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THE TREBLE DAMAGE BONANZA: NEW DOCTRINES OF DAMAGES IN PRIVATE ANTITRUST SUITS

*Homer Clark**

SECTION 7 of the Sherman Act, as amended by section 4 of the Clayton Act, gives a private right of action for treble damages to persons injured "in . . . business or property by reason of anything forbidden in the antitrust laws. . . ."¹ The lucrative possibilities of this section for plaintiffs and their attorneys have recently received sufficient notoriety to arouse curiosity concerning the legal doctrines involved.²

The purposes of the section have been said to include compensation for those affected by violations,³ prevention of violations,⁴ and assistance for the government in discovering and bringing before the courts persons who have violated the law.⁵ In practice the last purpose has hardly been achieved, since private suits generally are not brought until the government wins a suit against a violator, after which the private plaintiff can not only take advantage of section 5 of the Clayton Act,⁶ but can also rely on the successful legal theory developed in the government's case. The great complexity and expense of antitrust cases seem to prevent any pioneering in the field by private plaintiffs, the proof of which is that the landmark cases in recent times have not been treble damage suits.

It also seems that the mandatory trebling of any recovery has generated a natural reluctance in the courts to impose prodigious damages upon violators of the act, although statements are to be found in opinions to the effect that the judges do not let the compulsory trebling of the damages influence their judgments.⁷ Since the recoveries are likely to be large in Sherman Act cases, multiplying them by three is not necessary as an inducement to litigate, unlike other types of cases in which treble damages are allowed, so that this provision may

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¹ The entire section reads as follows: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." 26 Stat. L. 210 (1890), 38 Stat. L. 731 (1914), 15 U.S.C. (1946) §15.

² *TIME*, June 16, 1952, p. 88.

³ *Vold*, "Are Threefold Damages under the Anti-Trust Act Penal or Compensatory?" 28 *Kr. L.J.* 117 (1940).

⁴ See *United States v. National City Lines*, 334 U.S. 573 at 581, 68 S.Ct. 1169 (1948).

⁵ *Maltz v. Saz*, (7th Cir. 1943) 134 F. (2d) 2 at 4.

⁶ 38 Stat. L. 731 (1914), 15 U.S.C. (1946) §16.

⁷ See *Straus v. Victor Talking Machine Co.*, (2d Cir. 1924) 297 F. 791 at 812.

have hindered, rather than aided, accomplishment of the statutory purpose.

Whatever the reason, it is generally agreed that until World War II the treble damage suit was of relatively little importance, but that from then on it grew in number and significance.⁸ It now appears that the treble damage suit may have a substantial effect both in compensating the victims of violations, and in deterring violators who might be willing to risk the nominal fines of a criminal prosecution, or even an equity decree, but who would be slow to subject themselves to million-dollar treble damage recoveries. Two reasons for this which come to mind are (1) the chain reaction set off by the government's successful suits, as for example in the moving picture industry; and (2) the development by the courts of a new, realistic doctrine of damages in such cases. It is the latter of these reasons which will be discussed in this paper.

The cases, which arise upon varied facts, have for convenience in discussion, and in an effort to avoid meaningless generalization, been classified with reference to the relationships of the parties and the kind of damages being claimed.

I. *Loss of Specific, Identified Sales or Customers*

Where the plaintiff is able to prove that the effect of the defendant's illegal conduct was to deprive him of particular sales, or of the business of particular customers, the damages will include the profits which would have been made on those sales or on the sales to those customers.⁹ The plaintiff in these cases usually has little difficulty in valuing his loss, but sometimes is unable to show that the activities of the defendant

⁸ Compare the statements in note, 49 YALE L.J. 284 (1939) with those in note, 61 YALE L.J. 1010 (1952).

⁹ *Albert Pick-Barth v. Mitchell Woodbury Corp.*, (1st Cir. 1932) 57 F. (2d) 96, cert. den. 286 U.S. 552, 52 S.Ct. 503 (1931); *Frey & Son v. Welch Grape Juice Co.*, (4th Cir. 1917) 240 F. 114. For other examples of this kind of claim see *Peto v. Howell*, (7th Cir. 1938) 101 F. (2d) 353, cert. den. 313 U.S. 583, 61 S.Ct. 1103 (1941) (plaintiff alleged a corner in corn deprived him of sales); *Decorative Stone Co. v. Building Trades Council*, (D.C. N.Y. 1927) 18 F. (2d) 333, affd. (2d Cir. 1928) 23 F. (2d) 426, cert. den. 277 U.S. 594, 48 S.Ct. 530 (1927) (plaintiff claimed a boycott cost him a single large customer); *American Sea Green Slate Co. v. O'Halloran*, (2d Cir. 1915) 229 F. 77 (plaintiff claimed a price-setting combination lost him a valued customer); *Atlanta Brick Co. v. O'Neal*, (D.C. Tex. 1942) 44 F. Supp. 39 (plaintiff alleged defendant's activities caused him to lose several jobs on which plaintiff had been low bidder). In these cases, except for *American Sea Green Slate Company*, the damages issue was not squarely presented, usually for procedural reasons. In *Thomsen v. Cayser*, 243 U.S. 66, 37 S.Ct. 353 (1917), the plaintiff apparently claimed he had lost particular customers, but it is not clear whether the jury took it into account in giving damages. See 243 U.S. 66 at 89, 37 S.Ct. 353 (1917).

caused the loss. In *McWhirter v. Monroe Calculating Machine Co.*,¹⁰ for example, the plaintiff was a local district manager for the Marchant Calculating Machine Company in Kansas City, selling calculating machines on commissions. He proved a secret arrangement between the defendant, a seller of competing machines, and others, by which secret discounts were given to purchasers of defendant's machines. Although it held that this violated section 3 of the Robinson-Patman Act,¹¹ the court said that the plaintiff had failed to prove that the sales he lost had been lost because of the discount. The plaintiff had shown that about forty sales were made by the defendant under discount, after the plaintiff had opened negotiations with the customers, and in some cases had delivered his own machines to the customers for demonstrations. The court was persuaded by the testimony of a large number of the buyers that they would not have bought the plaintiff's machines, regardless of the discount, although several of them admitted that other things being equal, the price would be a matter for serious considera-

¹⁰ (D.C. Mo. 1948) 76 F. Supp. 456. Apparently plaintiff in his complaint asked for the amount by which his commissions had declined, but in proof limited himself to "every sale where he was in competition with defendant and a discount was allowed." 76 F. Supp. 456 at 462. As the facts appear, it is hard to see how he could have made any other claim, since the defendant gave the illegal discount on only forty machines, and that could certainly not have affected plaintiff's commissions other than those attributable to these particular sales.

This case is unusual in that the plaintiff was an employee of the corporation primarily damaged by the defendant's illegal acts. His injury was the derivative one of a reduction in his selling commissions by reason of a reduction in the business of his employer. The court held that he was entitled to sue with little discussion of the form of the injury, although other kinds of derivative injury are held not to be within the area of rights protected by the antitrust acts, such as losses incurred by stockholders [*United Copper Securities Co. v. Amalgamated Copper Co.*, 244 U.S. 261, 37 S.Ct. 509 (1917)]; or losses incurred by creditors or officers of the corporation [*Westmoreland v. Johns-Manville Corp.*, (D.C. N.Y. 1939) 30 F. Supp. 389, adhered to on reargument, 32 F. Supp. 731, affd. (2d Cir. 1940) 113 F. (2d) 114]. A commission salesman of fire fighting equipment whose complaint alleged that his business was harmed by the defendant's combination prevailed against a motion to dismiss in *Roseland v. Phister*, (7th Cir. 1942) 125 F. (2d) 417. Another complaint was held good on a motion to dismiss in *Vines v. General Outdoor Advertising Co.*, (2d Cir. 1948) 171 F. (2d) 487, where the plaintiff, also a commission salesman, alleged that his employer withdrew a valuable account from him pursuant to an illegal agreement between the employer and another firm. It seems that an ordinary salesman working on a salary would not be able to recover even though he could show that the antitrust violations had cost him his job, though it is hard to find any convincing distinction between the two kinds of employees. If the *Westmoreland* case turns on the proof of injury, then the distinction is understandable, but it purports to say that stockholders, creditors and employees are entirely outside the range of interests protected. *Harrison v. Paramount Pictures*, (D.C. Pa. 1953) 115 F. Supp. 312, excludes from recovery against a distributor the owner of a theater who rented it to an exhibitor under a percentage lease. The court held that the owner's injury was too remote, by which it seemed to mean that his chances for increased rent, even if the theater's clearance and run improved, were doubtful. The case further illustrates the judicial reluctance to recognize derivative injury in this field.

¹¹ 49 Stat. L. 1528 (1936), 15 U.S.C. (1946) §13(a).

tion. The defendant's evidence to the effect that its sales grew faster than those of the plaintiff's, even disregarding those made by means of the discount, was also treated as significant by the court, which made the familiar distinction between the fact of damage and its amount. This distinction is meaningful here only because the evidence available to prove the fact of damage, which is to say causation, differs from that available to prove its amount. The plaintiff would offer, as evidence that the defendant's violation caused the loss, the facts as to difference in price, equivalence of the two machines and the motives of buyers in making a choice. On the issue of amount he would merely show what his commissions on the lost sales would have been. With evidence of this kind before it, the court may say that causation was proved, but amount was not, though that is not likely, since the causation issue is the one hardest to prove. Yet even if the court should say this, there seems to be no reason why a more liberal standard of proof should be applied to evidence of one kind than another. In fact in most cases this distinction is purely verbal, although the courts seem to find in it a solace from the pain of deciding hard cases.

The interesting question raised by the *McWhirter* case is whether, if the defendant had not been able to induce the customers to give evidence of their motives, the court would have held that the plaintiff had adequately proved that his loss of these sales was caused by the defendant's illegal discounts. It is at least arguable that where the plaintiff rests his claim on specific sales, he should be held to a stricter standard of proof than where he merely claims a general loss of profits, and that if he merely proves (a) the discounts and (b) that the customers bought from the defendant instead of the plaintiff, his evidence does not clearly enough rule out the possibility that they may have been influenced as much by the quality of the machines or other considerations as by the price. This merely amounts to the argument that where the case admits of convincing proof, the plaintiff should lose if he fails to produce evidence which will exclude alternative explanations of his loss. I believe this is what the court means by saying that the fact of damages must be proved without recourse to speculation. If this is true, then the cases dealing with the recovery of profits generally are not reliable authorities when the plaintiff is claiming a small number of identifiable losses on specific sales, nor are the stricter requirements of cases like *McWhirter* applicable to suits for profits generally.

II. *Lost Profits as a Source of Damages*

By far the most common claim made by plaintiffs in treble damage actions is that the illegal activities of the defendants prevented them from profiting as much in their business as they would have in the absence of those illegal activities. They do not point to specific transactions as a source of losses, but argue that the profits in general were reduced. It is of course often stated hornbook damages law that damages must be proved with certainty, and lost profits are frequently held not to be recoverable because the necessary certainty is not proved.¹² A noted authority has pointed out that the use of "certainty" is misleading here, the cases really requiring only that the damages be shown with "reasonable certainty" or "probability."¹³ Like many other legal rules, this one is very easily stated, but as Professor McCormick emphasizes, it is capable of infinite variation in its use in individual cases.¹⁴ In fact, as I believe a close examination of the antitrust cases will show, the doctrine has in this field been entirely transformed by a process of gradual adaptation to new conditions, and although it is still given by courts in their opinions as the reason for results reached, it by no means describes the operations of proof which are now approved.

The early attitude of the federal courts on this issue, adopting the conventional rule of damages, is shown by *Central Coal & Coke Co. v. Hartman*,¹⁵ which is still relied on by defendants to show that expected profits are not recoverable.¹⁶ In holding that a verdict for the plaintiff was unsupported by the evidence, the court in that case emphasized two points: (1) The plaintiff failed to produce the best available evidence of his profits, such as his books of account, copies of contracts, journals or invoices. (2) The estimates which he did make were proved to be erroneous. The case could therefore be considered as holding merely that the evidence offered was insufficient in view of what could have been offered, but the language of the court seems to mean that under no circumstances could the proof given support a verdict for damages.¹⁷ In that, and in much of its general discussion, the decision

¹² MCCORMICK, DAMAGES 97-126 (1935); Daniel, "Enforcement of the Sherman Act by Actions for Treble Damages," 34 VA. L. REV. 901 at 903-907 (1948).

¹³ MCCORMICK, DAMAGES 100 (1935). See *Central Coal & Coke Co. v. Hartman*, (8th Cir. 1901) 111 F. 96 at 98.

¹⁴ MCCORMICK, DAMAGES 124 (1935).

¹⁵ (8th Cir. 1901) 111 F. 96.

¹⁶ Brief for Respondent-Defendant, pp. 40, 41, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946).

¹⁷ 111 F. 96 at 102, 103. Donovan and Irvine, "Proof of Damages under the Anti-Trust Law," 99 UNIV. PA. L. REV. 511 at 516, n. 27 (1940), cites this case as holding that the plaintiff must submit the best evidence available to him.

typifies the traditional method of handling this problem, stating that the general rule is that profits are not recoverable, with the exception that "the loss of profits from the destruction or interruption of an established business may be recovered where the plaintiff makes it reasonably certain by competent proof what the amount of his loss actually was."¹⁸ The plaintiff here did give some evidence that he had lost customers, had been unable to get a supply of coal, had suffered a decline in volume of business and had received less profits than previously, and if his testimony was believed, as it should be for purposes of the appeal, the rejection of it by the court must have been on the ground of a relatively strict application of the conventional rule of damages, that is, that this evidence was not reasonably certain, in the usual sense of that phrase. It is interesting to note that the court did not mention the fact that plaintiff was attempting to compare his profits before 1897, when he himself was enjoying the benefits of the illegal combination, with the years after that date, when he claimed the combination was oppressing him. Several cases have denied relief for this reason, arguing that the prior period cannot be used as a yardstick for measuring profits when the plaintiff's profits during that time were magnified by his membership in the combine,¹⁹ in two of which the court seems to have been persuaded that the plaintiff was *in pari delicto*, in addition to having failed to prove his damages.²⁰ In a third case, however, the court squarely held that the plaintiff's lost profits could not be "ascertained from profits which he had earned under a system whose sole purpose was to maintain prices, restrict competition and create monopoly."²¹ This holding clearly made it impossible for the plaintiff to recover any profits, by ruling out in advance the only evidence available to him.

Another case, *Baush Machine Tool Co. v. Aluminum Company of America*,²² got the same result, under more dramatic circumstances, for precisely the opposite reason. The plaintiff in that case was a manu-

¹⁸ 111 F. 96 at 98.

¹⁹ *First National Pictures, Inc. v. Robison*, (9th Cir. 1934) 72 F. (2d) 37, cert. den. 293 U.S. 609, 55 S.Ct. 125 (1934), rehearing den. 293 U.S. 631, 55 S.Ct. 141 (1934); *Victor Talking Machine Co. v. Kemeny*, (3d Cir. 1921) 271 F. 810; *Eastman Kodak Co. v. Blackmore*, (2d Cir. 1921) 277 F. 694.

²⁰ *First National Pictures v. Robison and Eastman Kodak Co. v. Blackmore*, supra note 19.

²¹ *Victor Talking Machine Co. v. Kemeny*, (3d Cir. 1921) 271 F. 810 at 819.

