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## Federal Antitrust Law--Price Discrimination--Proof and Measurement of Damages In Treble Damage Action

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## COMMENTS

FEDERAL ANTITRUST LAW—PRICE DISCRIMINATION—PROOF AND MEASUREMENT OF DAMAGES IN TREBLE DAMAGE ACTIONS—Section 2(a) of the Robinson-Patman Act<sup>1</sup> makes it unlawful for a seller to charge buyers who compete with each other different prices for commodities of like grade and quality. Price discrimination which violates this section operates to confer an unlawful benefit upon a favored buyer by making his costs of obtaining, using, or reselling the particular commodities involved lower than the similar costs of non-favored buyers and puts non-favored buyers at a competitive disadvantage to the extent that the difference in costs affects the ability of favored and non-favored buyers to compete with one another. If this wrongfully induced competitive disadvantage results in provable damage to the business of a non-favored buyer, or if the discrimination otherwise causes provable damage to that buyer, section 4 of the Clayton Act enables him to recover three times the amount of damage proved.<sup>2</sup>

This treble damage provision provides an extraordinary remedy designed to encourage one injured by a violation of an anti-trust law to prosecute his claim for damages sustained as a result of the violation by making it economically feasible for him to do so.<sup>3</sup> While this extraordinary remedy serves to encourage a

<sup>1</sup> 49 Stat. 1526 (1936), as amended, 15 U.S.C. 13(a) (1958). Sections 2(d) and 2(e) make it unlawful to discriminate among purchasers in providing services or facilities or in providing payment for services or facilities. 49 Stat. 1527 (1936), as amended, 15 U.S.C. §§ 13(d), (e) (1958). Insofar as such price-related discriminations affect the respective buyers' operating costs, reducing the costs of favored buyers relative to the costs of non-favored buyers, they operate to give a favored buyer a competitive advantage just as a price discrimination does. Insofar as this competitive advantage may lead to an infliction of damage on a non-favored buyer's business, these price-related discriminations are no different from ordinary price discriminations. Consequently, though the elements of violation involved under §§ 2(a), (d) and (e) may be quite different, treble damage cases arising under these sections can be considered interchangeable for most purposes in analyzing proof and measurement of damages in actions based on price or price-related discrimination.

<sup>2</sup> 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958).

<sup>3</sup> See Wham, *Antitrust Treble Damage Suits*, 40 A.B.A.J. 1061 (1954); Comment, 46 CALIF. L. REV. 447 n.6 (1958). Section 4 of the Clayton Act provides "That any person . . . injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . ." 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958). However, since the remedy is extraordinary, the language "any person . . . injured" has been strictly construed, and the availability of the remedy has been limited to persons who stand in some immediate or direct relationship to the violator. See *Karseal Corp. v. Richfield Oil Corp.*, 221 F.2d 358, 363 (9th Cir. 1955); Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 240-49 (1961); Comment, 46 CALIF. L. REV. 447 (1958).

respect for the law on the part of potential law breakers, its primary function in the context of each individual law suit is not the vindication of the public interest, but the assertion of a private and individual right to compensation for injuries suffered.<sup>4</sup> The fact that a recovery is given of three times the amount of damage proved does not necessarily deprive an individual treble damage suit of its essentially compensatory nature, for the complexity and prohibitive cost of such a suit require a generous recovery if the injured party is to be justified in risking the great expense of a suit and be compensated in any real sense of the word. Furthermore, the injury inflicted by a typical antitrust violation is of such a nature that its full extent may seldom (if ever) be possible to discover, let alone prove.<sup>5</sup>

<sup>4</sup> "The private-injunction action, like the treble-damage action under § 4 of the Act, supplements government enforcement of the antitrust laws; but it is the Attorney General and the United States district attorneys who are primarily charged by Congress with the duty of protecting the public interest under these laws. The Government seeks its injunctive remedies on behalf of the general public; the private plaintiff, though his remedy is made available pursuant to public policy as determined by Congress, may be expected to exercise it only when his personal interest will be served." *United States v. Borden Co.*, 347 U.S. 514, 518 (1954).

"The . . . Clayton Act afford[s] a cause of action for those suffering damages. In their provisions for damages they embody both punitive and compensatory damages but no recovery can be had unless a case for compensatory damages is made. In the event of compensatory damages, then automatically the punitive damages follow." *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945).

"The conduct of Ascap [defendant] may be a public wrong for which penalties and other remedies are afforded the government under the statute. But no private right of action arises unless a plaintiff is injured in his property or business by the violations of Ascap." *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 898 (S.D.N.Y. 1948).

Every tort action tends to vindicate the public interest in compensating the injured and in encouraging lawful and non-tortious conduct. The private antitrust treble damage action is, of course, a valuable aid in enforcing the antitrust laws, for its treble recovery feature encourages private vigilance and discourages violation. See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). See generally Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181 (1961). The courts have repeatedly recognized this fact, but they have also recognized that the private action is primarily one to vindicate a private right to compensation, and that it is only when the private right has been established that the trebling or "punitive" feature of the action comes into play. Vindication of the public interest in policing violations is a strictly subordinate aspect of the individual private treble damage suit. See, e.g., *Karseal Corp. v. Richfield Oil Corp.*, *supra* note 3, at 365; *Maltz v. Sax*, 134 F.2d 2, 5 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); *Hess v. Anderson*, *Clayton & Co.*, 20 F.R.D. 466, 475 (S.D. Cal. 1957); *United States v. Standard Ultramarine & Color Co.*, 137 F. Supp. 167, 171-72 (S.D.N.Y. 1955); *Leonia Amusement Corp. v. Loew's, Inc.*, 117 F. Supp. 747, 756 (S.D.N.Y. 1953); *Electric Theater Co. v. Twentieth Century-Fox Film Corp.*, 113 F. Supp. 937, 942 (W.D. Mo. 1953); *Winkler-Koch Eng'r Co. v. Universal Oil Prods. Co.*, 100 F. Supp. 15, 29 (S.D.N.Y. 1951).

<sup>5</sup> It has been suggested that the type of business harm inflicted by an antitrust viola-

In any event, the courts have consistently and uniformly held that the basic cause of action in a treble damage suit is compensatory in nature,<sup>6</sup> and that a plaintiff may not recover treble any amount until he has established *actual damage* sustained in the form of genuine economic loss to his business or property.<sup>7</sup> Thus, courts have refused to award damages where the award would represent a windfall to the plaintiff,<sup>8</sup> and have required that a plaintiff take steps to mitigate his loss when a reasonable opportunity for doing so exists.<sup>9</sup> In the latter instance recovery may be limited to the cost of mitigation so far as it would or did involve expense exceeding usual business expenses.

The task of proving damages resulting from price discrimination has been a formidable one, however, and there has been considerable disagreement as to what constitutes compensable damage to non-favored buyers, how much a non-favored buyer must show to establish a claim for such damage, and how much of that required showing can be provided by proof of the fact and amount of a particular price (or price-related) discrimination. Some courts have indicated that "general damages" based on the

tion is "accumulative," that intangible and unmeasurable harm accompanies the tangible and measurable (e.g., loss of steady customers resulting from a break in their buying habits), and that the ordinarily recoverable legal damages affords a definite base in proportion to which liquidated (treble) compensation for the additional intangible damage can be awarded. *Vold, Are Threefold Damages Under the Anti-Trust Act Penal or Compensatory?*, 28 Ky. L.J. 117, 125, 128-29 (1940).

<sup>6</sup> See cases cited note 4 *supra*.

<sup>7</sup> See, e.g., *Flintkote Co. v. Lysfjord*, *supra* note 4, at 392; *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 54 (8th Cir. 1951); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 353 (E.D.N.Y. 1960); *McWirtter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456, 465 (W.D. Mo. 1948). The words "business or property" are used in the ordinary sense of a commercial venture or enterprise. *Peller v. International Boxing Club*, 227 F.2d 593, 595-96 (7th Cir. 1955); *Roseland v. Phister Mfg. Co.*, 125 F.2d 417, 419 (7th Cir. 1942); *Broadcasters, Inc. v. Morristown Broadcasting Corp.*, 185 F. Supp. 641, 644 (D.N.J. 1960); *Image & Sound Serv. Corp. v. Altec Serv. Corp.*, 148 F. Supp. 237, 239 (D. Mass. 1956).

<sup>8</sup> *American Can Co. v. Russellville Canning Co.*, *supra* note 7, at 54-55; *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir. 1945). See also *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 753 (1947).

<sup>9</sup> *American Can Co. v. Russellville Canning Co.*, *supra* note 7, at 55; *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949); *Strauss v. Victor Talking Mach. Co.*, 297 Fed. 791, 801-03 (2d Cir. 1924); *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 829 (M.D. Pa.), *aff'd*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960); *Lowry v. Tile, Mantel & Grate Ass'n*, 106 Fed. 38, 47 (C.C.N.D. Cal. 1900), *aff'd sub nom. Montague v. Lowry*, 115 Fed. 27 (9th Cir. 1902), *aff'd*, 193 U.S. 38 (1904).

amount of the discrimination may be awarded, on the ground that in particular cases such an award is a reasonably accurate reflection of actual pecuniary damage sustained by the non-favored buyer.<sup>10</sup> Other courts have refused to permit such awards, on the ground that proof of price discrimination alone cannot prove actual damage to the non-favored buyer's business,<sup>11</sup> and have required plaintiffs to prove "special damages" in the form of "lost profits" and depreciated value of the business as a going concern.<sup>12</sup> After examining the principles which govern proof of damages in treble damage actions, the discussion which follows will analyze the types of loss or damage which a non-favored buyer can suffer as a result of price (or price-related) discrimination by a seller, the way in which such loss can occur, and appropriate methods for proving and measuring that loss.

### I. ELEMENTS AND PRINCIPLES OF PROOF

A plaintiff's cause of action for treble damages consists of four essential elements: (1) an antitrust violation; (2) the existence of actual damage to his business or property; (3) a proximate causal relationship between that damage and the defendant's unlawful acts; and (4) a basis for measuring or estimating the amount of that damage with a reasonable degree of accuracy. Proof of these four elements properly falls into three distinct stages as the second and third elements are established in the same stage.<sup>13</sup>

<sup>10</sup> "[The petitioner] would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices. If the prices are illegally discriminatory, petitioner has been damaged, in the absence of extraordinary circumstances, at least in the amount of that discrimination." *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947) (dictum). In *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945), the court awarded "general damages" in the amount of a discrimination (difference) in allowances made to buyers for clerks' or demonstrators' salaries which violated §§ 2(d), (e) of the Robinson-Patman Act.

The court in *American Can Co. v. Russellville Canning Co.*, *supra* note 7, at 55, found that the plaintiff had not been damaged but added, "We do not doubt that, ordinarily, where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages . . . ."

<sup>11</sup> *E.g.*, *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457, 459, 460 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (amount of a price discrimination not a proper measure of damages); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949) (amount of a price-related discrimination not a valid measure of damages). See also *Timberlake*, *supra* note 3, at 259.

<sup>12</sup> See cases cited notes 40-45 *infra*.

<sup>13</sup> See *Timberlake*, *supra* note 3, at 231 n.2.

### A. *The Violation*

Section 2(a) of the Robinson-Patman Act prohibits price discrimination the effect of which “*may be* substantially to lessen competition . . . , or to injure . . . competition . . . with customers [of any person who grants such discrimination]. . . .”<sup>14</sup> This provision does not require that competition actually be lessened or injured before a violation can be found, but only that there be a “reasonable possibility” for the price discrimination to injure or substantially to lessen competition.<sup>15</sup> Because a sufficient possibility of a “substantial lessening” of, or injury to, second-line competition will be inferred from the fact that a “substantial” price discrimination existed, and because a price discrimination is merely a price difference,<sup>16</sup> a violation of section 2(a) can be established simply by showing that a seller sold goods of like grade and quality in interstate commerce to competing customers at “substantially” different prices.<sup>17</sup>

<sup>14</sup> 49 Stat. 1526 (1936), as amended, 15 U.S.C. § 13(a) (Supp. 1961) (emphasis added). For discussion of the Robinson-Patman Act, see generally EDWARDS, *THE PRICE DISCRIMINATION LAW* (1959); ROWE, *PRICE DISCRIMINATION UNDER THE ROBINSON-PATMAN ACT* (1962).

