacked Ramsey's failure to estimate lost profits as fatal to his entire case. This argument was based on the ground that in treble damage suits specific damages had to be computed by plaintiffs.

In affirming awards to both plaintiffs, the Second Circuit rendered a landmark decision in damage calculation. On Rankin's extrapolation of lost profits, the court departed from the inflexible attitude of the past.

The fact that . . . plaintiff's damages could not be expressed in exact figures did not make them speculative . . . as to the fact of actual damage. Its business had been seriously curtailed. The defendants had caused the damage, and cannot be permitted to escape liability because it is difficult for the plaintiff to express in terms of dollars the damages it has suffered. The evidence, while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted. It had to do with what was never actually earned, because of the defendants'

14 *Id.* at 107

15 *Ibid.*

16 42 F.2d 152 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

wrongdoing. The witness testified from his knowledge of the business history, made his calculations upon what appears to be a reasonable basis, and the defendants had ample opportunity by cross-examination or the offer of their evidence on the subject to discredit him and show any fallacy in his reasoning or testimony. Whatever may be said of its weight, and that was entirely for the jury, we have no difficulty with its admissibility.¹⁷

The court then turned to a review of Ramsey's award:

Because Ramsey did not introduce any estimate of probable future earnings, being content to leave the matter on proof of earnings, expenses, and net profits before the defendants' unlawful acts, it is said that no damages warranting a recovery have been proved by that plaintiff. Thus we have . . . in two separate actions . . . defendants taking the position in respect to one plaintiff that it was error to introduce evidence of estimated future earnings because it is too speculative, and the position in respect to the other plaintiff that it was fatal to a recovery not to do so. Had there been no evidence from which damages could be fixed by the jury, of course this plaintiff could not recover. But there was evidence. The financial history of the Ramsey business was in the case. Perhaps the jury was not as competent to analyze that evidence as some financial and business expert might have been, but it could draw its own reasonable conclusions from it. That is what a jury is to do anyway in arriving at the amount of damages in any case. The jury had the data before it, and was left to determine the damages from that in what may be called its raw state. Perhaps the testimony of someone competent to have estimated the business loss resulting from the defendants' acts would have helped, but it was not indispensable.¹⁸

In *Frey & Son v. Welch Grape Juice Co.*, also involving a refusal to deal, a lower court decision limiting damage recovery to the loss of specific and recorded sales orders was reversed.¹⁹ The appellate court felt it unduly severe to expect a plaintiff to itemize all specific sales lost. Instead, it was held quite acceptable for a plaintiff to show what quantity of the defendant's product it sold prior to being cut off from supplies, its unit profit on these sales, and how much its *general* sales of other goods had increased over the damage period. The latter increase was then used as a measure of plaintiff's estimated sales gains on the defendant's product had plaintiff not been denied access to the defendant's output. The court was not willing, however, to go so far as to award damages based upon the fact that the plaintiff might have lost customers for his other products because of an inability to stock the defendant's goods. Such alleged damages were termed too remote and speculative to warrant recovery.

3. The Formula Approach to Damage Measurement

In the first treble damage case in which a damage award was allowed, the court held it "the duty" of an injured party "to use all reasonable efforts to make any damage to his business as small as possible."²⁰ This being the case,

17 *Id.* at 155.

18 *Id.* at 155-56.

19 240 Fed. 114 (4th Cir. 1917), *cert. denied*, 251 U.S. 551 (1919).

20 *Lowry v. Tile, Mantel & Grate Ass'n*, 106 Fed. 38, 47 (N.D. Calif. 1900), *aff'd sub nom. Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

a plaintiff was obliged to show that he was unable to procure the goods anywhere at the same price as the defendant sold them. Once shown, damages were termed the difference between the higher price per unit actually paid to obtain the goods and the price at which the defendant sold his products to others, multiplied by the quantity purchased by the plaintiff during the damage period.²¹

The court in *City of Atlanta v. Chattanooga Foundry & Pipe Co.*²² assumed that the price of the goods immediately prior to a price-fixing conspiracy was the price that would have prevailed over the damage period. Once this assumption was made, damages were readily obtained by subtracting from the customer's total purchase costs over the damage period a sum equal to the product of the "reasonable" price multiplied by the actual quantities of the good consumed. No attempt was made to ascertain whether the plaintiff had passed its increased costs for pipe on to consumers of the good for which the pipeline had been constructed through higher utility rates.

*Thomsen v. Cayser*²³ adopted a different, but equally fundamental, approach to the determination of what price would have existed in the absence of conspiracy. There, defendant shipowners returned a certain percentage of a collusively fixed shipping rate to all customers who did not use competing ship-lines. This lower rate paid by all customers dealing exclusively with the defendants was considered by the court a reasonable price for the basis of calculations. The excess price that a plaintiff who used competing lines was required to pay the defendants was considered the specific damages sustained. Thus, in *Thomsen*, as in *Straus v. Victor Talking Mach. Co.*,²⁴ a price fixed by the defendants themselves for dealings with the plaintiff's competitors formed the basis of damage calculation.

*O'Halloran v. American Sea Green Slate Co.*²⁵ was considerably more exacting concerning the determination of what constituted a reasonable price. The case is of significance because the briefs of both disputants made general use of "demand elasticity" in their arguments. The defendants were independent producers of sea-green slate. They had formed one cartel-like company, whose purpose was to buy slate from themselves for resale to customers. The plaintiff was a roofer who bought sea-green slate. Charging a conspiracy in restraint of trade, he claimed damages resulting from having to pay a higher price for slate than would have been charged under free competition and from the loss of customers who refused to buy slate at this higher price. Relying on cross-elasticity, the defendant argued that sea-green slate competed with black and all other slate and that the price of slate could not be controlled by sea-green slate producers alone.

The district court ruled that sea-green slate was a line of commerce entire

21 When applying such a formula to price-fixing cases, the crucial question any court had to consider in assessing damages was the extent to which a conspiratorially fixed price differed from the price that would have prevailed in the absence of collusion. The latter, referred to as a "reasonable" price, did not necessarily have to be a competitively determined price.

22 127 Fed. 23 (6th Cir. 1903), *aff'd*, 203 U.S. 390 (1906).

23 243 U.S. 66 (1917).

24 297 Fed. 791 (2d Cir. 1924). See note 4 *supra* and accompanying text.

25 207 Fed. 187 (N.D.N.Y. 1913), *rev'd*, 229 Fed. 77 (2d Cir. 1915).

of itself and awarded damages to the plaintiff. This award was overruled on appeal, however, on the traditional ground that the damages claimed were speculative, remote, and uncertain and therefore not recoverable. This decision was based on two factors: first, that it was impossible to calculate what the price for sea-green slate would have been had no conspiracy existed; second, that it was impossible to calculate the elasticity of demand [author's terminology] for sea-green slate.

As in *O'Halloran*, demand elasticity was at issue in *Story Parchment v. Paterson Paper Co.*;²⁶ for in charging lost profits as a result of predatory price cuts by his competitors, the plaintiff assumed that the industry faced an inelastic demand curve. And in asserting that the price cuts were not predatory, but were utilized to get more business, the defendants implied that the market demand for parchment was elastic in nature. Despite the significance of elasticity in this case, no serious attempt was made by either side to ascertain the demand elasticity of its product. If such an attempt had been made, the resulting calculation would have involved a certain amount of uncertainty and speculation, but so would any inquiry into what constituted a reasonable price for parchment, since the price prevailing before the predatory price cutting was also the result of collusion. Such inevitabilities proved too much for the First Circuit to contend with, and it consequently vacated an award of damages on the ground that

there was no basis for a reasonable inference that prices in excess of those actually realized would have prevailed if there had been no combination; and that, in any event, there was no damage which could be measured and expressed in figures not based on speculation and conjecture.²⁷

The Supreme Court, less cautious, sustained the initial award of damages that used the collusively fixed and, therefore, monopolistic price prevailing before the price cuts as a measure of what constituted a reasonable price.²⁸

In deciding price discrimination cases, the use of formulas to measure damages is tempting. It is relatively easy to assess injury by multiplying a plaintiff's quantitative consumption of goods by the price differential charged him for those goods.²⁹ The defendant objected to the use of such a formula in *American Can Co. v. Ladoga Canning Co.*³⁰ After first observing that the trial court had interjected "no such rule" of damage calculation into the case, the appellate court recognized that "the actual damages . . . might possibly have been a sum that equaled such difference."³¹ It observed with approval, however, the introduction of other evidence on damage sustainment by the plaintiff, specifically,

26 37 F.2d 537 (1st Cir. 1930), *rev'd*, 282 U.S. 555 (1931).

27 *Id.* at 539.

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

29 Many courts from 1940-1966 were in fact prone to adopt such a formula when dealing with price discrimination suits. *E.g.*, *American Co-op. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946); *Elizabeth Arden Sales Corp. v. Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945). Other courts, however, have objected to the use of such an approach. See *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949).

30 44 F.2d 763 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931).

31 *Id.* at 769.

the plaintiff's profits before the damage period and its losses during it, the growth in sales of the plaintiff's competitors who were charged lower prices, and the plaintiff's average profits per case of canned goods.³²

C. Economic Summary and Evaluation

There were, then, two means by which awards in treble damage suits were calculated during the period 1890-1939. Loss was estimated either through a comparison of predamage-period profits with damage-period profits, or through use of a formula that equated injury with the product of the difference between a reasonable and illegal price multiplied by a volume figure representing sales by a plaintiff or purchases from a defendant. The latter technique lent itself to cases involving price-fixing, price discrimination, and refusals to deal; the former, to all types of illegal behavior.