²² (2d Cir. 1935) 79 F. (2d) 217. The case was tried twice. The first trial resulted in a judgment for the defendant, which was reversed by the circuit court of appeals for improper exclusion of evidence. *Baush Machine Tool Co. v. Aluminum Co. of America*, (2d Cir. 1934) 72 F. (2d) 236, cert. den. 293 U.S. 589, 55 S.Ct. 104 (1934). The second trial gave the plaintiff a jury verdict for \$956,300, which it lost as a result of the decision discussed in the text, because part of the circuit court opinion on the first appeal was read in the hearing of the jury. The case was finally settled. See note, 37 Col. L. Rev. 269 (1937).

facturer of aluminum products from aluminum ingot, who claimed that the defendant, the sole domestic producer of ingot, had monopolized interstate commerce in virgin aluminum; that it had combined with foreign producers to fix American prices; and that it maintained, through its subsidiaries, a "price squeeze" on independent fabricators, by keeping the price of virgin aluminum high and the price of manufactured products low, so that independents who had to buy from defendant could not make enough to meet their costs of manufacture. Some of these claims were vindicated by the later case against Alcoa.²³ In attempting to prove that it lost profits, the plaintiff's president was allowed by the trial court to state his own estimate of what those losses had been. The circuit court of appeals held that this was not admissible because the plaintiff's business had never shown a profit from the time of its inception in 1919 until the suit was brought in 1931, so that the president's testimony was "nothing but a guess based on conditions contrary to fact."²⁴ Similarly, when the plaintiff put an expert consulting engineer on the stand, and asked him his opinion of the value of the plant in 1925, on the hypothesis that there was a reasonable prospect of profitable operation, the court held the answer inadmissible because this was an impossible hypothesis, the plaintiff never having operated at a profit.

The result was that if the plaintiff had been prevented from making a profit by the defendant, the *Baush* case said his evidence of damages was inadmissible, while if his past profits could have been inflated by membership in defendant's combination, the *Kemeny* case²⁵ and others like it said that the evidence was not sufficient to support a verdict. No matter what effect the violation had on him, the plaintiff lost. A neater device for protecting violators of the antitrust laws from treble damage recoveries could hardly be invented. It is therefore hardly an exaggeration to say, with Judge Manton's dissent,²⁶ that restraint of trade had only to be effective to be immune from private recovery.

There were other treble damage cases in the lower courts before 1945, most of them holding that damages were not proved with the requisite "certainty,"²⁷ some approving plaintiffs' verdicts,²⁸ but all

²³ *United States v. Aluminum Co. of America*, (2d Cir. 1945) 148 F. (2d) 416.

²⁴ (2d Cir. 1935) 79 F. (2d) 217 at 227.

²⁵ See note 21 *supra*.

²⁶ (2d Cir. 1935) 79 F. (2d) 217 at 231.

²⁷ *Alexander Milburn Co. v. Union Carbide & Carbon Corp.*, (4th Cir. 1926) 15 F. (2d) 678, cert. den. 273 U.S. 757, 47 S.Ct. 459 (1926) (directed verdict for defendants affirmed, partly because of failure to prove damages); *Hart v. B. F. Keith Vaudeville Exchange*, (2d Cir. 1926) 12 F. (2d) 341, cert. den. 273 U.S. 703, 47 S.Ct. 97 (1926) (judgment for defendant affirmed partly on the ground that plaintiff did not prove the

purporting to accept the traditional dogmas of damages law. Some of the cases which did uphold awards of damages entirely ignored the fact that the plaintiffs' prior earning histories could have been affected by the defendants' restraints, and to that extent evaded the *Baush* dilemma.²⁹

Aside from an early case which in a dictum stated the usual rule,³⁰ the Supreme Court first dealt with the problem of proof of damages in antitrust cases when it decided *Eastman Kodak Co. v. Southern Photo Materials Co.*³¹ The plaintiff in that case was a dealer in photographic equipment and supplies in Atlanta, selling throughout the South. Before 1910 it bought supplies from the defendant, for resale to professional photographers. In that year the defendant bought out other dealers in Atlanta, and when it was unable to buy out the plaintiff, refused to sell to the plaintiff any longer at dealers' discounts. All of

alleged combination caused his loss); *Jack v. Armour & Co.*, (8th Cir. 1923) 291 F. 741 (motion to strike petition granted for failure to allege that the injury was due to the defendant's acts); *Victor Talking Machine Co. v. Kemeny*, (3d Cir. 1921) 271 F. 810 (jury verdict and judgment for plaintiff reversed as to recovery of lost profits because plaintiff failed to show what he would have made in a free market); *Eastman Kodak Co. v. Blackmore*, (2d Cir. 1921) 277 F. 694 (jury verdict and judgment for plaintiff reversed, with a dictum that plaintiff failed to prove damages with sufficient certainty); *American Sea Green Slate Co. v. O'Halloran*, (2d Cir. 1915) 229 F. 77 (judgment for plaintiff reversed on the ground that the damages were not proved); *Locker v. American Tobacco Co.*, (2d Cir. 1914) 218 F. 447 (judgment for defendant affirmed, partly for failure of proof on damages); *Loder v. Jayne*, (D.C. Pa. 1906) 142 F. 1010 (judgment for plaintiff affirmed on condition he remit the amount given him for loss of profits, since he failed to prove he had lost any profits).

Many of the earlier cases are discussed in the leading article on this subject, Donovan and Irvine, "Proof of Damages under the Anti-Trust Law," 88 *UNIV. PA. L. REV.* 511 (1940). See also, notes, 64 *HARV. L. REV.* 317 (1950); 41 *ILL. L. REV.* 462 (1946); 35 *COL. L. REV.* 335 (1935).

²⁸ *White Bear Theatre Corp. v. State Theatre Corp.*, (8th Cir. 1942) 129 F. (2d) 600 (verdict and judgment for plaintiff affirmed where there was evidence of the reduced value of plaintiff's theater); *Connecticut Importing Co. v. Continental Distilling Corp.*, (2d Cir. 1942) 129 F. (2d) 651 (verdict and judgment for plaintiff affirmed where past profits had not been affected by the defendant's activities); *Connecticut Importing Co. v. Frankfort Distilleries*, (2d Cir. 1939) 101 F. (2d) 79 (verdict and judgment for plaintiff affirmed on evidence similar to that in the Continental case); *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, (1st Cir. 1932) 57 F. (2d) 96, cert. den. 286 U.S. 552, 52 S.Ct. 503 (1932) (verdict and judgment for plaintiff upheld on estimates of plaintiff's employee); *William H. Rankin Co. v. Associated Bill Posters of the U.S.*, (2d Cir. 1930) 42 F. (2d) 152, cert. den. 282 U.S. 864, 51 S.Ct. 37 (1930) (estimates of what profits would have been earned supported a plaintiff's verdict); *American Can Co. v. Ladoga Canning Co.*, (7th Cir. 1930) 44 F. (2d) 763 (verdict and judgment for plaintiff affirmed, damages being based on a period of sales in a free market, and on a comparison of sales with those of others); *Frey & Son v. Welch Grape Juice Co.*, (4th Cir. 1917) 240 F. 114 (judgment for defendant reversed, damages could be based on plaintiff's estimate of future profits).

²⁹ See, e.g., *William H. Rankin Co. v. Associated Bill Posters of the U.S.*, (2d Cir. 1930) 42 F. (2d) 152, cert. den. 282 U.S. 864, 51 S.Ct. 37 (1930).

³⁰ *Keogh v. Chicago & Northwestern Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47 (1922).

³¹ 273 U.S. 359, 47 S.Ct. 400 (1927).

this was done, as the jury found and the Supreme Court held, as a result of a combination to monopolize interstate trade in photographic materials. The question whether there was competent proof of damages was one of those raised by the petition for certiorari.

The plaintiff's evidence was to the effect that from 1901 on it handled the defendant's goods, which it sold to photographers direct, and not through retailers;³² that it had sold varying but increasing amounts of these goods at a gross profit of from 15 percent to 25 percent of selling price;³³ that in 1910 plaintiff took on the line of another manufacturer, but that it could have continued to sell defendant's products at a cost for handling of 5 percent;³⁴ and that after 1910 plaintiff was able to supply only 25 percent to 50 percent of the materials needed by professional photographers.³⁵ The defendant's evidence showed that before 1910 the plaintiff had sold at prices fixed by the defendant³⁶ and that for the years before 1910 the plaintiff had shown a net loss on its total business, while it had a net gain in 1910 and 1911.³⁷ Apparently the plaintiff never was able to present sufficient accounting evidence to show what, if any, net profit was attributable to the defendant's line of goods.

Thus the defendant was able to argue (1) that the profits on these goods before 1910 were never proved, (2) even if they were proved, they were due to the illegal price-fixing system of the defendant,³⁸ and (3) there was nothing to indicate that there would have been any profits after 1910 under any circumstances, or at least any more profits than the plaintiff in fact earned. This latter argument is of course the one which seemed to have persuaded the court in the *Baush* case to say that the plaintiff could not offer in evidence an estimate of future profits. Yet the Supreme Court here held that the jury verdict for the plaintiff could stand, even without any estimate of future profits. The Supreme Court seemed to accept the plaintiff's argument that it need not show the amount of net profits from sales of defendant's products, since it remained in business anyhow, and the increase in costs caused by carrying defendant's line was only 5 percent. If that is accepted, then the case is not hard, and would fit well enough into accepted

³² Transcript of Record, p. 150, *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400 (1927).

³³ *Id.*, pp. 184-189, 214-215.

³⁴ *Id.*, pp. 261, 191, 192.

³⁵ *Id.*, p. 301.

³⁶ *Id.*, p. 323.

³⁷ *Id.*, pp. 236, 237, 239, 302, 313.

³⁸ *Id.*, p. 550 gives the decree in a government equity suit against Eastman, enjoining the use of resale price maintenance terms in contracts.

doctrines of damages law, for the plaintiff would have proved the profits of an established business and that those profits were wholly cut off by defendant's illegal acts. The defense that plaintiff's profit was the consequence of resale price maintenance the Supreme Court rejected by a reference to plaintiff's evidence showing its pre-1910 profits were no higher than those of manufacturers not parties to the Eastman monopoly, although the evidence was that as soon as the price restrictions were lifted, prices were cut.³⁹ The Court seemed to think that the plaintiff could have earned the same profits in a lawfully competitive market. The Court finally fell back on the often-used remark that "a defendant whose wrongful conduct has rendered difficult the ascertainment of the precise damages suffered by the plaintiff, is not entitled to complain that they cannot be measured with the same exactness and precision as would otherwise be possible,"⁴⁰ which of course cannot mean what it says. If it did, there would never be any problem in these cases.

The *Story Parchment*⁴¹ case was decided by the Supreme Court only four years after the *Eastman* case, with an opinion by Justice Sutherland. The plaintiff and defendant were in the relation of competitors, rather than that of buyer and seller, as in the *Eastman* case, in the business of making and selling vegetable parchment, a paper chemically treated for use as a protective wrapper for foodstuffs. The plaintiff went into this business in November 1927, at a time when there were only three other firms in it, the two defendants and one other corporation which could not be served. The complaint alleged, and the evidence tended to show, that the defendants, together with the other parchment manufacturer, had, before the plaintiff entered the field, combined to restrict production, fix prices, and had enjoyed a substantial monopoly, which they sought to preserve against the plaintiff's competition by conspiring to cut prices below cost of production. In June 1928 the plaintiff had to go out of business, after only eight months of existence. In the district court the jury returned a verdict for the plaintiff for \$65,000, finding, in the alternative, for the defendant if as a matter of law the plaintiff should not be entitled to a verdict. The judgment entered on this verdict for treble the damages and attorney fees was reversed by the Court of Appeals for the First Circuit, on the ground that the evidence failed to support the

³⁹ *Id.*, p. 323.

⁴⁰ 273 U.S. 359 at 379, 47 S.Ct. 400 (1927).

⁴¹ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931). Noted in 45 HARV. L. REV. 193 (1931) and 39 YALE L.J. 1035 (1930).

finding of damages to the plaintiff. This court agreed that the finding of a conspiracy was supported by the evidence. The Supreme Court unanimously reversed, and affirmed the judgment of the district court for the plaintiff.

The damages claimed here were of two classes: (1) the loss of revenue which resulted from the price-cutting, meaning the difference between the actual prices and "reasonable" prices on the sales made by the plaintiff, which amounted to about \$20,000;⁴² (2) the depreciation in the value of plaintiff's plant and equipment which occurred when the plaintiff was forced to close down in June 1928.

The first claim of damages did not purport to ask for lost profits,⁴³ as such, although the effect was the same. As phrased, it appeared to be somewhat more definite than lost profits, since it made no claim that the plaintiff would have sold more in volume, but only that the prices would have been higher. There is a basic inconsistency in this claim, because the complaint alleged, and the plaintiff argued, that the conspiracy had been in existence before the plaintiff entered the business, and that it had maintained uniform prices,⁴⁴ whereas at the trial the plaintiff gave evidence to show that the prices so artificially maintained were "reasonable."⁴⁵ There was evidence that prices, after the price war began, went below the point of profit-making, and even below the cost of production,⁴⁶ although the business of both defendants continued to show net profits throughout the period.⁴⁷ Apparently the plaintiff's business never did show a profit. The circuit court of appeals, Judge Anderson dissenting, refused to allow this claim of damage because as it said, there was a "moral certainty that, according to Nature's first law, each of the three old companies, if no combination had existed, in order to hold their trade would at least have met every reduction in price made by the plaintiff to gain trade. . . ."⁴⁸ The Supreme Court got around this difficulty by saying in the first place that the fact of damage was certain, and that only the amount was uncertain. In the second place, it said that where the tort is of such a kind as to preclude

⁴² Transcript of Record, p. 600, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931).

⁴³ *Id.*, p. 9.

⁴⁴ *Id.*, p. 8.

⁴⁵ *Id.*, pp. 471, 508.

⁴⁶ *Id.*, p. 235.

⁴⁷ Brief for Respondents, p. 45, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931).

⁴⁸ (1st Cir. 1930) 37 F. (2d) 537 at 541.

ascertainment of damages with certainty, it would pervert principles of justice to deny all relief.⁴⁹

In support of its first point the Supreme Court cited the rather ancient New York case of *Taylor v. Bradley*,⁵⁰ involving the breach of a contract to lease a farm, in which the plaintiff claimed the benefits which would have accrued to him from the lease. Aside from the obvious objections to such a case as authority in Sherman Act litigation, its language is misleading when applied to the facts of the *Story* case. The fact-amount distinction is a procedural one which is valid only where the legal injury is proved by one set of facts and the amount of damages by another. In *Taylor v. Bradley* proof of a breach of the contract established the legal injury, after which entirely different evidence was relevant to the value of what the plaintiff had lost. This is the usual order of proof in contract and most tort actions, such as *Linen Thread Co. v. Shaw*,⁵¹ also cited in the *Story* case, in which a seine broke, causing the plaintiff to lose a catch of fish already in the net. The loss of the fish was the fact of damage, proved by evidence that the fish were in the net and were lost through the defendant's fault. The amount of damage turned on evidence on the number of fish in the net and their value. In this case again the technique of proof involved two distinct and separable stages.

The treble damage suit for violation of the antitrust laws is quite different. When the plaintiff complains that defendants' illegal acts caused him to lose business, his evidence of the injury is not separate from evidence of the injury's extent. The same testimony proves both, and consists in statements about what plaintiff earned in the past, or about what a comparable business earned, or in estimates by experts of what plaintiff would have earned in the absence of the illegality. On this state of the evidence, if he is held to have proved with sufficient probability that he would have profited but for the defendants' tort, he has proved with equal probability the amount of that profit. At this point, in other words, the issues of liability and damages become one

⁴⁹ 282 U.S. 555 at 562, 563, 51 S.Ct. 248 (1931). A recent application of this method of computing damages is found in *American Cooperative Serum Assn. v. Anchor Serum Co.*, (7th Cir. 1946) 153 F. (2d) 907. In that case the plaintiff sued for treble damages for violation of the Clayton and Robinson-Patman Acts, giving evidence to show that the defendant had sold hog cholera serum at discriminatory prices, thereby forcing the plaintiff to cut its own prices from seventy-five cents to sixty-five cents. The court held that the plaintiff could recover the difference in price on its sales in areas competitive with the defendant during the period in which the price cuts had lasted, although it did not cite the *Story* case.

⁵⁰ 39 N.Y. 129, 4 Abb. Ct. of App. Rep. 363, 366, 367 (1868). The language quoted by Justice Sutherland appears only in 4 Abbott.

⁵¹ (1st Cir. 1925) 9 F. (2d) 17.

issue which cannot be split.⁵² Thus it makes no sense to say that plaintiff proved the fact of damage and not the amount: if he proved one, he proved the other.