<sup>15</sup> *FTC v. Morton Salt Co.*, 334 U.S. 37, 46 (1948); *Standard Motor Prods. v. FTC*, 265 F.2d 674, 676 (2d Cir. 1959); *Edelmann v. FTC*, 239 F.2d 152, 154 (7th Cir. 1957), *cert. denied*, 355 U.S. 941 (1958); *Moog Indus. v. FTC*, 238 F.2d 43, 51 (8th Cir. 1956). The Supreme Court had earlier indicated that a reasonable “probability” of an injury to competition was necessary. *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 738 (1945).

<sup>16</sup> *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960); *FTC v. Morton Salt Co.*, *supra* note 15, at 45.

<sup>17</sup> *FTC v. Morton Salt Co.*, *supra* note 15, at 46-47, 50-51; *Standard Motor Prods. v. FTC*, 265 F.2d 674, 676 (2d Cir. 1959); *Edelmann v. FTC*, 239 F.2d 152, 154-55 (7th Cir. 1957), *cert. denied*, 355 U.S. 941 (1958); *Moog Indus. v. FTC*, 238 F.2d 43, 50-51 (8th Cir. 1956); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 353 (E.D.N.Y. 1960). Where a substantial price difference exists, the fact that individual buyers agree they have not been hurt by the discrimination is not considered necessarily inconsistent with a finding of a possibility or probability of injury to competition. *Whitaker Cable Corp. v. FTC*, 239 F.2d 253, 255 (7th Cir. 1957), *cert. denied*, 353 U.S. 938 (1957); *Edelmann v. FTC*, *supra* at 155; *Moog Indus. v. FTC*, *supra* at 50-51.

“To show injury in the secondary line, there is need only to show that the favored and disfavored customers were in competition with one another and that the amount of the price difference was substantial, either as a part of the sale price or as a part of the profit margin or in the aggregate saving that it made available to the favored customers. From substantiality in relation to sales price, the Commission can infer differences in resale price and diversion of trade or significant differences in operating profit. From substantiality in relation to operating margin, the Commission can infer an effect on profits. From substantiality in the total benefit obtained through discrimination, the Commission can infer a significant addition to the funds available for sales promotion, and consequent diversion of trade. It is not necessary to ascertain by examination of the facts that changes in business practice or diversion of trade actually occurred. Since the facts as to each commodity can be considered separately without regard to the importance of that commodity in the customer's total business, injury to competition among cus-

The cases indicate that a "substantial" price difference is simply one which, in the context of a particular market situation, is not negligible.<sup>18</sup> There apparently remains considerable disagreement as to the amount of evidence necessary to establish that a price difference was "substantial," and as to the extent to which the trier of fact is required to inquire into the *actual* effect which a price difference may have (or have had) on the market. The quantum of evidence necessary will vary from case to case, of course, but it would appear that the burden is on the defendant to persuade the trier of fact that the price difference in question was so insignificant or insubstantial that second-line competition could not possibly (or probably) have been "substantially lessened" or injured. At any rate, if a price difference is significant or substantial when compared with the resale price or profit on the item involved (or on the unit in which the item is incorporated), an appellate court without looking further will affirm a finding that injury to competition was sufficiently possible to establish a violation of section 2(a).<sup>19</sup>

tomers may be discovered by inference, even when the commodity is so small a part of the customer's sales volume that the customer is aware of no injury." *EDWARDS, op. cit. supra* note 14, at 234.

The burden is on the defendant to justify the price difference, if grounds for legal justification exist. 49 Stat. 1526 (1936), 15 U.S.C. Supp. § 13(b) (1961); *FTC v. Morton Salt Co.*, *supra* note 15, at 44-45.

Where the violation charged is price discrimination in first-line competition (seller competing with seller) rather than in second-line competition (buyers competing with buyers who all purchase from seller who discriminates in price), a substantial lessening of, or injury to, competition will not be so readily inferred. There the possibility or probability of injury to competition must be shown. *FTC v. Anheuser-Busch, Inc.*, *supra* note 16. However, the Supreme Court took care to note:

"Of course we do not depart from our holding in *Federal Trade Comm'n. v. Morton Salt*, . . . as to adequacy of proof of tendency to injure competition in cases involving discrimination between purchasers. The instant case, as we have pointed out, involves differences in prices among competing sellers." *Id.* at 552 n.21.

<sup>18</sup> *Corn Prods. Ref. Co. v. FTC*, 324 U.S. 726, 739 (1945); *Edelmann v. FTC*, *supra* note 17, at 155; *Whitaker Cable Corp. v. FTC*, *supra* note 17, at 256; *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 789, 792 (7th Cir. 1951), *cert. granted*, 342 U.S. 940 (1952), *cert. dismissed as untimely*, 344 U.S. 206 (1952); *cf. FTC v. Morton Salt Co.*, *supra* note 15, at 49.

"The substantiality of a price difference is to be shown through proof (1) that the price difference is large enough to affect significantly the buyer's profit margin in reselling, (2) that if the price difference were reflected in resale prices it would significantly affect the buying decisions of customers in resale markets, or (3) that the price difference provides, for the favored buyer, an aggregate saving large enough to be used for significant business purposes. Where the discrimination is substantial by any of these tests, an inference that the discrimination is injurious to the class of customers that does not receive it is thought to be inescapable." *EDWARDS, op. cit. supra* note 14, at 532.

<sup>19</sup> See *FTC v. Anheuser-Busch, Inc.*, 363 U.S. 536, 549 (1960); *FTC v. Morton Salt Co.*,

Sections 2(d) and (e) of the Robinson-Patman Act make it unlawful for a seller to pay for or to provide services or facilities to customers in connection with the sale of commodities to those customers, except on proportionately equal terms.<sup>20</sup> A discrimination in violation of these sections is per se unlawful and no effect on competition need be shown.<sup>21</sup>

### B. *The Fact and Amount of Damage*

Having established the violation, a plaintiff must next establish the existence of actual damage proximately caused by the defendant's violation, and its amount.<sup>22</sup>

The identification of three distinct elements in proof of damage (existence, causation and amount) which are to be established in two stages, and the grouping of proof of existence and causation together as one stage which is differentiated from proof of amount, may at first appear artificial. After all, proof of an amount of damage necessarily establishes the existence of that damage. Further, even if it is shown that defendant's acts caused a loss to plaintiff, specific amounts of loss claimed must be shown to have been part of that loss which was caused by defendant. Thus, proof of causation seems a necessary part of proving amount, and proof of the existence of damage hardly seems a separate requirement, especially where virtually the same evidence is used to establish all three elements. Indeed, it has been suggested that proof of the fact of damage (existence and causation) and meas-

*supra* note 15, at 46. For discussion of proof of competitive effect under § 2(a) of the Robinson-Patman Act, see generally EDWARDS, *op. cit. supra* note 14, at 223-36, 531-45; ROWE, *op. cit. supra* note 14, at chs. 6, 8; ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 160-70; Kalinowski, *Price Discrimination and Competitive Effects*, 17 A.B.A. ANTITRUST SECTION 382-86 (1960); Rowe, *Borderland Issues*, A.B.A. Antitrust Section 60-72 (April 5-6, 1956); Note, 74 HARV. L. REV. 1597 (1961).

<sup>20</sup> 49 Stat. 1527 (1936), 15 U.S.C. §§ 13(d), (e) (Supp. 1961). See generally Comment, 29 U. CHI. L. REV. 160 (1961).

<sup>21</sup> See *FTC v. Simplicity Pattern Co.*, 360 U.S. 55, 65 (1959) (dictum); *State Wholesale Grocers v. Great Atl. & Pac. Tea Co.*, 258 F.2d 831, 837-38 (7th Cir. 1958); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 152 (2d Cir. 1949); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 994-95 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

<sup>22</sup> For general discussion of proof of damages in private treble damage suits, see Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363 (1954); Timberlake, *supra* note 3; Comment, 18 U. CHI. L. REV. 130, 131 (1950); Comment, 61 YALE L.J. 1010, 1022-27 (1952).

urement of the amount of damage may be only a single step rather than a two-step process.<sup>23</sup>

In fact, however, there are good reasons for maintaining a distinction between proving the existence of compensable loss and proving the amount of damages.<sup>24</sup> A treble damage plaintiff cannot always prove specific and individually identifiable items of loss, each readily measurable. Frequently he will be forced to seek recovery for a general or overall loss, and in such cases the amount of loss cannot usually be proved with a great degree of exactness.<sup>25</sup> Who can prove exactly how many sales he would have made and at what profit, but for an unlawful advantage given his competitor?

If the plaintiff did lose some sales because of an unlawful advantage given his competitor, or sustained some other form of damage, however, the *fact* that some such loss did occur,<sup>26</sup> and that it was caused by the defendant's acts,<sup>27</sup> can usually be per-

<sup>23</sup> See *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32, 45 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959); Clark, *supra* note 22, at 374-75.

<sup>24</sup> See *Timberlake*, *supra* note 3, at 232, 240.

<sup>25</sup> This is true in any case where the plaintiff sues for a general loss of sales. The "movie cases" are good examples. See, e.g., *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946); *Milwaukee Towne Corp. v. Loew's*, 190 F.2d 561 (7th Cir. 1951); *Bordonaro Bros. Theaters v. Paramount Pictures*, 176 F.2d 594 (2d Cir. 1949). See also *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

<sup>26</sup> Financial records are generally essential, however. See, e.g., *Enterprise Indus. v. The Tex. Co.*, *supra* note 25, at 458-59; *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 389-90 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Seigfried v. Kansas City Star Co.*, 193 F. Supp. 427, 436-37 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1, 6-8 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962).

<sup>27</sup> Proof of causation must generally be made with circumstantial evidence and the burden of proof is on the plaintiff. E.g., *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 957-58 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 353 (E.D.N.Y. 1960); *Momand v. Universal Film Exch.*, 72 F. Supp. 469, 482 (D. Mass. 1947), *aff'd*, 172 F.2d 37 (1st Cir. 1948); *Lowry v. Tile, Mantel & Gravel Co.*, 106 Fed. 38, 46 (C.C.N.D. Calif. 1900), *aff'd sub nom. Montague v. Lowry*, 115 Fed. 27 (9th Cir. 1902), *aff'd*, 193 U.S. 38 (1904). The fact that in a given case the amount of the discrimination was substantial as compared with the plaintiff's operating costs will be persuasive evidence as to causation, *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 766, 769 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 989-90 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951), especially when coupled with other evidence such as customer testimony to the effect that the favored competitor's lower prices induced the customers to buy from the competitor rather than from the plaintiff. *American Can Co. v. Ladoga Canning Co.*, *supra* at 768-69. Such evidence may alone be sufficient to establish causation, absent a showing to the contrary. See *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 712-13 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960); *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32, 46 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959). The burden is on the defendant to rebut the plaintiff's showing of causation once

suasively shown. Furthermore, it *must* be persuasively shown. The treble damage action being essentially compensatory, a plaintiff is required to prove the existence of such actual economic loss caused by the defendant's acts before a treble damage recovery can be awarded.<sup>28</sup> It is here that the "actual damage" requirement exerts its influence. A court may not speculate as to whether an antitrust violation may have injured a particular plaintiff, and the fact of actual loss may not be inferred simply from the fact that a price discrimination existed, for a price discrimination will not always and inevitably cause such a loss to one who does not receive its benefit as the subsequent analysis of the types of damage and how they occur will indicate.<sup>29</sup>

a persuasive showing has been made. See *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *Bruce's Juices v. American Can Co.*, *supra* at 988. If the defendant can show that plaintiff's losses were due to other causes, plaintiff is not entitled to recover. See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 1960 Trade Cas. 77215, 77238-39 (9th Cir. 1960); *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, *supra* at 957-58; *Prentice Mach. Co. v. Associated Plywood Mills*, 252 F.2d 473, 477 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958); *American Can Co. v. Ladoga Canning Co.*, *supra* at 770; *McWirtter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456, 462-63, 465 (W.D. Mo. 1948). Plaintiff can recover, however, if defendant's violations were the most substantial cause of the plaintiff's losses. See *Riss & Co. v. Association of Am. R.Rs.*, 1960 Trade Cas. 76873, 76877 (D.D.C. 1960); *Momand v. Universal Film Exch.*, *supra* at 482. See generally *Timberlake*, *supra* note 3, at 234-40; Comment, 61 YALE L.J. 1010, 1016-19 (1952).