However, the courts of the 1930's were considerably more lenient in the application of such standards of measurement than they had been decades earlier. Moreover, considerable latitude was given juries to modify a plaintiff's claimed damages, even though based on the above techniques. Thus, in reviewing the jury's award in *Straus v. Victor Talking Mach. Co.*,³³ the court noted that it was about \$7,700 less than should have been the case in light of the formula approach used by the plaintiff. Commenting on this fact, the court observed that "whether or not the reduction was due . . . [to any special cause] we cannot know, and with the jury's method of arriving at the result we have no concern."³⁴

That juries are not particularly qualified to handle the economic intricacies that arise in damage computation is hardly subject to dispute. In certain instances the courts themselves have been shown wanting in economic sophistication. For example, in calculating the damages in *Story Parchment*, the jury considered two items of damage: first, the difference in total revenue that the plaintiff would have obtained "at reasonable prices" (or those collusively inflated prices prevailing before the predatory price cuts) and that which he did obtain after prices were cut; second, the extent to which the price-cutting conspiracy had lowered the value of the plaintiff's plant.³⁵ That some decline had occurred in the value of the plaintiff's plant the Supreme Court believed "obvious."³⁶ Such a fact is equally "obvious" to an economist, simply because the value of any income-producing asset is a reflection of the future flows accruing to it. If those future flows are diminished, so too is the value of the asset. But

32 *Id.* at 768-70.

33 297 Fed. 791 (2d Cir. 1924). See note 4 *supra* and accompanying text.

34 297 Fed. at 804. Similar sentiments were expressed by the *Rankin* court:

Perhaps the jury was not as competent to analyze that evidence as some financial and business expert might have been, but it could draw its own reasonable conclusions from it. That is what a jury is to do anyway in arriving at the amount of damages in any case. The jury had the data before it, and was left to determine the damages from that in what may be called its raw state. Perhaps the testimony of someone competent to have estimated the business loss resulting from the defendants' acts would have helped, but it was not indispensable. William H. Rankin

Co. v. Associated Bill Posters of United States & Canada, 42 F.2d 152, 156 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

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

36 *Id.* at 567. The plant, originally costing \$235,000, of which \$90,000 represented an outlay for parchmentizing equipment, was estimated by the plaintiff's treasurer to be worth \$75,000 at the time of its abandonment. *Ibid.*

to award the plaintiff damages for both a loss of profits and a decline in the value of its plant, as the Court did in *Story Parchment*, is to assess a defendant twice for the same act — once for a decline in future flows, and again for the same decline in future flows as reflected in a reduction in value of the plaintiff's income-producing property.

Under English common law, courts were not permitted to add interest to any damage award where not within the parties' agreement.³⁷ American practice, however, differed in that interest payments developed from being solely in the discretion of juries to matters of right, especially where the claim was for liquidated damages.³⁸ Considering opportunity cost, interest payments are an essential part of any damage recovery; for if a party had not sustained a loss in funds at the hands of another, those funds themselves would have earned income, based at the minimum on the going rate of return for loanable funds. To deny a plaintiff interest on damages is, therefore, to deny him a portion of his damages.

Economically more important than the failure of courts to add interest to all damage awards is that during this period few courts or parties to treble damage actions attempted, in determining damages, to measure demand elasticity for a plaintiff's or defendant's product. Such a failure is undoubtedly in large part explainable by the fact that any calculation of demand elasticity is necessarily somewhat uncertain and speculative. But this does not change the fact that the size of actual damages is influenced by it.³⁹

Closely linked with the economic concept of elasticity is the "pass-on" doctrine, which holds that a plaintiff has sustained no injury if he succeeded in shifting any damage backward to resource suppliers or forward to customers. A firm can, of course, only shift damages in their entirety if there exists an inelastic demand for its product or an inelastic supply of resources to make that product. This qualification must be kept in mind when the concept is used. Despite the significance of the pass-on doctrine in damage calculation from 1940-1966, it was not employed from 1890-1939.

II. The Period 1940-1966

A. *Electrical Equipment: The Use of Price Differentials*

In the landmark case of *Philadelphia Elec. Co. v. Westinghouse Elec. Corp.*,⁴⁰ the plaintiffs were held entitled to the difference between the prices they

37 *E.g.*, *London, G. & D. Ry. v. South E. Ry.*, [1893] A.C. 429, 437-41; *De Haviland v. Bowerbank*, 1 Campb. 50, 170 Eng. Rep. 872 (N.P. 1807); *McCORMACK, DAMAGES* § 51, at 210-11 (1935).

38 *E.g.*, *Reid v. Rensselaer Glass Factory*, 3 Cow. 393 (N.Y. 1824); *Lewis v. W. D. Roundtree & Co.*, 79 N.C. 120, 128, 28 Am. Rep. 309, 313 (1878); *McCORMACK, op. cit. supra* note 37, at 211.

39 See, *e.g.*, *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924), where in awarding damages the court made the unwitting and tenuous assumption that there existed a perfectly inelastic demand for phonograph machines.

Price increases under inelastic demand conditions cause a rise in revenues; conversely, price decreases cause a fall in revenues. However, where the demand is elastic, increasing the price of a good leads to a drop in revenues, while decreasing the price leads to a rise in revenues.

40 1964 Trade Cas. ¶ 71123 (E.D. Pa. June 1, 1964). This was the first electrical equipment suit in which damages were allowed.

paid for power transformers and the price they would have paid had a free market existed. To compute the free market price, plaintiffs relied on defendants' price history during and after the damage period. The lower prices existing after government exposure were held to be the prices that would have prevailed in a free market. Subtracting post-indictment prices from actual prices paid yielded a damage estimate of \$12,499,409 for one plaintiff, \$166,279 for a second, and \$210,853 for a third. Charged with collusive price-fixing, the defendants denied that their meetings affected prices in the industry. Prices, they argued, always resulted from individual buyer-seller negotiations, as influenced by general supply-demand conditions, excess capacity in the industry, and historically declining costs resulting from technological breakthroughs.⁴¹

The most outstanding feature of this case is the heavy burden the court placed on the jury in assessing damages:

[I]f there is anything I want to emphasize with all the power that I command, [it is] that the evidence is for you. I have only referred to it by way of example, and if what I said doesn't agree with your recollection just absolutely disregard what I have said because I can't make it any more emphatic, that you are the judges of the facts Your verdict may range anywhere from zero to \$12,499,409 for the Philadelphia Electric.⁴²

Left to the jury to accept or reject was the testimony of expert witnesses. Left to the jury, even though the judge saw no direct link, was the decision whether lower post-indictment prices were the result of the defendant's cost reduction program. Left to the jury to decide was the effect of changes in the national economy, recessions, and wars on prices during and after the damage period. Also left to the jury was whether prices in the industry were affected by economic factors other than the conspiracy, affected solely by the conspiracy, or affected by both the conspiracy and economic factors. Saddled with these burdens, the jury awarded damages of \$9,374,557 to one plaintiff, \$124,709 to a second, and \$158,140 to a third.

In the second electrical equipment case awarding damages, *Ohio Valley Elec. Corp. v. General Elec. Co.*,⁴³ plaintiffs showed that with the return of

41 On the allegation that prices were negotiated on individual sales, the trial judge offered the following charge to the jury:

"[A]ssume that the defendants conspired to fix the price level of a power transformer at \$100, and let us assume that through negotiations the plaintiff is able to obtain it for \$90, but assume further that on a free market without a price conspiratorially fixed the price would have been \$50; then the plaintiff's damages in that case would have been \$40, but the mere fact that there was negotiation from an illegally fixed price would not relieve the defendants of responsibility."

Id. at 79441.

42 *Id.* at 79446.

43 244 F. Supp. 914 (S.D.N.Y. 1965). The defendant had employed the services of an eminent economist, Dr. Morris A. Adelman, also to analyze what prices would have been had no conspiracy existed. His method of computation involved applying the ratio of production costs in both periods to postconspiracy prices. Such a procedure resulted in the interesting proposition that conspiratorial prices were actually \$506,000 less than competitive prices, a theoretical conclusion that the court felt flew in the face of common sense. Specifically, the method was attacked for failing to recognize that under competitive pressures production costs would have been lower than was the case under collusion. Damages of \$5,624,401 were awarded. *Id.* at 941-42, 947.

competition, actual prices dropped below book prices by some 25 percent. It was assumed that absent a conspiracy, prices during the damage period would similarly have been 25 percent below book levels. Defendants objected that different economic conditions other than the conspiracy were prevalent with the return of competition, making comparison of the two periods fallacious. Specifically, these conditions included a slowdown in the growth of demand, a drop in production costs, and the emergence of foreign competition and excess capacity. The court agreed that there were economic differences between both periods, but held them inadequate to negate completely plaintiff's theory of damage. To adjust for them partially, however, the competitive discount of 25 percent was lowered to 21 percent. This was done even though the court observed that book prices in both periods were supposed to take into account changing economic forces.

B. Motion Pictures: The Use of Profit Extrapolation and Damage Estimates Based on a Comparison With the Earnings of Other Companies as Measures of Damage

In the first successful movie suit, *Bigelow v. RKO Radio Pictures, Inc.*,⁴⁴ the plaintiffs pursued two methods of demonstrating damage. First, they compared their theatre's average profits under other operators (their parents) for a four-year period, during which plaintiffs' Jackson Park theatre received films for the run requested (C prerelease status), with average profits for the five-year period immediately following, when their theatre was being denied films on this availability. The difference in average profits was \$125,659. Second, they compared their theatre's profits for the five-year period in which they were denied C prerelease status with the profits of another theatre that was operating on a C prerelease run. The difference in profits was \$115,982.34. The jury chose to award neither \$125,659 nor \$115,982.34.⁴⁵ Instead, it awarded \$120,000, a figure comfortably between both estimates.

The Seventh Circuit was not persuaded by these computations of damage. That the defendants in this case had engaged in Sherman Act violations the court did not doubt. But, it insisted, the plaintiffs had failed to show damages other than those of a speculative nature. The court noted that plaintiffs neither knew nor could prove the profits they would have made if competitive bidding in an open market existed. The showing of profits for a de facto C prerelease status for four years before the damage period was, in the court's opinion, irrelevant, particularly in light of the fact that the theatre was then owned and operated by individuals other than the plaintiffs, and that the plaintiffs "neither operated nor assisted in operating any theatre prior to their ownership of this one"⁴⁶ According to the court, this last fact "would only prove that matters other than the illegal Chicago system had proximately caused the damages assessed by the jury."⁴⁷ As far as the comparison of the Jackson Park thea-

⁴⁴ 327 U.S. 251 (1946).

⁴⁵ *Id.* at 257-58.