One might argue here that even if this distinction is fictitious, it serves the useful purpose of justifying the award of damages in meritorious cases. The answer is that the fiction can just as readily be made to justify the opposite result, by a slight change in its terms. Instead of saying that the fact of damage is shown with certainty, though not its amount, the court could as well say that the plaintiff failed to prove both the fact and the amount of injury and therefore could not recover.⁵³ The result of discussing the subjective requirement of "certainty" in terms of a fictitious distinction can only be confusion.

The reliance in the *Story* opinion upon the related cliché that where the tort is of such a kind as to preclude ascertainment of damages with certainty, the plaintiff is excused from the usual burden of proving his loss is also objectionable. This is a question-begging device. The question in these cases is whether the defendants' activities caused the loss, or whether some other factor caused it, such as the plaintiff's inefficiency, his lack of capital, or business conditions generally. It does not help in answering that question to assume that the defendants' own wrong has led to the loss, and then to say for that reason the plaintiff need not give convincing proof of that fact. If the defendants caused the loss, it is superfluous to say that the plaintiff need not prove it, as he has already proved it. If defendant did not cause the loss, he should not have to pay damages, and the court cannot say that defendants' wrong made proof impossible.

The second element of damages in the *Story* case, the depreciation in the value of the plant, was based on plaintiff's evidence that the plant had cost about \$235,000,⁵⁴ that it produced parchment of high quality,⁵⁵ that the machinery was larger and more efficient than that

⁵² Mr. Thomas C. McConnell, who represented the plaintiffs in the *Bigelow* and *Milwaukee Towne* cases, contends that as a result of the *Bigelow* case "the measure of proof for the fact of damage is identical with the measure of proof of the amount," and that "either may be sustained upon a showing of any substantial evidence in the record in support thereof." McConnell, "The Treble Damage Action," (1950) *UNIV. OF ILL. LAW FORUM*, 659 at 668. For a discussion of the conventional distinction between fact and amount of damage, see note, 78 *A.L.R.* 858 (1932). For a discussion agreeing with the argument of the text, see note, 64 *HARV. L. REV.* 317 at 318 (1950).

⁵³ Justice Frankfurter does exactly this in his dissent in the *Bigelow* case, *Bigelow v. RKO Radio Pictures*, 327 *U.S.* 251 at 267 (1946), distinguishing the *Story* case on the ground that the plaintiff there did prove the fact of damage, while in *Bigelow* he did not.

⁵⁴ Transcript of Record, pp. 562, 563, *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 *U.S.* 555, 51 *S.Ct.* 248 (1931).

⁵⁵ *Id.*, p. 591.

of the defendants,⁵⁶ and that it was worth, in June 1928, only \$75,000.⁵⁷ The latter figure was given as an estimate of value by the plaintiff's treasurer and assistant secretary, who had no qualification, other than his position, for making such a judgment. Since the damages for lost profits, as computed by the plaintiff, could not exceed about \$20,000, and the jury brought in a verdict of \$65,000, it is clear that part of the verdict at least was based upon the depreciation in the value of the plant. The defendants' argument, with which the circuit court of appeals agreed, was that there was no evidence of what the plant would have been worth in June 1928 if the defendants had not combined, so that no one could say to what extent depreciation was caused by the combination. Defendants also argued that the plaintiff would have gone out of business anyway for lack of capital, since its assets had shrunk more than \$100,000 in eight months of operation.⁵⁸ The Supreme Court's solution to this problem was to say that it was a matter for the jury to decide, and their findings were supported by the evidence.⁵⁹ The Court said that here again the fact of damage was not disputable, the amount alone being in doubt, but this is misleading, since the defendant was arguing that the depreciation, if there was any, was not caused by the combination, but would have occurred at all events.

If *Story* is critically examined, its holding, though obscured by the pseudo-distinction between fact and amount of damage, and by the Court's strong moral feelings against letting a defendant excuse his

⁵⁶ *Id.*, pp. 591, 592.

⁵⁷ *Id.*, p. 564. Compare the *Baush* case, *supra* note 28, which refused to allow an estimate of the value of plaintiff's plant at the beginning of the damage period because no profits had ever been made. That ruling is not affected by the *Story* decision permitting such an estimate as of the date plaintiff failed, where all operative facts had already occurred.

⁵⁸ *Paterson Parchment Paper Co. v. Story Parchment Co.*, (1st Cir. 1930) 37 F. (2d) 537 at 541.

⁵⁹ On this issue the *Story* case is followed by *White Bear Theatre Corp. v. State Theatre Corp.*, (8th Cir. 1942) 129 F. (2d) 600, in which the plaintiff asserted that the defendant had conspired to monopolize the exhibition of motion pictures in a small Minnesota town by renting more films than he could show, in order to prevent the plaintiff from getting them. The evidence of damage, which the court of appeals held would have supported a verdict, consisted of testimony that the plaintiff's theatre building could only be used for the showing of motion pictures, and that the value of the building and equipment had been cut in half as a result of the broker's activities, the witness being a Minneapolis real estate broker who had loaned money on this and other theaters in the area. Transcript of Record, pp. 64-68, *White Bear Theatre Corp. v. State Theatre Corp.*, (8th Cir. 1942) 129 F. (2d) 600. Here, as in *Story*, the court had little hesitation in holding that such evidence was competent, and that it would support a verdict, although of course the major cause of depreciation in the value of the property was the fact that it could not be profitably used for the purpose for which it was designed, so that in effect this evidence of value is evidence of loss of profits one step removed. For some reason, however, such evidence appears more reliable to the courts than direct evidence that profits decline as a result of the conspiracy.

misconduct with the argument that the plaintiff could not have succeeded in business anyway,⁶⁰ is seen to accomplish three significant changes in the established rules of damages. (1) Most important, the case allowed a plaintiff to recover who was not well established in business, had no record of earnings to serve as a comparison, and who in fact could hardly be said to have gotten a foothold in business at all. It would not be a long step from this case to allow recovery for exclusion from business. The strength of the holding on this point is slightly weakened by the fact that the plaintiff's theory called for recovery of a difference in price, rather than of profits as such. (2) The case accepted as a yardstick for measuring "reasonable" price a price level which was reached when the industry was in the grip of a strong combination in restraint of trade. (3) The Court refused to deny relief merely because the price cuts might have resulted from the independent action of the defendants, even if there had been no combination. The defendants strongly argued that the damages were speculative for that reason. Present economic theory of the operation of an oligopolistic market seems to predict relatively stable prices in such a market,⁶¹ so that on the probabilities of the situation the Court may have been correct.

The latest and most important of the Supreme Court trilogy on antitrust damages is the *Bigelow* case,⁶² which made the later *Paramount* holding⁶³ available to private plaintiffs in the movie industry. The plaintiffs in the case were the owners of the Jackson Park movie theater, which was located on Chicago's South Side. They had acquired the theater in 1936. The defendants were the large national distributors of movies, RKO Radio Pictures, Loew's, Twentieth Century-Fox, Paramount, Warner Brothers and Vitagraph, a subsidiary of Warner. Two Chicago exhibitors were also named as defendants, Balaban & Katz Corporation, a subsidiary of Paramount, and Warner Brothers Circuit Management Corporation, a subsidiary of Warner. One or another of the defendants operated each of the six competing theaters in the neighborhood of the plaintiffs' Jackson Park. The most nearly comparable of the six was the Maryland, run by Balaban & Katz. Thus in the *Bigelow* case the relationship of the parties was a combination of the relationships in *Eastman* and *Story*: the defendants were

⁶⁰ The moral attitude is even more obvious in the dissent to the lower court's opinion. *Paterson Parchment Paper Co. v. Story Parchment Co.*, (1st Cir. 1930) 37 F. (2d) 537 at 544.

⁶¹ BAIN, PRICING, DISTRIBUTION AND EMPLOYMENT 180-184 (1948).

⁶² *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946).

⁶³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915 (1948).

both suppliers and competitors of the plaintiffs. For that reason it was perhaps a little easier to show that the defendants caused plaintiffs' losses in the *Bigelow* case than in *Story*.

The plaintiffs' contention was that the operation of the "Chicago system" of uniform clearance, run and admission price by the defendants had prevented them from getting feature pictures for first runs,⁶⁴ and in that way had caused the plaintiffs to lose earnings in the amount of \$120,000 over the five-year period from July 28, 1937 to July 28, 1942. The "Chicago system," found by the jury to have been imposed by a conspiracy of all the defendants, set up a first run called the Loop run, in the large theaters of the Loop, with a three week clearance over all other theaters in the city. The next showings were called the A pre-release, the B pre-release, and the C pre-release, followed by weeks of general release. There were varying clearances set between A, B and C pre-release runs. The Jackson Park theater had been assigned the first week of general release, which meant that it showed films ten weeks after they were first shown in the large loop theaters. Six of the eight theaters competing with the Jackson Park had better playing positions than it did, ranging from A pre-release to C pre-release. One played on even terms with the Jackson Park. The other competing theater played in the second week of general release, one week behind the plaintiffs' theater. The comparable Maryland theater played in the C pre-release bracket.

There was evidence from which the jury could have found that no matter what rent the plaintiffs offered for films, the defendants, in carrying out their conspiracy, refused to license films to the plaintiffs for any run in advance of the one assigned, and that the Jackson Park in size, location and appointments was equal or superior to the Maryland. The plaintiffs' evidence also showed that, commencing in 1936, the defendants began to show double features in their theaters, thereby using many more films and removing from the market some of the films which the Jackson Park theater had been able to get before they had been played in a prior Chicago run.⁶⁵

The jury found for the plaintiffs in the amount of \$120,000. On appeal the Court of Appeals for the Seventh Circuit held that the verdict was supported by the evidence on the issue of liability, but that the plaintiffs had failed to prove their damages by substantial competent

⁶⁴ See plaintiffs' complaint, Transcript of Record, p. 11, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946).

⁶⁵ *Id.*, p. 211.

evidence.⁶⁶ Certiorari was granted to consider the damage issue.⁶⁷ The Supreme Court reversed the judgment of the court of appeals, and affirmed the judgment of the district court for the plaintiffs.⁶⁸

The evidence by which the plaintiffs sought to prove their damages consisted of a comparison of their actual earnings under the "Chicago system" with (1) the earnings of the Maryland theater for the same period; and (2) the earnings of the Jackson Park theater for the four year period just before the plaintiffs acquired it. The theory of this latter evidence was that there had been some "clear product" available to the Jackson Park in the earlier period which was reflected in higher admissions, but that this "clear product" was used up by double featuring in the prior runs after the plaintiffs acquired the Jackson Park theater. The first comparison indicated that the Maryland theater had earned net receipts \$115,982.34 in excess of those of the Jackson Park, after allowing for a difference in film rent between the two theaters.⁶⁹ The second comparison showed that the Jackson Park had earned \$125,659.00 more in the period 1933 to 1937 than in the period 1937 to 1942, after compensation for the shorter period and for the effect of "Bank Night" on the receipts of the earlier period.⁷⁰

Since there was testimony that the "Chicago system" had been in effect at all times from 1927 or before to the date of suit,⁷¹ and since the system affected all theaters, the case squarely presents the question of whether there can be competent evidence of damages when there is no possibility of proving what the plaintiffs' receipts would be in a market not controlled by the combination. The court of appeals disposed of this question by holding that (1) the comparison with the Maryland earnings did not support the verdict by over \$4,000, and therefore must not have been relied on by the jury; (2) the comparison with the prior earnings of the Jackson Park did not support the verdict because the plaintiffs' contention was that they could have earned more if allowed to bid in any open market, unembarrassed by the "Chicago system," while the prior earnings were obtained under the very same system, and thus proved nothing about what the plaintiffs might have been able to earn in a free market. The same objection of course also applied to the evidence on the Maryland's earnings. The court then said that

⁶⁶ *Bigelow v. RKO Radio Pictures, Inc.*, (7th Cir. 1945) 150 F. (2d) 877.

⁶⁷ *Bigelow v. RKO Radio Pictures, Inc.*, 326 U.S. 709, 66 S.Ct. 144 (1945).

⁶⁸ See note 62 *supra*. Justice Jackson took no part, and Justice Frankfurter dissented.

⁶⁹ Transcript of Record, p. 476, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946).

⁷⁰ *Id.*, p. 477.

⁷¹ *Id.*, pp. 540, 708.

the proper measure of damages here would be the excess of plaintiffs' hypothetical profits, if they had been able to bid for pictures on an even footing with all other theaters, over their actual profits under the "Chicago system." The court never squarely faced the objection that this would effectively rule out recovery against the old, highly organized combination, since such evidence would never be available.

The Supreme Court, with Chief Justice Stone writing the opinion, held that the jury verdict was supported by the evidence of the prior earnings of the Jackson Park theater, expressly refusing to say that it would not be supported by the other class of evidence, however. The opinion reached this result by a logical, highly specific argument, which it later buttressed by more general considerations and by reference to applicable cases. The argument ran as follows: (1) The jury clearly could find that it was advantageous to an exhibitor to show on prior runs, both because of the power of attraction inherent in novelty and because newer pictures could command higher admission prices. (2) Both classes of evidence tended to show that prior runs brought greater returns. (3) Under the complaint as drawn and the charge to the jury, the jury could have found, and will be presumed to have found, that the price fixing was the result of defendants' individual, not collective, action, and that therefore it could not be said that the conspiracy, by price maintenance, had benefited the plaintiffs as much or more than it hurt them by relegating them to a late run. (4) The plaintiffs were entitled to show films which had not been previously shown, free of unlawful restraints, and the measure of the value of that right was the amount by which receipts declined when the right was lost in 1937, by the defendants' adoption of double featuring.

The bare account of this reasoning is enough to indicate its relatively narrow application to the particular facts of this case. If this were all the case held, it would hardly have been worth the time and trouble of the Supreme Court, and certainly would not justify any generalizations about proof of damage in antitrust suits. There is plenty of evidence, both in the opinion and in the factual context of the case, however, to show that a new judicial attitude toward proof of injury had developed within the shell of old doctrine and factual reservation.

In the first place, the attempt by the Chief Justice to show that the conspiracy did not distort market conditions other than to deprive plaintiffs of clearance and run advantages is entirely unconvincing, since the evidence made it very clear, as the plaintiffs' own brief in the Supreme Court argued, that clearance, run and admission price were all

interdependent factors in a single conspiracy, each being a function of the others, and each being necessary for the successful operation of the "Chicago system,"⁷² the purpose of which was to maintain high prices and high profits on the prior runs. Furthermore, the jury must have considered the effect of the conspiracy on price, since it was instructed to find what part of the Jackson Park's profits in the earlier period would have been "derived from operation under conditions of free and open competition and not from operation in the playing position, under the clearances and minimum admission prices of the so-called system of release. . . ." ⁷³ Thus the case is one in which the only evidence of injury related to a wholly administered market, but which allowed the jury to consider that evidence in awarding damages.

In the second place the Court said that this case was comparable to *Eastman Kodak*⁷⁴ and *Story Parchment*⁷⁵ in that the tortious acts precluded ascertainment of the damages by a comparison of market conditions under the conspiracy with what would have prevailed in a freely competitive market, ignoring the distinction that the two earlier cases had each contained affirmative evidence that the conspiracy had not distorted prices or profits during the yardstick period, while that sort of evidence is not found in *Bigelow*. Since the court of appeals expressly made this distinction, it appears that the Chief Justice did not overlook it, but was in effect saying that the distinction is unimportant, and that the sort of evidence relied upon in *Eastman*, *Story* and *Bigelow* will support substantial damages even if it does not provide a comparison with a free competitive market, unaffected by the illegal combination.

Finally, other indications that this is the meaning of the *Bigelow* opinion are found in the Court's statement that in all three cases the jury "could conclude as a matter of just and reasonable inference from the proof of defendants' wrongful acts and their tendency to injure plaintiffs' business, and from the evidence of the decline in prices, profits and values, *not shown to be attributable to other causes*, that defendants' wrongful acts had caused damage to the plaintiff,"⁷⁶ and in the statement farther along that "the wrongdoer may not object to the plaintiff's *reasonable estimate of the cause of injury and of its*

⁷² Brief for Petitioners, pp. 9-13, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251 (1946).

⁷³ Transcript of Record, p. 1271, *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946).