<sup>28</sup> See *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, *supra* note 27, at 77240; *Talon, Inc. v. Union Slide Fastener, Inc.*, 1959 Trade Cas. 75260, 75262 (9th Cir. 1959); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Peller v. International Boxing Club*, 227 F.2d 593 (7th Cir. 1955); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 54 (8th Cir. 1951); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949); *Momand v. Universal Films Exchs.*, 172 F.2d 37, 42-43 (1st Cir. 1948); *Roseland v. Phister Mfg. Co.*, 125 F.2d 417 (7th Cir. 1942); *Sano Petroleum Corp. v. American Oil Co.*, 187 F. Supp. 345, 353 (E.D.N.Y. 1960); *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146, 147 (D. Ore. 1958); *McWirtter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456, 465 (W.D. Mo. 1948).

<sup>29</sup> In *Duff v. Kansas City Star Co.*, 299 F.2d 320, 323 (8th Cir. 1962), the court said: "The trial court very correctly stated [that the] 'gist of a private treble-damage action is not the violation of the antitrust laws, as such, but is the allegation of facts from which it may be inferred that a party plaintiff was caused direct injury to his business or property as a result of such violation . . . .'"

In *American Can Co. v. Russellville Canning Co.*, *supra* note 28, at 54, the court said: "It is our understanding that, in order for a plaintiff to recover damages . . . , it is not enough to show that a defendant was guilty of price discriminations which might lessen or injure competition, but it is also necessary for the plaintiff to prove that the wrong done proximately resulted in ascertainable damage to its business and property."

In *Sano Petroleum Corp. v. American Oil Co.*, *supra* note 28, at 353, the court said: "In this Circuit [Second], proof of discrimination in price establishes a prima facie case that the discrimination is one proscribed by section 2(a) so as to shift to the defendant the burden of proving that the discrimination is not proscribed. . . . But there is no presumption that the proscribed discrimination in price has caused damage to the plaintiff. The burden of proving such damage is always on the plaintiff." See also *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 909-10 (2d Cir. 1962); authorities cited note 11 *supra*.

Once the existence of actual economic loss caused by defendant's acts has been established, the plaintiff must still measure the amount of his loss. It is one thing to prove that some sales were lost to a competitor, however, and quite another to prove the amount of profit that would have been made had the sales not been lost. In the early days of the treble damage action, stringent proof requirements as to the *amount* of damage tended to defeat recoveries even where there was no doubt that the plaintiff had suffered substantial economic loss as a result of the defendant's antitrust violation, for as a practical matter it was (and is) almost impossible to determine exactly the amount of loss in a given case.<sup>30</sup> Practicality necessitated a less exacting requirement of proof as to the *amount* of damage; and because the plaintiff's inability to prove with precision what his profit would have been absent the defendant's wrongdoing was, after all, the result of the defendant's wrongdoing, it was only equitable that the plaintiff should be permitted to estimate in a reasonable manner the amount of his loss.<sup>31</sup> The *amount* of damage may thus be estimated from relevant data which is sufficient to make the estimate reasonably accurate.<sup>32</sup> This does not mean that the amount of the damage award may be based on speculation or guesswork, however;<sup>33</sup> though proof requirements for measuring or valuing the amount of damage are relaxed once the fact of damage has been established, this relaxation is intended to eliminate impossible proof requirements, not to make proof of amount unnecessary.<sup>34</sup>

Even where the same evidence is used to prove both the fact and the amount of damage, the distinction between the two stages

<sup>30</sup> Clark, *supra* note 22, at 367-69.

<sup>31</sup> See Bigelow v. RKO Radio Pictures, 327 U.S. 251, 264-65 (1946); Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 563-66 (1931); Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 379 (1927).

<sup>32</sup> Bigelow v. RKO Radio Pictures, *supra* note 31, at 264-66; Story Parchment Co. v. Paterson Parchment Paper Co., *supra* note 31, at 563; Eastman Kodak Co. v. Southern Photo Materials Co., *supra* note 31, at 379; Talon, Inc. v. Union Slide Fastener, Inc., 1959 Trade Cas. 75260, 75262 (9th Cir. 1959).

<sup>33</sup> Bigelow v. RKO Radio Pictures, *supra* note 31, at 264; Eastman Kodak Co. v. Southern Photo Materials Co., *supra* note 31, at 379.

<sup>34</sup> See Siegfried v. Kansas City Star Co., 298 F.2d 1, 7-8 (8th Cir.), *affirming* 193 F. Supp. 427, 431-34, 436, 438 (W.D. Mo. 1961), *cert. denied*, 369 U.S. 819 (1962); Herman Schwabe, Inc. v. United Shoe Mach. Corp., 297 F.2d 906, 909-10, 912-15 (2d Cir. 1962); Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods., 1960 Trade Cas. 77215, 77241 (9th Cir. 1960); Flintkote Co. v. Lysfjord, 246 F.2d 368, 394 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

of proof must be kept clear in order to preserve their qualitative differences.<sup>35</sup> The fact that the amount of damages may be estimated must not be misconstrued so as to destroy the requirement that a treble damage plaintiff cannot recover unless he proves with certainty the existence of actual economic loss caused by the defendant's unlawful acts.

Proof of the existence of damage caused by defendant's violation, the second stage in a plaintiff's proof, must of course be clearly distinguished from the first stage in which he proves the violation. There, as we have seen, the requisite *possibility* of a "substantial lessening" of or "injury" to competition under section 2(a) can be inferred from the existence of a substantial price discrimination without further proof,<sup>36</sup> and the furnishing of or paying for services or facilities for purchasers on terms not proportionately equal is per se unlawful under sections 2(d) and (e).<sup>37</sup> A finding of damage to an individual plaintiff may not rest upon a generalized finding of a possibility of injury to competition nor upon the fact that the discrimination was per se unlawful. A finding of "damage" must rest upon a specific finding of economic loss suffered by that plaintiff and caused by the defendant's unlawful acts.

At the same time the fact and the amount of a price or price-related discrimination may be a very important part of a plaintiff's proof; while it cannot establish the existence of damage, it can be persuasive proof of causation.<sup>38</sup> In the usual case the fact that the discrimination complained of was substantial when viewed

<sup>35</sup> In *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931), the Court said: "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 damage, 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."

In *Flintkote Co. v. Lysfjord*, *supra* note 34, at 392, the court said: "The cases have drawn a distinction between the quantum of proof necessary to show the *fact* as distinguished from the *amount* of damage; the burden as to the former is the more stringent one. In other words, the *fact* of injury must first be shown before the jury is allowed to estimate the *amount* of damage."

See also *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods.*, *supra* note 34, at 77240; *Talon, Inc. v. United Slide Fastener, Inc.*, 1959 Trade Cas. 75260 (9th Cir. 1959).

<sup>36</sup> See cases cited note 17 *supra*.

<sup>37</sup> See authorities cited notes 20, 21 *supra*.

<sup>38</sup> See cases on proving causation cited note 27 *supra*.

in the market situation will not be the only evidence tending to show causation, but in every case where such a showing can be made it will be important evidence on the causation question once the existence of actual loss has been demonstrated.

## II. THE NATURE OF DAMAGE AND APPLICATION OF PRINCIPLES OF PROOF

### A. *Indirect or Consequential Damage*

A non-favored buyer can suffer damage as a direct or as an indirect result of a seller's price discrimination. Because the nature of the causal relationship between violation and damage has an important bearing on the application of principles of proof to specific types of damage, it is important that the distinction between direct and indirect damage be understood.<sup>39</sup>

If a non-favored buyer does suffer some loss as a result of a price discrimination the loss is most likely to occur *indirectly* through operation of the competitive process. Perhaps the most obvious type of such indirect or consequential damage is the loss of prospective profits which results from a loss of sales to favored competitors. In this instance the amount of profit which would have been made on the sales which were lost constitutes damage.<sup>40</sup> Indirect damage may also be sustained through a decrease in the plaintiff's profit margin on continuing operations, *i.e.*, on those sales which the plaintiff was able to retain. This form of indirect loss can occur in three distinct ways. A non-favored buyer may find it necessary to incur an increase in his sales or operating expenses in attempting to avoid or offset the competitive advan-

<sup>39</sup> The terms "direct damage" and "indirect damage" have been adopted here to denote two broad categories of damage and this terminology is used throughout this comment. The courts have generally used the term "special damages" to refer to the types of loss here labeled "indirect damage."

<sup>40</sup> *E.g.*, *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 953 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960) (first-line competition—profit lost on sales which would have been made but for price discrimination); *Richfield Oil Corp. v. Karseal Corp.*, 271 F.2d 709, 714-15 (9th Cir. 1959), *cert. denied*, 361 U.S. 961 (1960) (first-line competition—profit lost on sales which would have been made but for illegal restraint); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 390 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) (second-line competition—loss of profits on sales which plaintiff would have made but for defendant's unlawful refusal to sell to plaintiff); *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457, 458-59 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957) (second-line competition—loss of profits necessary to show damage); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949) (second-line competition—loss resulting from diversion of customers).

tage conferred upon favored buyers by the discrimination.<sup>41</sup> If, instead of increasing his sales or operating expenses, the non-favored buyer decides to reduce his resale price to meet the competition of favored buyers, his profit margin will similarly be reduced.<sup>42</sup> Such involuntary price reductions are similar to increased selling and operating expenses in that both represent a loss of profit incurred in mitigating the loss inflicted by the discriminatory advantage of favored buyers.<sup>43</sup> Finally, if a non-favored buyer loses sales he may find that in addition to a loss of anticipated profits on those sales, he has suffered an increase in the unit cost of producing, handling, or even selling the particular commodity involved due to a loss of economies of large scale operation.<sup>44</sup> In each of these three instances the amount of the decrease in profit margin on continuing operations constitutes damage.

A third type of indirect damage may be found in a general depreciation of the value of the plaintiff's business as a going

<sup>41</sup> *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945) (second-line competition—increased cost of operation of plaintiff's cosmetic department); *cf.* *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, *supra* note 40. Such expenses can result, for example, from increased advertising, increased promotion or sales effort (as in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, *supra*), or additional sales features offered with the product involved. An increase in a non-favored buyer's cost of doing business can also occur in the form of a direct and unlawfully discriminatory increase in the price charged the buyer by the seller, in excess of the price which would have prevailed absent the discrimination. This type of increased costs will be considered under the heading "direct damage."

<sup>42</sup> *American Co-op. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907, 914 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946) (first-line competition—profit lost by reducing selling price to meet competition); *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146 (D. Ore. 1958) (second-line competition—amount of reduction in resale price necessary to meet reduced prices of favored competitors); *cf.* *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931), in which defendants conspired unlawfully to drive plaintiff out of business by selling in competition with plaintiff at prices below cost. Plaintiff, forced to lower its prices to meet the competition, recovered the difference between the lower sale price and what the sale price would have been absent defendants' conspiracy.

<sup>43</sup> In some instances a buyer may be required to mitigate his loss. See cases cited note 9 *supra*. A reasonable opportunity to mitigate should exist, of course. The requirement could not be imposed prior to the time when the buyer knew that a loss was occurring, and one should not be required to mitigate his loss if it is not economically feasible to do so, or where it would involve unreasonable hardship. It would seem that a reasonable business judgment against spending money in mitigation should not limit a plaintiff's recovery for loss sustained. Where mitigation is required, however, recovery should be limited to the cost of mitigation so far as it would or did involve expense exceeding usual business expenses.

<sup>44</sup> *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960) (first-line competition—increased cost of production due to reduced sales).

concern, reflecting the reduced business-getting ability of the business and the effect which the impairment of its competitive position may be expected to have on its prospects for future operation and growth.<sup>45</sup>

The various types of indirect damage possess a common characteristic which distinguishes them from direct damage (discussed later)—they can occur *only* if the non-favored buyer loses sales or is forced to incur an increase in cost or a decrease in profit to avoid a loss of sales. Such a loss or threatened loss of sales is not inflicted by the discrimination itself<sup>46</sup> but by favored buyers' use of the competitive advantage given them by the discrimination in the form of lower purchase or operating costs compared to those of non-favored buyers.