⁴⁶ *Bigelow v. RKO Radio Pictures, Inc.*, 150 F.2d 877, 884 (7th Cir. 1945), *rev'd*, 327 U.S. 251 (1946).

⁴⁷ *Ibid.*

tre's profits with those of a C prerelease theatre was concerned, the court held that "such evidence would not tend to prove what profits either would have received under any system other than the illegal Chicago system"48 "In suits under our anti-trust laws for claimed loss of profits," solemnly, if incongruously, observed the court, "speculation is not permitted to take the place of proof of the *fact* of damage, although if the *fact* of damage is proved, the *amount* may be reasonably approximated if based upon competent evidence."⁴⁹

The Supreme Court thereupon granted certiorari "because of the importance of the problem presented,"⁵⁰ and proceeded to reverse the Seventh Circuit, which had rejected the jury's determination of damages. After referring to *Southern Photo* and *Story Parchment*, the Court ruled:

. . . [Juries] may not render a verdict based on speculation or guesswork. But the jury may make a just and reasonable estimate of the damage based on relevant data, and render its verdict accordingly. . . . Any other rule would enable the wrongdoer to profit by his wrongdoing at the expense of his victim. It would be an inducement to make wrongdoing so effective and complete in every case as to preclude any recovery, by rendering the measure of damages uncertain. Failure to apply it would mean that the more grievous the wrong done, the less likelihood there would be of a recovery.

The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . . [T]he wrongdoer may not object to the plaintiff's reasonable estimate of the cause of injury and of its amount . . . because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable.⁵¹

To the dissenting Justice Frankfurter, it was "wholly speculative . . . whether the intake of petitioners would have been more profitable if the distribution of films in Chicago had been left wholly to the haggling of a free market"52 This dissent is of much more than passing interest. Throughout all subsequent movie cases in which damages were calculated upon a profit comparison between a plaintiff theatre and those with prior exhibition rights, the method sanctioned in *Bigelow*, one significant economic point seems to have been purposefully ignored. That is that just as injured exhibitors had unduly low profits resulting from the industry's illegal acts, so also did favored exhibitors have abnormally high profits resulting from the same acts. Taking the profit difference between both types of exhibitors as a measure of what profits would have been earned by the plaintiffs "under normal competitive conditions" was, therefore, highly fallacious. Moreover, in each case this error was compounded to three times over due to the award of treble damages.⁵³

48 *Ibid.*

49 *Ibid.*

50 *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 254 (1946).

51 *Id.* at 264-65.

52 *Id.* at 268.

53 It is small wonder that the plaintiff's attorney in *Bigelow* observed:

[P]erhaps loss of profits is not the best theory upon which an antitrust litigant should proceed. . . . It would seem . . . that where a business conspiracy or monopoly has excluded a plaintiff from a business or from obtaining a product necessary

Another aspect of the *Bigelow* problem was encountered in *Bausch Mach. Tool Co. v. Aluminum Co. of America*.⁵⁴ There the appellate court reversed an award of damages to a new company based on lost profits, because "there never had been any profits" upon which an extrapolation could be made.⁵⁵

A similar situation arose in *William Goldman Theatres, Inc. v. Loew's, Inc.*⁵⁶ Again, plaintiff's theatre was opened while the industry's discriminatory system of film distribution was operative. Naturally, as a new theatre, no profit history existed for the plaintiff's business. After observing that Goldman was an experienced theatre manager, having worked in that capacity for Warner Brothers, and that his theatre was a handsome and well-appointed plant fully equipped for first-run showings, the district court awarded damages. In so doing the court observed that the calculation of profits in the motion picture industry was a good deal easier than for other industries. Costs were held to be readily calculable since film rental, computed on a percentage basis and being the largest of all costs, bore a constant proportion to receipts. The court felt that rent, advertising, electricity, and maintenance also could be easily discovered, with wage costs being relatively minor. Indeed, the court noted that both disputants readily agreed on the cost of operating the plaintiff's theatre. The court observed that prices could be ascertained from the actual charges for admission at first-run theatres during the damage period. Plaintiff's volume of business was recognized, in fact, as the only issue open to question. Goldman met this problem by totalling the dollar volume of business of the five first-run theatres within his surrounding market area, Philadelphia, and taking one-fifth of this figure as the probable dollar volume for his theatre, the Erlanger. He also showed earnings of the one first-run theatre of the five that was most "comparable" in size and location to his theatre for the three-month period that the former operated during the damage period. This theatre, the Mastbaum, had 4,387 seats, compared to the plaintiff's 1,859. With these facts at its disposal, the court proceeded to note a myriad of problems that rendered any damage calculation a Herculean task. For example, the plaintiff's theatre was admittedly of inferior location to the other four first-run theatres. Furthermore, in extrapolating the Mastbaum's three-month earnings figure out to fifteen months (a debatable feat in and of itself) in order to cover the length of the damage period, the court recognized that during this wartime period many crucial variables affecting theatre earnings were undergoing marked shifts. Thus, "higher wages, full employment and migration to the centers of industry [caused by World War II] naturally produced a greatly augmented public with money to spend on first-run shows."⁵⁷ These factors, it was recognized, tended to make the Mastbaum's three-month earnings unduly high. Finally, the court listed certain other unfavorable characteristics of the Erlanger that might cause

for the successful conduct of a business, a measure of damages is applicable on the basis of the benefit the wrongdoer has obtained from his wrongful conduct. *McCConnell, The Treble Damage Action*, 1950 U. ILL. L.F. 659, 668.

⁵⁴ 79 F.2d 217 (2d Cir. 1935).

⁵⁵ See also *Buckeye Powder Co. v. E. I. du Pont de Nemours Powder Co.*, 223 Fed. 881 (3d Cir. 1915), *aff'd*, 248 U.S. 55 (1918).

⁵⁶ 69 F. Supp. 103 (E.D. Pa. 1946), *aff'd*, 164 F.2d 1021 (3d Cir. 1948).

⁵⁷ *Id.* at 108.

its profits to be somewhat lower than those of other first-run theatres. These included its not having been operated as a first-run theatre under any ownership for ten years and its lack of air-conditioning. Although cognizant of these many variables, the court proceeded to award a rounded sum of \$125,000 to the plaintiff, but not before openly admitting that there existed "an element of speculation . . . [and] guesswork in making an estimate of probable profits on the evidence presented."⁵⁸ The award was summarily affirmed on appeal without any discussion of the lower court's method of calculating damages.⁵⁹

In *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*,⁶⁰ the facts differed enough that the court was presented with an alternative to the method of computation based on the profits of comparable theatres. There plaintiff had leased one of the finest suburban theatres in Greater Kansas City only to have first-run status denied him in preference to theatres operated by one of the defendants. After being driven out of business, the plaintiff had his theatre taken over by a defendant. Damages were calculated from an analysis of the profits earned by that defendant from the time it took over the plaintiff's theatre to the date the latter's lease would have expired. Although this amounted to \$317,478.02, the jury chose to assess damages at \$375,000, a figure affirmed on appeal despite its confessedly large nature.

In *Milwaukee Towne Corp. v. Loew's, Inc.*,⁶¹ the district court preferred to compute damages based upon profits of comparable theatres. Thus, it refused to consider the earnings of the plaintiff's theatre for a preceding period in which it obtained first-run films as a measure of damages. Instead, the earnings of two comparable theatres were examined and the one with the larger earnings was selected as a damage gauge. The Seventh Circuit thought the rejected approach had much to recommend it, but declined to overrule the method that was adopted by the trial court.⁶²

A decision embodying many diverse methods of damage calculation is *Homewood Theatres, Inc. v. Loew's, Inc.*⁶³ The seeds of this litigation were sown in 1930 when a uniform zoning plan for Minneapolis was drawn up by the major film producer-distributors. A competitor of the plaintiff, dissatisfied with the playing position assigned him within this plan, brought a treble-damage suit that was settled out of court through an agreement to give his Paradise theatre first-run status. As a result of this agreement, the plaintiff's Homewood theatre, "superior" to the Paradise in appearance, appointments, facilities, and furnishings, was denied first-run status. The three means of calculating damages

58 *Id.* at 109.

59 *William Goldman Theatres, Inc. v. Loew's, Inc.*, 164 F.2d 1021 (3d Cir. 1948). See also *William Goldman Theatres, Inc. v. Loew's Inc.*, 163 F.2d 241 (3d Cir. 1947), in which a petition to file a bill of review in the district court was denied. It should be noted here that plaintiff consistently refused to accept subsequent-run films and, instead, ceased operations. The court felt this was of no consequence. Contrasted to this is *Lowry v. Tile, Mantel & Grate Ass'n*, 106 Fed. 38 (N.D. Cal. 1900), *aff'd sub. nom. Montague & Co. v. Lowry*, 193 U.S. 38 (1904), which held that an injured party has the duty "to use all reasonable efforts to make any damage to his business as small as possible." *Id.* at 47. Presumably, *Lowry* would have Goldman mitigate damages by accepting second-run features.

60 194 F.2d 846 (8th Cir.), *cert. denied*, 343 U.S. 942 (1952).

61 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952).

62 *Id.* at 564.