⁷⁴ *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 47 S.Ct. 400 (1927).

⁷⁵ *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 51 S.Ct. 248 (1931).

⁷⁶ 327 U.S. 251 at 264, 66 S.Ct. 574 (1946). Emphasis supplied.

amount, supported by the evidence, because not based on more accurate data which the wrongdoer's misconduct has rendered unavailable."⁷⁷ The Court insisted that there was nothing new in all this, citing damages cases in other fields,⁷⁸ but most of the cases cited arose out of situations where the causation of substantial injury was clear enough, the only problem being to place a money value on the injury. As I have argued,⁷⁹ the antitrust cases are significantly different in that the issue is whether the defendant's acts caused any injury to the plaintiff. Justice Frankfurter's dissent in the *Bigelow* case rests on this distinction, saying that the plaintiffs failed to show that any legal injury had been done them.⁸⁰

What guides then does *Bigelow* furnish for courts and lawyers to follow in the trial of subsequent cases? The result of the case, it seems to the writer, is to suggest the analysis of treble damage suits into the following issues:

1. Did the defendants violate the antitrust laws? In the *Bigelow* case this was not before the Supreme Court and is outside the scope of this paper.

2. What effect, if any, did the violation have upon the market or segment of the business world in which the plaintiff operated? The Supreme Court in the *Bigelow* case did discuss this problem, and found that the effect was solely to prevent plaintiffs from obtaining first-run pictures. This paper has attempted to show that the evidence will not bear that construction. The issue here is a more precise one than the general question of what were the effects of the acts alleged to be in violation of the statute, which general question is relevant to a determination that the acts alleged did constitute a violation. In the movie cases the precise effect on the plaintiff's market can be plainly defined, as for example the deprivation of first-run movies and the fixing of prices which plaintiff must charge. In other cases the effect may be quite obscure.

⁷⁷ Id. at 265. Emphasis supplied.

⁷⁸ *Hetzel v. Baltimore & Ohio Railroad Co.*, 169 U.S. 26, 18 S.Ct. 255 (1898), held the railroad illegally occupied a street abutting on his land, thereby reducing the land's value. It was clear that some depreciation had been caused by the defendant's act. The *Pennsylvania*, 19 Wall. (86 U.S.) 125 (1873), divided the damages caused by a collision at sea between the two vessels, since both were at fault, and the Court presumed that the fault contributed to the injury. Another cited case, *Great Southern Gas & Oil Co. v. Logan Natural Gas & Fuel Co.*, (6th Cir. 1907) 155 F. 114, dealt with the ascertainment of damages after the tortious confusion of goods, where the cause of the wrong was plain, using the best available estimate of its extent.

⁷⁹ Pp. 376-377 *supra*.

⁸⁰ 327 U.S. 251 at 266-268, 66 S.Ct. 574 (1946).

3. What is the value in dollars of the opportunity to operate in a freely competitive market,⁸¹ of which the plaintiff has been deprived in certain specific ways? Here the *Bigelow* case allows the plaintiff to bring in the best evidence of the value of this opportunity available to him, and says that the decision of the trier of fact on this evidence shall stand. The question is thus to be decided like other questions relating to the fact of causation, without meaningless references to certainty, and with awareness that the statute is not to be nullified by the subterfuge of imposing impossible requirements of proof.

Other explanations of the *Bigelow* case have been given. Judge Wyzanski, in *Momand v. Universal Film Exchange*,⁸² suggests that "the ratio decidendi of the *Bigelow* case is that where the evidence in an Anti-trust case is such that the discrepancy between plaintiff's earnings and a competitor's earnings or between plaintiff's earnings in one year and another year could be found by a jury to be entirely unexplained except by acts of defendants which are unlawful under the Anti-trust laws then the jury may find defendants are the jural cause of the discrepancy, that is, of the loss." This is a statement of the narrow holding of the case, but as has been shown above, the facts, contentions and charge will not support such a narrow construction of the issue which was allowed to go to the jury. On those facts it cannot be said that the discrepancy was wholly unexplained except for the fact that plaintiffs were discriminatorily deprived of earlier runs. Many explanations other than the depressing effect of the restraint were available and were offered by the defendants. Judge Wyzanski goes on, however, to point out that the *Bigelow* case may be given a broader significance, so as to mean that the plaintiff may recover upon proof of illegality and evidence that he has had lower earnings than his own prior record, or a theoretically normal period, or a comparable competitor; that segregation and measurement of the cause of loss is impossible; and that the defendant's acts were the dominant or main cause, or perhaps among the known factors the most substantial in causing the loss.⁸³

Unfortunately for the elucidation of the law the *Momand* case did not directly raise the issue, because the plaintiff in that case had sued in another district on somewhat the same cause of action and lost, so that both Judge Wyzanski and the circuit court of appeals held that he

⁸¹ Apparently the plaintiff could get nominal damages even without proving the value of his lost opportunities. See *United Exhibitors, Inc. v. Twentieth Century Fox Film Distributing Corp.*, (D.C. Pa. 1940) 31 F. Supp. 316.

⁸² (D.C. Mass. 1947) 72 F. Supp. 469 at 480, *affd.* *Momand v. Universal Film Exchanges*, (1st Cir. 1948) 172 F. (2d) 37.

⁸³ *Ibid.*

had to make a much clearer showing of causation than if he had been suing for the first time in the Massachusetts district court. In other words, because he was bound by doctrines of *res judicata* as to certain activities of the defendant, the plaintiff had to show with considerable particularity that defendant's other illegal acts had caused the loss, and this he failed to do. Nevertheless, Judge Wyzanski's evaluation of the *Bigelow* case, even though dictum, is important. In its effort to define the degree of causation, however, it is rather unsatisfactory. Words like "dominant," "main," "preponderant" or "substantial," as applied to cause, by giving an illusion of meaning, block further analysis.

It has also recently been suggested that the *Bigelow* case supports recovery of the defendant's profits, as distinguished from the plaintiff's losses.⁸⁴ This is of course the usual measure of recovery in equity suits for unfair competition or patent infringement. It is pretty clear that, although the *Bigelow* case did cite unfair competition and copyright cases,⁸⁵ the equity measure of recovery was not being adopted, these cases being cited merely to show that impossible burdens of apportioning a loss among various possible causes are not imposed on plaintiffs in other areas of the law. The actual measure of damages in the *Bigelow* case appears to have been the comparison with plaintiffs' own prior earnings record, although the Court makes it reasonably plain that a recovery based on comparison with the earnings of the competing theater would have been upheld. This is not to say that the competing theater's profits as such would be awarded to the plaintiffs. In the patent, copyright or trade-mark cases the profits which the plaintiff recovers are the product of the appropriation of a single device, work of art or distinctive mark, and are therefore relatively easy of determination, except where the defendant adds other profit-producing elements, as in the *Sheldon* case. But in the usual antitrust suit the defendant's profits arise from an illegal course of conduct not related to specific property of the plaintiff, so that it would be even more difficult to isolate the profits which the plaintiff ought to recover than to ascertain legal damages.

⁸⁴ McConnell, "The Treble Damage Action," (1950) *UNIV. OF ILL. LAW FORUM* 659 at 668.

⁸⁵ *Sheldon v. Metro-Goldwyn Mayer Pictures Corp.*, 309 U.S. 390, 60 S.Ct. 681 (1940) (plaintiff may recover only so much of defendant's profits as were attributable to the use of plaintiff's play); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 36 S.Ct. 259 (1916) (plaintiff not required to make an apportionment of defendant's profits where that is impossible); *Westinghouse Electric and Mfg. Co. v. Wagner Electric and Mfg. Co.*, 225 U.S. 604, 32 S.Ct. 691 (1912) (plaintiff in patent suit need not apportion profits where patented device is inextricably mingled with other elements).

In the movie cases there is a superficial resemblance because copyrighted films are used, but even there it would be difficult to allow the plaintiff to recover the defendant's profits. In the *Bigelow* situation, for example, the plaintiffs might claim the profits of the Maryland theater under this theory with perhaps some plausibility, but if there were another independent competing in the same neighborhood, the court could hardly hold that he also could recover the profits of the Maryland theater. The theory of the equitable recovery of profits is that the defendant has benefited from the use of a specific thing which in fairness ought to belong to the plaintiff, and which usually has a value which is very difficult to predict. The theory of treble damage suits, however, is that the defendants illegally deprived the plaintiff of an opportunity to do business in a competitive market. The profits which the defendant is able to make usually have no relation to the value to the plaintiff of that opportunity.

Furthermore, in industries other than the movies, the profits of the defendant often have no conceivable bearing on the plaintiff's recovery, due to difference in location, size, type of business or methods of sale and production.⁸⁶ On the whole, therefore, it would seem that the equitable doctrine of recovery of defendant's profits would be less workable, and would cause more difficulty, than the legal rules of damages applied in the *Bigelow* case.

At least two cases recently have decided the issue raised but not precisely determined in *Bigelow* by allowing plaintiffs to prove their lost profits by comparison with the earnings of theaters run by the defendants.⁸⁷ The second of these cases went further, to affirm a judgment based partly upon expert testimony about what the plaintiff would have earned if it had had an unrestrained opportunity to license first-run films,⁸⁸ the sort of evidence which the *Baush* case⁸⁹ had held would not support an award of damages. On the other hand even under

⁸⁶ *Fargo Glass & Paint Co. v. Globe American Corp.*, 201 F. (2d) 534 (7th Cir. 1953) reversed a lower court's award of damages based upon the defendant's profits, finding no evidence that the plaintiff's sales would have equalled the defendant's in the absence of the restraint.

⁸⁷ *Theater Investment Co. v. RKO Radio Pictures, Inc.*, (D.C. Wash. 1947) 72 F. Supp. 650; *Bordonaro Theaters, Inc. v. Paramount Pictures*, (2d Cir. 1949) 176 F. (2d) 594.

⁸⁸ On the issue of damages, Judge Clark said: "Damages in such a situation necessarily cannot be assessed with mathematical precision; but the testimony of plaintiff's expert witness, Samuelson, 'while purely an estimate and introduced as such, was proof of a kind as definite and certain as the subject-matter admitted.' . . . Defendants must not be allowed to create their own immunity by the extent and duration of their conspiracy." (2d Cir. 1949) 176 F. (2d) 594 at 597.

⁸⁹ See note 22 *supra*.

the *Bigelow* ruling it is clear that the trier of fact may find that the losses were the result of factors other than the action of the conspiracy.⁹⁰

The effect of the *Bigelow* case can nowhere be perceived more clearly to be a departure from the usual rules of damage than in *Milwaukee Towne Corporation v. Loew's, Incorporated*.⁹¹ The plaintiff's contentions were very much like those in the *Bigelow* case, to the effect that the defendants, six of the major national distributors and their subsidiaries, conspired to monopolize and restrain trade in the exhibition of movies in Milwaukee by adopting the "Milwaukee plan" of release, which gave preference and priority to defendants' theaters over that of the plaintiff. The district court tried the case without a jury. It found that the "Milwaukee plan" was set up in 1930, the theater which plaintiff later acquired being assigned to a second run position following a twenty-eight day clearance.⁹² The plaintiff was organized in 1946, ran the theater from May to August of that year, then remodeled it at a cost of \$200,000, and reopened in December. The district judge found that it was a modern, up-to-date and beautiful theater, suitable in all respects to be a first-run house, and in fact was a first-run theater for United Artists' pictures, but that was not sufficient for full time first run operation. Under the "Milwaukee plan" the court found that clearance, run and admission price were established by the defendants for the various theaters,⁹³ and that although the plaintiff asked the defendants for first-run films on several occasions, commencing in April of 1946, plaintiff was told that its theater was a second-run house, and that all first runs were going to the Fox and Warner theaters. The district court found damages of \$431,959.42.

⁹⁰ *Dipson Theatres, Inc. v. Buffalo Theatres, Inc.*, (D.C. N.Y. 1949) 86 F. Supp. 716, *affd.* without discussion of damages, (2d Cir. 1951) 190 F. (2d) 951, *cert. den.* 72 S.Ct. 363, 342 U.S. 926 (1952).

⁹¹ (7th Cir. 1951) 190 F. (2d) 561, *cert. den.* 72 S.Ct. 302, 342 U.S. 909 (1952). The lower court's decision is printed in (D.C. Ill. 1950) 100 F. Supp. 90.

⁹² Transcript of Record, pp. 3326-3349, *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561.

⁹³ One's skepticism of the efficacy of antitrust decrees is strengthened by the court's finding numbered 17: "Sometime subsequent to June 11, 1946 and pursuant to the opinion of the statutory court in the United States District Court for the Southern District of New York in the case of *United States vs. Paramount Pictures, Inc., et al.*, defendants removed from their license agreements the provision fixing minimum admission prices but directed their Branch Managers contemporaneously therewith to watch reductions in admission prices and to advise the home office in the event that any such reduction took place which was likely to adversely affect other theaters and that at that time pictures were being licensed picture by picture so that the distributors and each of them still maintained the position of being able to refuse clearance or refuse a license if the relative admission prices as set forth originally in the uniform zoning and clearance schedule as a basis for the respective clearances were not maintained." Transcript of Record, p. 3331, *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561.

The circuit court of appeals held that there was no substantial evidence to support the finding that plaintiff had demanded first runs in April 1946, and that the plaintiff could not recover for the period from May to August of that year, before the theater was closed for remodeling. The court affirmed the judgment as to the later period, from December 1946 to July 1948, in the amount of \$313,858.10, trebled.

The plaintiff's evidence of damages consisted of a comparison of the receipts in the plaintiff's Town Theatre with the receipts from two of defendant Fox's first-run theaters, the Wisconsin and the Palace, for the two periods between 1946 and the date of the complaint.⁹⁴ This was buttressed by testimony of the plaintiff's president and principal stockholder that with first-run pictures the plaintiff's receipts would have equalled those of the Wisconsin and Palace,⁹⁵ by evidence that plaintiff's theater was comparable to the other two, and superior in some respects,⁹⁶ and that it was able to gross as much at the box office as the defendant's theaters when it was able to get pictures of comparable quality.⁹⁷ The defendant countered with evidence that from the date of suit to the date of the trial the Towne Theatre, which was then getting first-run films, had failed to take in nearly as much in receipts as the other two theaters.⁹⁸ The defendants also gave evidence tending to show that with first-run pictures and larger admissions the plaintiff would have had much greater advertising expenses, and that its other operating expenses would have been greater.⁹⁹ Finally the defendants argued that the plaintiff's theater was not suitable for first-run films during the earlier period before the remodeling.¹⁰⁰

The district court's award of damages was based directly on the comparison with the Wisconsin theater receipts. The circuit court of appeals held that this was a "matter for the judgment of the trial court,"¹⁰¹ so far as the period after plaintiff remodeled its theater was

⁹⁴ *Id.*, p. 2337.

⁹⁵ Transcript of Record, pp. 415-418, 429, 430, *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561.

⁹⁶ *Id.*, pp. 131, 373, 809, 810, 830.

⁹⁷ *Id.*, pp. 411, 412, 2366. The plaintiff's exhibit 80 compared admissions of the Towne Theatre with those of the Wisconsin and Palace Theatres on specific occasions when the Towne Theatre was able to get outstanding films on a prior run, and tended to show that it could then draw larger admissions than the other two.

⁹⁸ *Id.*, pp. 3098, 3100. The defendants' calculations indicated that during this "yardstick period," after suit was brought, but before trial, the plaintiff's receipts increased and those of the Wisconsin and Palace declined, but the latter two remained substantially ahead of the Towne.

⁹⁹ Brief of Appellants, pp. 89-97, *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561.

¹⁰⁰ (7th Cir. 1951) 190 F. (2d) 561 at 566.

¹⁰¹ *Id.* at 567.

concerned, although it seemed to have some doubts about the desirability of computing damages in this way. The *Bigelow* case rationale was held to justify the comparison with other theaters, provided the fact of damage was shown. As has been argued, however, the *Bigelow* case seems to have said that the methods of proving the "fact" of damage are to be judged on the same standard as methods of proving amount, and in fact to have said that there is no valid distinction between the fact and amount in cases of this kind.