Two significant consequences flow from the causal characteristics of indirect damage. First, the fact that a discrimination occurred does not necessarily indicate that a non-favored buyer suffered any loss. Second, the amount of such indirect damage as may occur in any given case bears no necessary or predictable relationship either to the amount of the discrimination involved or to the complainant's purchase volume.

Before a loss can occur the discriminatory benefit must be competitively used by a favored buyer in such a way that the non-favored buyer feels the effect of its use in his business. If the amount of the discrimination is distributed by a favored buyer

<sup>45</sup> *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 566-67 (1931) (first-line competition—depreciation in value of plaintiff's plant); *Atlas Bldg. Prods. Co. v. Diamond Block & Gravel Co.*, *supra* note 44, at 958-59 (first-line competition—extent to which value of plaintiff's assets or property had been diminished); *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 389-90 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957) (second-line competition—expenses incurred by plaintiff in establishing business which was caused to fail in its infancy); *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 992 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951) (second-line competition—injury to overall business structure and operation reflected in failure to maintain progress in line with the growth of the citrus industry in Florida). It should be noted that the depreciated value of a business will reflect a loss of good-will and hence that loss of good-will is not a separate item of damage.

However, the various types of loss or damage discussed above as indirect damages are not mutually exclusive and several types of loss may exist simultaneously. *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, *supra* note 44, at 958-59; *Flintkote Co. v. Lysfjord*, *supra* at 389-90. *Bruce's Juices v. American Can Co.*, *supra* at 992-93, recognized that care must be taken to avoid overlapping in various categories of loss, though the court manifested an inability to separate categories of loss with any significant degree of specificity.

<sup>46</sup> It must be remembered that the discussion in this comment is concerned only with the effect of price discrimination in *second-line* competition.

as additional profits it could hardly be the cause of competitive harm to any non-favored buyer. Even if it is retained in the favored buyer's business, it cannot cause a loss to any non-favored buyer unless it is used against him. Thus if a defendant seller could show that favored buyers used the amount of the discrimination in competitive effort directed at competitors other than the complaining non-favored buyer,<sup>47</sup> or that the amount of the discrimination simply was not used competitively,<sup>48</sup> the defendant seller would seem to have established that the discrimination could not have damaged the complainant.

Furthermore, even if a favored buyer uses the amount of the discrimination competitively against a non-favored buyer, that use will not inevitably hurt the latter buyer. Before he can suffer any loss the competitive use made of the discriminatory benefit by the favored buyer must be effective actually to influence the choice which third-line customers make in deciding whether or not to buy from the non-favored buyer, for unless the non-favored buyer loses sales as a result of the discrimination (or is forced to incur expense or loss of profit to avoid a loss of sales), he cannot be injured by it in any way thus far discussed. The use to which the discrimination is put must be sufficient in the particular market situation to overcome other factors which influence the third-line customer's decision. Those factors may include business reputation, location, facilities, quality and extent of services offered, sales personalities, nature of sales approach and promotional activity, variety and extent of stock on hand, and credit policy, as well as pricing. Where the complaining buyer is a manufacturer or processor relevant factors may also include brand reputation, product features, and product quality.<sup>49</sup> The type of competitive use made of the discrimination may also be important, for the effect of general advertising, price reductions, or concen-

<sup>47</sup> It is perhaps possible that the complainant could be hurt if the use of the discrimination against some competitors caused a general intensification of competition in the market as a whole. This particular circumstance seems unlikely and would be extremely difficult to prove.

<sup>48</sup> It would seem that a plaintiff's failure to show any intensified sales effort (advertising, price reduction, etc.) by favored competitors would be persuasive evidence that the discriminatory benefit was not used competitively. Some showing as to the probable use made of the benefit is necessary to a plaintiff's case, for absent such showing it would seem impossible for him to establish that alleged damage was *caused* by the defendant's discrimination.

<sup>49</sup> In some instances competing buyers may sell different products. In such a case the interchangeability of the ultimate competing products themselves becomes an important factor. See *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 56 (8th Cir. 1951).

trated sales effort directed at particular customers may not be the same even in a given market situation.

In determining the effect that a price discrimination may have had on a non-favored buyer's business, therefore, it may be necessary to consider a number of variable market factors. It may also be necessary to consider certain characteristics of the discrimination itself. The amount of the discrimination and the length of time during which it was given may be significant, for unless the amount involved was substantial as compared at least with the non-favored buyer's resale profit margin on the item (or on the unit in which the item was incorporated) the discrimination may have had no real competitive value. The nature of the item affected by the discrimination may be significant, for the fact that a competitor received a price break on a minor component of a large assembled unit, or on an item which was of little consequence in the total business involved, may not have given the competitor any real competitive advantage.<sup>50</sup> Where the item represented a significant part of the buyer's cost of doing business the situation may be entirely different.<sup>51</sup> Furthermore, the geographic markets in which favored and non-favored buyers sell are not necessarily coextensive in every case. The extent to which a complaining non-favored buyer did business in competition with favored buyers during the period of discrimination may thus be an important factor in determining the extent to which a price discrimination may have caused loss to the non-favored buyer.

It should be apparent that the amount of any type of indirect damage is not determined by the amount of the discrimination and is not influenced by the complainant's purchase volume. Rather, the amount of such damage is determined by the interplay of competitive market factors which are influenced by the presence of discrimination, and is dependent upon the complainant's *loss* or prospective loss of *sales* volume.<sup>52</sup>

<sup>50</sup> In *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 791-92 (7th Cir. 1951), *cert. granted*, 342 U.S. 940 (1952), *cert. dismissed as untimely*, 344 U.S. 206 (1952), the court found no reasonable possibility that discrimination in the pricing of heating controls could "substantially injure" competition in heating units into which the controls were built (and hence no violation of § 2(a) of the Robinson-Patman Act).

<sup>51</sup> See, e.g., *American Can Co. v. Ladoga Canning Co.*, 44 F.2d 763, 766, 768 (7th Cir. 1930), *cert. denied*, 282 U.S. 899 (1931); *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985, 989-90 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951).

<sup>52</sup> The number of sales lost bears no necessary relationship to the amount of plaintiff's

B. *Proof of Indirect Damage*

1. *Loss of Profit on Anticipated Sales Lost to Favored Competitors*

In proving the fact of loss plaintiff must establish the existence of a business loss in the form of a loss of sales. This can be established from plaintiff's business records by showing a decline of sales volume (or of the rate of growth of sales volume) in the item involved in the discrimination during the period in question.<sup>53</sup> In some cases it may be necessary to compare plaintiff's sales figures with those of his competitors. Of course the fact that the non-favored buyer lost sales to a favored buyer, or was threatened with such a loss, does not make the seller liable for the non-favored buyer's attendant damage unless the discrimination was the proximate cause of the damage. Thus, if a plaintiff claims damage from a loss of sales, he must show not only that sales were lost to a favored competitor but that it was the competitive advantage given the competitor by the seller's price discrimination that enabled the competitor to take those sales from the plaintiff.<sup>54</sup>

The fact that the loss of sales of the item in question was caused by defendant's price (or price-related) discrimination can be established by showing that favored competitors did not suffer a similar decline in sales or sales growth (*i.e.*, that the loss was peculiar to the plaintiff's business), and that the discrimination was substantial in amount and competitively used by one or more of plaintiff's favored competitors. In the case of a discriminatorily excessive charge (discussed later under "direct damage") plaintiff would show that he was forced to raise his resale prices substantially above the competitive resale price level. Customer testimony and other evidence concerning the effect which the favored buyer's competitive use of the discrimination had on the customers' buying decisions may be important, as may evidence of plaintiff's

purchases, particularly if the plaintiff did only part of his business in competition with favored competitors. Further, even the total number of units sold by plaintiff during the period when he was feeling the effect of the discrimination is not necessarily the same as the number of units he purchased during the period. If the plaintiff was drawing from inventory on hand at the beginning of the period, he may have purchased less than he sold; if he carried over inventory at the end of the period he may have purchased more than he sold.

<sup>53</sup> See generally cases cited note 40 *supra*.

<sup>54</sup> See generally cases cited notes 27, 40 *supra*.

good business management. Plaintiff's evidence must, however, outweigh the defendant's evidence tending to show that the discrimination and its use by favored buyers was not substantial enough to influence customers' buying decisions, and that plaintiff's loss was caused by factors such as bad management, business recession (affecting the item in question), sales technique, and others.<sup>55</sup>

Once the fact that a loss of sales was caused by defendant's discrimination is established, plaintiff must provide a reasonably accurate means of estimating the amount of loss. If the loss of specific sales can be shown<sup>56</sup> plaintiff's business records should provide a basis for calculating the amount of profit that would have been made on each sale, and that profit per sale can be multiplied by the number of sales lost.<sup>57</sup> If specific sales lost cannot be determined, various methods of approximation are available. These include comparison of the plaintiff's sales volume before the impact of defendant's violation with sales volume during the violation, comparison of plaintiff's sales volume during the period of defendant's violation with the sales volume of a comparable business not affected by defendant's violation, and expert testimony as to hypothetical sales volume.<sup>58</sup> In each instance evidence as to probable costs will be necessary because loss is measured by anticipated profit, not by anticipated gross receipts.

## 2. *Loss of Profit Margin on Continuing Operations*

a. *Increased Sales and Operating Expenses.* The very existence of the expenses demonstrates that loss occurred. The fact that the loss was proximately caused by defendant's violation can be established by showing that the expenses were reasonably necessary to meet or offset competitive activity of one or more favored buyers, and that the competitive activity of those favored buyers represented a use of the benefit conferred upon them by the defendant-seller's discrimination. The entire amount of such ex-

<sup>55</sup> See generally cases cited notes 27, 40-42 *supra*.

<sup>56</sup> This may be possible where sales are of a large item, such as business machines. See *McWhirter v. Monroe Calculating Mach. Co.*, 76 F. Supp. 456 (W.D. Mo. 1948), where, however, plaintiff failed to show that the defendant's violations were the cause of plaintiff's loss of sales.

<sup>57</sup> See cases cited note 40 *supra*.

<sup>58</sup> An excellent and recent discussion of these methods of approximation is found in *Timberlake*, *supra* note 3, at 261-77.

penses (insofar as not "passed on")<sup>59</sup> represents damage to the plaintiff,<sup>60</sup> and can easily be proved from the plaintiff's business records.

b. *Involuntary Resale Price Reductions.* Here plaintiff must show that he lowered his resale price (or did not raise it when he normally would have), and that the price reduction was reasonably necessary to combat the effect of competitive activity (price cutting or other activity) by favored competitors made possible by defendant's discrimination. Such a loss represents another cost of mitigation and is measured by the amount of the reduction (or the amount by which the resale price would otherwise have been raised) multiplied by the number of sales made at the reduced price.<sup>61</sup> These figures should be readily ascertainable from plaintiff's business records.

c. *Loss of Economies of Scale.* The fact of loss is established by figures showing reduced production or reduced total sales of the item involved and by cost figures showing an increase in the unit cost of production or handling. Causation is established by showing that the reduced production or sales represents a loss of sales already shown to have been caused by favored competitors' use of the benefit conferred by the defendant seller's discrimination. The amount of damages is calculated by multiplying the amount of increased unit cost by the number of units produced or sold during the period in question.<sup>62</sup>

### 3. *Depreciated Value of the Business*

The difficulties of proving this type of loss would bear extensive discussion, but in the context of this comment it will suffice to observe generally that evidence showing a depreciation in value of the plaintiff's business, and that the depreciation was the result of a loss of sales caused by defendant's discrimination,

<sup>59</sup> See discussion regarding "passing on" in text accompanying notes 73-76 *infra*.

<sup>60</sup> See *Flintkote Co. v. Lysfjord*, 246 F.2d 368, 389-90 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945).

<sup>61</sup> *American Co-op. Serum Ass'n v. Anchor Serum Co.*, 153 F.2d 907, 914 (7th Cir.), *cert. denied*, 329 U.S. 721 (1946); *Youngson v. Tidewater Oil Co.*, 166 F. Supp. 146, 147 (D. Ore. 1958); *cf. Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 561 (1931).