63 110 F. Supp. 398 (D. Minn. 1952), *appeal dismissed*, 207 F.2d 263 (8th Cir. 1953).

proffered by the plaintiff were: first, a comparison between the gross receipts of the Homewood and another theatre comparable in size, appearances, facilities, etc.; second, a comparison between the Homewood's gross receipts and the gross receipts of all motion picture theatres in the United States; and third, a comparison between gross receipts for pictures shown at the Homewood before and after the proven conspiracy. The third method was abandoned after the plaintiff experienced computational problems. The court considered the second method improper.⁶⁴ The first method was also dismissed, on the ground that comparison with a first-run theatre of equal furnishings in a different type of neighborhood was not to be preferred to comparison with the competitor's Paradise, which benefited from the discriminatory practices against Homewood. Faced with this ruling, the plaintiff attempted to compare the earnings of the Homewood and Paradise via two routes. The less sophisticated of the two approaches compared profits for the year prior to the damage period. Since the Homewood then earned over twenty-seven percent more than the Paradise, plaintiff argued the latter's earnings for each year of the damage period were increased by that percentage. The resulting figures were allegedly what the Homewood would have earned but for the conspiracy. Labeling this approach manifestly unsound, the court next examined the plaintiff's second approach, and in turn rejected it as "fallacious and entirely unrealistic." Actually, the plaintiff had subtracted the total gross receipts of the Homewood from those of the Paradise for the damage period and from this difference subtracted an average Paradise film rental of twenty-five percent to arrive at its net damages. The court then offered its own solution to the problem, which consisted of a year-by-year analysis of net rather than gross profits (the difference being film rental) and a belief that

if the subsequent run theatre makes as great a profit by reason of the differentiation in film rental as it would have made if it had been a first run theatre, one cannot find any sound basis for allowing damages — there is no pecuniary loss.⁶⁵

*Charles Rubenstein, Inc. v. Columbia Pictures Corp.*⁶⁶ did not take the route charted by the *Homewood* court. After observing that the plaintiff's theatre was superior in appointments and attractiveness to its favored competitor, the court in *Rubenstein* ruled that "under such an arrangement, the total gross returns of the two theatres would have to be totaled and a reasonable film rental deducted therefrom, and the balance then divided between the two theatres."⁶⁷ In so ruling, the court recognized that damage calculation poses difficult problems. For example, while perceiving that the superior appointments of plaintiff's theatre might have caused it to earn more than defendant's theatre, the court also thought it possible that plaintiff's inferior location would have

64 *Id.* at 412.

65 *Id.* at 416.

66 *Charles Rubenstein, Inc. v. Columbia Pictures Corp.*, 176 F. Supp. 527, (D. Minn. 1959), *aff'd*, 289 F.2d 418 (8th Cir. 1961).

67 *Id.* at 540.

caused it to earn less. It objected to taking the difference between the plaintiff's and defendant's gross receipts and labeling this amount as damages on the ground that plaintiff's earnings during the damage period were abnormally low due to "causative factors and conditions other than the preferential run."⁶⁸

Still another method of calculating damages was presented in *Sablosky v. Paramount Film Distrib. Corp.*⁶⁹ Since no "normal preceding period" or comparable theatre existed to aid in damage calculation, the plaintiff estimated what percent of the area's population could have been expected to attend its theatre had it been operated on a first-run basis. This estimate was then multiplied by a "fair admission price" to obtain what the plaintiff's estimated gross receipts would have been but for the conspiracy. From this sum estimated advertising and film rental costs were subtracted. The difference between the resulting figure and the plaintiff's actual net receipts (\$1,454,965.41) was termed damages. However, the jury saw fit to award only \$425,000, a determination probably influenced by evidence showing that the plaintiff's estimated earnings during the damage period were "abnormally high," compared with gross-income statistics for the industry.⁷⁰

C. Other Suits

1. Price Differentials as a Measure of Damage

As in the *Philadelphia Elec. Co.* case,⁷¹ other successful price-fixing suits found the courts holding that the proper measure of an award was the difference between what a plaintiff paid or received for goods due to a conspiracy and what it would have paid or received had no conspiracy existed.

In the Vanadium Cases,⁷² the court recognized that there was "no direct evidence tending to show what vanadium ore would have sold for in a free market, absent the conspiracy."⁷³ The jury was instructed, therefore, to calculate damages to vanadium ore miners based on the profit spread between the cost of the vanadium ore to the defendant and the price received by the same party for refined vanadium.⁷⁴ Noted the court:

It would seem reasonable to say that profits from sales of a finished product in a monopolistic market are distinctly relevant to the free market value of the raw materials, the cost of which was a constituent element of such profits.⁷⁵

A monopoly suit, *North Tex. Producers Ass'n v. Young*,⁷⁶ involved a prospective milk dealer's source of supply which had been conspiratorially cut off.

68 Plaintiff had cut prices in the mistaken belief that demand was elastic; gas rationing had made the defendant's theatre more accessible than the plaintiff's, and the plaintiff was in the United States Army during part of the damage period. *Id.* at 539.

69 137 F. Supp. 929 (E.D. Pa. 1955).

70 *Id.* at 939.

71 See notes 40-42 *supra* and accompanying text.

72 *Union Carbide & Carbon Corp. v. Nisley*, 300 F.2d 561 (10th Cir. 1961), *petition for cert. dismissed*, 371 U.S. 801 (1962).

73 *Id.* at 579.

74 *Id.* at 580.

75 *Ibid.*

76 308 F.2d 235 (5th Cir.), *cert. denied*, 372 U.S. 929 (1962).

The damage award was based on the difference between what would have been the plaintiff's unit cost and the retail price prevailing for milk in his market area, multiplied by the quantity of milk the source of supply had contracted to furnish. The plaintiff had originally planned to undercut existing prices, but the whole question of demand elasticity and of how much more milk could have been sold at a lower price was not considered by the court.⁷⁷

Hanover Shoe, Inc. v. United Shoe Mach. Corp.,⁷⁸ another monopoly case, involved a lease-only policy on the part of the United Shoe Machinery. Damages were held equal to the difference between leasing costs and the cost of owning the machines. What machine prices would have been during the damage period was computed by applying the Bureau of Labor Statistics Consumer Price Index to the sales price of machines after the demise of the lease-only policy. Except for this adjustment for inflation, with an index that had little relation to machinery prices, plus adjustments for depreciation and the interest the plaintiff would have had to pay to borrow money for the financing of its purchases, no attempt was made to account for the possibility of differing supply-demand conditions during both periods.

When Congress passed the Robinson-Patman Act,⁷⁹ it failed to provide a formula for ascertaining damages. In *Bruce's Juices, Inc. v. American Can Co.*,⁸⁰ however, the Supreme Court ruled that any plaintiff at least had the "right to recover three times . . . [any] discriminatory difference without proving more than the illegality of the prices." The Court went on to say that "if the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination."⁸¹

This viewpoint of damage calculation was adopted earlier in one of the first Robinson-Patman awards of this period, *Gus Blass Co. v. Elizabeth Arden Sales Corp.*⁸² After showing that the defendant had paid the entire salary of a competitor's employee-demonstrator, but only one-half the salary of a similar employee of the plaintiff, the latter was allowed to collect as damages the extra salary received by the competitor.

The same approach was followed in a suit decided one year later.⁸³ In this suit a cooperative that bought hog-cholera biologics for resale to its members collected damages from both the serum manufacturer and a farm bureau to whom the manufacturer had sold its product at a lower price. The plaintiff had been charging a price of \$.75 for serum and was forced to cut its price to \$.65 in order to meet the competition of the farm bureau. Damages were held to equal the difference between what revenues the plaintiff would have made selling at \$.75, and what it did make selling at \$.65.⁸⁴

77 This case stands in contrast to the *Duff* case, where plaintiff was denied recovery on the ground that an anticipatory business cannot collect anticipatory profits. *Duff v. Kansas City Star Co.*, 299 F.2d 320 (8th Cir. 1962).

78 245 F. Supp. 258 (M.D. Pa. 1965).

79 52 Stat. 446 (1938), 15 U.S.C. § 13(c) (1964).

80 330 U.S. 743 (1947).

81 *Id.* at 757.

82 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

83 *American Co-op. Serum Ass'n v. Anchor Serum Co.* 153 F.2d 907 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946).

84 This computational method was viewed with approval in a later case. *State Wholesale*

In *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*,⁸⁵ the Second Circuit reversed an assessment of damages for the same act, based on the same calculation, and involving the same defendant against whom damages had been assessed in *Blass* three years earlier.⁸⁶ This reversal was on the ground that it was incorrect to use a price difference as the measure of damage. A similarly minded court in *Sano Petroleum Corp. v. American Oil Co.*⁸⁷ stated:

Sano argues that the measure of damages in this kind of case is the difference in price to it and another buyer, multiplied by the number of gallons bought by Sano during the period that the particular difference prevailed. To show an application is to refute the theory. From April 10, 1948 to December 3, 1949, Uneeda bought 239,440 gallons of gasoline from American on which it paid ½ cent per gallon less than Sano. During this same period Sano bought 5,200,379 gallons. Thus, on a transaction that conferred a \$1,297.20 benefit on Uneeda, Sano finds an untrebled injury of \$26,001.90. There is nothing in law or logic . . . that supports such a ridiculous result.⁸⁸

The court in *Enterprise Indus., Inc. v. Texas Co.*⁸⁹ concurred that the amount of a price difference was not a proper measure of loss. Rather,

the gross loss was the profit on any sales that . . . [plaintiff] would have made to . . . [lost] customers whom it could and would, have retained, had it been able to buy from the defendant at the same price as the competitors.⁹⁰

The court then ruled for the defendant on the ground that it was without reliable figures for appraising the plaintiff's gross loss, since the plaintiff did not show how much of its competitors' business it would have had if able to buy at the same price.⁹¹

A similar fate awaited the plaintiff in *Alexander v. Texas Co.*,⁹² for as the court indicated, the measure of loss was the gross loss of profit on sales that otherwise would have been made to those customers who bought from the favored dealers, instead of from the plaintiff because of the price difference; and the plaintiff failed to show the loss of any business.⁹³ The plaintiff's argu-

Grocers Ass'n v. Great Atl. & Pac. Tea Co., 202 F. Supp. 768 (N.D. Ill. 1961). It was, however, specifically repudiated in a large number of other suits. *E.g.*, *Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, 178 F.2d 457 (2d Cir. 1949); *Freedman v. Philadelphia Terminals Auction Co.*, 197 F. Supp. 849 (E.D. Pa. 1961), *aff'd*, 301 F.2d 830 (3d Cir.), *cert. denied*, 371 U.S. 829 (1962); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345 (E.D.N.Y. 1960); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); *Youngson v. Tidewater Co.*, 166 F. Supp. 146 (D. Ore. 1958); *Alexander v. Texas Co.*, 149 F. Supp. 37 (W.D. La. 1957).

85 178 F.2d 150 (2d Cir. 1949).

86 See note 82 *supra* and accompanying text.

87 187 F. Supp. 345 (E.D.N.Y. 1960).

88 *Id.* at 357.