As to the first period during which the plaintiff claimed to have been deprived of first runs, the court of appeals reviewed the evidence and found that the statement of plaintiff's president that he had demanded first runs as early as April 1946, could "be given little, if any, credence."¹⁰² It held for that reason that there could be no recovery for losses occurring during this period. Aside from the obvious objection that the court was upsetting a finding which was primarily a matter of credibility, this is dubious as a matter of law. As the situation was developed by the evidence, it is obvious that a demand for first runs by the plaintiff would have been useless, since all later demands of that kind were rejected. The court was thus denying recovery for a substantial part of the alleged loss on the ground that the plaintiff did not make a request which would clearly have been futile, at a time when the defendants had long made it clear plaintiff's theater was to be allotted no better than second run films. The court's reliance on evidence tending to show that the Towne theater was not suitable for first-run pictures as a means of showing no demand had been made leads one to suspect that the real reason for denying recovery here was that the plaintiff failed to prove the Towne theater was a proper first-run house before the remodeling. Although the defendants' evidence was quite persuasive on the point, it did not persuade the trial court, and there was certainly sufficient evidence to support the trial court's findings. For that reason the decision on this branch of the case is open to some question.

The *Milwaukee Towne* case is important, not only because it marks the capitulation of the Seventh Circuit in treble damage suits,¹⁰³ but

¹⁰² *Ibid.*

¹⁰³ At least three recent treble damage cases went against the plaintiff in the Seventh Circuit and were then reversed by the Supreme Court for various reasons: *Bigelow v. RKO Radio Pictures, Inc.*, 327 U.S. 251, 66 S.Ct. 574 (1946); *Kiefer-Stewart v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259 (1951); *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558, 71 S.Ct. 408 (1951).

also because it is a square holding that under the *Bigelow* doctrine a comparison of plaintiff's receipts with those of defendants' competing theaters will support an award of damages to the full extent of the difference between them,¹⁰⁴ even though the competing theaters had the advantage of their own illegal practices, and even though the defendants introduced substantial evidence tending to explain or rebut the plaintiff's figures. This is a long way from the traditional rules of damages as stated, for example, in *Central Coal & Coke v. Hartman*,¹⁰⁵ or *Keogh v. Chicago & Northwestern Railway Co.*¹⁰⁶ By allowing a comparison with businesses other than that of the plaintiff, it enables recovery to be had for injuries which are not only not well established, but which are not even in existence, where the reason for their non-existence is the illegal conduct of the defendant. Finally, the case is a strong indication that the *Bigelow* case is not to be limited to its precise facts, but is to be given the broad construction suggested previously in this paper.

Although the motion picture industry has been the proving ground for recent developments in damages under the antitrust acts, there have been some cases dealing with other industries and different factual

¹⁰⁴ The trial court's conclusion of law numbered 11, which, not being reversed by the court of appeals, must have been considered a proper statement of the applicable rule, answers the defendants' argument that the plaintiff should not recover the entire difference between the two theaters' receipts, since it was clear that the total first-run business would not have been larger under competitive conditions, and therefore the Towne and the Wisconsin would have split the difference, the Towne improving its receipts and the Wisconsin losing receipts, but that the two would not be likely to exchange places: "Plaintiff was entitled as of right to purchase and show film free of the restraints of the unlawful distribution system. A fair measure of the damage to that right by defendants' unlawful distribution system was the loss by plaintiff of admission receipts as the result of the application of that system to plaintiff's business, and in this case where defendants have mingled admission receipts of their own with admission receipts which, except for defendants' own wrongdoing, would have been received by plaintiff and where defendants have made it impossible for plaintiff to show in what proportions, if any, defendants have a right to box-office receipts in their theatres, there is legal justification for the conclusion that without the restraints imposed by defendants plaintiff would have increased its admission receipts, less adjustments for film rental, to an amount equivalent to that received by the Wisconsin Theatre during the period in which the illegal restraints continued." Transcript of Record, p. 3348, *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561. *Homewood Theatre, Inc. v. Loew's, Inc.*, (D.C. Minn. 1952) 110 F. Supp. 398, also bases an award of damages upon a comparison with a competing theater which, although not owned by one of the defendants, did participate in the benefits from the conspiracy. The case contains an exceptionally perceptive application of the *Bigelow* doctrine, and a most thorough discussion of the evidence.

¹⁰⁵ See note 15 *supra*.

¹⁰⁶ See note 30 *supra*.

backgrounds.¹⁰⁷ One of these, *American Crystal Sugar Co. v. Mandeville Island Farms, Inc.*,¹⁰⁸ makes it clear that although *Bigelow* allows damages to be measured by a comparison with plaintiff's prior earnings which may have been affected by the conspiracy, where no better evidence is available, if there is evidence of earnings in a competitive market, that evidence should be relied on rather than other data distorted by the illegal activities of the defendant. The evidence of price in the *Mandeville* case which the defendant argued should be used as the measure of damages was in most respects a much more accurate indication of precisely what the plaintiff would have earned in the absence of the conspiracy, but it was rejected by the court because it felt that the Supreme Court's opinion in the first appeal¹⁰⁹ had held this evidence was affected by the defendant's illegal price fixing, to such an extent as not to be a reliable indication of plaintiff's losses. Granted the factual premise, the conclusion is sound, but the difficulty is that the facts of the case do not seem to support the assertion that the fixing

¹⁰⁷ For instance in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259 (1951), a district court judgment was affirmed by the Supreme Court without mention of damages, although a contention with regard to damages was made by the defendants, in their Brief, p. 35. Proof of damages in that case was by testimony of any accountant, showing the decline in plaintiff's sales, and an estimate of the decline in profits during the period when plaintiff was deprived of defendants' products. As to one of these products, plaintiff had no records, never having sold it, so that the testimony was purely an estimate. Transcript of Record, pp. 121-138, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259 (1951).

Two recent cases are concerned with proof of damages when the alleged violation consists in a misuse of patents to restrain trade. *Kobe, Inc. v. Dempsey Pump Co.*, (10th Cir. 1952) 198 F. (2d) 416, cert. den. 344 U.S. 837, affirmed a judgment that defendant's attempts to monopolize the hydraulic oil pump market had caused the plaintiff to lose sales of its pumps to the extent of six per month for the period involved. The evidence on which this was based consisted of (1) facts showing the plaintiff's ability to make and sell the pumps; (2) the relatively great efficiency and low price of plaintiff's pumps; (3) numerous inquiries from purchasers; (4) expert testimony as to the state of the market; (5) the sales of comparable pumps by the defendant. *Chipleys, Inc. v. June Dairy Products Co.*, (D.C. N.J. 1953) 114 F. Supp. 129, got the opposite result, where the evidence of loss consisted chiefly of the testimony of the plaintiff's officers, and letters from potential customers. The court did allow recovery of one specific sale's profit, which was clearly shown to have been prevented by the defendant's wrongful activity.

The suggestion is made in *William Goldman Theaters, Inc. v. Loew's, Inc.*, (D.C. Pa. 1946) 69 F. Supp. 103 at 106, that the problem of estimating probable profits is much simpler in the business of exhibiting motion pictures than in a manufacturing business, because cost and prices can be predicted with much greater accuracy, the only variable being volume.

¹⁰⁸ (9th Cir. 1952) 195 F. (2d) 622, cert. den. 343 U.S. 957, 72 S.Ct. 1052 (1952).

¹⁰⁹ *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 68 S.Ct. 996 (1948). The Supreme Court referred to "the interdependence and inextricable relationship between the interstate and intrastate effects of the combination," and said that "In sum, the restraint and its monopolistic effects were reflected throughout each stage of the industry, permeating the entire structure." 334 U.S. 219 at 241, 242, 68 S.Ct. 996 (1948).

of beet prices had had any effect on the sugar prices which defendant sought to use as a measure of damages.¹¹⁰

There is at least one case outside the movie industry whose result suggests that the courts might limit the application of *Bigelow* and *Milwaukee Towne* to that industry, although of course there is no language in either case to support such a limitation. *Emich v. General Motors Corporation*¹¹¹ was a suit by a Chevrolet dealer against General Motors to recover for the cancellation of plaintiff's franchise which had allegedly occurred as part of a conspiracy to force the plaintiff to finance sales through the General Motors Acceptance Corporation. On the damages issue the plaintiff offered evidence of the same general nature approved by the *Bigelow* and *Milwaukee Towne* cases, consisting of (1) a comparison with the business of other dealers, and (2) an attempt to project past business and profits into the future so as to show the prospective profits lost and the value of the good will of the business which was destroyed. The jury verdict gave the plaintiff damages of \$350,000 which the district court trebled. This was reversed by the circuit court of appeals partly on the ground that "the evidence submitted by plaintiffs as to the issue of damages was so extremely speculative and conjectural as to furnish no sound basis for the amount allowed."¹¹² The court did not refer at all to the comparison with the

¹¹⁰ The price of beets paid to the plaintiffs was computed at approximately 50% of the net price received by the defendant for sugar, after converting the weight of their beets into their sugar content. The illegal activities of the defendant consisted in agreeing with its two competitors to use the average net sugar price of the three of them as the basis for computing the beet price, rather than the individual net price of each of them. This was done in 1939, 1940 and 1941, and had the effect of fixing a uniform price for sugar beets purchased from all growers in the northern California market. The plaintiffs urged and the district courts adopted, as the measure of damages, the difference between what plaintiffs had received for their beets in 1937 and 1938, and what they received in 1939, 1940 and 1941. Due to the method of figuring beet prices, this measure of damages was ultimately based on the prices which the defendant received for sugar in 1937 and 1938. The defendant unsuccessfully argued that its 1939 and 1940 and 1941 individual net sugar prices should be used as the starting point for calculating damages, since they would show exactly what plaintiffs had lost by the price fixing conspiracy. Although there was almost no evidence that the conspiracy aimed at fixing beet prices had affected the price of sugar, and although the district court deliberately refused to find that it had, both district court and court of appeals thought that the Supreme Court's holding required the conclusion that the conspiracy had distorted sugar prices to such an extent as to disqualify them as criteria of damages. This is a questionable application of the Supreme Court's decision in view of the beet supply contracts used in this industry, as a result of which both growers and sugar companies were directly interested in higher sugar prices, and sugar prices controlled beet prices. The evidence and findings of the district court are revealed by Transcript of Record, pp. 222, 266, 384-387, 694-697, 700, 718-720, 751, 759, 807, 810, *American Crystal Sugar Co. v. Mandeville Island Farms, Inc.*, (9th Cir. 1952) 195 F. (2d) 622.

¹¹¹ (7th Cir. 1950) 181 F. (2d) 70, reversed on other grounds, 340 U.S. 558, 71 S.Ct. 408 (1951).

¹¹² (7th Cir. 1950) 181 F. (2d) 70 at 84.

business of other dealers as a method of determining damages, the defendants having strongly argued that the other dealers were not shown to be comparable.¹¹³ As to profits lost before the franchise was cancelled, the court objected that the plaintiff had not furnished any records to substantiate the testimony of its president, who said that his figures on cars he could have sold, but did not because of the conspiracy, were solely in "his mind and heart."¹¹⁴ Estimates of prospective profits lost, and of the value of good will of the business were given by an accountant. The court objected that they represented his own views, that he did not give his reasons for choosing the particular figures, and gave no factual material to support his computations, so that their background appeared to be "very speculative and subjective."¹¹⁵

In general the damage evidence in the *Emich* case was much like that in the *Bigelow* case. In both cases the defendant was at the same time a supplier and a competitor of the plaintiff, using its leverage as supplier to win advantages as competitor. It was therefore plain in both cases that the plaintiff had been deprived of any chance to operate in a competitive market. In fact in the *Emich* case plaintiff was deprived of its chance to operate altogether. In both cases the plaintiff compared his earnings with those of competitors. In the *Bigelow* case a comparison was also made with earnings of the plaintiff for an earlier

¹¹³ Brief for Appellants, pp. 113-115, *Emich Motors Corp. v. General Motors Corp.*, (7th Cir. 1950) 181 F. (2d) 70. The plaintiff put in some evidence that the physical plants of the other two dealers were comparable to the plaintiff's, and also argued that the Chevrolet franchises required the operations to be substantially the same. There was evidence of the earnings of the allegedly comparable dealers both before and after deductions for income taxes and for compensation to their owners. Transcript of Record, pp. 1414-1453, *Emich Motors Corp. v. General Motors Corp.*, (7th Cir. 1950) 181 F. (2d) 70.

¹¹⁴ (7th Cir. 1950) 181 F. (2d) 70 at 84. The losses were alleged to have been caused by defendant's failure to ship cars when ordered, and failure to ship the right models.

¹¹⁵ (7th Cir. 1950) 181 F. (2d) 70 at 83. The accountant testified that he found normal earnings from tangibles by taking 7½% of the value of those assets, and deducting that figure from average actual earnings to get the earnings attributable to good will. This figure was then capitalized at 10%, producing a value for good will of slightly over \$100,000. The defendant made many objections to this method, saying that the percentages chosen were erroneous, that in using actual earnings the accountant failed to deduct the compensation paid to plaintiff's president, who was its sole stockholder, that the accountant failed to deduct income taxes, and that the good will estimate duplicated the estimate for prospective profits, so that there was a double recovery. Brief for Appellants, pp. 103-108, 98, *Emich Motors Corp. v. General Motors Corp.*, (7th Cir. 1950) 181 F. (2d) 70. The last objection at least seems to be well taken, since the good will figure capitalized future profits as of 1936, the date when the dealership was cancelled, while the prospective profits figure included amounts plaintiff would have earned from 1936 to date of suit in 1941, all of which had been capitalized in the good will figure. The estimate of prospective profits from 1936 to 1941 was based on the opinion of the plaintiff's president as to the number of cars he would have sold, and the computations of the accountant as to expenses, profit margins and total profits. Transcript of Record, pp. 1148, 1449, 1494-1503, *Emich Motors Corp. v. General Motors Corp.*, (7th Cir. 1950) 181 F. (2d) 70.

period. In the *Emich* case earnings of an earlier period were used to give the profit margin on sales which allegedly would have been made after cancellation, the volume of those sales being furnished by estimates of the plaintiff's president. Perhaps if the plaintiff's evidence had merely indicated past sales, and sought to recover profits on an equal volume in the future, the court might have approved, although it would seem just as speculative to assume that volume would continue at the same rate as to assume that it would increase. Both are merely predictions, to be weighed by the trier of fact. In the *Emich* case the actual sales for the later period could not be given, because the plaintiff had been forced out of business by the alleged conspiracy, so that the plaintiff necessarily had to make estimates. The best explanation for the case probably is that the court felt that the estimates made were not properly supported by the books and documents of the plaintiff and by an account of the calculations from which the ultimate figures were reached. If so, then the case does not rule out estimates of the kind given, but merely holds that such estimates must be based on more adequate facts, which is to say that the best evidence of the facts available was not produced. On the other hand the case could very well be construed to amount to a refusal to follow *Bigelow's* line of reasoning that this is just a question of causation, a matter of fact as to which the trier's decision supported by adequate evidence is to be accepted.

III. *Recovery of Profits Lost by Reason of Robinson-Patman Act Violations*

The difficulties of proving damages where the plaintiff is alleging a violation of the Sherman Act are compounded when the alleged illegality consists of a violation of the Robinson-Patman Act.¹¹⁶ In the first situation the plaintiff must prove that a conspiracy or monopoly caused him to lose business, by cutting off his supplies, or by driving the price down, or by preventing him from getting first run films. In the second, he must prove that he lost business as a result of the defendant's giving benefits to his competitors, in the form of more favorable prices or terms. A comparison of plaintiff's earnings with those of a competitor, or with his own earnings before the violation may be fairly persuasive to show how much business he lost by reason of a Sherman Act violation. The same sort of comparison is much less persuasive in the Robinson-Patman Act case.

¹¹⁶ 49 Stat. L. 1528 (1936), 15 U.S.C. (1946) §13a.