<sup>62</sup> See generally *Atlas Bldg. Prods. v. Diamond Block & Gravel Co.*, 269 F.2d 950, 958 (10th Cir. 1959), *cert. denied*, 363 U.S. 843 (1960). Conceivably the "passing on" defense could come into play here.

will establish the existence of compensable loss. The amount of damages is measured by the amount of the depreciation so shown.<sup>63</sup>

### C. *Direct or Immediate Damage*

The only way in which a seller's price discrimination can *directly* injure a non-favored buyer is by causing that buyer to pay a higher price for the commodities in question than he would pay absent the seller's discrimination. Here the damage is not inflicted by a favored buyer's use of the discrimination but by the discrimination itself.

Direct damage of this sort can be found where a seller, in violation of the antitrust laws, causes a buyer to pay a price in excess of a reasonable price—a reasonable price being the price which would prevail if the market were free of the seller's unlawful conduct. In such a case the buyer is damaged in the amount by which the price he was forced to pay exceeded the price which he would have paid if the market had been free of the seller's unlawful conduct,<sup>64</sup> at least to the extent that the buyer does not otherwise recoup this loss.<sup>65</sup>

As a general principle of antitrust damage law this concept of direct damage through unlawfully excessive prices<sup>66</sup> is hardly

<sup>63</sup> See cases cited note 45 *supra*; Timberlake, *The Legal Injury Requirements and Proof of Damages in Treble Damage Actions Under the Antitrust Laws*, 30 GEO. WASH. L. REV. 231, 277-83 (1961).

<sup>64</sup> *Thomsen v. Cayser*, 243 U.S. 66, 88 (1917) ("If . . . more than a reasonable rate was secured by the [unlawful] combination, the excess over what was reasonable was an element of injury."); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390, 396 (1960) (city injured where caused by unlawful conspiracy to pay a price for pipe in excess of a reasonable price); *Peto v. Howell*, 101 F.2d 353, 361 (7th Cir. 1938) ("enhancement" of price resulting from defendant's illegal monopoly held actionable damage); *Straus v. Victor Talking Mach. Co.*, 297 Fed. 791, 799, 803 (2d Cir. 1924) (plaintiff recovered difference between the defendant-seller's established price, which was found reasonable, and the inflated price, which an illegal combination caused plaintiff to pay); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, 80 (2d Cir. 1915) (where plaintiff alleges damage because unlawful combination compelled him to buy at a price higher than market value, he must show evidence as to market value in the years in question); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888, 898 (S.D.N.Y. 1948) (one paying a price to a monopolist may recover "the amount of any overcharge," but must offer evidence from which the overcharge can be approximated). See also cases cited notes 68-69 *infra*.

<sup>65</sup> See, e.g., *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747, 750 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941) (plaintiff failed to show any loss in profit margin and hence was denied recovery—the inflated purchase price was "passed on" to plaintiff's customers).

<sup>66</sup> It is important to distinguish between *direct damage* in the form of an unlawfully imposed increase in buying cost (i.e., an excessive charge), and *indirect damage* in the form of an increase in the general cost of doing business resulting from ex-

subject to question. The principle was originally established in actions under section 7 of the Sherman Act and carried over into actions under section 4 of the Clayton Act (which superseded the old section 7). Although it has received suprisingly little discussion in recent years the continuing validity of the principle has not been challenged<sup>67</sup> and examples of its recent application in situations paralleling price discrimination can be found. In *Flintkote Co. v. Lysfjord*<sup>68</sup> the defendant, pursuant to a conspiracy to monopolize trade, refused to sell tile to the plaintiff buyer and the buyer was consequently forced to turn to a more expensive source of supply. The buyer was permitted to recover as one element of its damage the amount by which the cost of obtaining tile was thus increased. In *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*,<sup>69</sup> the plaintiff buyer was held to have a cause of action for damages where the defendant seller, through its unlawful control of the market, charged plaintiff an excessive price for the lease of shoe machinery. The amount of damage was held to be "the difference between what plaintiff was charged and what it could properly have been charged in the absence of the monopolistic practices."

Unfortunately, it is not clear whether there has been judicial recognition of the applicability of this principle of damage to price (or price-related) discrimination cases.<sup>70</sup> But there can be

penditures which a non-favored buyer found it necessary to make in order to offset the competitive advantage of a favored buyer so as to avoid a loss of sales (and of the prospective profits which those sales represent) to the favored buyer. While both types of damage are "increased costs" and operate to decrease the non-favored buyer's profit margin, they nonetheless occur differently and are caused differently, and it is possible for them to exist simultaneously. In the case of direct damage it is the seller's wrongful acts that alter the non-favored buyer's profit margin. Where indirect damage (in the form of increased costs) is involved, the non-favored buyer alters his own profit margin to combat the competitive market effect of the seller's wrongful acts. It may be observed that the so-called "passing on" defense should theoretically apply to any type of damage in the form of increased costs.

<sup>67</sup> See, e.g., Clark, *The Treble Damage Bonanza: New Doctrines of Damages in Private Antitrust Suits*, 52 MICH. L. REV. 363, 404 (1954); Comment, 70 YALE L.J. 469 (1961). The authors accept the principle without question. The cases which consider the "passing on" defense implicitly assume the validity of this fundamental principle of damages. See cases cited note 75 *infra*.

<sup>68</sup> 246 F.2d 368, 389-90 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

<sup>69</sup> 185 F. Supp. 826, 829 (M.D. Pa.), *aff'd*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960).

<sup>70</sup> See, e.g., *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *Becker-Lehmann v. Firestone Tire & Rubber Co.*, 1959 Trade Cas. 75406, 75409 (E.D. Mo. 1959); *Bruce's Juices v. American Can Co.*, 87 F. Supp. 985,

little doubt that the principle is as applicable to an excessive price which is unlawful because discriminatory as it is to an excessive price which is unlawful because made possible by a monopoly or by a conspiracy to monopolize or restrain trade. In either case the buyer is forced to incur an increase in his cost of doing business which, but for the unlawful conduct of the seller, he would not have had to incur, and that increase in cost represents damage to the buyer insofar as the buyer's business thereby realizes a lower profit than it would have absent the discrimination.

It is important to observe, however, that the mere fact that one buyer paid more for his goods than another does not mean that the first buyer necessarily paid more than he would have if the seller had not discriminated against him. If the seller gave a special discount on only a small portion of his business, it is unlikely that in any event he would have given a similar discount on *all* sales. Absent the discrimination the complaining buyer (along with all other buyers) would probably have paid the same price he paid during the period of discrimination, or at best a price somewhere between the price he did pay and the lowest price paid by a favored buyer.

Consequently, an "excessive price" situation must be carefully distinguished from a "discounted price" situation. A buyer pays an "excessive price" to the extent that he pays more than he would have paid in a market free of the seller's unlawful conduct. A buyer pays a "discounted price" to the extent that he pays less than he would have in a market free of the seller's unlawful conduct. The fact that a *favored* buyer receives a *discount* will not damage a non-favored buyer unless the favored buyer uses his competitive advantage (lower costs) effectively to threaten the non-favored buyer with a loss of sales. The fact that a *non-favored* buyer pays an *excessive* price, on the other hand, damages him immediately and directly by increasing his cost of purchasing the commodities he uses or resells over what that cost would otherwise be, and can also damage him indirectly to the extent that his competitive disadvantage (higher buying costs than his com-

990 (S.D. Fla. 1949), *aff'd*, 187 F.2d 919 (5th Cir. 1951). *But see* Siegfried v. Kansas City Star Co., 193 F. Supp. 427, 432 (W.D. Mo. 1961), *aff'd*, 298 F.2d 1 (8th Cir.), *cert. denied*, 369 U.S. 819 (1962); State Wholesale Grocers v. The Great Atl. & Pac. Tea Co., Civil No. 56 C 418, N.D. Ill., May 31, 1961 (the unequal expense burden in handling defendant's products, which claimant would not have had to bear if there had been no discrimination, held a direct business damage).

petitor) causes him to lose sales to his competitor or to incur other expenses to avoid such a loss of sales.

Even though an unlawfully excessive price involves a form of "damage" which is directly imposed on the buyer by the seller, the buyer may not necessarily recover the amount by which the price charged was excessive merely by showing that he was charged more than he would have been charged absent the discrimination.<sup>71</sup> The defendant seller may defeat the buyer's claim by showing that the buyer would have made no more profit even if he had not had to pay the excessive prices which the seller unlawfully charged, and hence that the buyer was not actually damaged by the excessive prices.<sup>72</sup> The requirement that a plaintiff in a treble damage action can recover only for damage actually sustained gives rise therefore to the sometimes misunderstood "passing on" defense in treble damage actions based on price discrimination or the charging of unlawfully high prices.<sup>73</sup>

The "passing on" defense arises from a recognition of the fact that in some peculiar market situations where the buyer's resale profit is not strongly dependent upon his buying cost (as distinguished from general operating cost) it is possible for a buyer to pay "excessive prices" for a commodity he resells without being any worse off financially than he would be if he had paid a lower price, and that if the buyer is no worse off he has not actually been damaged "in his business or property."<sup>74</sup> The classic

<sup>71</sup> This is in sharp contrast to the right given in an action under the Interstate Commerce Act, 49 Stat. 543 (1935), as amended, 49 U.S.C. § 8 (1958), to recover the amount of an overcharge or excessive charge (the amount by which the price charged exceeded the published rates) as such, without reference to whether the plaintiff was damaged by the overcharge. *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582-83 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 970-71 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747, 750-51 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941). See *ICC v. United States*, 289 U.S. 385, 390-91 (1933); *Southern Pac. Co. v. Darnell-Taenzer Co.*, 245 U.S. 531, 533-34 (1918) (the fact that plaintiffs were able to pass on the amount of the unreasonable charge will not prevent their recovering the overpayment from the carriers); *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 428-29 (1915); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 202-03 (1913).

<sup>72</sup> See cases cited notes 74, 75 *infra*.

<sup>73</sup> For discussion of the "passing on" defense, see generally: Clark, *supra* note 67, at 404-06; Timberlake, *supra* note 63, at 249-51; Comment, 18 U. CHI. L. REV. 130, 135-37 (1950); Comment, 70 YALE L.J. 469 (1961); Comment, 61 YALE L.J. 1010, 1023-26 (1952). There seems no reason in theory why this defense should not apply to increased costs sustained in avoiding a loss of sales equally as well as to increased buying costs.

<sup>74</sup> This is generally approached as a question of whether or not the plaintiff

example of this situation, typically involving non-discriminatory pricing, is found in the *Oil Jobbers* cases<sup>75</sup> in which the resale prices of gasoline were determined by a formula which included a fixed profit margin for distributors and where distributors of competing brands followed the price leadership of one primary brand. There the fact that the defendants raised the price of gasoline to distributors did not cause the distributors to lose any sales (for competing distributors resold at the same higher resale prices),<sup>76</sup> nor

recouped ("passed on") the amount by which the prices were excessive. Dictum in two cases suggests it may also be approached as a question of whether plaintiff would have been any better off at a lower purchase price. "Exaction of this higher . . . rate may not have injured Keogh at all; for a lower rate might not have benefited him. Every competitor was entitled to be put—and we must presume would have been put—on a parity with him. . . . Under these circumstances no court or jury could say that, if the rate had been lower, Keogh would have enjoyed the difference between the rates or that any other advantage would have accrued to him. The benefit might have gone to his customers, or conceivably, to the ultimate consumer." *Keogh v. Chicago & No. W. Ry.*, 260 U.S. 156, 165 (1922).

"[T]he only claim . . . as to damages actually suffered is . . . that if plaintiff 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. This is, of course, entirely speculative. It assumes that plaintiff could have continued to sell gasoline at the same price while paying less for it, an unlikely eventuality in view of the fact that it was in competition with other retail dealers buying from defendant who would also have to receive the benefit of a lower price from defendant and could therefore lower their retail price." *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665, 667-68 (D. Mass. 1959).

At times the "passing on" defense has apparently been viewed as involving a very mechanical test. "[T]o prove his damages the plaintiff must show (1) that the defendant illegally increased the price of plaintiff's supplies, and (2) plaintiff's selling price did not then rise enough to compensate for the rise in costs." *Clark, supra* note 67, at 406. See *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32, 47 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959); *cf. Miller Motors v. Ford Motor Co.*, 252 F.2d 441, 448 (4th Cir. 1958); *Wolfe v. National Lead Co.*, 225 F.2d 427, 433 (9th Cir. 1955).