89 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

90 *Id.* at 458.

91 *Id.* at 458-59.

92 149 F. Supp. 37 (W.D. La. 1957).

93 *Id.* at 41.

ment in *Secatore's, Inc. v. Esso Standard Oil Co.*,⁹⁴ that if it "could have bought its gasoline at the lower price allegedly paid by other purchasers, it would have increased its profits by the amount of this price differential," was dismissed as "entirely speculative."⁹⁵

In *State Wholesale Grocers Ass'n v. Great Atl. & Pac. Tea Co.*,⁹⁶ however, the court saw "no good reason for disagreeing with the rule" of the *Blass* case.⁹⁷ Since plaintiffs showed that they spent funds on advertising, the court permitted damages "at least to the extent of the payments they ought to have received from the defendants."⁹⁸ The *Sun Cosmetic* decision was rejected as "unconvincing" and "not in accordance not only with prevailing authority, but the realities of the economic facts of life, as well."⁹⁹ This court was also unconvinced by the oil cases, which held increased costs that were passed on not recoverable as damages.¹⁰⁰ After observing that this "pass-on" doctrine was being "consistently repudiated" by other courts, it refused to consider whether the plaintiff's advertising costs had been recouped via higher retail prices.¹⁰¹

Courts have not always been willing to speculate on what prices would have been were there no collusion or monopoly. When a gas producer brought suit against a pipeline company for refusing to transport the former's product except at unreasonable rates, damages were ruled unrecoverable, since impossible to ascertain.¹⁰² The court believed that any award "necessarily depends upon the existence of . . . a criterion,"¹⁰³ and that the instant case presented no such criterion to determine a reasonable rate.

The decisions in two patent suits, *Alden-Rochelle v. American Soc'y of Composers, Authors & Publishers*¹⁰⁴ and *Turner Glass Corp. v. Hartford-Empire Co.*,¹⁰⁵ failed to assess damages against antitrust violators because the prices they charged the plaintiffs were deemed not unfair or unreasonable. Neither court, however, discussed the standards it used in reaching such a conclusion.

2. Damage Estimates Based on Comparisons With the Earnings of Other Entrepreneurs

As previously indicated, the plaintiffs in movie suits showed a significant degree of success in using the earnings of favored competitors as a measure of damage.¹⁰⁶ A similar approach to damage calculation has been employed in

94 171 F. Supp. 665 (D. Mass. 1959).

95 *Id.* at 667. Similarly, the court in *Youngson v. Tidewater Co.*, 166 F. Supp. 146 (D. Ore. 1958), said, "[O]ne 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." *Id.* at 147.

96 202 F. Supp. 768 (N.D. Ill. 1961).

97 *Id.* at 774.

98 *Id.* at 775.

99 *Id.* at 777.

100 *Ibid.*

101 *Ibid.*

102 *McClellan v. Montana-Dakota Util. Co.*, 104 F. Supp. 46, 55 (D. Minn. 1952), *aff'd*, 204 F.2d 166 (8th Cir.), *cert. denied*, 346 U.S. 825 (1953).

103 *Id.* at 51.

104 80 F. Supp. 888 (S.D.N.Y. 1948).

105 173 F.2d 49 (7th Cir. 1949).

106 See text accompanying notes 44-70 *supra*.

monopolization, exclusive dealing, and tying contracts suits, as well as in refusal to deal suits outside the movie industry. The first successful exclusive dealing case of this period involved a gasoline refiner that forbade its 2,965 franchised gasoline stations to carry the plaintiff's brand of auto polish. The court recognized that "there is no particular way for a plaintiff, injured by a defendant's violation of the anti-trust laws to show precisely what sales it lost."¹⁰⁷ It found nothing objectionable, therefore, in the plaintiff's calculating damages based on sales of a competing company's "comparable product," which had only one-third the national sales of the plaintiff's product. Since the defendant had bought 4,707 cases of this comparable product for distribution to its service stations during the damage period, the court felt that the plaintiff, if not illegally excluded from that market, would have sold three times 4,707, or 14,121 cases of its product. The latter figure was then multiplied by the plaintiff's average net profits per case to obtain a damage figure. In the court's opinion there was no difference between damage awards in treble damage suits and awards in personal injury cases where one had to place a dollar figure on such an item as pain and suffering; thus, it readily asserted that a plaintiff should not be required "to prove with mathematical certainty the amount of its damage resulting from a defendant's violation of the anti-trust laws."¹⁰⁸

This liberality has not generally prevailed. Even though the jury in *Siegfried v. Kansas City Star Co.*¹⁰⁹ recognized that the plaintiff had sustained injury resulting from the defendant's monopoly, it termed the calculation of damages speculative and awarded only one dollar in nominal damages. The plaintiff, a publisher, had sought to collect lost advertising revenues by showing revenues for the year preceding the damage period and by showing the average gains in advertising revenue made by similar publishers throughout the country during the years of injury.

During the 1940's, the owners of a ballroom brought suit against the previous owner and agents for certain "name" bands, charging lost profits as the result of a proven conspiracy to prevent the plaintiffs from getting well-known bands to play in their establishment.¹¹⁰ The jury awarded damages of \$18,500, "based upon evidence that in the year 1944 . . . the predecessor of the plaintiffs . . . showed a profit therefrom of approximately \$74,000, and that 25% thereof was allocable to the ballroom."¹¹¹ This award was overturned on the ground that its calculation was "conjectural and based upon too insecure support . . . to sufficiently fix the damages to the plaintiffs . . ."¹¹²

In a 1951 case the plaintiff received damages identical in amount to a de-

107 *Rickfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 713 (9th Cir. 1959).

108 *Id.* at 714. In *Sterling Nelson & Sons v. Rangen, Inc.*, 235 F. Supp. 393 (D. Idaho 1964), *aff'd*, 351 F.2d 851 (9th Cir. 1965), *cert. denied*, 383 U.S. 936 (1966), where three firms were shut out of a market by the antitrust violation of the remaining fourth, it was assumed by the court that each of the former would have obtained twenty-five percent of the defendant's sales absent any conspiracy. Fifteen percent of this figure was then taken as a measure of profit and damage.

109 193 F. Supp. 427 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962).

110 *Finley v. Music Corp. of America*. 66 F. Supp. 569 (S.D. Calif. 1946).

111 *Id.* at 571.

112 *Ibid.*

fendant's net profits, on the theory that these profits were due to business taken from the plaintiff.¹¹³ This method of calculation was rejected on appeal because the court felt that damage awards based on the net profits of wrongdoers were improper. After citing the classic damage case of *Hartman v. Central Coal & Coke Co.*¹¹⁴ the court said:

There is no evidence to justify the assumption that plaintiff would have sold the same number of Globe ranges that Maytag sold, or that it would have realized the same profit on sales it made. The record is silent as to the comparative costs of doing business by Maytag and plaintiff. Damages to be recoverable must be actual not speculative, remote or uncertain.¹¹⁵

Finally, in the 1964 case of *Christiansen v. Mechanical Contractors Bid Depository*,¹¹⁶ general damages based on the earnings of the wrongdoer were not permitted. In only permitting damages for the proven loss of a specific job, the court was careful to observe that the "mere amount of illegal transactions does not establish pecuniary loss to a business or property when countervailing [*sic*] elements are present."¹¹⁷

3. Profit Extrapolation as a Measure of Damage

Plaintiffs in all categories have sought to measure damages by means of profit extrapolation. More often than not, however, courts have viewed such an approach with disfavor. The success of plaintiffs has by and large hinged on the degree of philosophical conservatism found in a particular court. Standards of measurement acceptable to some courts have been summarily rejected by others.

a. Estimates of Damage by Plaintiffs and Expert Witnesses Based on Past Profits

At issue in one case was the calculation of lost profits for a five-year period, during which the plaintiff was cut off from the supply of the defendant's product.¹¹⁸ The court focused its attention on the loss of the plaintiff's principal account, to which the defendant's product was supplied and from which the plaintiff had made a \$4,627.76 profit the year before being cut off. Using this figure as a base, damages were calculated according to plaintiff's estimate, made "in light of 43 years experience with promoting similar lines of merchandise," that sales to this account would have increased by 50 percent in the first year of damage, 33 percent in the following year, 25 percent in the next year, and 15 percent in each of two subsequent years.¹¹⁹ In this manner and after some modification for minor inventory and salary losses, treble dam-

113 *Fargo Glass & Paint Co. v. Globe American Corp.* 201 F.2d 534 (7th Cir.), *cert. denied*, 345 U.S. 942 (1953).

114 111 Fed. 96 (1900). See notes 2-7 *supra* and accompanying text.

115 *Fargo Glass & Paint Co. v. Globe American Corp.* 201 F.2d 534 (7th Cir.), *cert. denied*, 345 U.S. 942 (1953).

116 230 F. Supp. 186 (D. Utah 1964), *aff'd*, 352 F.2d 817 (10th Cir. 1965), *cert. denied*, 384 U.S. 918 (1966).

117 *Id.* at 194.

118 *A. C. Becken Co. v. Gemex Corp.*, 272 F.2d 1 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960).