One might draw an analogy to a footrace in which there are many runners. It is reasonably plain that when X knocks A down, he destroys whatever chance A had of winning the race. It is not nearly so clear that when X furnishes an unfair advantage to B, another runner, he has destroyed A's chances for success, especially if B does not win either. In all such instances the injury, precisely defined, is the same, and consists in depriving the plaintiff of his chance to compete in a race or in a market operated in accordance with the rules, or, as some of the cases say, a market which is freely competitive. But if the money value of that chance is measured by estimating what the plaintiff would have earned in such a market, that estimate can be made with a much lower degree of probability in Robinson-Patman Act cases because the competitive relationship is affected only as between the plaintiff and one or two competitors, while as between the plaintiff and all others, the relationship is not affected.

Two recent cases, *American Can Co. v. Russellville Canning Co.*,¹¹⁷ and *American Can Co. v. Bruce's Juices*,¹¹⁸ illustrate the problem and reach opposite conclusions. In the first case, the plaintiff was a small Arkansas canner of vegetables, who bought from the defendant all the cans it used. The alleged violations of the Robinson-Patman Act consisted of discriminatory freight equalization, improper price allowances to an Indiana canner, and the defendant's system of quantity discounts to large purchasers. The only element of damages which concerns this discussion is plaintiff's claim that the defendant's discriminatory practices impaired its competitive position.¹¹⁹ The district court, citing *Story* and *Bigelow*, found a large decline in plaintiff's business from the peak year of 1944 to the point where it showed a net loss for 1947.¹²⁰ Plaintiff's can purchases showed a similar decline. On the other hand, those of plaintiff's competitors who benefited from the discriminations in various ways did not show such a loss of business. The national competitors got a larger and larger share of the national market at the expense of the smaller canners. The district court then held that although many factors may have affected plaintiff's business and that of its competitors, the defendant's trade practices alone were

¹¹⁷ (8th Cir. 1951) 191 F. (2d) 38. The case in the lower court is *Russellville Canning Co. v. American Can Co.*, (D.C. Ark. 1949) 89 F. Supp. 484.

¹¹⁸ (5th Cir. 1951) 187 F. (2d) 919, rehearing den. (5th Cir. 1951) 190 F. (2d) 73, petition for certiorari dismissed on motion of counsel for petitioner, 342 U.S. 875, 72 S.Ct. 165 (1951). The case is reported below as *Bruce's Juices v. American Can Co.*, (D.C. Fla. 1949) 87 F. Supp. 985.

¹¹⁹ The rather closely connected problem of allowing recovery of the amount of the discrimination, so-called general damages, will be discussed below. See p. 406 *infra*.

¹²⁰ (D.C. Ark. 1949) 87 F. Supp. 484 at 501.

common to all, and therefore the evidence was "legally sufficient to enable the court to make a just and reasonable estimate of the damages incurred by plaintiff."¹²¹ This was reversed by the court of appeals which found that "there were too many factors bearing upon the decline in the plaintiff's earning power to justify blaming it upon the trade practices of the defendant."¹²² Some of these factors were the illness of plaintiff's most active manager, climatic conditions, crop failure and the change over after the war from a noncompetitive to a competitive market. There was apparently no evidence in the case to show how the defendant's discriminatory practices were connected with the plaintiff's loss of business, such as, for example, evidence that plaintiff's prices were higher than those of its competitors because of the discrimination. If in fact the discriminatory pricing did cause the plaintiff to lose business, it would seem that this would have been reflected in the price which plaintiff had to charge in order to cover costs, and that plaintiff could show that the discrimination caused its costs to be higher than those of its favored competitors.

The *Bruce's Juices* case¹²³ upheld an award of damages on evidence somewhat similar to that in the *Russellville* case. Plaintiff, a canner of citrus juices, with its principal cannery located at Tampa, Florida, bought all its cans from the defendant. The alleged discriminations consisted of quantity discounts to large customers, a "runway" price discount to an Indiana canner, and a secret low price on a certain type of can to one of plaintiff's competitors. The district court found the following elements of damage to be proved: (1) The amount of the discounts themselves could be recovered, without further proof. The court called this "general" damage, as distinguished from "special" damage. The problems raised by this award will be discussed below.¹²⁴ (2) Plaintiff's business did not grow to the same extent as the Florida citrus industry generally. (3) Plaintiff's sales of grocery size cans declined after the discriminations. (4) The plaintiff's lost sales before 1942 caused its tinplate quota, set by government regulation during the war, to be less as to certain juices than it would otherwise have been in 1942. (5) Plaintiff's good will, the public favor of its name, trade-mark and product, were damaged. The district court was unable to separate the various items of damage, or to value them individually, partly because there was an "overlapping" among them. It merely found that the

¹²¹ *Id.* at 503.

¹²² (8th Cir. 1951) 191 F. (2d) 38 at 60.

¹²³ See note 118 *supra*.

¹²⁴ See p. 406 *infra*.

total damages equalled \$60,000 after the overlap was eliminated. The court of appeals affirmed the judgment, without discussion of the question of damages, except to say, "We have carefully reviewed the action of the district court in awarding damages in this case, and have reached the conclusion that the judgment rendered is fully in accord with the principles enunciated in the applicable authorities."¹²⁵

There was apparently no evidence in the case as to the extent of injury to good will, except the testimony of the plaintiff's president that it had been injured.¹²⁶ On the other points there was evidence of the increase in the total industry pack of Florida citrus juices, as compared with a decline in plaintiff's pack from a high point in 1937-1938,¹²⁷ and evidence that plaintiff's sales of a special small size of canned juice fell off markedly in various areas of the country during the period in question,¹²⁸ due, in the opinion of plaintiff's president, to the competition of the canners who were favored by the defendant's discriminatory price system. There was also evidence of the gross profit on the small cans,¹²⁹ and of price-cutting by the favored competitor which forced the plaintiff to lower its price.¹³⁰ No such showing was made on losses of sales of other kinds of cans.

The defendant's arguments were to the effect that the evidence did not show that plaintiff lost sales to the favored competitors, that the discrimination did not explain the decline in sales because it continued before and after the decline, and in fact the discrimination in pricing was greater when the plaintiff was having its best year.¹³¹ The defendant also argued that most members of the Florida citrus industry were in the same situation as the plaintiff, in not receiving the price discounts, so that proof that the industry sales increased while plaintiff's did not indicated nothing about the causes of increase, the comparison being substantially between non-favored canners.¹³² The defendant finally attempted to show that plaintiff did not compete with the favored canners, either because they sold in different geographical areas, or because they sold through different outlets.¹³³

¹²⁵ (5th Cir. 1951) 187 F. (2d) 919 at 924.

¹²⁶ Transcript of Record, p. 353, *American Can Co. v. Bruce's Juices*, (5th Cir. 1951) 187 F. (2d) 919.

¹²⁷ *Id.*, pp. 314-321, 1593-1596, 268, 269.

¹²⁸ *Id.*, pp. 228-253.

¹²⁹ *Id.*, pp. 367, 368, 631-634.

¹³⁰ *Id.*, pp. 196-198.

¹³¹ Brief for Appellant, pp. 93, 94, *American Can Co. v. Bruce's Juices*, (5th Cir. 1951) 187 F. (2d) 919.

¹³² *Id.*, pp. 92, 93.

¹³³ *Id.*, pp. 96-101.

The *Russellville* and *Bruce's Juices* cases seem to be in conflict at least in their attitudes on the extent to which the plaintiff is required to show that his loss was the favored competitor's gain. It may be possible to distinguish the two cases on the basis of the evidence offered, since in *Bruce's Juices* the plaintiff was able to show that some competitors were enabled to cut prices by the discount, that one competitor received other competitive advantages, and that while plaintiff's business was declining, the business of two of the favored competitors was increasing somewhat, while in the *Russellville* case the plaintiff was apparently not so specific.

Neither case, however, attempts to make any general statements about requirements of proof. A tentative generalization which the two cases might support is that in cases based on price discrimination the plaintiff cannot prove his damages merely by showing that he lost business during the period of the discrimination, but he must also show that the competitors who received the illegal discount increased their business, and perhaps that the discount gave them specific advantages, such as the ability to cut prices or to spend more on advertising or on purchasing than the plaintiff. If the movie cases were relied upon, they would seem to justify a comparison of the plaintiff's business with that of the favored competitor, provided there could be at least some testimony as to the effect of the price discrimination on selling prices, and provided that the businesses were in other respects comparable. A comparison of the plaintiff's business before and after the discrimination also would be persuasive, but probably would not be feasible, as it was not in the *Bruce's Juices* case, where the discrimination had apparently been going on for the entire period of the plaintiff's existence.

IV. *Recovery for Exclusion From Business*

The cases to be discussed in this section are much like those in the preceding sections, the difference being that they deal with the problem which is presented when the plaintiff has never been actively in business at all, but contends that his entry into the business was foreclosed by the illegal activities of the defendant. In these cases the plaintiff thus has no prior record of operations to use as a yardstick for his recovery.

The first problem which arises is whether the plaintiff is a member of the class of persons given a cause of action by the antitrust laws, that is, whether he has been injured "in his business or property."¹⁸⁴ The

¹⁸⁴ 26 Stat. L. 210 (1890), 15 U.S.C. (1946) §15.

argument is sometimes made that if the plaintiff has not actually entered the business, he is not given any right to recover for violations, and is in no different position from any member of the general public. It is reasonably clear that a plaintiff who has done no more than to think of going into a business which is dominated by a monopolistic firm, or by a combination in restraint of trade, may not recover on a claim that he was prevented from going further by the violation of the antitrust laws.¹³⁵ On the other hand, it is equally clear that the courts do not require that he must be actively operating the business before he may recover.¹³⁶ At least some protection is given his right of entry. The inquiry is thus resolved into one of determining whether the plaintiff had such intention and means as to make his entry into the business probable, in the absence of interference from the defendants. This would ordinarily depend on what the plaintiff's conduct had been up to the time of suit, whether he had taken affirmative steps to go into business, whether he had the means for going on, and what his experience was in the business, what financing he had, and similar facts

¹³⁵ *Brownlee v. Malco Theatres, Inc.*, (D.C. Ark. 1951) 99 F. Supp. 312. Here the plaintiff had entered into negotiations for the purchase of a movie theater, which the defendants then sold to someone else, allegedly as part of a conspiracy to prevent the independent operation of the theater by the plaintiff. In dismissing the complaint, the court said, (D.C. Ark. 1951) 99 F. Supp. 312 at 316, 317: "Giving to the complaint the most favorable construction in favor of the statement of a cause of action it merely reveals that the plaintiff desired to buy the property but did not complete his negotiations for it and that it was sold by one of the defendants to another of the defendants before he succeeded in acquiring any rights in regard to or interest in the property. . . . the failure of his negotiations for the purchase of the theatre did not injure him in his business or property any more than it may have injured any member of the general public who might have been desirous of buying the property. If the plaintiff can maintain this suit merely because he desired to buy the property and was unable to persuade the owner to sell him the property, then it would be possible for any citizen to maintain a similar suit who had discussed in any manner with any owner or his agent the possibility of buying a building suitable for the operation of a theater, and that would be true regardless of the prior business or lack of business that the person was engaged in at the time he had the idea that he would like to purchase property and enter the show business."

¹³⁶ *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, (2d Cir. 1908) 166 F. 254, reversed the dismissal of a complaint which alleged that the plaintiff, a sugar importer and refiner who had stopped business during the Spanish-American War, had built a new plant and wished to resume operations but was prevented from doing so by the defendant's illegal conduct. The court said that even if plaintiff was unable to prove substantial compensatory damages, it might get nominal damages.

See also *American Federation of Tobacco Growers v. Neal*, (4th Cir. 1950) 183 F. (2d) 869, reversing (D.C. Va. 1950) 89 F. Supp. 12, which held that summary judgment for the defendants was improperly granted where the plaintiff alleged that the defendants had combined to exclude the plaintiff from selling time in the local tobacco market.

indicating that the plaintiff would and could have begun his operations but for the defendant's illegal conduct.¹³⁷

There is one other hurdle for the plaintiff which, however, is probably no longer of any importance. There is some indication in an early case by Justice Holmes to the effect that a plaintiff who enters business at a time when the defendant has already become a monopolizer, or has already set up a restraint of interstate trade, is in some manner to be given less consideration than a plaintiff who was actually in business while the defendant's influence was being developed and was injured in the course of that development.¹³⁸ The least that can be said for this dictum is that it furnishes incentive for the monopolist to work fast, in order to forestall competition. It seems clearly inconsistent with the entire line of cases which allow recovery for exclusion from trade.

Once the plaintiff has established his intention and readiness to enter a given business, and has proved that he was prevented from doing so by the defendant's illegal conduct, he then has the difficult task of proving the extent to which he has been damaged by the exclusion. Of course under the traditional damages rules he could not recover substantial damages because he could not put in evidence an earnings record for an established business. It is here, however, that the recent movie cases are extremely important, since they allow a comparison with a competitor's earnings, even though those earnings may be distorted by membership in an illegal combination.

The leading case is *William Goldman Theatres, Inc. v. Loew's, Inc.*¹³⁹ The plaintiff in that case got a ten-year lease on the Erlanger Theatre in Philadelphia, with the intention of entering the first-run business in that city. At that time all other first-run theaters in the city were owned or operated by a subsidiary of Warner Brothers, and plaintiff was completely unable to lease any first-run films for his theater. The circuit court of appeals, on appeal from the first trial, had held that an unlawful conspiracy existed between the defendants, the major

¹³⁷ In *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corp.*, (3d Cir. 1945) 152 F. (2d) 398, the defendant's summary judgment was affirmed when it appeared plaintiff could scarcely fill its own requirements, and was entirely unable to sell the product in the market. A similar case is *Pastor v. American Telephone & Telegraph Co.*, (D.C. N.Y. 1940) 76 F. Supp. 781.

¹³⁸ *Buckeye Powder Co. v. DuPont Powder Co.*, 248 U.S. 55 at 63, 39 S.Ct. 38 (1918).

¹³⁹ (D.C. Pa. 1946) 69 F. Supp. 103, aff'd. on the opinion of the district court, (3d Cir. 1948) 164 F. (2d) 1021, cert. den. 334 U.S. 811, 68 S.Ct. 1016 (1948).

national producers and distributors of films and their subsidiaries, to exclude the plaintiff from the first-run business.¹⁴⁰ The plaintiff was never able to show pictures regularly in the Erlanger, although it did receive some income from the theater which was not enough to cover its out-of-pocket expenses.

The plaintiff claimed damages over the period from September 1, 1941 to December 8, 1942, consisting of its out-of-pocket expenses and the profits which it allegedly would have made if it could have operated the Erlanger as a first-run theater. The evidence on the expenses was of course clear. So far as profits were concerned the plaintiff was, as the district court pointed out, in as strong a position as anyone could be who had not actually started in business,¹⁴¹ since it had been operating a chain of second-run houses in the Philadelphia area for some time with great success. Its sole stockholder was an experienced theater operator who had been employed by Warner Brothers at one time as general manager for Philadelphia.¹⁴² It was therefore plain that plaintiff had the intention and capacity to operate the business if given a chance.

The plaintiff was also able to present convincing evidence that its theater was suitable in size, appointments, location, equipment and reputation for the showing of first-run pictures, although it was smaller than most of the Warner theaters, and had no air-conditioning equipment.

As a measure of profits lost, the plaintiff put in evidence of the total earnings of the five existing first-run theaters in Philadelphia, less their total expenses. Plaintiff then divided this figure by five and contended that this average net earning figure, which came to \$302,560.94, over the period in question, was a fair indication of what the Erlanger would have earned if it had been able to get first-run films.¹⁴³ Plaintiff also put in evidence the net earnings of the Warner Mastbaum Theatre,

¹⁴⁰ *William Goldman Theatres, Inc. v. Loew's, Inc.*, (3d Cir. 1945) 150 F. (2d) 738. The court's only reference to the question of damages was to say that the plaintiff had clearly suffered loss, but that there was no way of knowing the extent of that loss. It remanded for inquiry as to damages.

¹⁴¹ (D.C. Pa. 1946) 69 F. Supp. 103 at 106: "Turning now to the facts of the present case, it appears that the plaintiff was about as close to having an established business at the Erlanger as it could be without actually having one."