Such a mechanical test, however, will not work in the situation where a buyer's resale price is responsive to the influence of a variety of factors in addition to buying cost and consequently does not vary in a fixed relationship to buying cost. The court in *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 829-31 (M.D. Pa.), *aff'd*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960), apparently recognized this fact in holding the defense of "passing on" was not available where the injured customer was a consumer (manufacturer) rather than a middleman. The discussion in *Minneapolis-Honeywell Regulator Co. v. FTC*, 191 F.2d 786, 791-92 (7th Cir. 1951), *cert. granted*, 342 U.S. 940 (1952), *cert. dismissed as untimely*, 344 U.S. 206 (1952) is relevant to this point, though no damage issue was before the court in that case.

<sup>75</sup> *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941).

<sup>76</sup> It has been suggested that loss might have occurred through an industry-wide decrease in volume of sales. See Comment, 18 U. CHI. L. REV. 130, 136 (1950); *cf. Clark*,

to lose any profit on sales made (for if the price to them had not been raised, their resale prices would have been set lower to give them the same margin of profit).

The *Oil Jobbers* cases, of course, presented a very unusual market situation. Normally, resale profit is primarily dependent upon the cost of buying the particular commodity involved, and it is not so likely that a buyer will be able to escape damage if he raises his resale price after paying an unlawfully excessive purchase price; this is especially true if the excessive price is discriminatory rather than uniform to all buyers as it was in the *Oil Jobbers* cases. For one thing, the buyer might well have raised his resale price even though his purchase cost had not been raised, assuming the possibility of raising the resale price without a significant loss of sales. In this circumstance the excessive purchase price which he was caused to pay reduced the profit the buyer would otherwise have made from his advanced resale prices. The amount by which the purchase price was excessive would thus remain direct damage which was not, and probably could not have been, "passed on." On the other hand, if the buyer was forced to raise his resale price in a market where he would not otherwise have raised it, he has recouped his direct loss by "passing it on," but he then is likely to suffer consequential or indirect damages resulting from a loss of sales.<sup>77</sup>

The "passing on" defense illustrates the basic fact that a private treble damage claimant may not recover damages under section 4 of the Clayton Act unless he shows that he would have been financially better off if he had been free of the defendant's unlawful conduct, *i.e.*, that he would have made profits which the defendant's conduct prevented him from making.<sup>78</sup>

*supra* note 67, at 406. This would seem doubtful and highly speculative, however, in view of the nature of the commodity and the market there involved.

<sup>77</sup> In the *Oil Jobbers* cases the "passing on" precluded both direct and indirect damage, because the distributors were no worse off either as to profit margin or as to sales volume. Where a discriminatory price is "passed on" however, the buyer is likely to suffer "indirect damage" from reduced sales volume even though he may be no worse off as to profit margin and hence sustains no "direct damage."

<sup>78</sup> It is interesting to observe that while an overcharge can be recovered under the Interstate Commerce Act without further inquiry as to damage sustained, the amount of a discriminatory rebate or discount given a shipper other than the plaintiff *cannot* be recovered as such. Recovery in the latter instance is permitted only for such damage as the plaintiff can prove he sustained as a result of the discrimination. *ICC v. United States*, 289 U.S. 385, 390-91 (1933); *Meeker v. Lehigh Valley R.R.*, 236 U.S. 412, 428-29 (1915); *Pennsylvania R.R. v. International Coal Mining Co.*, 230 U.S. 184, 202-03 (1913).

### D. *Proof of Direct Damage*

A direct loss in the form of an excessive charge exacted by the seller can be established simply by showing that the plaintiff paid more for certain commodities than he would have absent the discrimination,<sup>79</sup> and that the plaintiff's profit margin was thereby reduced (*i.e.*, that the excessive charge was not "passed on").<sup>80</sup> Such a showing establishes the existence of the loss, and the fact that the defendant-seller charged the discriminatorily excessive price conclusively establishes causation. The amount of the damage is the difference between what plaintiff did pay, and what he would have paid absent the defendant's discrimination, multiplied by the amount of plaintiff's purchases during the period of dis-

<sup>79</sup> See cases cited notes 64, 68, 69 *supra*. If a price-discrimination occurs in items which are not bought for resale but rather which represent a capital investment (as in buying machinery for a plant, or equipment for a store or a bowling alley), or which are used in manufacturing another product, the basic inquiry remains the same: Would the non-favored buyer (plaintiff) have paid less absent the discrimination? If so, he has sustained direct damage in the amount by which the price he paid exceeded the price he would have paid absent the seller's discrimination. See *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, 185 F. Supp. 826, 829-31 (M.D. Pa. 1960), *aff'd*, 281 F.2d 481 (3d Cir.), *cert. denied*, 364 U.S. 901 (1960), which held that the "passing on" defense is not available to a defendant seller where the injured buyer is a "consumer" (manufacturer) rather than a middleman; hence, where the item involved represents capital investment or is consumed in manufacturing another product, plaintiff need not prove that the excessive charge actually reduced his profit margin.

Whether or not the non-favored buyer of such an item paid more than he would have absent the seller's discrimination, he can recover the amount of such indirect damage as he may have sustained as a result of the competitive advantage given favored competitors by the discrimination.

<sup>80</sup> Where it can reasonably be inferred from the facts that the excessive charge was not or could not have been "passed on," the existence of an unlawful excessive charge will be prima facie evidence that the plaintiff buyer's profit margin was reduced. See cases cited notes 64, 68 *supra*. Where the facts suggest that the excessive charge may have been "passed on" by the plaintiff, rather than "absorbed," the plaintiff may be required to show that his retail price was not increased in an amount representing all or part of the excessive charge. See *Miller Motors v. Ford Motor Co.*, 252 F.2d 441, 448 (4th Cir. 1958); *Wolfe v. National Lead Co.*, 225 F.2d 427, 433 (9th Cir. 1955); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 582 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967, 971 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747, 750 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32, 47 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959). But see *Hanover Shoe, Inc. v. United Shoe Mach. Corp.*, *supra* note 79, at 829-31, which held that such a showing was not necessary where the plaintiff was a consumer (manufacturer) of goods bought from defendant, rather than a middleman. The inquiry, of course, is whether the plaintiff's profit margin was lower as a result of the defendant's violation, not simply whether or not the plaintiff raised his resale price. The mere fact that the plaintiff raised his resale price should not be considered as a mechanical test for "passing on" in market situations where the buyer's resale price is responsive to the influence of factors other than buying cost alone, and consequently does not

crimination<sup>81</sup> (provided none of that difference was "passed on" to consumers). It should be observed that in this instance the amount of damage is related to the amount of plaintiff's purchases and is totally unrelated to his volume of sales during the period. This is the only instance in which damage is dependent upon purchase volume rather than on sales volume. Even here, however, the amount of damage bears no necessary relationship to the amount of the discrimination, for while the non-favored buyer might have paid less in the absence of the seller's discrimination, *all* buyers in that event might have paid more than the favored buyers actually did during the period of discrimination, and such loss as the non-favored buyer did sustain may have been "passed on" in whole or in part.

It will not be possible to determine whether a price charged a non-favored buyer was excessive, and in what amount, until it has been determined what that buyer would have been charged if the seller had not discriminated in price. The determination of what the "reasonable market price" would have been absent the seller's discrimination may include consideration of such factors as: (1) the price charged by other sellers of similar goods; (2) the portion of the defendant-seller's business done at low prices compared with the portion done at high prices; (3) the defendant-seller's profit margin; (4) the defendant-seller's own competitive position (including the desirability of the defendant-seller's product and the practical availability of interchangeable competing products; (5) the extent to which favored and non-favored buyers did business in competition with each other; and (6) when available, the prices prevailing after the end of the period of violation.

vary in a fixed or constant relationship to buying cost. See note 74 *supra* and text accompanying note 77 *supra*. It has been suggested in dictum that where all buyers have paid an excessive (but non-discriminatory) price none of them necessarily have been damaged because all would have received the benefit of a lower price (assuming lawful pricing) and competition might then have forced the resale price down accordingly. *Keogh v. Chicago & No. W. Ry.*, 260 U.S. 156, 165 (1922); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665, 667-68 (D. Mass. 1959). This rationale can apply where the plaintiff paid a discriminatorily excessive price only if other competing buyers were also discriminated against by the defendant seller.

<sup>81</sup> See *Thomsen v. Cayser*, 243 U.S. 66 (1917); *Chattanooga Foundry v. Atlanta*, 203 U.S. 390 (1906); *Peto v. Howell*, 101 F.2d 353 (7th Cir. 1938); *Strauss v. Victor Talking Mach. Co.*, 297 Fed. 791 (2d Cir. 1924); *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77 (2d Cir. 1915); *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, 80 F. Supp. 888 (S.D.N.Y. 1948). See also *Flintkote Co. v. Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957).

Naturally, courts and defendants' attorneys would prefer to avoid the necessity of making such a determination, but the necessity for such determinations is not new in antitrust proceedings<sup>82</sup> and would appear inevitable within the present framework of antitrust damage law. Some of the apparent impossibilities of such a determination disappear when it is remembered that only the existence of compensable loss need be proved with certainty. If plaintiff's evidence shows he would have paid *some* price less than he did, and the defendant's evidence does not rebut that showing, the fact of loss has been established. The amount of loss then need only be estimated, though of course the evidence must provide a basis for estimating the amount of loss with reasonable accuracy.

#### E. *Damage Resulting From Price-Related Discrimination*

It should be noted that price-related discriminations can operate in the same way as ordinary price discriminations. For example, if a seller provides a favored buyer with a clerk or demonstrator, or with advertising, or if the seller gives the favored buyer an allowance to be used to finance a demonstrator or advertising, and if that favored buyer did not already have the demonstrator or was not already doing the particular advertising involved, the use of the demonstrator or the advertising represents increased promotional activity by the favored buyer. This extra promotional activity may cause non-favored competing buyers to lose sales and hence to suffer damage in the form of lost profits,<sup>83</sup> and may also force the non-favored buyer to hire a similar demonstrator or to increase his advertising in order to avoid a continuing loss of sales. If he would not have incurred that increased expense but for the influence of the seller's discrimination, the non-favored buyer has suffered damage in the form of involuntarily increased operating expenses.<sup>84</sup>

<sup>82</sup> See *Thomsen v. Cayser*, *supra* note 81; *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *Peto v. Howell*, *supra* note 81; *American Sea Green Slate Co. v. O'Halloran*, *supra* note 81, at 80; *Alden-Rochelle, Inc. v. American Soc'y of Composers, Authors & Publishers*, *supra* note 81.

<sup>83</sup> See *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949).

<sup>84</sup> It would appear that this was the situation in *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, *supra* note 83, at 153, *reversing* 82 F. Supp. 687 (S.D.N.Y. 1949). There the plaintiff alleged that the defendant furnished services of "special personnel," 82 F. Supp. at 687, and "supplied . . . assistants" to plaintiff's competitors, 178 F.2d

A price-related discrimination can also cause direct damage in the form of excessive costs. For example, if a seller gives favored buyers an allowance to be used to pay the salary of clerks already employed by the favored buyers and which the favored buyers would have employed even without the benefit of the discrimination, or an allowance to pay for advertising which the favored buyers would have done even without the benefit of the discrimination, then the seller's discrimination has lowered the operating costs of the favored buyers. If a non-favored buyer can show that he too would have received an allowance but for the discrimination, the amount of such allowance which he would have received represents damage in the form of "increased" costs, directly imposed by the seller's discrimination.<sup>85</sup> Proof of damage resulting

at 151. This would seem to indicate that these "assistants" were not simply existing employees of the competitors, but were not additions to their staffs.