119 *Id.* at 5.

ages were determined. In awarding these damages the court, quoting from the *Rankin*¹²⁰ case, said: "It is not the law that the defendant who caused the damage can be permitted to escape liability because it is difficult for plaintiff to express in terms of dollars the damages it has suffered."¹²¹

Upon remand, however, the size of this award was reduced, the court holding that plaintiff's projected sales increases were excessive in nature.¹²² After noting that the defendant had reduced its advertising outlays during the damage period, that its share of the market had declined, and that the sales volume of the plaintiff's competing dealers had similarly declined, the court reduced the plaintiff's projected sales increases to 33.3, 20, 10, and 5 percent. The court cautioned:

When estimates of general market conditions, profit percentages, future purchases, the effect of advertising and promotional expenditures upon sales, and the effect of direct selling by manufacturers to retailers, have some valid basis in fact, they are admissible to rebut prima facie damage proofs which . . . are based upon estimates. . . . The weight to be accorded evidence which is based upon estimates and admitted to rebut prima facie proof also based upon estimates depends upon an evaluation of the relative probabilities that one party's estimates will prove more accurate than the others.¹²³

Termination of the plaintiff's dealership was the principal cause of damage in *Osborn v. Sinclair Ref. Co.*¹²⁴ Estimating lost profits arising from this act, the plaintiff assumed that his ten percent sales growth for the eighteen-month period preceding the termination of his dealership would have continued for each year of the damage period. The trial court found this too speculative, after observing that neither the plaintiff's successor in the same gas station nor the plaintiff in a new location made such sales gains, and that the base period from which the actual ten percent gain had occurred was one of abnormally low activity.¹²⁵ The Fourth Circuit reversed and ordered payment to the plaintiff of its estimated lost profits.¹²⁶

In *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*,¹²⁷ a price discrimination suit, expert testimony was readily admitted to support the award. First, an expert on "production methods and procedures prevalent in the business" testified that, but for the discrimination, the plaintiff "could have expeditiously enlarged its production facilities to meet . . . demand . . ."¹²⁸ Second, a public accountant computed the amount of business the plaintiff "might reasonably" have expected to receive, but for the illegal discrimination. From

120 *William H. Rankin Co. v. Associated Bill Posters of United States & Canada*, 42 F.2d 152 (2d Cir.), *cert. denied*, 282 U.S. 864 (1930).

121 *A. C. Beken Co. v. Gemex Corp.*, 272 F.2d 1, 5 (7th Cir. 1959), *cert. denied*, 362 U.S. 962 (1960).

122 *A. G. Becken Co. v. Gemex Corp.*, 199 F. Supp. 544 (N.D. Ill. 1961), *aff'd*, 314 F.2d 839 (7th Cir.), *cert. denied*, 375 U.S. 816 (1963).

123 *Id.* at 553.

124 207 F. Supp. 856 (D. Md. 1962), *rev'd*, 324 F.2d 566 (4th Cir. 1963).

125 *Id.* at 863-64.

126 324 F.2d 566 (4th Cir. 1963).

127 269 F.2d 950 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960).

128 *Id.* at 958.

this figure he subtracted production costs to obtain the measure of damage.

In a 1966 case¹²⁹ involving a refusal to deal, the First Circuit approved two methods of computing damages. One method involved taking the difference between the quantity of goods supplied before and during the refusal to deal and multiplying this by net profits per unit of the good. The second method was to use the record of past gross profits as an indicator of future net profits. In rendering its decision the court observed:

Precise computation of damages can rarely be derived from the complexities of antitrust litigation. This court has recognized that older standards requiring "certainty" of damages have given way to "proof of losses which border on the speculative, in order to implement the policy of the antitrust laws."¹³⁰

In contrast to this liberal method of assessing damages is *Flinkkote Co. v. Lysfjord*,¹³¹ a refusal-to-deal case in which the plaintiff was recognized to be "an able and experienced salesman." The court felt, however, that this fact alone did not qualify him as "an expert on business prognosis."¹³² Consequently, his estimate of lost profits was given no weight. The testimony of an accountant was also discounted, since in the court's opinion, he "merely performed the mechanical function of computing the figures given him by plaintiffs."¹³³ Those figures were "based on the assumption that . . . profits would increase as much as 50% annually."¹³⁴ Since the court felt there was no evidence that the plaintiff "would . . . have obtained more business" if supplied with the defendant's product, his damage estimates were ruled "fraught with uncertainty"¹³⁵

What the court viewed as "hopelessly irreconcilable" data concerning plaintiff's profit history barred him from recovering lost profits in *Klein v. American Luggage Works*.¹³⁶ His federal excise tax returns showed the plaintiff had average annual sales of \$3,700. His average annual purchases from the defendant alone, however, were \$9,400. The lower of these two figures the court ruled inadequate for use in computation of damages, since it included the sale of goods other than those of the defendant.¹³⁷

*Kobe, Inc. v. Dempsey Pump Co.*¹³⁸ was a patent case in which the court recognized that the injured party had "the facilities, the personnel and the finances" to service the market from which he had been illegally excluded.

129 *Ford Motor Co. v. Webster's Auto Sales, Inc.*, 5 CCH TRADE REG. REP. (1966 Trade Cas.) ¶ 71651 (1st Cir. June 13, 1966).

130 *Id.* at 81922-23.

131 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

132 *Id.* at 390.

133 *Id.* at 390-91.

134 *Id.* at 391.

135 *Id.* at 393.

136 206 F. Supp. 924, 945 (D. Del. 1962), *rev'd on other grounds*, 323 F.2d 787 (3d Cir. 1963).

137 *Id.* at 945. Damage from the forced sale of the defendant's closed-out line was permitted, however. This sum was held equal to the difference between what the plaintiff normally received for the defendant's goods and the revenue obtained at the close-out. *Id.* at 945-46.

138 198 F.2d 416 (10th Cir.), *cert. denied*, 344 U.S. 837 (1952).

Before the illegal act complained of, the injured party had been selling 45 pumps per month and after the act it sold but 23 per month, a drop in sales of 22 pumps per month. The court then considered the testimony of an expert "with long experience" in the field of marketing the plaintiff's product, who felt that the plaintiff's sales "would have continued upward" over the damage period. With these facts before it, the court held that, but for the alleged illegal acts, the injured party would have sold 6 additional pumps per month, or less than one-third the actual drop experienced. To arrive at a figure for monthly damages, the court, after observing that the production of these 6 pumps did not require "additional plant, machinery, tools or other capital requirements," subtracted their total variable cost of production from the total revenue they would have yielded if sold at prevailing prices.¹³⁹ This award was affirmed on appeal, despite the reviewing court's recognition that, "in view of all the evidence," the trial court's award was "conservative" in amount.¹⁴⁰

In another patent case,¹⁴¹ although the court assessed some damages resulting from forced stoppage of production and advertising costs rendered useless by this forced stoppage, damages for lost profits were not awarded. The calculation by the injured party, Original Tractor, was deemed "speculative" and "uncertain." After an administrative reorganization immediately preceding the damage period, Original Tractor had discontinued its system of 684 dealerships and, instead, acquired 17,450 distributorships. Since in the year preceding the damage period it had sold an average of 1.86 tractor half-cabs (a covering for tractors) to each of its dealers, it estimated that it would have sold the same quantity to each distributor. This figure was used as a base from which sales throughout the damage period were extrapolated by comparison with the growth of the United States tractor population. Based upon such a calculation, hypothetical profits of \$1,364,200.10 were computed. From this sum actual profits for the period were subtracted, leaving estimated damages of \$1,284,203.93.¹⁴² After reference to the classic case on speculative damages, *Hartman v. Central Coal & Coke Co.*,¹⁴³ the Seventh Circuit upheld the denial of damages on the ground that the calculation did "not meet [the required] . . . standard of 'just and reasonable inference.'" ¹⁴⁴

b. Estimates of Damage by Plaintiffs and Expert Witnesses in the Absence of a Profit History

In the absence of a profit history, the chances of recovery by the plaintiff have been slim indeed. In one case,¹⁴⁵ a prospective seller of tobacco products

139 *Id.* at 427.

140 *Ibid.*

141 *Clapper v. Original Tractor Cab Co.*, 165 F. Supp. 565 (S.D. Ind. 1958), *rev'd in part*, 270 F.2d 616 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960).

142 *Id.* at 581. Even though the court rejected Original Tractor's calculation as "unrealistic," it stressed that it was "convinced, even beyond a reasonable doubt," that the latter had been damaged as a result of Clapper's antitrust violation. *Ibid.*

143 111 Fed. 96 (8th Cir. 1901). See notes 2-7 *supra* and accompanying text.

144 *Clapper v. Original Tractor Cab Co.*, 270 F.2d 616, 633 (7th Cir. 1959), *cert. denied*, 361 U.S. 967 (1960).

145 *Delaware Valley Marine Supply Co. v. American Tobacco Co.*, 184 F. Supp. 440 (E.D. Pa. 1960), *aff'd*, 297 F.2d 199 (3d Cir. 1961), *cert. denied*, 369 U.S. 839 (1962).

to ocean-going vessels temporarily at berth in Philadelphia had no profit history upon which to estimate future earnings. In lieu of this he assumed that he could have made customers of one-half of all docked ships not being supplied by the defendant. Bolstering this estimate was the testimony of a recognized expert, long established in the field, who asserted that a "responsible salesman" could sell tobacco products to one-half of all vessels contacted. The court, however, was more cautious and held such an estimate true only in a theoretical sense.¹⁴⁶ In practice, it considered the estimate "farfetched," because neither the plaintiff nor his salesman had any experience in supplying tobacco products to ocean-going vessels.¹⁴⁷ The court said:

[D]espite judicial liberality in accepting minimal proof of damage in an antitrust case, the rule persists that any damage estimate by a jury must be "just and reasonable," and not based on "speculation or guesswork." . . . No damage verdict could be rendered upon the evidence in the present case without doing violence to this inexorable requirement.¹⁴⁸

In *Chipleys, Inc. v. June Dairy Prods. Co.*,¹⁴⁹ the trial court ruled that evidence of lost business left "much to be desired" when it was predicated solely on testimony of the injured company's officers and on inquiries from "potential customers."¹⁵⁰ As a result, the only item of damage permitted in this patent suit was the profit that would have been made on an actual purchase order that was cancelled immediately after the customer was informed of an infringement suit against the injured party.

When the plaintiff in another patent case estimated future earnings but for illegal interference by the defendant, the court rejected the figure on the ground that "there are so many factors involved" that no estimate "would give even an approximate measure of the damages sustained."¹⁵¹ An otherwise unexplained award was made, which the Sixth Circuit affirmed, even though it considered the award if not "clearly erroneous," at least "quite low under the circumstances."¹⁵²

In yet another instance, despite the fact that the defendant admitted violating antitrust law by notifying the plaintiff's customers that their supplier was infringing another's patents, no damages were permitted the plaintiff, since its decline was felt to have come from other causes, to wit, consumer dissatisfaction and a failure to operate in "an aggressive and businesslike manner."¹⁵³

c. Estimates of Damage by Plaintiffs and Expert Witnesses Based on Sales of Other Goods in the Same Market or the Same Good in Other Markets

*Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*¹⁵⁴ involved a manufacturer

146 *Id.* at 446.