¹⁴² In this respect the case is like that of the *Buckeye Powder* case, 248 U.S. 55, 39 S.Ct. 38 (1918), where the Supreme Court intimated that the plaintiff had resigned from DuPont and set up his own business just for the purpose of suing the DuPont for violating the Sherman Act.

¹⁴³ Brief for Appellee, pp. 34, 41, *William Goldman Theatres, Inc. v. Loew's, Inc.*, (3d Cir. 1948) 164 F. (2d) 1021.

which was only in operation from September 4, 1942 on. The Mastbaum was more than twice as large as the Erlanger, though found by the district court to be otherwise comparable, and was located very close to it.¹⁴⁴

The defendants made the familiar arguments that the Erlanger had never made a profit, and that under those conditions the plaintiff had failed to prove its damages, relying on the older rules of damages and contending that *Bigelow* had not changed those rules.¹⁴⁵ Defendants produced expert testimony to the effect that the Erlanger's drawing power was from 33 1/3 percent to 65 percent less than that of the Warner theaters, and that the Erlanger's gross would have been less than half of the average gross revenue of the Warner theaters, which would have resulted in a net loss.¹⁴⁶ The defendants also argued that the playing of pictures for longer runs, as would be necessary with six, instead of five, theaters competing, would reduce the earnings of all six; that the Mastbaum earnings were not admissible because inflated by the war boom; and that the plaintiff had completely failed to prove that in a freely competitive situation it would have been able to lease any first-run pictures.¹⁴⁷

In its opinion the district court refused to award the plaintiff its out-of-pocket expenses, on the ground that it would be inconsistent with an award of profits, and that the two claims were based on distinct and mutually exclusive theories of recovery. This would seem to be erroneous. If the theory of damages is to place the plaintiff, as nearly as possible, in the same position he would have been in if the defendants had not wronged him, then he ought to recover his expenses as well as his profits. If the plaintiff in this case had been able to get first-run pictures, it would have had all its expenses paid, plus the profits. As it was, it not only had no profits, but it had to pay theater rent and upkeep, in excess of what little income it could get from the theater. Its theories of recovery were therefore not mutually exclusive. A similar situation arises in actions for breach of contract where there has been part per-

¹⁴⁴(D.C. Pa. 1946) 69 F. Supp. 103 at 107.

¹⁴⁵Brief of Distributor Defendants, pp. 78-82, *William Goldman Theatres, Inc. v. Loew's, Inc.*, (3d Cir. 1948) 164 F. (2d) 1021.

¹⁴⁶*Id.*, pp. 69, 71.

¹⁴⁷*Id.*, pp. 71, 68, 67. The defendants later, after the final judgment in the case, attempted to get a bill of review in the district court, alleging that after losing the case defendants had offered Goldman first-run films, but that Goldman had used them in other theaters than the Erlanger. The defendants argued that this proved that the Erlanger was not suitable for first-run exhibition. The court rejected all contentions. *William Goldman Theatres, Inc. v. Loew's, Inc.*, (3d Cir. 1947) 163 F. (2d) 241.

formance by the plaintiff, and where he is allowed to recover the cost of the part performance plus his net profit on the entire contract.¹⁴⁸

The district court also held that the plaintiff was not barred by its failure to show second-run pictures in the Erlanger Theatre, thereby minimizing the loss, since that would have involved entering and carrying on a business quite different from that which it intended.¹⁴⁹ This result seems fair, although if the expenditure of a relatively small sum would prevent a much larger loss, some cases would require the plaintiff to make the expenditure on pain of failing to recover the larger sum.¹⁵⁰

On the main issue the district court rejected the contention that recovery could be given only where the injury was done to an established business, and said that although the plaintiff must produce all the evidence he can, when the circumstances are such that accurate data cannot be given, the standard of proof will be lowered. It then allowed a recovery of \$125,000, saying that it considered both the evidence of the average profits of defendants' theaters, and the profits of defendants' Mastbaum, but discounted them for the Erlanger's inferior location, equipment, expenses and the fact that the Mastbaum earnings were inflated by the war.

This case has great significance since it is such a clear-cut decision that there can be recovery for exclusion, even though the proof of profits is open to all sorts of logical objections. It stands directly in the line of cases liberalizing the rules of damages. Of course later cases may very well be distinguished on their facts since few of them will be as favorable to the plaintiff's claims as the *Goldman* case.

Proof that the *Goldman* case is not a fluke, if any is needed, can be found in *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*,¹⁵¹ which upheld a much larger recovery under similar circumstances. In this case the conspiracy of the defendants forced the plain-

¹⁴⁸ 5 WILLISTON, CONTRACTS, rev. ed., 1363 (1937); MCCORMICK, DAMAGES 582, 585 (1935).

¹⁴⁹ *Montague v. Lowry*, 193 U.S. 38, 24 S.Ct. 307 (1904), held that the plaintiffs were not required to join the defendants' illegal association as a means of minimizing damages.

¹⁵⁰ In *Momand v. Universal Film Exchanges*, (1st Cir. 1948) 172 F. (2d) 37, the court said that the plaintiff could not recover several hundred thousand dollars where he could have prevented the loss by paying \$10,000 in illegal arbitration claims exacted by the defendants.

¹⁵¹ (8th Cir. 1952) 194 F. (2d) 846, cert. den. 343 U.S. 942, 72 S.Ct. 1035 (1952). A jury verdict for the plaintiff in the amount of \$375,000 was affirmed.

tiff to sell its long lease on a theater to a corporation controlled by the defendants. The jury was allowed to consider evidence of the net profits which the defendants' corporation made from the theater over the period, and returned a verdict which clearly showed it had taken those profits as the measure of damages. This case in effect reaches the result contended for by Mr. McConnell,¹⁵² since here the measure of plaintiff's damages is exactly the same as the amount of the defendants' profits from the conspiracy. The court does not purport to adopt the profits theory of recovery, however, but merely indicates that the defendants' profits are a reasonable basis for estimating the plaintiff's loss on these rather unusual facts. Oddly enough it does not cite the *Goldman* case, although the only differences between the two cases are that the plaintiff in *Brookside* may have operated its theater for a very short time, and that it had the profits of the theater available for use as a measure of damages, thereby avoiding some of the uncertainty inherent in the *Goldman* facts. The plaintiff in the *Brookside* case made this possible by waiting from 1937 until 1949 to sue, the statute of limitations being suspended during the pendency of the *Paramount* case¹⁵³ under section 5 of the Clayton Act.¹⁵⁴

The *Goldman* and *Brookside* cases give damages for exclusion from business where a similar competing business is available for comparison. The *Brookside* case in fact is based upon even more reliable evidence as to the earnings, in the hands of the defendant, of the very business from which the plaintiff was excluded. If, however, the plaintiff were prevented from entering a manufacturing business whose novelty permitted of no comparison with existing firms, his task would be more difficult. It is just in that situation that his exclusion would cause the most social harm, one often repeated justification for the so-called competitive system being its incitement to industrial progress. The *Bigelow* doctrine as interpreted in this paper seems to support a recovery in this hypothetical case if based on the best available evidence, such as expert testimony about the plaintiff's prospects in the market, or evidence of the opinions of investors as shown in the financing of the venture. In view of the conservatism of lower courts in these cases, however, a clearcut prediction that such a plaintiff could get a judgment for substantial damages would be rash to say the least.

¹⁵² See note 84 supra.

¹⁵³ *United States v. Paramount Pictures, Inc.*, 334 U.S. 131, 68 S.Ct. 915 (1948).

¹⁵⁴ 38 Stat. L. 731 (1914), 15 U.S.C. (1946) §16.

V. *Recovery of Buyers for Illegal Pricing by Sellers*

Although pricing practices which violate the antitrust laws may produce claims of loss of profits, as in the *Russellville* and *Bruce's Juices* cases,¹⁵⁵ the discussion in this section does not deal with those claims, but with attempts to recover the price increase or price discrimination as such, without proof of lost profits.

Two questions arise out of these attempts on the part of buyers to recover price differences from their suppliers: (1) Where the plaintiff sues for an illegal price increase, must he prove not only that the price increase was the result of illegal conduct, but also that he was not able to pass the increase on to his own customers? (2) Where the claim is that the defendant discriminated in price between the plaintiff and plaintiff's competitors, may the plaintiff recover the amount of the discrimination without further proof of damage to his business?

A. *Damages For Price Increases.* To take up the first question first, it appears to be settled that if the plaintiff is a consumer of the goods or services for which he is forced to pay an inflated price by an illegal combination or monopoly, he may recover the amount of the difference between a "reasonable" price and the actual price multiplied by the volume of goods purchased.¹⁵⁶ In general the courts seem not to have gone into whether the plaintiff might pass the higher prices along to his customers, where the plaintiff consumed the goods or services, as distinguished from reselling them. One case does intimate that the plaintiff must show not only that prices were unreasonably high, but also that if they were lower, plaintiff would be better off than its competitors in some way, on the theory that if the prices were lower for plaintiff, they would be for his competitors in most instances, and the plaintiff would be no better off than before.¹⁵⁷ This requirement would seem to put such a heavy burden of proof on the plaintiff as to prevent him from ever being able to recover for illegal prices, except where he

¹⁵⁵ See notes 117 and 118 *supra*.

¹⁵⁶ *Chattanooga Foundry & Pipe Works v. City of Atlanta*, 203 U.S. 390, 27 S.Ct. 65 (1906). The plaintiff here did not buy from the defendant, but from another member of the conspiracy. *Thomsen v. Caysner*, 243 U.S. 66, 37 S.Ct. 353 (1917), contains a dictum that the excess over a reasonable rate may be recovered. See *Ring v. Spina*, (2d Cir. 1945) 148 F. (2d) 647 at 653.

¹⁵⁷ *Keogh v. Chicago & N. R. Co.*, 260 U.S. 156, 43 S.Ct. 47 (1922). Cf. *Southern Pacific Co. v. Darnell-Taenzer Lumber Co.*, 245 U.S. 531, 38 S.Ct. 186 (1918), not an antitrust case, where the plaintiff was allowed to recover excessive railroad rates even though it appeared that the plaintiff, a shipper, passed on the rate expenses to its customers. Holmes there said, "The general tendency of the law, in regard to damages at least, is not to go beyond the first step. As it does not attribute remote consequences to a defendant, so it holds him liable if proximately the plaintiff has suffered a loss." 245 U.S. 531 at 533, 38 S.Ct. 186 (1918).

could show lost profits, and it also overlooks the fact that plaintiff and all his competitors might be able to expand their sales if they could offer lower prices themselves, in a situation where the demand curve for the industry was more or less elastic.

It is equally well settled that a dealer in the articles on which the price is illegally raised may recover the excess of the price over a freely competitive price where the dealer's own selling price is held down by competitive or other forces. The usual case of this kind occurs when a retailer who refuses to observe the manufacturer's suggested prices is denied the regular dealer's discount, and has to pay the full retail price.¹⁵⁸ In such cases it is clear that the dealer should get the difference in price, since that will measure quite exactly the losses of profits he has suffered by being deprived of the discount. Lost profits and price difference should then be equal.

Of course in these cases the plaintiff must prove with reasonable probability what the price of the goods would have been in the absence of the combination or monopoly.¹⁵⁹

Where the plaintiff buys the goods for resale, however, several cases hold that he may not recover for an illegally high price in the absence of proof that his margin of profit was reduced by that high price.¹⁶⁰ Though some of these cases seem to stand for the broad rule that illegal prices are not recoverable as such,¹⁶¹ their facts will not support such a rule. A business may suffer loss either through decline in sales volume or selling price on the one hand, or by an increase in costs on the other. Prices illegally increased, as in the oil cases, cause loss by increasing costs. If selling prices are not raised, clearly the illegal cost price will produce a loss in the amount of the illegal increase, as in the *Straus case*.¹⁶² If selling prices go up as a result of the increase in costs, it is equally clear that no loss occurs, except so far as the entire industry may lose in volume. This is what occurred in the oil cases,¹⁶³

¹⁵⁸ *Straus v. Victor Talking Machine Co.*, (2d Cir. 1924) 297 F. 791; *Montague & Co. v. Lowry*, (9th Cir. 1902) 115 F. 27, *affd.* 193 U.S. 38, 24 S.Ct. 307 (1904); *Frey & Son v. Cudahy Packing Co.*, (D.C. Md. 1917) 243 F. 205.

¹⁵⁹ *Alden-Rochelle, Inc. v. American Society of C., A. and P.*, (D.C. N.Y. 1948) 80 F. Supp. 888; *American Sea Green Slate Co. v. O'Halloran*, (2d Cir. 1915) 229 F. 77.

¹⁶⁰ *Clark Oil Co. v. Phillips Petroleum Co.*, (8th Cir. 1945) 148 F. (2d) 580, *cert. den.* 326 U.S. 734, 66 S.Ct. 42 (1945); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7th Cir. 1943) 138 F. (2d) 967, *cert. den.* 321 U.S. 792, 64 S.Ct. 790 (1944); *Twin Ports Oil Co. v. Pure Oil Co.*, (8th Cir. 1941) 119 F. (2d) 747, *cert. den.* 314 U.S. 644, 62 S.Ct. 84 (1941); *Farmers Co-op Oil Co. v. Socony-Vacuum Oil Co.*, (D.C. Iowa 1943) 51 F. Supp. 440; *Leonard v. Socony-Vacuum Oil Co.*, (D.C. Wis. 1942) 42 F. Supp. 369.

¹⁶¹ See *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, (7th Cir. 1943) 138 F. (2d) 967 at 971.

¹⁶² See note 158 *supra*.

¹⁶³ See note 160 *supra*.

where the plaintiffs' own evidence showed that their margin of profit remained the same even after the increase in cost prices. The question then is what will be the result if there is no evidence at all on the movement of plaintiff's selling prices. This is really a matter of imposing the burden of producing evidence. There are dicta in the oil cases which seem to indicate that the burden is on the plaintiff, so that if he proves only that his cost prices were illegally increased by the defendants' conduct, without showing how his selling prices reacted, he would get no damages. If, on the other hand, he proves both that his cost prices increased and that his selling prices did not, he may recover.¹⁶⁴ This would seem to be a workable result, since the plaintiff would be in a better position to give evidence about his own selling prices than the defendant.

The net result of the foregoing cases then is that to 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. Presumably the decline in total industry volume as a result of a general price increase could not be measured accurately enough to be a factor. At any rate no case seems to consider it.

B. *Damages For Price Discrimination.* Price discrimination under the Clayton and Robinson-Patman Acts¹⁶⁵ differs from the price increases described in the foregoing cases in that the plaintiff's cost prices are not raised, but one or more of his competitor's prices are reduced, although in some situations the two forms of illegality will be quite similar. For example the *Straus* case might be called one of discrimination since the plaintiff paid a higher price than his competitors. The distinction is that in the *Straus* case it is clear that without the illegality all parties would pay the lower, wholesale price, whereas in the usual case of illegal discounts it is probable that without the illegal pricing all parties would not pay the lower price, but would pay either the higher price, or perhaps some intermediate price.

The problem then is whether the plaintiff may recover the amount by which his price differs from that of the favored competitor, multiplied by the volume of purchases made by plaintiff from the defendant. The early drafts of the Robinson-Patman Act contained a specific provision allowing this measure of damages in the absence of proof of other damages, but this provision was removed by the conference committee

¹⁶⁴ See *McCain v. Socony-Vacuum Oil Co.*, (D.C. Mo. 1945) 64 F. Supp. 12.

¹⁶⁵ 38 Stat. L. 730 (1914), 49 Stat. L. 1528 (1936), 15 U.S.C. (1946) §13.

of the two houses of Congress.¹⁶⁶ This is of course persuasive evidence that the amount of discrimination was not intended to be, ipso facto, the measure of damages, although it is possible that the members of the committee thought that the same result would be reached under ordinary rules of damages so that there was no need for the special provision.