<sup>85</sup> Apparently that was the situation in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945). There plaintiff took on the Elizabeth Arden cosmetics line under an oral agreement in which the defendant agreed "to designate one of the clerks in appellee's [plaintiff's] toilet-goods department as an Elizabeth Arden 'demonstrator,'" and to pay or reimburse plaintiff for one-half of the clerk's salary. *Id.* at 990. This would seem to indicate that the clerks involved were already employed by the plaintiff and by his more favored competitors (who received an allowance for a whole clerk's salary). The trial court found that absent the defendant's discrimination the plaintiff's costs would have been reduced by one-half of a clerk's salary, and hence that plaintiff was damaged in that amount. *Id.* at 995. The appellate court found direct loss in the "increased cost" of operation for plaintiff's cosmetics department, but noted that all discriminations do not necessarily cause direct damage. *Id.* at 996.

The author (Judge Johnsen) of the *Elizabeth Arden* opinion, dissenting in *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951), said at 61, that in *Elizabeth Arden* "[W]e held . . . that discrimination in favor of one dealer in a seller's products as against an immediate competitor, in granting allowances for services or facilities furnished by the dealer in marketing the seller's products, or in providing contributions of services or facilities to the dealer for such marketing, which were violative . . . of the Act, were recoverable as direct or immediate damages, to the extent of the illegal difference, *where that difference represented money which the dealer would have saved in expenses or for which he would have been reimbursed . . . , if the seller had accorded him equal treatment with his competitor. . . .* [D]amages in such cases normally will consist of the amount which would have been saved in price or expense or restored through reimbursement, if there had been equal treatment. . . . Damages in the cash amount or cash value of such illegal discriminations seems to me therefore virtually automatically to follow under the Act as between immediate competitors . . . ." (Emphasis added.)

The only error in this reasoning would appear to be the implicit assumption that absent discrimination, all dealers would have received (or should have received) an allowance representing a clerk's whole salary. The *Elizabeth Arden* opinion does not intimate whether there was any evidentiary basis for finding that the plaintiff *would* have received an allowance for a whole salary. In the *American Can* case, the error in reasoning is apparent, for there, absent the violation, the plaintiff would have paid *more*, rather than less, than he did during the period of violation. On this ground

from price-related discrimination is therefore no different from proof of damage from ordinary price discrimination.

### III. THE PROBLEM OF IMPLIED OR "AUTOMATIC" DAMAGES AND GENERAL DAMAGES

A treble damage award is clearly valid where the existence of specific types of loss has been demonstrated and the amount of each type or category of loss has been estimated in a reasonably reliable fashion. Such an award is probably best described as a "special damages" award, using the term "special damages" as it is apparently used in the cases to denote items of damage specifically proved. The question remains, however, as to what extent the fact and amount of the discrimination in a given case may in and of itself establish either the fact of loss or the amount of damages.

#### A. "Automatic" Damages

It can be argued that, except in rare situations, the plaintiff can show damage simply by proving the fact of an unlawful discrimination.<sup>86</sup> Two basic ideas are advanced in support of this proposition: (1) a buyer who is discriminated against by a seller is placed in a less advantageous competitive position as a result of the discrimination and must inevitably be injured as a result;<sup>87</sup> (2) a seller who

the majority held plaintiff had not been damaged. Judge Johnsen's "error in reasoning" in his dissent in *American Can* was not, however, inadvertent, for in the *Elizabeth Arden* opinion he had intimated that once a seller had discriminated among competing buyers, the seller would be compelled to accord the "equality" of treatment required under the statute, by an award of damages to non-favored buyers in the amount of the discrimination. It would appear that Judge Johnsen's view was rejected by the majority in the *American Can* case (the same three judges decided both *Elizabeth Arden* and *American Can*). But see *State Wholesale Grocers v. The Great Atl. & Pac. Tea Co.*, Civil No. 56 C 418, N.D. Ill., May 31, 1961, *remanded by* 258 F.2d 831 (7th Cir. 1958). There, defendants had violated § 2(d) of the Robinson-Patman Act by buying advertising in a magazine published for A&P and used by A&P as a promotional device, without making comparable advertising or promotional allowances available to other retailers competing with A&P. The trial judge, in following the *Elizabeth Arden* decision, apparently accepted Judge Johnsen's view, for he indicated that retailers who advertised during the period of violation had been damaged "at least to the extent of the payments they *ought* to have received from the defendants, for unlike A&P, they have borne the cost of their advertising without the benefit of the defendants' aid." (Emphasis added.)

<sup>86</sup> See Clark, *supra* note 67, at 394.

<sup>87</sup> See, e.g., *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38, 55 (8th Cir. 1951); Clark, *supra* note 67, at 408.

gave a benefit to one buyer in violation of the Robinson-Patman Act should be compelled to give the same benefit to others; for if non-favored buyers had been treated as well as favored buyers were, non-favored buyers would have had more money in their treasuries to use as they chose and hence they have been damaged.<sup>88</sup> A "convenient" measure of such "inevitable loss" is the amount of the concession given favored buyers or the amount by which non-favored buyers are charged more than their competitors. Thus, when the plaintiff cannot or does not prove any specific losses, the award of "automatic damages" in the amount of the discrimination may be thought to be justified.

This view, while it may appear reasonable in some situations, has much to condemn it.<sup>89</sup> Its primary weakness lies in its tendency to confuse cause and effect. Ostensibly identifying an immediate and direct economic injury in the fact of the discrimination itself, this view does not require the plaintiff to show either actual detrimental competitive effect or that absent the discrimination he would have enjoyed a greater profit margin.<sup>90</sup> But damage is by definition an effect—for our purposes the effect which unequal treatment has on a non-favored buyer. Unequal treatment is not itself an effect, but a cause.<sup>91</sup> In actuality, therefore, the view sup-

<sup>88</sup> See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), cert. denied, 326 U.S. 773 (1945); *State Wholesale Grocers v. The Great Atl. & Pac. Tea Co.*, Civil No. 56 C 418, N.D. Ill., May 31, 1961 (the unequal expense burden in handling defendant's products, which claimant would not have had to bear, held a direct business damage); Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 220 (1961).

Insofar as lack of equality may reflect a burden of expense that the complainant would not have had to bear but for the discrimination (supported by a finding that absent the discrimination complainant would have gotten the same favors that favored competitors received during the discrimination, and that complainant's resale price and volume would not have lowered), the "inequality" idea is an inarticulate reference to damage in the form of unrecouped increased expenses.

<sup>89</sup> See generally Clark, *supra* note 67, at 408-09.

<sup>90</sup> It should be noted that this view of direct damage has not been unequivocally adopted by any court and would perhaps be rejected by all courts. Some commentators, however, have interpreted judicial language to suggest this result. *E.g.*, Comment, 18 U. CHI. L. REV. 130, 137 (1950); Comment, 61 YALE L.J. 1010, 1023-24 (1952). Perhaps the confusion has been strengthened by judicial statements in cases where the issue was not actual damage to an individual business but rather the *reasonable possibility* of general injury to competition, such as: "[T]he Commission found what would appear to be obvious, that the competitive opportunities of certain merchants were injured when they had to pay respondent substantially more for their goods than their competitors had to pay." *FTC v. Morton Salt Co.*, 334 U.S. 37, 46-47 (1948).

<sup>91</sup> Even where unequal treatment actually places a greater financial burden on the non-favored buyer than he would otherwise have borne in handling the defendant's

porting an automatic damage award involves an *inference* of damage from the fact of a violation. A suspicion of damage is given the respectability of a finding of damage. In some cases this may be a legitimate inference, subject to rebuttal by the defendant, for circumstantial evidence, so familiar in antitrust actions, can be very convincing. But the possibility of a legitimate inference of fact from circumstantial evidence is a matter of proof, individual to each case, and such a mere possibility should not be elevated to the dignity of a general proposition or concept of damage. Such a "concept" of damage does not represent any independent category of damage; it is simply an inarticulate reference to every type of damage previously discussed. Moreover, insofar as "automatic damages" are thought to restore "equality," the effect of the trebling provision of section 4 of the Clayton Act is completely ignored. The former beneficiary of a discrimination, who may well have been quite innocent of any wrongdoing, would become its inadvertent victim.<sup>92</sup>

In any event, the great weight of authority indicates that the

goods, this "greater burden" is an effect (in the form of increased buying or operating costs) which requires proof. It should not be inferred simply from an inequality of treatment.

<sup>92</sup> See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 997 (8th Cir.) (dissenting opinion), *cert. denied*, 326 U.S. 773 (1945). The U.S. Supreme Court's celebrated dictum in *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743, 757 (1947), that a plaintiff "would establish its right to recover three times the discriminatory difference without proving more than the illegality of the prices," remains a bit embarrassing; but even as dictum it would not seem to have been carefully considered by the Court. The issue before the Court, whether a Robinson-Patman Act violation could be raised as a defense to an action on notes representing indebtedness for goods delivered, had a difficult history. The state trial court had denied the defense. The Florida Supreme Court reversed in a five-to-two decision, and then on rehearing, in a four-to-three decision (without opinion), held that the defense was not available on the facts in evidence. *Bruce's Juices, Inc. v. American Can Co.*, 155 Fla. 877, 22 So. 2d 461 (1945). The U.S. Supreme Court affirmed by an equally divided court without opinion, 327 U.S. 758 (1946), granted a rehearing, 327 U.S. 812 (1946), and then reaffirmed in an eight-to-one decision, 330 U.S. 743 (1947). The petitioner's argument before the Supreme Court was essentially that it had been charged an unlawfully discriminatory price over and above the fair value of cans purchased, that it had paid the fair value of the cans, that the amount remaining due on its notes represented the amount by which it had been overcharged, and hence that the notes could not be collected by legal action. 330 U.S. 743, 748, 758-59. The Court rejected this argument on the ground that petitioner was attempting to measure its injury by the amount of credit it received, rather than by the injury sustained. 330 U.S. 743, 753. In light of petitioner's argument the Court's dictum makes sense. See *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457, 459 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957). But in light of statements made by the Court at 330 U.S. 743, 746, 753, the dictum seems ill-considered nonetheless.

view favoring "automatic" damages has been rejected.<sup>93</sup> For that view runs counter to the cases requiring proof of "special damages,"<sup>94</sup> requiring that plaintiff prove with certainty<sup>95</sup> the fact that defendant's violation did cause some economic loss in his business,<sup>96</sup> and denying recovery of damages representing a windfall.<sup>97</sup> It ignores the realities of market effects and represents a serious lack of understanding of the nature of, and the difference between, direct and indirect forms of damage resulting from price discrimination. Finally, it ignores the difference between proof of violation and proof of damage,<sup>98</sup> and contradicts the cases which indicate that proof of violation does not establish damage.<sup>99</sup>

### B. General Damages

A somewhat stronger case can be made for an award where the existence and cause of damage have been shown, and the plaintiff is then permitted to measure his damage by the amount of the discrimination involved. This type of award may be conveniently

<sup>93</sup> In *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580, 583 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945), the court stated: "[I]n an action [under the Interstate Commerce Act] to recover a freight overcharge . . . the amount of damages recoverable is fixed or is at least susceptible of being made certain by mathematical calculations, and hence, they are liquidated damages. On the other hand, an action to recover treble damages under the Clayton Act is based upon tort and the amount of compensatory damages which may be recovered cannot be determined and is not fixed by statutory provisions, but the damages are unliquidated." *But see Clark, supra* note 67, at 406-11.

<sup>94</sup> See cases cited note 11 *supra*.

<sup>95</sup> See cases cited note 7 *supra*.

<sup>96</sup> See *Keogh v. Chicago No. W. Ry.*, 260 U.S. 156 (1922); *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Wolfe v. National Lead Co.*, 225 F.2d 427 (9th Cir. 1955); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir.), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959). See also cases cited note 28 *supra*.

<sup>97</sup> See cases cited note 8 *supra*.

<sup>98</sup> See *Keogh v. Chicago No. W. Ry.*, 260 U.S. 156 (1922); *Miller Motors v. Ford Motor Co.*, 252 F.2d 441 (4th Cir. 1958); *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *Clark Oil Co. v. Phillips Petroleum Co.*, 148 F.2d 580 (8th Cir.), *cert. denied*, 326 U.S. 734 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir.), *cert. denied*, 321 U.S. 792 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, 119 F.2d 747 (8th Cir.), *cert. denied*, 314 U.S. 644 (1941); *Secatore's, Inc. v. Esso Standard Oil Co.*, 171 F. Supp. 665 (D. Mass. 1959); *Banana Distribs. v. United Fruit Co.*, 162 F. Supp. 32 (S.D.N.Y. 1958), *rev'd on other grounds*, 269 F.2d 790 (2d Cir. 1959); *Momand v. Universal Film Exch.*, 72 F. Supp. 469, *aff'd*, 172 F.2d 37 (1st Cir. 1948).