147 *Id.* at 446-47.

148 *Id.* at 449.

149 114 F. Supp. 129 (D.N.J. 1953).

150 *Id.* at 143-44.

151 *Darden v. Besser*, 147 F. Supp. 376, 382 (E.D. Mich. 1956), *rev'd in part*, 257 F.2d 285 (6th Cir. 1958).

152 257 F.2d at 286.

153 *Prentice Mach. Co. v. Associated Plywood Mills*, 252 F.2d 473, 478 (9th Cir. 1958).

154 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

of roofing products who was the victim of a conspiracy among his competitors to cut prices for asphalt-saturated felt and rolls in his market area in order to drive him from business. He attempted to show lost profits by comparing the decline in his sales of these goods with the growth in his sales of asphalt, a commodity not involved in the price-cutting. At the trial's conclusion, plaintiff was awarded damages based on this comparison. The reviewing court, however, found such a method of damage assessment unacceptable because there was "no evidence to support the claim that there . . . [was] a general overall pattern" for the plaintiff's commodities to "move in any particular relation to each other."¹⁵⁵

The plaintiff in a monopoly suit also met disaster despite proof "that defendant had unlawfully placed obstacles in the way of competition generally, and that these continued in some measure during the damage period" ¹⁵⁶ Plaintiff, a competing manufacturer of shoe machinery, relied on the services of an economist to show injury. The latter calculated plaintiff's historic market share of machinery sales to nonshoe industries and theorized that, but for the defendant, plaintiff would have held an identical share of the shoe machinery market. A figure for gross revenues was then obtained by applying this hypothetical market share, 15.5 percent, to the defendant's gross revenues. The resulting figure was multiplied by the plaintiff's ratio of pretax earnings to sales during a peak year of profits. From this sum the plaintiff's actual profits from shoe machinery sales were subtracted to obtain the measure of damage. These calculations were supplemented by a profit history for the plaintiff from 1952 to 1960, which showed erratic annual fluctuations and "no correlation with the effective date of the [government] decree."¹⁵⁷

The court considered the profit history to be of little value in guiding a jury. The economist's calculations were similarly rejected: first, on the ground that it was fallacious to assume that the plaintiff's share of the shoe machinery market would equal its share of the nonshoe market; second, on the ground that the ratio of pretax earnings to sales used was far from normal for the plaintiff's business. The court concluded:

It might indeed have been possible for a judge, with days in which to study the exhibits of plaintiff's expert, to come up with some rational computation of damages, on a theory wholly different from what the expert advocated, that would satisfy the Supreme Court's modest requirements in this area; it would be foolhardy to expect a jury to do so. "When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."¹⁵⁸

The philosophical conflict between judicial liberalism and conservatism is evident into the 1960's. In an exclusive dealing suit of this decade, a broad-

155 *Id.* at 391.

156 *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 910 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962). The defendant had earlier been found guilty of monopolizing the shoe machine industry in the United States. *United States v. United Shoe Mach. Corp.*, 110 F. Supp. 295 (D. Mass. 1953), *aff'd*, 347 U.S. 521 (1954).

157 297 F.2d at 912 n.6.

158 *Id.* at 912.

casting station operating in Elyria and Lorain, Ohio, claimed lost advertising revenue as the result of being partially excluded by the defendant from the Lorain market.¹⁵⁹ In showing damages the plaintiff compared revenues in each of its two operating markets.¹⁶⁰ The trial court was unpersuaded by the comparison and felt that the plaintiff should be required to show the loss of specific advertising revenues after cancellations by existing customers and to demonstrate that it had made fruitless attempts to acquire new customers to replace these losses. A mere comparison of revenues between markets in different geographic areas was held inadequate to show damage. The Sixth Circuit reversed.¹⁶¹ To it, the figures showed beyond doubt a marked decline in advertising revenue while the *Lorain Journal's* policy was in effect and an equally marked increase in revenue when this policy was enjoined in 1951. Damages based on this comparison were ordered.

d. Estimates of Damage Based on Rate-of-Return Analysis

The district court in *Talon, Inc. v. Union Slide Fastener, Inc.*¹⁶² refused to admit plaintiff's evidence supplied by its accountants that it suffered loss of profits as a result of defendant's activities. The estimate of loss given to show proximate cause was based upon what the fair return should have been for invested and long-term borrowed capital. The Ninth Circuit agreed with the trial court that the estimate that such capital would have yielded a ten percent return failed to establish any causal link between plaintiff's losses and Talon's unlawful activity.¹⁶³

This same philosophy prevailed where an award was reversed on the ground that its calculation was speculative and conjectural.¹⁶⁴ The plaintiff in

¹⁵⁹ *Elyria-Lorain Broadcasting Co. v. Lorain Journal Co.*, 298 F.2d 356 (6th Cir. 1961). The defendant had been found guilty of violating antitrust law in 1951 in a government suit first filed in 1949. *United States v. Lorain Journal Co.*, 92 F. Supp. 794 (N.D. Ohio 1950), *aff'd*, 342 U.S. 143 (1951).

160	YEAR	ELYRIA	LORAIN
	1948	\$ 9,744	\$10,706
	1949	78,501	33,356
	1950	86,630	20,077
	1951	59,720	54,425
	1952	68,561	70,988
	1953	78,313	71,989

298 F.2d at 359.

¹⁶¹ 298 F.2d 356 (6th Cir. 1961). Curiously, on retrial all instructions of the appellate court went unheeded, for only specific damages of \$10,000, covering the loss of sixteen known advertisers, were awarded. On appeal, in 1966, it was once again necessary to reverse. In so doing, the reviewing court held:

It is not the rule that in an action for damages for violation of the antitrust laws plaintiff is limited to recover only the specific items of damage which he can prove with reasonable certainty. On the contrary, the trier of the facts may make a just and reasonable estimate of the damage based on relevant data and may act upon probable and inferential as well as direct and positive proof. The wrongdoer shall bear the risk of the uncertainty which his own wrong has created. . . .

That the court should have allowed recovery in some amount for general damages is clear from the evidence. 5 CCH TRADE REG. REP. (1966 Trade Cas.) ¶ 71737, at 82359-60 (6th Cir. Apr. 12, 1966).

¹⁶² 266 F.2d 731 (9th Cir. 1959).

¹⁶³ *Id.* at 737. "[T]he trial court was not compelled to infer the fact of injury from the fact that certain of the unlawful acts of Talons were directed at Union." *Id.* at 738.

¹⁶⁴ *Emich Motors Corp. v. General Motors Corp.*, 181 F.2d 70 (7th Cir. 1950), *rev'd on other grounds*, 340 U.S. 558 (1951).

showing damages relied principally on the testimony of an accountant who simply assumed that 7.5 percent of the plaintiff's tangible assets was an appropriate measure of what its earnings would have been had the defendant not cancelled its franchise.¹⁶⁵

e. Judicial Calculations Purposefully Unexplained

The tin container cases provide the best example of the philosophical conflict present in damage determination. While the district court in *Bruce's Juices, Inc. v. American Can Co.*¹⁶⁶ recognized that it was faced with a most difficult problem in determining damages, it did not demur from approximating damages for injury to the plaintiff's goodwill. Among other incidents of damage was the fact that the plaintiff had not grown at the same rate as the industry, that its sales fell off after it was discriminated against, and that these lost sales caused its wartime quota of tin plate to be cut back. The court intentionally refrained from itemizing the damages emanating from these factors, but concluded that the plaintiff had sustained precisely \$60,000 worth of damages at the hands of the defendant.¹⁶⁷

The district court in *Russellville Canning Co. v. American Can Co.*¹⁶⁸ was as equally liberal in damage assessment as the *Bruce's Juices* court. That 2,700 customers out of 2,730 did not qualify for a quantity discount from American Can impressed that tribunal, which ruled that American Can had failed to justify such a discount schedule on the basis of cost savings. The court was not impressed, however, by the fact that Russellville did not can the same vegetables as its competitor who got the discount; for it held that the relevant market was all vegetables, not simply green beans, spinach, pork and beans, or carrots and peas. Both companies were in competition, held the court, even if they sold different vegetables, because "each was actively competing for the housewife's dollar."¹⁶⁹ In awarding damages, the court pursued much the same path as that taken in *Bruce's Juices*. First, the court felt that the plaintiff was injured in its competitive position. Second, it asserted that no attempt to detail damages should be undertaken, but rather a lump-sum award representing "reasonable compensation" should be made, and it fixed that sum at \$125,000.¹⁷⁰

The Eighth Circuit refused to accept the lower court's liberal interpretation of the cause of Russellville's damages, holding:

[T]here 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 post-war 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

165 *Id.* at 83.

166 87 F. Supp. 985 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951).

167 *Id.* at 993.

168 87 F. Supp. 484 (W.D. Ark. 1949), *rev'd*, 191 F.2d 38 (8th Cir. 1951).

169 *Id.* at 499.

170 *Id.* at 502-03.

of financial attrition due solely to the practice of which complaint is made. This conclusion we regard as too speculative and conjectural to sustain any award of damages

We think there were too many factors bearing upon the decline in the plaintiff's earning power to justify blaming it upon the trade practices of the defendant.¹⁷¹

With remarkable candor the court then proceeded to recognize that its judgment differed with that of the Fifth Circuit in *Bruce's Juices* and that "there can be, and are, honest differences of opinion" about the ascertainment of damages in such cases.¹⁷²

D. Economic Summary and Evaluation

Below is an outline of judicially accepted methods of calculating damages during the period 1940-1966:

1. *Electrical Equipment Suits*
 - a. Difference between illegal damage-period price and "reasonable" price. Latter equaled postconspiracy price.
 - b. Difference between illegal damage-period price and "reasonable" price. Latter equaled percentage discount from book price after the conspiracy.
2. *Other Price-Fixing Suits*
 - a. Difference between illegal damage-period price and "reasonable" price. Latter equaled preconspiracy price.
 - b. Difference between illegal damage-period price and "reasonable" price. Latter equaled price for same good during same period in other markets.
 - c. Difference between illegal damage-period price and "reasonable" price. Latter estimated from the price of related goods (ore and refined ore) during same period.
3. *Movie Suits*
 - a. Difference between net earnings when no discrimination existed and net earnings during the damage period.
 - b. Difference between gross earnings during the damage period and the gross earnings of favored theatre.
 - c. The earnings of plaintiff's theatre between the time it was taken over by the defendants and the time when the plaintiff's lease would have expired.
 - d. Sum of amounts by which a plaintiff's net earnings fell below a favored theatre's net earnings for each year of the damage period.
 - e. One-half the sum of the gross earnings of a plaintiff's theatre and favored theatre, less an estimate of film rental costs.