The authorities are clearly in conflict on the question. In favor of the amount of discrimination as the measure of damages are Justice Jackson's dictum in the first *Bruce's Juices* case,¹⁶⁷ the *Gus Blass* case,¹⁶⁸ and the second *Bruce's Juices* case,¹⁶⁹ although the latter is not entirely specific on the point. Cases which oppose this method of damages are *Russellville*,¹⁷⁰ or so it seems, and *Sun Cosmetic*.¹⁷¹

The *Russellville* case is doubtful on this point, since it purports not to overrule *Gus Blass*, an earlier case in the same circuit. It goes on to say that although ordinarily "where a seller is guilty of unlawful discrimination in prices between customers, the amount of the price difference is the measure of damages . . .,"¹⁷² that is not true in the *Russellville* situation because there all canners were benefited by the equalization of freight on Fort Smith, Arkansas, which was the alleged discrimination, and the plaintiff's only complaint was that it did not receive as great a benefit as its competitors. Yet that is precisely the claim made in most price discrimination cases. What the court seems to be arguing is that the discrimination benefited the plaintiff in comparison to its competitors located outside Arkansas, even though it

¹⁶⁶ The Senate report on the Robinson Bill stated that it included a presumptive rule for the measure of damages as a deterrent to violators, and as a means for enabling victims of discriminations to avoid the great difficulties of proving loss of business. The proposed section reads as follows: "(d) For purposes of suit under section 4 of this Act, the measure of damages for any violation of this section shall, where the fact of damage is shown, and in the absence of proof of greater damage, be presumed to be the pecuniary amount or equivalent of the prohibited discrimination, payment, or grant involved. . . ." S. Rep. No. 1502, 74th Cong., 2d sess., 2, 8 (1936). The conference report deleting this section read: "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." H. Rep. 2951, 74th Cong., 2d sess. 8 (1936).

¹⁶⁷ "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 v. American Can Co.*, 330 U.S. 743 at 757, 67 S.Ct. 1015 (1947).

¹⁶⁸ *Elizabeth Arden Sales Corp. v. Gus Blass Co.*, (8th Cir. 1945) 150 F. (2d) 988, cert. den. 326 U.S. 773, 66 S.Ct. 230 (1945).

¹⁶⁹ See note 118 supra.

¹⁷⁰ See note 117 supra.

¹⁷¹ *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, (2d Cir. 1949) 178 F. (2d) 150.

¹⁷² (8th Cir. 1951) 191 F. (2d) 38 at 55.

damaged plaintiff as compared with its other competitors who had plants at Fort Smith. The plaintiff was thus in a position much like that of a buyer who comes within an intermediate classification on an illegal discount schedule. He does not get as large a discount as some of his competitors, but he does get a larger one than others.

A simple illustration may perhaps throw light on this issue. Suppose, as may have been the case in *Gus Blass*, that there are only two competing firms selling an article in the market, the plaintiff and X, and that both buy from the defendant. Suppose their costs total \$1 per unit, and that they both sell for \$1.25. If the defendant then gives X an illegal discount of \$.25 per unit, X will be able to make double the profit the plaintiff makes if the selling price remains the same. Assuming that plaintiff cannot prove that he lost any business to X, at that point plaintiff has suffered no damages in one sense, that is, he is making no less of a profit than he was before. In another sense, he has suffered damage, however, since he is no longer making a profit equal to his competitor's, as he would be if the market were not affected by the defendant's violation. This may be a matter of some importance to the plaintiff, since it may enable X to become much stronger than the plaintiff financially, so that in a later competitive trial of strength X would stand a better chance of winning. If the purpose of awarding damages is to place the plaintiff as nearly as possible in as good a financial position as he occupied before the injury, the court has two alternatives: (1) If it compares the plaintiff's earnings with his earnings over an earlier period, as in the *Bigelow* case, it will find that he has suffered no damage. (2) If it compares plaintiff's cost prices with those of his competitor, however, it will find that the plaintiff's position has changed for the worse. A convenient way to measure this change in dollars is by the amount of the price concession to the competitor, although it may well be that by superior efficiency or other means the plaintiff could continue successfully to compete in the market. This analysis is equally applicable notwithstanding the fact that the defendant would not have given the plaintiff the lower price.

The *Gus Blass* case and Justice Jackson¹⁷³ seem to have adopted the second alternative without much discussion of its implications. On the facts of the *Gus Blass* case that result seems correct, since, so far as appears, plaintiff had only one comparable competitor for the market, which consisted of the retail sales of defendant's cosmetics in Little Rock, Arkansas. The limited nature of the market and the fewness of competitors make the plaintiff's damages plain.

¹⁷³ See notes 167, 168 *supra*.

Where the market is geographically larger, and there are many sellers, only one or two of whom receive price concessions, as in the *Russellville* case, there would be more reason to choose the first alternative, and to hold that the price difference is not ipso facto the measure of damages. For one thing, the plaintiff and the favored competitor would probably compete for only a fraction of the plaintiff's sales. It would therefore be very difficult to determine to what extent plaintiff's ability to compete had been affected by the illegal price discount, since he would still be operating on equal terms with all other competitors. His injury, precisely defined, would consist in not being on equal terms with the favored competitor to the extent of that fraction of the business done in the market where they both sold. The extreme difficulty of proving the extent of competition here would often justify a refusal to compute the damages in this way. Similarly if the plaintiff and the favored competitors sold different articles, as was true in the *Russellville* case,¹⁷⁴ the plaintiff's injury would be definable as no longer being on equal terms with the competitor, to the extent that their products competed for the buyer's dollar. But, as the dissent in that case pointed out,¹⁷⁵ it was nearly impossible to say to what extent a buyer would consider the plaintiff's spinach and beans an alternative for the favored competitor's different vegetables, so that it would also be impossible to say how much of plaintiff's business was affected by the discrimination. If only a small, or indeterminate part was affected, then it would be entirely unjustified to allow the plaintiff to recover the price difference on all cans purchased from the defendant.

The case is even plainer when the plaintiff is in an intermediate position in the discriminatory price system, better off than some competitors and worse off than others in the prices he receives from the defendant. If he is allowed to recover the difference between the price he paid and that of his most favored competitor, the advantage which he himself received from the illegal price system is not taken into account. That advantage might often be great enough to offset his losses. Presumably that was what the majority thought had occurred in *Russellville*. In such a situation the plaintiff is properly left to recover only such of his losses as he can prove were the result of the discrimination, without the aid of the "general" damage rule.

The use of the price difference as the measure of damages is, therefore, a specific application of the more general finding, required for

¹⁷⁴ See *American Can Co. v. Russellville Canning Co.*, (8th Cir. 1951) 191 F. (2d) 38 at 50.

¹⁷⁵ *Id.*, p. 62.

liability in Robinson-Patman cases, that the effect of the price discrimination "may be substantially to lessen competition. . . ."¹⁷⁶ While liability may result from evidence showing no more than that the discrimination was large enough to influence resale price,¹⁷⁷ the amount of the discrimination can only be the measure of damages where the difference in price can be related to the impairment of the plaintiff's competitive position, to his ability to compete with the favored competitor. If the evidence does not show the extent to which that ability was impaired by the discrimination, then the damages must be computed in some other way, and be based on some other evidence, even though the evidence was sufficient to show a "lessening of competition" which would support a finding of liability.

The *Bruce's Juices* case raises the question whether both kinds of damages, lost profits and price difference, can be awarded in the same case. That case did give them both, without, however, revealing its method of computation, thereby leading one to suspect that the figure awarded was the product of pure fiat. If the foregoing analysis of the conditions under which damages are given in these cases is correct, both measures of damage should not be applied in the same case and *Bruce's Juices* was wrongly decided. When the plaintiff is given the profits he would have made but for the defendant's illegal price discrimination, he is made whole. If the court then goes on to award the amount of the discrimination, multiplied by the volume of plaintiff's purchases from the defendant, the plaintiff ends up with more money in his treasury than if there had been no illegality in the first place.

Even if it is assumed that the amount of the price difference in these cases can be the measure of damages, there is a suggestion in *Russellville* that this should be reduced by the extent to which the price difference was justified by the difference in cost.¹⁷⁸ In many cases the issue would not arise because of the absence of any evidence of cost justification. It sometimes might be possible, however, for the defendant to prove that cost differences justified a price difference of ten cents per unit, while the price difference actually given was fifteen cents. On those facts the *Russellville* dictum would allow recovery of only the five-cent difference, on the theory that a ten-cent difference

¹⁷⁶ 38 Stat. L. 730 (1914), 49 Stat. L. 1526 (1936), 15 U.S.C. (1946) §13(a).

¹⁷⁷ Federal Trade Commission v. Morton Salt Co., 334 U.S. 37 at 47, 68 S.Ct. 822 (1948).

¹⁷⁸ See American Can Co. v. Russellville Canning Co., (8th Cir. 1951) 191 F. (2d) 38 at 56.

would have been legal, and therefore the only legal injury to the plaintiff came from the discrimination in excess of ten cents. Other cases seem not to have discussed this point.

The *Sun Cosmetic* case makes the suggestion that although the price difference cannot automatically be the measure of damages, it does set an upper limit to the damages, since the plaintiff should have minimized its losses from its lack of a "demonstrator" of defendant's products by hiring one, if those losses exceeded the cost of hiring such a person.¹⁷⁹ On the facts of this case, that dictum is probably valid, because plaintiff could pretty clearly have hired a demonstrator and put itself on equal terms with its competitors in the sale of defendant's cosmetics. In the price discount cases, however, it can hardly be argued that the price differences should be the upper limit on damages, since the plaintiff always pays the higher price as a matter of course, and in fact if he did not he would not be a "purchaser" under the statute, and no discrimination would have occurred. Even if he does pay the higher price in such cases, the plaintiff may be unable to sell at a figure which will enable him to compete with more favored buyers from the defendant, so that he may very well lose business in excess of the price difference.¹⁸⁰ It may be argued that he could prevent that by meeting the favored competitor's prices, so that all other things being equal, the amount of the price difference would equal the loss of profits, but the plaintiff may be financially unable to sell at such a price and stay in business. It therefore would be unreasonable to require him to minimize his losses in that way. For that reason Judge Hand's dictum is much too inclusive, and is applicable only in cases whose facts resemble the facts before him.

VI. *Recovery of Costs and Attorney's Fees*

The statute's provision for recovery of costs pretty clearly applies only to the usual taxable costs.¹⁸¹ Items of cost not usually considered taxable have been sought by plaintiffs, but have generally been denied.¹⁸²

¹⁷⁹ See *Sun Cosmetic Shoppe, Inc. v. Elizabeth Arden Sales Corp.*, (2d Cir. 1949) 178 F. (2d) 150 at 153. See also *American Can Co. v. Russellville Canning Co.*, (8th Cir. 1951) 191 F. (2d) 38 at 55.

¹⁸⁰ See *American Can Co. v. Russellville Canning Co.*, (8th Cir. 1951) 191 F. (2d) 38 at 61.

¹⁸¹ *Straus v. Victor Talking Machine Co.*, (2d Cir. 1924) 297 F. 791.

¹⁸² *Brookside Theatre Corp. v. Twentieth Century-Fox Film Corp.*, (D.C. Mo. 1951) 11 F.R.D. 259. This case suggests that counsel should have especially large or unusual costs authorized by the court in pre-trial conference before they are incurred.

The attorneys' fees recoverable under the statute, it is well settled, must be reasonable.¹⁸³ Judging from the reported cases, there are nearly as many notions of what is reasonable as there are judges.¹⁸⁴ The most recent discussion of the matter is in the *Milwaukee Towne* case,¹⁸⁵ where the court of appeals reduced the fee allowed by the district court from \$225,000 to \$75,000, on the ground that the larger amount was "shocking to [its] sense of reason and justice."¹⁸⁶ There had been evidence of the large number of hours spent by three lawyers in the preparation and trial of the case, and testimony by three leading members of the Chicago bar that a fee of from \$175,000 to \$250,000 would be reasonable. Although each fee proceeding must be decided pretty much on its own facts, the court did make some observations which are of general application: (1) The agreement of attorney and client is immaterial in determining what is reasonable. (2) These antitrust cases are no longer so unique as they once were, and so compensation should be determined in the same manner as for any other case of comparable size. Here the evidence was that competent trial attorneys could be employed in Chicago for \$40 per hour, and that assistants commonly received \$20 per hour.¹⁸⁷ These figures, multiplied by the hours spent on the case, gave the fee of \$75,000. (3) Although the result achieved in the litigation should be considered, the relevant figure is that of the actual damages proved, not the damages after being trebled.

¹⁸³ *Straus v. Victor Talking Machine Co.*, (2d Cir. 1924) 297 F. 791. The court reduced the attorney fee on appeal because the plaintiff lost part of his judgment, and the award of the fee had been partly based on the amount of damages. The court also denied recovery of attorney fees in a prior suit, found to have been brought by the defendant against this plaintiff as part of defendant's illegal restraint of trade. The holding is of doubtful validity on this point, in view of the damages rule that where the defendant's tort has made it necessary for the plaintiff to bring or defend a suit, the expenses of that suit may be recovered in the later litigation. See McCORMICK, DAMAGES 247, 248 (1935).

¹⁸⁴ See the table in Donovan and Irvine, "Proof of Damages under the Anti-Trust Law," 88 UNIV. PA. L. REV. 511, n. 1 (1940). The authors found a wide variation in the relation between attorney fees and judgments. The same variations may be found in more recent cases. In the following the first figure is the damages before trebling, and the second the fee: *Milwaukee Towne Corp. v. Loew's, Inc.*, (7th Cir. 1951) 190 F. (2d) 561 (\$313,858.10, \$75,000); *Twentieth Century-Fox Film Corp. v. Brookside Theatre Corp.*, (8th Cir. 1952) 194 F. (2d) 846 (\$375,000, \$100,000); *Emich Motors Corp. v. General Motors Corp.*, (7th Cir. 1950) 181 F. (2d) 70 (\$412,000, \$250,000); *American Can Co. v. Bruce's Juices*, (5th Cir. 1951) 190 F. (2d) 73 (\$60,000, \$40,000).

¹⁸⁵ (7th Cir. 1951) 190 F. (2d) 561.

¹⁸⁶ *Id.* at 569.

¹⁸⁷ A more recent case in Illinois has adopted the same method of computing attorneys' fees. *Sager Glove Corp. v. Bausch and Lomb Optical Co.*, CCH Trade Reg. Serv., 1951 Trade Cases, ¶62,956.

In spite of the courts' attempts to limit the large fees produced by these cases, the lawyers' compensation is still generous to say the least. The fee in the *Brookside* case has even attained the doubtful eminence of envious comment in a national magazine,¹⁸⁸ leading one to conclude that stricter judicial restraint should be imposed in keeping counsel fees within bounds.

Conclusion

The law of damages is ordinarily concerned with the amount of the plaintiff's losses. In the antitrust cases the plaintiff has not "lost" anything in the usual sense of that word, but his activities have been interfered with in such a way as to impair his chances for success in business. In deciding how he should be compensated for the unlawful interference, the courts have relied on four kinds of evidence: (1) estimates by experts of what the plaintiff would have earned; (2) comparison with plaintiff's earnings in a prior period; (3) comparison with defendant's earnings or those of a comparable competitor; (4) the difference in prices charged plaintiff and his competitor.

Reliance upon evidence of this kind makes it plain that the traditional subjective "rule" that damages must be proved with "reasonable certainty" no longer has any meaning. How could a court say in the complex context of the usual treble damage case that it was reasonably certain that the plaintiff would have earned one sum or another? In fact, this so-called rule was nothing more than a statement of the result of the case, in a form which gave the appellate court an excuse to upset awards where that seemed desirable.

As more treble damage suits were brought, it became equally plain that this judicial approach to the problem would prevent any recovery at all in a majority of the cases. The response to this dilemma, in which the Supreme Court led the way, was to substitute for a subjective, question-begging "rule," an intelligible standard of relevant evidence informing the trier of fact what he might take into account. If he bases his award on that sort of evidence, the judgment will be affirmed. The damages doctrine has thus been redefined in operational terms, that is, in terms of what the parties and the trier of fact may do in getting the case decided.

Although this has produced some judgments which are large enough

¹⁸⁸ *TIME*, June 16, 1952, p. 89.

to be startling, as an approach to damages it is not novel, as witness, for example, the ascertainment of damages for wrongful death.¹⁸⁹ It appeals to the writer as a workable solution to the problem.

¹⁸⁹ See McCORMICK, DAMAGES §105 (1935).