<sup>99</sup> See cases cited notes 11, 29 *supra*.

—though somewhat inaccurately—termed a “general damages” award.<sup>100</sup> It can be argued that by their nature damages resulting from price discriminations are very difficult and at times impossible to prove, and that a refusal to award “general damages,” at least where the plaintiff has shown the actual existence of some damage but cannot prove the amount of damages, runs counter to the policy of the antitrust laws. It may be said that by such a refusal the private treble damage action will be rendered ineffective as an instrument of antitrust enforcement,<sup>101</sup> the policy of compensating persons injured by violations of the antitrust laws will be frustrated, and the victim rather than the wrongdoer will be required to bear the risk of the uncertainty created by the wrongdoing. It can further be argued that an injunction is remedial rather than deterrent in effect, for while it causes unlawful conduct to be discontinued it does not prevent the original initiation of that conduct, and that such penalties as may exist, other than the damage action, are not always sufficient to make unlawful conduct unprofitable. The private treble damage action, on the other hand,

<sup>100</sup> The term “general damages,” as it has been used in some price discrimination cases, is rather puzzling. Generally the term has significance with respect to the method of pleading rather than with respect to the method of proof. “General damages” usually designates damages which are commonly found to follow a specific type of wrong. Such damages need not be specifically pleaded, for defendants’ attorneys know that damages in this class will be placed in issue. On the other hand, the term “special damages” usually denotes types of damage which are unusual or uncommon, and which must be specifically pleaded to give notice to the defendant that they will be placed in issue. The pleading significance of the terms was recognized by the court in *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949). However, the term “general damages” has at times been used to imply an automatic damage recovery or to denote a measure of damages (the amount-of-discrimination formula). See, e.g., *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 703 (1945). This use of the term would appear to be both confusing and improper. First, it suggests that the amount of the discrimination in the usual case is itself damage, or is equivalent to the amount of damage. This, as we have seen, is at best a fiction, and items of general damage, while they need not be pleaded, must be proved as to amount just like items of special damage. A “damage” award which requires no proof of amount is in fact an award of punitive damages. The trebling provision of § 4 of the Clayton Act causes punitive damages to be awarded automatically once actual damages have been proved. It does not authorize an award of punitive damages in the first instance. Second, the distinction implied between “general damages” (as an automatic or semi-automatic damage award) and “special damages” (as items of loss specifically proved) is erroneous, for all ordinary business losses are general damages. See, e.g., *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, *supra* at 153.

<sup>101</sup> See Barber, *Private Enforcement of the Antitrust Laws: The Robinson-Patman Experience*, 30 GEO. WASH. L. REV. 181, 210-21 (1961), suggesting an automatic damage approach to effectuate the enforcement function of the treble damage action; the discussion is especially relevant to the “general damage” approach.

is not only remedial but deterrent in effect, for it makes violation a costly and unprofitable proposition. Consequently, if a defendant seller is permitted to escape liability for an injury shown to have been inflicted, disregard of Robinson-Patman Act provisions will not be discouraged and American business will thereby be deprived of a significant part of the protection which the Robinson-Patman Act, in conjunction with section 4 of the Clayton Act, was intended to provide.

It can also be argued that plaintiff has been hurt because he was not treated equally with favored buyers (this having been proved), that the result of the inequality in treatment was to leave plaintiff with a burden of expense which favored buyers did not have to bear, and that if plaintiff had received the same benefits that favored buyers received plaintiff would have been relieved of that unequal burden of expense. Hence, plaintiff's damage may be measured by the amount of the discrimination involved in a given case.<sup>102</sup>

While these and other arguments are appealing in some cases, the better view would clearly seem to be that they must be rejected. A measure of damages, while it need not be precisely accurate, must be one calculated to produce reasonably accurate results—it may not be arbitrary or speculative.<sup>103</sup> A plaintiff may not simply prove a violation and an injury and then recover automatic or liquidated damages measured by the amount of the discrimination. A rational basis for estimating the amount of loss sustained in each individual case must be provided.<sup>104</sup>

Consequently, the amount of the discrimination in a given case can be a valid measure of damages, but only if it is so related to the loss which it caused as to approximate the amount of that loss with reasonable accuracy. The entire preceding discussion, both as to the nature of damage and as to proof of damage, indicates that there is no necessary correlation between the amount of the discrimination and the amount of loss resulting to a non-favored buyer, for the loss is generally caused indirectly and depends on competitive effects on sales volume which are influenced by many factors in addition to buying cost.<sup>105</sup> Even where the loss is directly

<sup>102</sup> See generally Barber, *supra* note 101, at 210-21.

<sup>103</sup> See cases cited notes 33, 34 *supra*.

<sup>104</sup> See cases cited notes 11, 29, 34, 93 *supra*.

<sup>105</sup> It has been suggested that cases arising under the Interstate Commerce Act are

caused by the discrimination and is related to purchase volume (as in the case of an excessive charge) the necessary correlation may be lacking; absent discrimination the non-favored buyer (and all buyers) would perhaps seldom have received as great a benefit as favored buyers received during the period of discrimination, and such loss as the non-favored buyer did sustain may have been "passed on" in whole or in part.

If a loss actually occurred and its existence can be proved, certainly a reasonable method or combination of methods for estimating the amount of loss can be found among the variety of those available. It would seem that the difficulties private plaintiffs have had in recovering damages in private treble damage actions may be ascribed not so much to "impossible" proof requirements as to their own lack of understanding of what is involved in establishing a claim for treble damages.

The arguments in favor of a "general damages" award and those in favor of an "automatic damages" award are largely the same, and it is difficult to separate the question of "general

not relevant to actions under § 4 of the Clayton Act. See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 995-96 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945). This is true with respect to the freight overcharge cases where recovery is permitted without reference to whether the overcharges resulted in actual damage to the plaintiff. See note 71 *supra*. There seems to be no fundamental difference in principle between a cause of action under the Interstate Commerce Act and the basic cause of action under § 4 of the Clayton Act, however, where suit is for damages allegedly suffered as the result of the defendant's unlawful discrimination in pricing. In both cases the plaintiff claims that unequal treatment caused him to suffer loss, and in both cases plaintiff is permitted to recover only if he can prove that he did in fact suffer actual loss. Compare cases cited note 7, 11 *supra*, with cases cited note 78 *supra*. Consequently, principles discussed in actions under the Interstate Commerce Act for damages resulting from price discrimination, are relevant to the present discussion. See *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457, 459-60 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957).

In *ICC v. The United States*, 289 U.S. 385 (1933), Mr. Justice Cardozo wrote at 389-90: "When discrimination and that alone is the gist of the offense, the difference between one rate and another is not the measure of the damages suffered by the shipper. . . .

"Overcharge and discrimination have very different consequences, and must be kept distinct in thought. When the rate exacted of a shipper is excessive or unreasonable in and of itself, irrespective of the rate exacted of competitors, there may be recovery of the overcharge without other evidence of loss. . . . But a different measure of recovery is applicable 'where a party that has paid only the reasonable rate sues upon a discrimination because some other has paid less.' . . . Such a one is not to recover as of course a payment reasonable in amount for a service given and accepted. He is to recover the damages that he has suffered, which may be more than the preference or less . . . , but which, whether more or less, is something to be proved and not presumed. . . . *The question is not how much better off the complainant would be today if it had paid a lower rate. The question is how much worse off it is because others have paid less.*" (Emphasis added.)

damages" from that of "automatic damages."<sup>106</sup> Generally, when a plaintiff argues that he should be permitted to "measure" his damages by the amount of the discrimination involved, he is actually seeking not only to measure damages but also to prove the existence of loss simply by showing the existence of a price or price-related discrimination.<sup>107</sup> His complaint regarding the difficulty of proof of damages arises not because he cannot provide a basis for estimating the amount of damages, but because he cannot prove that he suffered any actual loss. In those cases where "general damages" have actually been awarded, the existence of actual loss appears to have been inferred from what seemed the apparent tendency of defendant's violation to injure the plaintiff. The decisions reveal no actual evidence that absent the unlawful discrimination plaintiff would have paid less for his goods than he did, that he would have had less operating expenses, or that he would have made more sales with an attendant increase in profits.<sup>108</sup> In other words, aside from the fact that a discrimination occurred, there apparently was no evidence that plaintiff would have been better off financially absent the discrimination. Damages seem to have been awarded in those cases on the ground that having given a favor to one, defendant *ought* to have given an equal favor to all. Such reasoning supports a finding of violation by defendant but not a finding of actual economic loss suffered by plaintiff. Consequently, those cases would not seem to be authority for a "general damages" award but for an "automatic damages" award.

Finally, the legislative history of the Robinson-Patman Act indicates that Congress did not intend that damages should be awarded in the absence of specific proof. Prior to the passage of the Robinson-Patman Act, section 2 of the Senate bill contained the following subsection:

"(e) For purposes of suit under section 4 of this Act, the measure of damages for any violation of this section shall,

<sup>106</sup> See note 100 *supra*.

<sup>107</sup> See, e.g., *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); *American Can Co. v. Russellville Canning Co.*, 191 F.2d 38 (8th Cir. 1951); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150 (2d Cir. 1949); *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945); *State Wholesale Grocers v. The Great Atl. & Pac. Tea Co.*, Civil No. 56 C 418, N.D. Ill., May 31, 1961.

<sup>108</sup> See *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, *supra* note 107; *State Wholesale Grocers v. The Great Atl. & Pac. Tea Co.*, *supra* note 107.

where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved in such violation; limited, however—

“(1) Under subsections (a) and (b) above, by the volume of plaintiff's business in the goods concerned, and for the period of time concerned, in such violation;

“(2) Under subsection (c) above, to the amount or share, or its pecuniary equivalent, to which plaintiff would have been entitled if the payment concerned in such violation had been made or offered on proportionally equal terms to all customers competing in distribution of such products.”<sup>109</sup>

This provision was entirely omitted from the final version of the Robinson-Patman Act, indicating at the very least a deliberate refusal by Congress to authorize such a measure of damages.<sup>110</sup> The House Conference Committee Report explained:

“Subsection (e) of the Senate bill set up a new measure of damages for violations of the law, whereas the House bill left the damages to be determined in accordance with the provisions of the existing Clayton Act. The Senate receded.”<sup>111</sup>

It might make sense, in answer to the above arguments, for Congress to authorize an automatic recovery based on the amount of the discrimination in a given case, in lieu of a treble damage recovery under section 4 of the Clayton Act. Such an automatic recovery would be in the nature of specific performance of the defendant's statutory obligation to accord equality. Congress has not authorized such a recovery, however, nor has it authorized section 4 of the Clayton Act to be used as an “equalization proceeding,” which would only multiply inequalities in second-line competition by giving the plaintiff three times the advantage formerly given a favored competitor.

It is not the function of the judiciary to rewrite antitrust damage law contrary to apparent congressional intent in an effort to provide more effective enforcement of the antitrust laws and to

<sup>109</sup> S. 3154, 74th Cong., 2d Sess. (1936).

<sup>110</sup> See Clark, *supra* note 67, at 406-07; 1957 U. ILL. L.F. 329, 331-33 (1957).

<sup>111</sup> H.R. REP. NO. 2951, 74th Cong., 2d Sess. 8 (1936). The attempt made in *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, 150 F.2d 988, 996 (8th Cir.), *cert. denied*, 326 U.S. 773 (1945), to explain away this fact of legislative history, is not convincing. See *Enterprise Indus. v. The Tex. Co.*, 240 F.2d 457, 460 (2d Cir.), *cert. denied*, 353 U.S. 965 (1957); 1957 U. ILL. L.F. 329 (1957).

“compensate” private plaintiffs who find it difficult to show that they have been hurt.<sup>112</sup> If antitrust remedies presently available are not sufficiently effective to enforce the antitrust laws Congress should provide more effective measures, but until it sees fit to do so, the judiciary should operate within the confines of those remedies presently authorized.

*Richard A. Miller, S.Ed.*

<sup>112</sup> *Id.* at 333.