171 191 F.2d at 60.

172 *Ibid.*

- f. Difference between estimate of total costs of operation and estimate of total revenues based on average dollar volume of favored theatres.
 - g. Estimate of attendance multiplied by a "fair" admission price, less estimate of advertising and film rental costs.
4. *Other Refusals to Deal*
- a. Estimates of lost profits based on past profits and estimates of sales gains over the damage period by plaintiffs and/or expert witnesses.
 - b. Difference between the quantity of goods supplied before and during the refusal to deal, multiplied by net profits per unit of the good.
 - c. Lost profits from cancelled sales orders.
5. *Monopolization Suits*
- a. Difference between total costs, as determined from supplier contracts, and total revenues, as determined by prevailing cartel prices. Volume of sales determined from supplier contracts.
 - b. One-quarter of defendant's sales, there being four firms in the industry.
 - c. Difference between illegal damage-period price and "reasonable" price. Latter equaled the cost of ownership (as opposed to rental).
6. *Price Discrimination Suits*
- a. Difference between illegal damage-period price and "reasonable" price. Latter equaled price charged a favored customer.
 - b. Estimates of lost profits based on past profits and estimates of sales gains over the damage period by expert witnesses and the court.
7. *Patent Misuse Suits*
- a. Estimates of lost profits based on past profits and estimates of sales gains over the damage period by expert witnesses.
 - b. Lost profits from cancelled sales orders.
8. *Exclusive Dealing Suits*
- a. Difference between plaintiff's sales and the sales of a competitor during the damage period.
 - b. Estimate of lost revenue in one market based on plaintiff's revenues in another market during the damage period.

As has been indicated, much the same standards of measurement have been applied to all categories of antitrust suits. In price-fixing and price-discrimination cases, use of price differentials is much favored because of the exactness of calculation that follows the crucial but freely made determination of what constitutes a reasonable price. It is both neat and simple to take a defendant's own prices before, during, or after a damage period and use them as a base for calculation. Economically, such an approach is subject to criticism. Since in the dynamic world in which we live the numerous market forces

that determine price are in a constant state of flux, there is little justification for equating the prices of predamage or postdamage periods with those of damage periods themselves. The use of differentials in price-fixing suits is understandable, however, in light of the absence of a more scientific solution to the problem. But such an approach should be supplemented whenever possible by use of correlation analysis. Inquiry into the historic relationship of prices for the same good in separate markets or related goods in the same market would, when coupled with predamage- or postdamage-period prices, yield a fairly scientific measure of "reasonableness."

The uniform use of differentials in price discrimination cases is not defensible. There is no reason to assume in every one of these suits that the price charged a favored customer was "reasonable" in nature. Economically, price discrimination might, in fact, have resulted in lower prices for all customers — this is why it is permitted in public-utility pricing. If only one price were permitted, less would have been bought in more elastic markets, leaving a larger share of fixed costs to be borne by inelastic markets. Moreover, if a plaintiff is not in competition with those receiving price concessions, or if he is in competition and his competitor has not passed on concessions granted him, he has suffered no loss of profits as a result of the discrimination. The only party who has conceivably lost profits is the defendant, who has accepted a cut in price from one of his customers. The approach of the *Youngson* court, requiring plaintiffs to "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,"¹⁷³ in order to receive damages for price discrimination, is economically sound.

The use of differentials has been sanctioned in a case involving monopoly. Economically, the method used is subject to criticism in that it took as a measure of "reasonable" price a collusively determined price prevailing in a monopolized market. If the plaintiff had successfully penetrated this market and charged lower prices as intended, his total revenues would not have been those calculated by the court. Indeed, it is logical to expect that the plaintiff's acts would have triggered a price war that would have depressed prices still further. A truer measure of damage would have been based on the price that the plaintiff planned to charge upon entering the industry and not the collusive price in existence prior to actual entry.¹⁷⁴

In the movie suits the same economically incorrect approach was adopted when courts assumed that the earnings of favored theatres were a measure of what plaintiffs would have earned under free competition. For just as plaintiffs had unduly low earnings due to the discrimination against them, so did favored theatres have unduly high earnings because of the discrimination in favor of them. Taking the difference between a plaintiff's earnings and the earnings of

173 *Youngson v. Tidewater Co.*, 166 F. Supp. 146, 147 (D. Ore. 1958).

174 Such an approach would have been consistent with *Philadelphia Elec. Co. v. Westinghouse Corp.*, 1964 Trade Cas. ¶ 71123 (E.D. Pa. June 1, 1964). In that electrical equipment suit discussed above, the judge held the proper measure of damage to be the difference between negotiated and competitive prices, and not the difference between collusive and competitive prices. See notes 39-41 *supra* and accompanying text.

a comparable theatre as a measure of loss, therefore, overstates damages. Assuming that both theatre owners were equally situated with equal abilities, this problem could have been avoided by summing both theatres' earnings, dividing by two and taking the difference between the resulting figure and the plaintiff's actual earnings as a damage figure.

Comparing earnings among entrepreneurs in order to measure damages has been practiced in a number of categories. Such a procedure is uncertain as is any estimate of lost profits based on past profit history. So many economic factors are involved as to render shaky any estimate constructed on such a base. In many instances, however, no other approach to damage calculation is feasible. To insist on the rigors of economics at such times would hardly be in the interest of fair play. "The most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of the uncertainty which his own wrong has created."¹⁷⁵

Apart from standards of measurement, a number of economic factors should be considered regarding damage calculation generally. No serious attempt has as yet been made to consider the role of demand elasticity in damage cases. This has resulted in the tenuous, if necessary, assumption that plaintiffs and defendants are involved in inelastic markets.

The pass-on doctrine, which asserts that plaintiffs have sustained no injury if they have passed damages on to customers or back to resource suppliers, emerged from 1940-1966 as a prime example of judicial inconsistency and inadequate economic analysis. As early as 1942 it was "clear" to some courts that if a plaintiff's damages were passed on by him to his customers, he had suffered no pecuniary loss or injury.¹⁷⁶ In 1960, the pass-on doctrine was being rejected on the economically meaningless ground that the general tendency of the law, in regard to damages at least, is not to go beyond the first step. In other words, the courts were suggesting that they were not concerned with whether damages had been shifted.¹⁷⁷

The award of double damages, once for lost profits and again for a diminution in the value of a plaintiff's assets, has by and large continued into the 1960's.¹⁷⁸ Most courts have considered both items to be separate and proper elements of damage. In one suit during the 1960's, however, the Sixth Circuit reversed the trial court's award for both lost profits and a decline in value of the plaintiff's business. The court recognized that when the plaintiff "received a verdict for lost profits . . . , it was made whole and suffered no loss to its investment in its property."¹⁷⁹

175 *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946).

176 *Leonard v. Socony Vacuum Oil Co.*, 142 F. Supp. 369, 371 (W.D. Wis.), *appeal dismissed*, 130 F.2d 535 (7th Cir. 1942). Economically, this is a logical statement only if it is assumed that an inelastic demand exists for the product.

177 *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 829-30 (M.D. Pa.), *aff'd per curiam*, 281 F.2d 481 (3d Cir. 1960). For a more recent rejection of the pass-on doctrine, see *Atlantic City Elec. Co. v. General Elec. Co.*, 226 F. Supp. 59 (S.D.N.Y. 1964).

178 See *Union Carbide & Carbon Co. v. Nisley*, 300 F.2d 561, 575-84 (10th Cir. 1961), *petition for cert. dismissed*, 371 U.S. 801 (1962).

179 *Volasco Prods. Co. v. Lloyd A. Fry Roofing Co.*, 308 F.2d 383 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963).

As in the period 1890-1939, so too from 1940-1966, where the amount of the damage was difficult of ascertainment, the addition of interest payments was left to the discretion of juries. Undue reliance continues to be placed on the abilities of juries to intelligently compute damages from the host of information placed before them. The wisdom of such a procedure seems never to have been seriously questioned by either Congress or the courts. The history of treble damage suits, however, suggests that lay juries are not as properly equipped as special masters or professional economists to be charged with the computation of damages.¹⁸⁰

180 See, *e.g.*, *Momand v. Universal Film Exch., Inc.*, 72 F. Supp. 469 (D. Mass. 1947), where a jury that "found it difficult to follow . . . documentary testimony which was read to it for hours at a time," computed damages and interest from "confessedly too early a date, sometimes . . . from a date before plaintiff was injured." *Id.* at 484.

One may even question the professional competency of judges in damage computation, as the recent observation of a candid court indicates:

While we are convinced that there is substantial evidence of damage in this record, that does not answer the question of how that evidence, together with other relevant evidence concerning what profits were in fact realized on the business wrongfully taken from the plaintiff, can be best organized for fair analysis. Certainly there should be a better method than having a judge, untrained and unassisted in matters of accounting, sift the raw material of original accounting records for the purpose of ascertaining plaintiff's damage. When we were at the Bar we did not dream that we could intelligently approach such a difficult task without the aid and assistance of a qualified accounting expert.

Our tedious and almost vexed attempt to decide the damage issue in this case without the benefit of expert guidance convinces us that becoming a judge did not vest us with powers we know we did not possess as a lawyer. We quite agree with plaintiff's pre-trial statement that "it should not be the burden of the Court to compute tables from an accountant's testimony," not because of the obvious work involved, but because a judge simply is not trained to perform accounting duties. *Reserve Plan, Inc. v. Arthur Murray, Inc.*, 38 F.R.D. 23, 34 (W.D. Mo.